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PRINCIPLES OF THE AUSTRIAN CORPORATE INSOLVENCY LAW

on the example of the ACC Austria GmbH

- ⊙ Austrian Company Insolvency Law
- ⊙ The insolvency of the “ACC Austria GmbH”
- ⊙ Reorganization and reconstruction instruments
- ⊙ Lack of international corporate insolvency legislation
- ⊙ Prohibited repayment of contributions
- ⊙ Anti-trust approval requirement

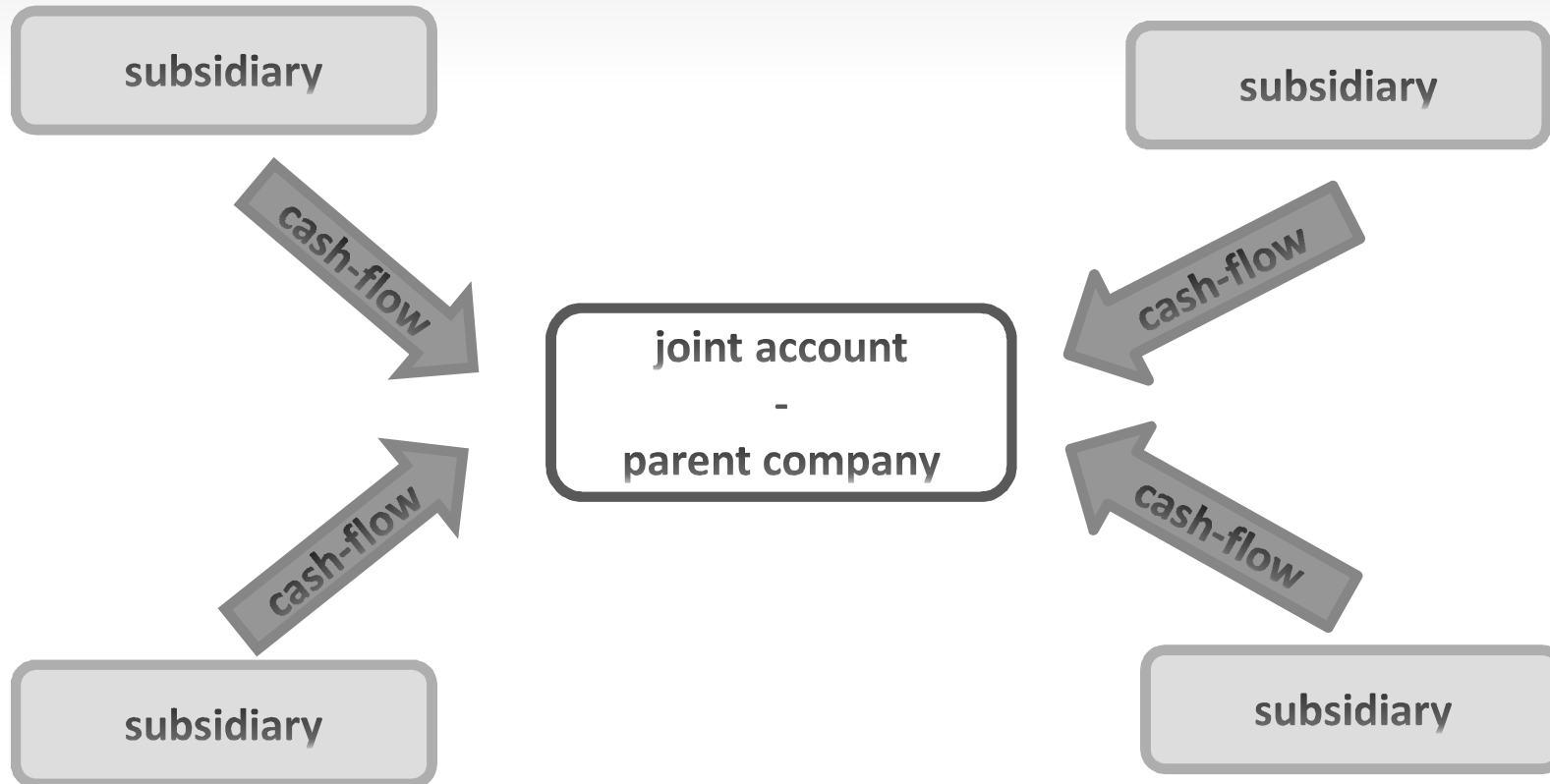
- ⊙ ACC Austria GmbH - a joint stock corporation under Austrian Law
- ⊙ approx. 700 employees
- ⊙ Production: cooling compressors for refrigerators and deep freezers/
approx. 6 mio. per year

	<u>Turnover</u>	<u>Loss</u>
2010	EUR 164 Mio	EUR - 4,9 Mio
2011	EUR 167 Mio	EUR - 4,1 Mio
2012	EUR 155 Mio	EUR - 12,6 Mio

MORE FACTS ABOUT THE COMPANY

- ◎ Owner of the company: ACC Compressors S.p.A (100 %);
 - registered headquarters in Pordenone/Italy;
 - same production – same design;
 - approx. 600 employees;
 - the same person was Managing Director of the parent company and daughter company
- ◎ Research and Development Centre of the “ACC Group” was located in Austria (patents-situation);
- ◎ Main customers: Whirlpool, Electrolux, Indesit, Bosch, Liebherr,...

- ⊙ Bad economic situation of the whole “ACC Group” - a financing by means of bank loans was no longer possible
- ⊙ "cash pooling agreement"
- ⊙ At the time of opening of proceedings - receivables of the ACC Austria: approx. EUR 8.5 million
- ⊙ Approx. 55 % of the assets of the ACC Austria represented holdings in associated companies and accounts receivable vis-a-vis these companies



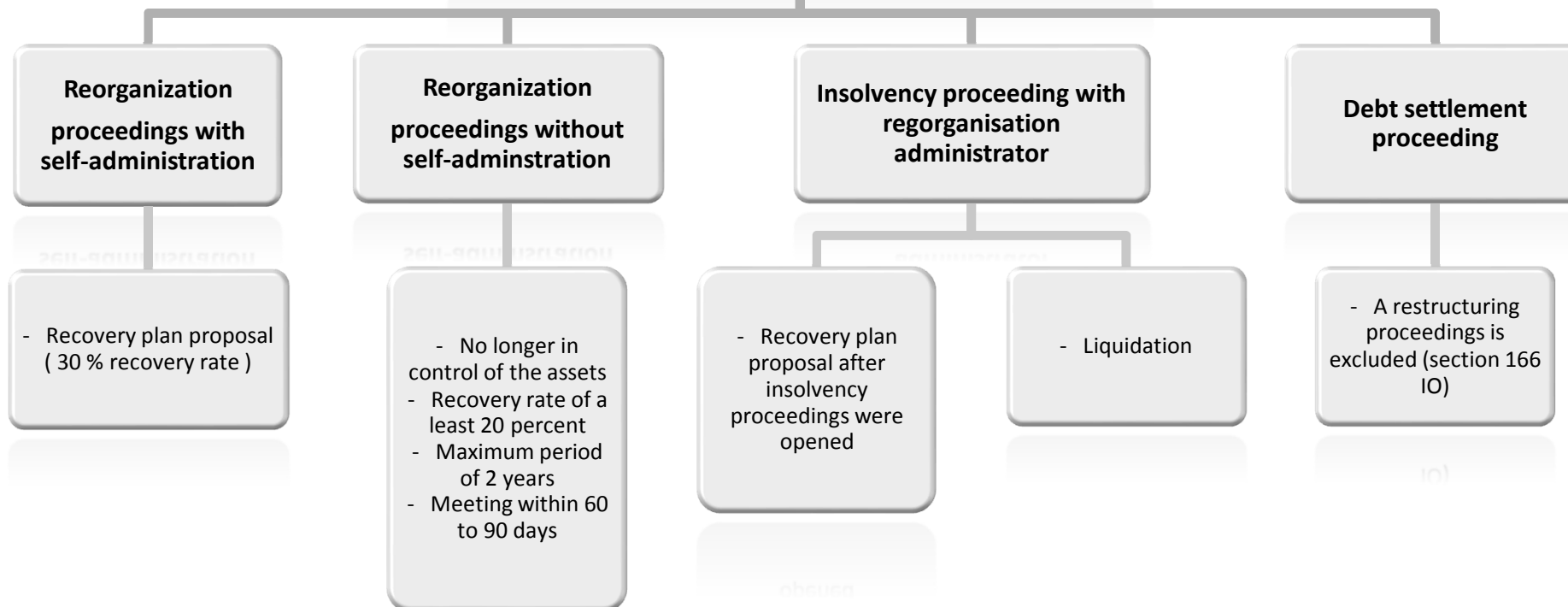
APPOINTMENT OF REORGANIZATION ADMINISTRATOR IN AUSTRIA

- ⊙ Appointment by the insolvency court (by the judge with competence for the insolvency proceedings - “Insolvency Administrator list”)
- ⊙ Debtor/creditors have no right of proposal
- ⊙ For (major) company insolvencies commercial lawyers with special expert knowledge or experience are to be appointed (also legal persons)
- ⊙ Independence of the Reorganisation administrator
- ⊙ Publication of the commencement of an insolvency proceedings in the “insolvency file “ www.edikte.justiz.gv.at
- ⊙ European Insolvency Register www.e-justice.europa.eu

- ⊙ Appointment by the insolvency court
- ⊙ Representatives of the Creditor Protection Agencies, financial Procurators, major creditors
- ⊙ Main task: monitoring and support of the the insolvency/reorganization administrator
- ⊙ Some transactions (such as the divestment and leasing of the entire company) require the approval of the insolvency court and the Committee of Creditors

- ⊙ In Austria compensation claims from employees are up to 100% safeguarded
- ⊙ Unpaid back pay, severance payments and outstanding overtime pay are paid from the insolvency contingency fund of the Austrian Republic
- ⊙ The fund receives the attributable quota payments in the insolvency

Insolvency proceedings



- ◎ Commencement of proceedings on 20.12.2012
- ◎ **Reorganization proceeding with self-administration**
 - Request of the debtor
 - Recovery plan proposal (30 % recovery rate)
 - Status of the assets and liabilities
 - Financial plan (for 90 days)
 - List of all restructuring measures
 - Financial statements for the past 3 years

REORGANIZATION PROCEEDINGS WITH SELF- ADMINISTRATION

- ⊙ Position of the debtor - Scope of self-administration
- ⊙ Debtor's power of disposal over the insolvency assets is restricted
- ⊙ All legal transactions (Only certain legal transactions require the prior approval of the reorganization administrator; e.g. preferred withdrawals, revocation of contracts, employment relationships)
- ⊙ Litigation

REORGANIZATION PROCEEDINGS WITH SELF- ADMINISTRATION

- ⊙ Position of the reorganization administrator
- ⊙ Avoidance of adverse transactions prior to the opening
- ⊙ Examination of the claims asserted by creditors
- ⊙ Immediate review of the economic situation of the company
- ⊙ Monitoring of the management of the debtor
- ⊙ Check if the financial plan can be adhered to and if the reorganization plan can be implemented

INSOLVENCY ACC AUSTRIA - INITIAL PHASE

- ⊙ No production operations on account of the usual Christmas vacation (from the 20.12.2012 to the 07.01.2013)
- ⊙ First effects of the commencement of insolvency:
 - ⊙ No available credit lines
 - ⊙ No "cash pooling"
 - ⊙ Continuation of deliveries only with advance payment
 - ⊙ Cancellation of orders;
- ⊙ First report to the insolvency court in the middle of January 2013: first doubts whether the financial plan could be adhered to

INSOLVENCY ACC AUSTRIA - INITIAL PHASE

- ⊙ Obtaining an overdraft facility for EUR 500 000.00 (only covered the liquidity requirements for a few days!)
- ⊙ By the end of January 2013 the cash flow situation was becoming more and more critical;
- ⊙ The reorganization administrator brought these circumstances to the attention of the insolvency court, the committee of creditors and the debtor
- ⊙ Consequence: on the 06.02.2013 the debtor voluntarily filed for withdrawal of self-administration;
- ⊙ Change from Reorganization “with” to Reorganization without self-administration;

REORGANIZATION WITHOUT SELF- ADMINISTRATION

- ⊙ Request of the debtor
- ⊙ Reorganization plan proposal (20 % recovery rate)
- ⊙ Maximum period of 2 years
- ⊙ creditors of the insolvency assets must receive preferential payment
- ⊙ Debtor is no longer in control of the assets

REORGANIZATION WITHOUT SELF- ADMINISTRATION

- ⊙ Position tasks of the Insolvency Administrator
- ⊙ All legal acts and legal transactions
- ⊙ Litigation
- ⊙ Continuation of the business
- ⊙ Assessment of liabilities
- ⊙ Identification, Collection and Administration of the assets
- ⊙ Realization of the assets and distribution of the proceeds to the creditors.
- ⊙ Some transactions require the approval of the Insolvency Court and Committee of Creditors (i.e for the divestment of the company or of a part of it).

INSOLVENCY ACC AUSTRIA - REORGANIZATION WITHOUT SELF-ADMINISTRATION

- ⊙ It fell to the Insolvency Administrator to arrange any further financing
- ⊙ Exit strategy - Possible closing of the company and distress sale
- ⊙ Top priority: Save the jobs of 700 employees and the business location
- ⊙ The Insolvency Administrator arranged an insolvency loan from an Austrian Banking Institution for EUR 2.5 million (Collateral! - "assets"/machines of the debtor company)
- ⊙ National and international investors with an interest in purchasing the ACC Austria company were contacting the insolvency administrator

REORGANIZATION PLAN ACC AUSTRIA

- ⊙ Reorganization plan proposal (20 % recovery rate)
- ⊙ Details as to how the creditors should be satisfied or secured.
- ⊙ The Insolvency Administrator must report to the insolvency organs and creditors whether the reorganization plan obviously cannot be successfully executed, whether the plan accords with the common interests of the insolvency creditors and is thus appropriate.
- ⊙ ACC Austria: the feasibility of the reorganization plan was very difficult (insolvency of the parent company; potential concentration of the company's operations in Italy)

ACC AUSTRIA VARIANTS FOR THE CREDITORS

- ⊙ Reorganization plan; or
- ⊙ The sale of the company within the framework of an "asset deal"
- ⊙ To achieve clarity as to which variants were better for the creditors, the Insolvency Administrator commissioned an estimate of the "assets" and obtained a company valuation expert report
- ⊙ Problem areas: "transferring reorganization" (employee claims and compensation claims from suppliers arising - increase of the liabilities by more than EUR 40 million)

REORGANIZATION PLAN HEARING ON THE 17.04.2013

- ⊙ Realization ban until the reorganization plan hearing (the insolvency administrator cannot divest the company without the agreement of the debtor)
- ⊙ ACC Austria: The insolvency court scheduled a reorganization plan hearing for the 17.04.2013.
- ⊙ The reorganization plan is deemed to have been accepted if two majorities are reached:
 - ⊙ if the majority of the insolvency creditors who are eligible to vote and present at the hearing agree (**absolute head majority**) and
 - ⊙ if the total sum of accounts receivable of the consenting creditors amounts to more than 50% of the total sum of the accounts receivable of the insolvency creditors who are eligible to vote and present at the hearing (**absolute majority vote**).
- ⊙ ACC Austria: 700 employees had the head majority and that whether a reorganization plan would be accepted or rejected depended decisively on their voting behaviour

REORGANIZATION PLAN HEARING ON THE 17.04.2013

- ⊙ “International football match atmosphere” between Austria and Italy
- ⊙ All of the Italian creditors (approx. 60 % of the capital claims) voted for the acceptance of the reorganization plan
- ⊙ All 700 employees (approx. 60 % of the present creditors) voted against the reorganization plan (because the claims had already been transferred to the insolvency contingency fund)
- ⊙ Result: the reorganization plan was rejected

INSOLVENCY OF THE ITALIAN PARENT COMPANY “ACC ITALY”

- ⊙ Preliminary insolvency proceedings in Italy
- ⊙ The – also materially insolvent – “ACC Italy” tried everything to push the reorganization plan of ACC Austria as “the decisive group asset” (patents and machinery!)
- ⊙ “ACC Italy” postponement agreements from all significant Italian creditors of the ACC Austria (sort of "debt for equity swap")

SALE OF THE ACC AUSTRIA - BIDDING PROCESS

- ⊙ With the agreement of the debtor the Insolvency Administrator set-up a data room (“due diligence”)
- ⊙ The bidding conditions were already stipulated in the offer conditions
- ⊙ Bidding process startet within 10 days after the reorganization plan hearing
- ⊙ Bidding process - No statutory rules – BUT The Insolvency Administrator must publish the sale in the insolvency file at least 14 days prior to finalization
- ⊙ ACC Austria: two main interested parties:
- ⊙ A group around the former Austrian minister for economic affairs
- ⊙ SECOP Kompressoren GmbH- A german competitor of ACC Austria

SALE OF THE ACC AUSTRIA - BIDDING PROCESS

- ◎ Result: The bid from the competitor from Germany was finally accepted (price approx. EUR 30 million). SECOP pledged to retain the company location as well as the expansion of Research and Development on the Furstenfeld site.
- ◎ Problem: The company was sold subject to the condition of a positive settlement of the anti-trust proceedings at the European level.

TRANSFER REORGANIZATION

- ⊙ Finally the takeover of the ACC Austria company took place by way of a “transfer reorganization” – “asset deal”
- ⊙ The transfer of the company from a company owner in need of reorganization to another legal entity that
 - ⊙ already exists or
 - ⊙ which is to be newly established (“new co”)
- ⊙ The Austrian Insolvency Code facilitates the “transfer reorganization”
 - ⊙ no liability of the purchaser for the debts of the acquired company,
 - ⊙ no entry in the working relationships,
 - ⊙ no reduction of the employee-claims

DEVELOPMENTS FOLLOWING THE CONCLUSION OF THE BIDDING PROCESS

- ⊙ New position of the Insolvency Administrator (Carrying on with the business but conflicting interests of the buyer and the creditors)
- ⊙ Development of the sales volume (From 300 000 to 400 000 compressors/month, to only 150 000 to 250 000 compressors)
- ⊙ Competition between ACC Austria and ACC Italy (dumping,...)
- ⊙ Difficult liquidity and market conditions
- ⊙ Insolvency credit: EUR 7.5 million
- ⊙ Short-time working: First time in Austria within the framework of an insolvency continued operation

- ⊙ June 2013: Commencement of a "amministrazione straordinaria" in Italy.
- ⊙ State aid in the amount of EUR 13 million from the Republic of Italy for the ACC Italy (approved by the European Union)
- ⊙ Separation of the ACC Austria and ACC Italy: Problems with the reciprocal use of IT data and patents - Start of a real industrial war
- ⊙ In late autumn 2013, the German purchaser ultimately advised the Insolvency Administrator that it was actually no longer interested in the ACC Austria GmbH company

LACK OF INTERNATIONAL GROUP INSOLVENCY

- ⊙ The case ACC Austria shows the striking effects of the lack of international group insolvency law.
- ⊙ Corresponding legal framework versus particular interests of a country
- ⊙ European Insolvency Code, work of UNCITRAL,

LACK OF INTERNATIONAL GROUP INSOLVENCY

- ⊙ **Key topics**
 - ⊙ competence and access to the courts,
 - ⊙ the question of applicable law
 - ⊙ the person of the insolvency administrator
 - ⊙ the nature of the cooperation between multiple competent courts
 - ⊙ the effects of the insolvency commencement in another country
 - ⊙ insolvency assets; realization and administration
 - ⊙ parallel insolvency proceedings at home and abroad
- ⊙ consolidation of the quota from
- ⊙ transnational cooperation;
- ⊙ legal protection;
- ⊙ prerequisites for recognition of a foreign insolvency proceedings;
- ⊙ proceedings transparency;
- ⊙ the rights of foreign creditors;
- ⊙ coordination within the framework of an insolvency proceedings, participation, required majorities:
- ⊙ measures for the protection of the insolvency assets and the interests of creditors

ACC AUSTRIA: FINAL PHASE

- ⊙ Numerous meetings in Italy, Brussels, Germany and even China,
- ⊙ Strained liquidity situation
- ⊙ Reporting to the European Commission
- ⊙ 07.12.2013: approval of the European Commission anti-trust authorities
- ⊙ 20.12.2013: Closing of the company company was subsequently closed effective
- ⊙ 01.01.2014: Employees entered the "newco"

ACC AUSTRIA: RESUME

- ⊙ The Insolvency Administrator continued to run the company for a year
- ⊙ During this period:
- ⊙ Turnover: approx. EUR 110 million
- ⊙ "cash loss": approx. EUR 6 million
- ⊙ Accounting loss: approx EUR 0.5 million
- ⊙ Maintenance of 600 employees, the company location and the Research and Development activities in Austria
- ⊙ Insolvency creditors with accounts receivable of around EUR 100 million shall receive a quota of around 20 %

DIRECTOR LIABILITY - CASH POOLING

- ⊙ Lawsuit against the former managing director of ACC Austria (director liability; forbidden repayment of contributions)
- ⊙ Dispute: amount of EUR 10 million
- ⊙ Conclusion/the maintenance of a “cash-pooling” agreement is constantly to be measured against the provisions of capital maintenance rules
 - ⊙ violation of the prohibition of the repayment of contributions
- ⊙ Question: Normal exchange transaction or a concealed distribution of company assets?
 - ⊙ Supreme Court in Austria (OGH): “third party comparison”

DIRECTOR LIABILITY - CASH POOLING

- ⊙ The plaintiff KAPP & STRIMITZER Rechtsanwälte maintains that the present Cash Pooling agreement did not comply with the capital maintenance rules
- ⊙ The sole purpose of the Cash Pooling agreement was to transfer liquid funds from ACC Austria to the superordinate parent company

DIVESTMENT OF ACC COMPRESSORS IN ITALY - CIVIL PROCEEDINGS AGAINST THE INSOLVENCY ADMINISTRATOR

- ⊙ “Closing“ in Austria
- ⊙ Bidding process in Italy in early Summer 2013
 - ⊙ Investor: Chinese Group
- ⊙ Lawsuit against the Austrian Insolvency Administrator because of accusations of anti-competitive practices
 - ⊙ Claimed damage: approx. EUR 5 million
- ⊙ Next hearing: End of January 2015

THANK YOU FOR YOUR ATTENTION



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