



Management of Distressed Companies The German Experience

Dr. Martin Prager

Aschaffenburg Augsburg Barcelona Bayreuth Berlin Bielefeld Bremen Chemnitz
Dresden Essen Frankfurt Hallbergmoos Hamburg Hannover Heilbronn Herford
Kassel Koblenz Cologne Leipzig Madrid Magdeburg Milan Mainz Mannheim Munich
Muenster Nuremberg Oldenburg Regensburg Solingen Stuttgart Ulm Würzburg



GREGORY

"I need someone well versed in the art of torture—do you know PowerPoint?"

Facts

- Legal advice, distressed M&A and insolvency administration
- 25 years of work experience
- 36 offices in Germany, Italy, Spain
- 330 employees, 66 professionals, 34 insolvency administrators
- 240 business restructuring and insolvency proceedings p. a.
- Total turnover EUR 33 million
- Top 5 of German insolvency law firms
- Member of BTG Global Network
- Member of the Restructuring Wing of the German Bar Association (DAV), Association of German Insolvency Administrators (VID), Gravenbrucher Kreis, International Insolvency Institute, INSOL Europe, INSOL International, DIAI, IDW

- Specialist areas
 - Restructuring and liquidation of companies
 - Legal Advice and Due Diligence within M&A
 - Cross-border insolvency proceedings
 - Creditor representation, in particular for financial institutions
 - Shareholder representation

Awards and Comments



WHO'S WHO LEGAL *The International Who's Who of Business Lawyers*

PLUTA is among Germany's top insolvency boutiques. A substantial firm with 330 staff in 30 locations.
source: © IFLR1000

PLUTA's 31-office network in Germany is complemented by offices in Spain and Italy. Michael Pluta and Martin Prager are the key contacts.

source: © Legal 500



Aschaffenburg	Dresden	Herford	München
Augsburg	Essen	Kassel	Münster
Bayreuth	Frankfurt	Koblenz	Nürnberg
Berlin	Gießen	Köln	Oldenburg
Bielefeld	Hallbergmoos	Leipzig	Regensburg
Braunschweig	Hamburg	Magdeburg	Solingen
Bremen	Hannover	Mainz	Stuttgart
Chemnitz	Heilbronn	Mannheim	Ulm
Barcelona	Madrid	Milano	Würzburg

Management

Dr. Martin Prager
Attorney at law
Insolvency Administrator

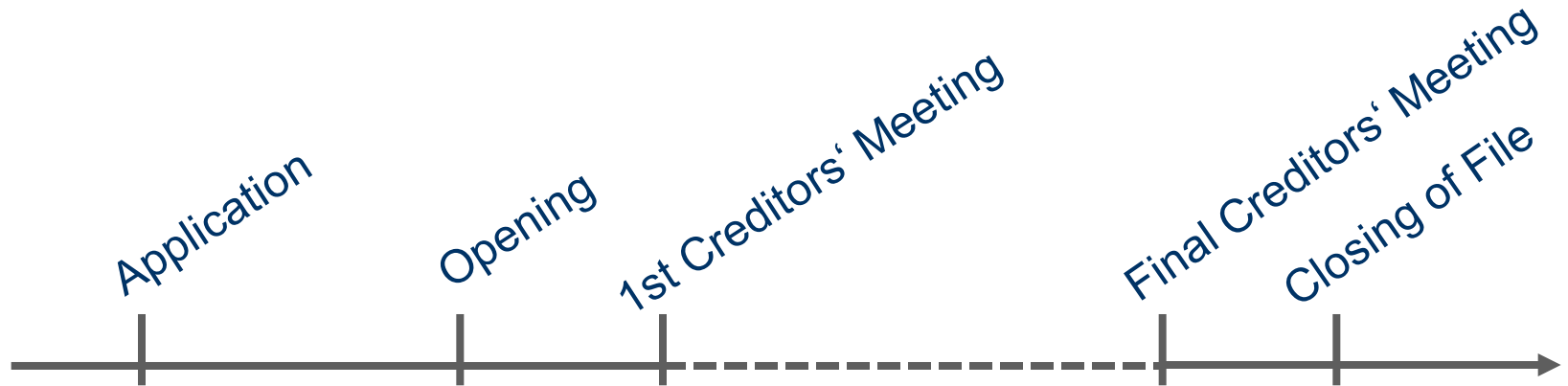


- Insolvency Administrator since 1998
- Main activities: Insolvency proceedings, M&A
- Chair of Insolvency and Restructuring Wing of the German Bar Association (DAV)
- Member of INSOL Europe, DAV Arbeitskreis Insolvenzrecht, Verband der Insolvenzverwalter Deutschland e.V., ABI, International Insolvency Institute (iii)
- Languages: German, English, French, Spanish

Content overview

- General information
- Mandatory creditors' committee
- Self-administration (debtor-in possession)
- Protective shield
- Shareholder cram-down in restructuring
- Group Insolvencies – German draft reform

Time Line



Insolvency Triggers

- Illiquidity (general trigger)
- Imminent illiquidity (available to debtor only)
- Overindebtedness

Exit Options

- Liquidation
 - Including asset sale as going concern (transfer to restructure)
- Insolvency plan

The Players

- Debtor
- Creditors
- Court (judge and clerk)
- (Preliminary) Insolvency Administrator / Trustee / Selfadministrator (DIP)
- Creditors' Committee

Preliminary Creditors' Committee

- **Mandatory**, if two of the following three criteria are met
 - ≥ 4.84 M. Euro total assets
 - ≥ 9.68 M. Euro turnover
 - Annual average of ≥ 50 employees

Basis: last fiscal year prior to filing

- **Optional** upon the request of
 - the debtor
 - the preliminary insolvency administrator
 - a creditor

if members have been nominated and have accepted such nomination

- **Excluded** if
 - business discontinued
 - too expensive in relation to expected estate
 - implementation has negative effect on debtor's situation

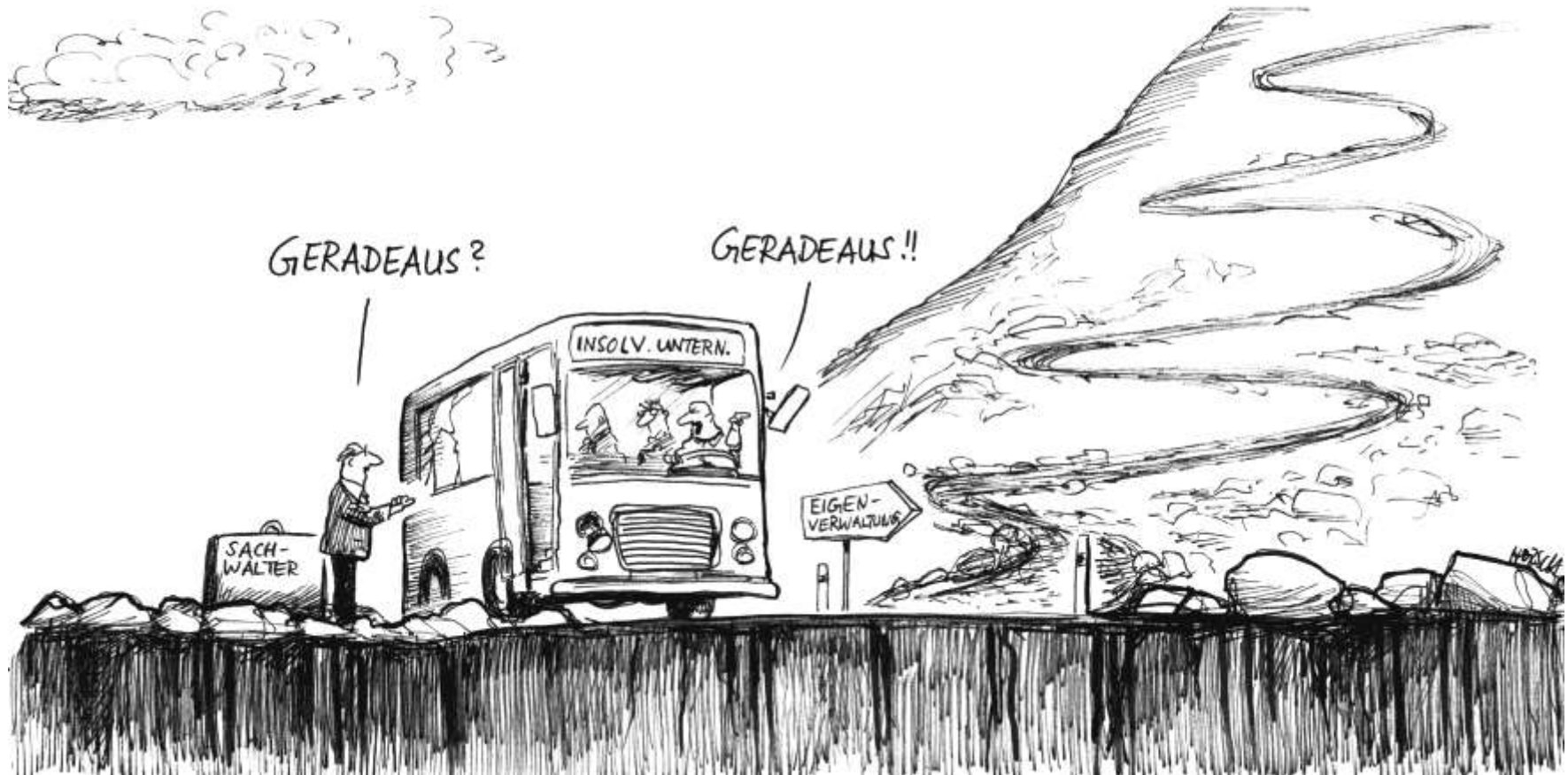
IP appointment

- Court must hear Preliminary Creditors' Committee, unless such hearing obviously has negative consequences for debtor's situation
- In case the Preliminary Creditors' Committee unanimously nominates an IP, Court must appoint such IP, unless unqualified
- In case the Preliminary Creditors' Committee sets criteria as to the qualification of this IP, the Court must use such criteria.
- If no hearing, Preliminary Creditors' Committee may nominate IP in its first meeting.

Self-administration (debtor-in-possession)

- Generally possible, if no circumstances suggesting disadvantages to creditors are known
- In preliminary proceedings,
 - Court must hear Preliminary Creditors' Committee unless this obviously results in a detriment to the financial status of the debtor
 - if application for self-administration is not obviously futile, Court should refrain from
 - imposing a general disposal ban on debtor
 - providing that all disposals are effective only with the approval of the preliminary IP
 - if Preliminary Creditors' Committee unanimously supports self-administration, there is deemed to be no disadvantage to creditors
- Debtor may withdraw proceeding if
 - filing is based on imminent illiquidity
 - Court informs debtor that it intends not to grant self-administration

Self-administration



Protective Shield, § 270 b InsO

Your client doesn't want to hide anything, does he?



Protective Shield (“Preparation of Restructuring“)

Requirements

- filing based on imminent illiquidity or over-indebtedness
- restructuring not obviously futile
- both points confirmed in certificate of restructuring
 - substantiated
 - issued by a professional expert on insolvency matters

Consequences

- Court sets date for submission of insolvency plan (3 months maximum)
- Court appoints preliminary trustee (IP) nominated by debtor unless obviously unqualified
- temporary measures limited
- Court may – upon request - allow debtor to create liabilities on the estate

Protective Shield (“Preparation of Restructuring“)

Court shall revoke Protective Shield Proceedings if

- restructuring becomes obviously futile
- Preliminary Creditors‘ Committee so requests
- if no Preliminary Creditors‘ Committee is established, certain creditors show disadvantages of self-administration to creditors

Insolvency Plan – Shareholder Rights

- Shareholders remain unaffected by the insolvency plan unless the plan expressly provides otherwise
- Shareholders, if affected, form a separate group in the insolvency plan
- The plan may provide
 - Anything which is admissible under company law, in particular the transfer of share or membership rights
 - Debt-equity swap
 - Capital reduction and increase
 - Exclusion of subscription right
 - Payments to withdrawing shareholders/members
- Shareholders are entitled to a compensation equivalent to what they would get in liquidation

Insolvency Plan – Shareholder Rights

- If the shareholder group does not agree with the plan, the Court may approve the plan provided
 - no creditor receives more than the full amount of his claim
 - no shareholder/member is preferred over other shareholders/members in equivalent situations.
- A shareholder may appeal among others if he can show to the Court that the plan places him at a major disadvantage compared to a situation without a plan.
- The right to appeal is excluded if the Plan provides for a sufficient compensation fund.
- Upon admissible appeal the Court may nevertheless at the request of the IP implement the Insolvency Plan if its implementation outweighs the appeal.

Group Insolvencies–German Draft Reform

One proceeding per legal entity, no substantial consolidation

Definition

Group of companies

- independant legal entities
- COMI in Germany
- related directly or indirectly through
 - the possibility to exercise dominating influence
 - subjected to uniform management

Group Insolvencies–German Draft Reform

COMI

- Group COMI for all group companies if concentration in one COMI is in the common interest of creditors
- One proceeding must be pending concerning a company of not inferior importance
 - >10% of aggregate group assets and
 - >10% of aggregate group turnover and
 - >10% of aggregate group turnover
- Cases may be referred to such court (concentration)

Group Insolvencies – German Draft Reform

Courts must cooperate and inform on inter alia

- preventive measures
- opening of proceedings
- appointment of IP (conflict of interest)
- presentation of insolvency plans

IPs must cooperate and inform

Group Creditors' Committee

Group Insolvencies – German Draft Reform

New proceeding: Coordination proceeding

- Group COMI determines competent court
- Upon the application of
 - any of the group debtors
 - any of the group IPs
 - any of the group creditors' committees, if unanimous
- Coordination IP
 - must be independent
 - may present coordination plan
 - on the restructuring of group companies or the group
 - on solving intra group conflicts
 - on agreements between group IP
 - must be approved by group creditors' committee



Thank you for your attention.

Dr. Martin Prager

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