Dr. Klaus-Peter Busch Insolvency court Detmold, Germany

Ladies and gentlemen, dear colleagues,

first of all, thank you very much for your invitation. I feel honoured to be able to participate in this congress as a German insolvency judge.

I have been asked to speak to you about the significance and experience of being an insolvency judge in Germany.

I am happy to do so.

However, before giving you a first-hand description of my daily job routine, I would like to tell you about some basic elements of German insolvency law. This short overview might help you to grasp the role of the judge within the German insolvency law.

Slide/Overhead transparency 1: Competence

The German Insolvency Act dates from 1999. It replaced a bill which had been passed in 1877.

The German insolvency court is part of the local /circuit court. It is a court sitting with one judge.

Slide 2: The aims of the German insolvency regulation

1. What are the different types and aims of insolvency proceedings?

The German Insolvency Regulations recognise only one standard insolvency proceeding. Its aim is the best possible, equal satisfaction of the creditors (first sentence of Section 1 of the German Insolvency Regulations (Insolvenzordnung - InsO)). Insolvency proceedings can be carried out in accordance with the statutory provisions relating to the administration, realisation and distribution of the insolvency assets ("regular insolvency proceedings"). The parties to the proceedings can however make other provisions in an insolvency scheme, particularly regarding the preservation of the company.

Insolvency proceedings are also intended to allow natural persons a financial fresh start. This is achieved by waiving any debts which have not yet been paid off after the conclusion of the insolvency proceedings ("discharge of remaining debts").

Slide 3: Types of proceedings

Insolvency proceedings can be opened in respect of the assets of any legal entity or natural person, even if they are not entrepreneurially active ("consumers").

There are also some special forms of insolvency proceedings. They regard the insolvency of a descendant's estate, for example.

In order to open the insolvency proceedings, it is first of all necessary to make an application. This may be filed by the debtor or by a creditor. Government departments can only make an application, if the debtor cannot pay the amounts owed to the state when due. There is an obligation to file an application in the case of joint-stock companies in the event of insolvency.

Slide 4: Types of proceedings

2. What are the conditions for opening each type of insolvency proceedings?

Grounds for opening insolvency proceedings are inability to make payment and/or over-indebtedness. Inability to make payment exists if a debtor is not in a position to meet the payment obligations which are due (Section 17(2) InsO). Over-indebtedness exists if the debtor's assets no longer cover the existing obligations (see Section 18(2) InsO). The debtor's assets must be valued on the basis that the business will be continued, if this is strongly likely in the circumstances. Imminent inability to make payment is also sufficient for an insolvency application by a debtor (Section 18(1) InsO).

In order to protect the court and the debtor against applications which are overhasty or which are made solely with the intention of causing damage, a creditor must, when making an application, present prima facie evidence that a ground for insolvency exists and that he owns a claim.

Finally, it is necessary for the financing of the insolvency proceedings to be secured. The application to open proceedings is therefore rejected if the debtor's assets are unlikely to be sufficient to cover the costs of the proceedings (first sentence of Section 26(1) InsO).

If the conditions are met, the insolvency court makes an opening order which is made publicly known. Public notification takes place at the instigation of the court on the Internet (www.insolvenzbekanntmachungen.de de).

You may have a look at this website, if you have some spare time.

Slide 5: Phases of insolvency proceedings

The German insolvency proceedings are split:

First of all, there's the opening stage of proceedings. Its beginning is marked by an application of either the debtor or a creditor. During the opening stage, the judge verifies whether all conditions for the opening of insolvency proceedings are fulfilled.

After that, the insolvency proceedings are opened by order of the local court.

The opening of the insolvency proceedings causes the debtor's right to administer and dispose of the assets constituting the insolvency assets to pass to the insolvency administrator (Section 80(1) InsO). This not only covers the assets belonging to the debtor at the time when the proceedings are opened but also the further assets acquired by him during the proceedings.

As the aim of the insolvency proceedings is the equal satisfaction of all creditors, the opening of proceedings establishes a prohibition on individual compulsory enforcement. This means that the insolvency creditors cannot, for the duration of the proceedings, enforce either upon the insolvency assets or upon the debtor's available assets.

Slide 6: The role of the judge

3. What is the role of the various participants in each type of proceedings?

It is the duty of the *insolvency court* to accompany and monitor the procedural course of the insolvency proceedings.

However, the insolvency judge has special powers and duties at the opening stage of the proceedings. He decides at this point, inter alia, about opening the proceedings, about interim security measures and about the appointment of an interim insolvency administrator and finally about the opening of the insolvency proceedings and about the final administrator.

Slide 7: Interim security measures

Interim security measures may be: firstly, an injunction against the continuance of certain actions by a creditor against the debtor or the debtor's property, e. g an injunction against the continuance of foreclosure sales; secondly, the compulsory arraignment of the debtor in order to ensure that the expert or the interim insolvency administrator gets all information he needs. If required, the judge may even issue a warrant. The debtor is then kept under arrest until he is ready to provide the necessary information. That is a kind of coercive detention.

The insolvency judge has to take gradual actions in order to make sure that the debtor’s property is preserved and that all facts are revealed which are required to decide about the opening of the insolvency proceedings in an appropriate way.

By opening the insolvency proceedings the judge usually gives the case to the judicial officer.

The court is also responsible for supervising the insolvency administrator. However, it merely monitors whether his actions are just, not whether they are expedient, and it also cannot give any instructions.

The *insolvency administrator* is the definitive figure in the insolvency proceedings. Lawyers, businessmen, auditors or tax consultants can be considered in particular for this purpose. When the insolvency proceedings are opened, the insolvency administrator acquires the power to administer and dispose of the debtor’s assets.

The central decisions in the insolvency proceedings that have been opened (realisation, liquidation, reorganisation and insolvency scheme) are left to the creditors.

In order to bring the insolvency proceedings to a rapid conclusion, the decisions of the insolvency court are only subject to appeal in those cases in which the law provides for an *immediate appeal* (see Section 6(1) InsO). The immediate appeal may be lodged at the insolvency court or at the appeal court (meaning the Regional Court superior to the insolvency court), and shall be lodged in writing or for recording by the court office. It has no postponing effect.