England - a paradise for insolvent European companies? A German perspective

Dr. Peter de Bra
Lawyer

Academic Group Meeting
13 October 2007

THE CASE OF DEUTSCHE NICKEL AG

- Step 1: Shares in Deutsche Nickel AG sold to newly founded ‚DNICK Ltd', corporate seat in London
- Step 2: Deutsche Nickel AG converted in German *Kommanditgesellschaft* with DNICK Ltd as general partner and another company under English law as limited partner

THE CASE OF DEUTSCHE NICKEL AG

- Step 3: Limited partner withdraws from the partnership, DNICK Ltd. as sole partner
- German law: Assets/liabilities of limited partnership merge by universal succession into the remaining partner DNICK Ltd – Limited partnership ceases to exist
- Step 4: DNICK Ltd transfers by way of spin-off all operating entities into newly set-up entities – ‚DNICK Holdings plc' founded as another subisidiary taking over all subsidiaries from DNICK Ltd
- Step 5: DNICK Ltd files for insolvency before the High Court in London

THE CASE OF HANS BROCHIER GMBH & CO.KG

Using the same ‚technique‘ as DNICK AG failed: German insolvency procedure finally was commenced, English procedures were annulled.

Differences:

- Obviously COMI still in Germany
  - Newly founded Hans Brochier Holdings Ltd operating in Germany
  - In DNICK case, DNICK Holdings plc installed between original holding (converted into Ltd) and operating German subsidiaries

THE CASE OF HANS BROCHIER GMBH & CO.KG

- Additional insolvency proceedings in Germany opened only some hours after opening by the High Court in London
  - Filing from the German workforce
  - German Insolvency Court: Decision of the High Court in breach of the *ordre public*
  - High Court: Hans Brochier Holdings Ltd. as mere ‚letter box‛ does not fulfil requirements for an ‚establishment‟ pusuant to EIR
    - Appointment of English insolvency administrators declared as void
    - Not even secondary proceedings in England

THE CASE OF SCHEFENACKER AG

- Similar way as in the case of DNICK
  - Schefenacker transformed into an Englsih plc with the corporate seat in Portchester/UK
  - UK registered sub-holding company formed to further distance the holsing company from the German operating companies
  - Unlike DNICK, no filing for the appointment of an insolvency administrator
  - CVA with a debt-to-equity-swap approved

POSSIBLE MEANING OF COCO GUIDELINES

- German Courts will be prepared to cooperate, but
  - main function of German Courts is (only) to appoint and supervise the liquidator
  - the cooperation between the liquidators will be more important than the cooperation between the Courts

Limited duty to file for insolvency

- Presently: Duty to file for insolveny in the case of over-indebtedness/illiquidity only for directors of companies incorporated under German law
- Henceforth: In principle, duty also for non-German companies with no individual as general partner
- Limitations:
  - Non-German companies with COMI within territory of the EIR: Duty only in the case of establishment within Germany
  - Non-German companies with COMI out of territory of the EIR: Pursuant to wording only assets in Germany required, but clarification is due

DEREGULATION OF GERMAN *‚EIGENKAPITALERSATZRECHT‛*

(Doctrine on equitable subordination or recharacerisation of equitiy)

- Presently:
  - Doctrine based on both legal regulations and case law
  - Necessary element: Financial crisis of the company
- Henceforth:
  - In the company‘s insolvency shareholders are subordinated to other creditors with all claims arising from loans and ‚economically equivalent legal acts‘.
  - Company‘s financial status in the moment the obligation is created is irrelevant.
  - Insolvency administrator can rescind settlements made within one year before filing for insolvency or after.