

# KIRKLAND ALERT

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## German Insolvency Avoidance Action Reform and its Impact on Financial and Trade Creditors

The German *Bundestag* recently enacted a reform bill seeking to improve Germany's stringent insolvency avoidance action regime and incentivize work-outs between debtors and, among others, financial and trade creditors. The law seeks to raise the bar for assertion of avoidance claims on account of prepetition transactions, potentially providing creditors greater protection, including for arrangements entered into with and concessions provided to a distressed debtor in the time period leading up to an insolvency filing.

### *Summary Overview of the Current Avoidance Action Regime in Germany*

German law currently enables an insolvency trustee (or the supervisor in a debtor-in-possession proceeding) to avoid certain pre-commencement transactions that harm creditors on various statutory grounds. Sections 130, 131 and 132 of the German Insolvency Code permit recovery of a preference made in the three months prior to the petition date. Section 133 of the Insolvency Code permits recovery of a fraudulent transfer made in the 10 years prior to the petition date. Section 134 of the Insolvency Code permits recovery of a transfer made for no consideration in the four years prior to the petition date. And Section 135 of the Insolvency Code permits recovery of a shareholder loan repayment made in the year prior to the petition date. Transfers made subsequent to the petition date and before formal commencement of the case likewise are subject to avoidance.

The specific requirements for recovery of pre-commencement transfers are set forth below:

- **Section 130 (Preference).** Even where the transferee was entitled (e.g., contractually or statutorily) to receive a transfer, the transfer is avoidable if made within the **three months** prior to the petition date or thereafter at a time when the transferee was aware either of the debtor's cash flow insolvency or, as applicable, of the fact that the debtor had filed for insolvency.
- **Section 131 (Preference).** In instances where the transferee was not entitled to receive the transfer, the transfer is avoidable if made (a) within the month prior to the petition date or thereafter, (b) within the **three months** prior to the petition date at a time that either the debtor was cash flow insolvent (no transferee knowledge required) or the transferee knew that the transfer harmed creditors.
- **Section 132 (Preference).** Transfers that harm creditors directly that are made within the **three months** prior to the petition date or thereafter can be recovered if made at a time when the transferee was aware either of the debtor's cash flow insolvency or, as applicable, of the fact that the debtor had filed for insolvency.
- **Section 133 (Fraudulent Transfer).** Transfers made within the **10 years** prior to the petition date or thereafter with the intention to defraud creditors (*vorsätzliche Gläubigerbenachteiligung*) can be avoided if the transferee had knowledge

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of the debtor's intent. The transferee is deemed to have constructive knowledge of fraudulent intent if it is aware of the debtor's anticipated cash flow insolvency (*drohende Zahlungsunfähigkeit*) and the fact that the transfer harms creditors.

- **Section 134 (No Consideration).** Transfers for which the debtor received no consideration can be avoided unless made more than **four years** prior to the petition date.
- **Section 135 (Shareholder Loans).** Repayments of loans made by 10%-shareholders or deemed shareholders can be avoided if made within **one year** prior to the petition date or thereafter. In addition, collateral to secure such a loan can be avoided if granted within the **10 years** prior to the petition date or thereafter. Further, the amount of a loan repayment made to a third party lender within the **one year** prior to the petition date, for which loan a shareholder provided collateral or a guarantee, can be recovered from the shareholder.

Section 142 of the Insolvency Code provides a defense to a preference action<sup>1</sup> for contemporaneous<sup>2</sup> transactions providing reasonably equivalent value to the debtor for an otherwise avoidable transfer.<sup>3</sup>

#### *New Amendments to the German Avoidance Action Statutes*

The reform law makes meaningful changes to the fraudulent conveyance statute, the “new value” defense and with respect to interest accruing on avoidance action claims.<sup>4</sup> Each of these changes is discussed in detail below.

##### *Fraudulent Conveyance Statute*

The most notable amendments to the avoidance action statute occur in the fraudulent transfer context (Section 133), which, as a result of the statute's considerable reach, long look-back period and generous interpretation given to it by German courts, plays a significant role in nearly every distressed situation in Germany.

*First*, the look-back period for avoidance of fraudulent transfers under which the transferee receives repayment or a grant of collateral has been reduced from 10 years to four years. *Second*, if a transferee was entitled to the repayment or a grant of collateral that otherwise would comprise a fraudulent transfer, the transferee will be deemed to have knowledge of the debtor's fraudulent intent only where the administrator can prove that the transferee had knowledge of *actual* cash flow insolvency (and not merely *anticipated* cash flow insolvency as is the case under current law). *Third*, a payment accommodation granted by a transferee to the debtor (e.g., repayment of a loan on adjusted terms) now will result in a rebuttable presumption that the transferee was not aware of the debtor's cash flow insolvency.

Among other things, the amendment reduces insolvency exposure to lenders in distressed scenarios, both as to the collateral granted to secure rescue financing as well as repayments made during the life of the loan. No longer will lenders have a decade-long exposure with respect to repayments and collateral received from a distressed borrower, the look-back period having been conformed to internationally comparable norms. In addition, where a lender or trade creditor gives a distressed debtor alternative payment terms to assist a recovery, the lender will have the benefit of a presumption of unawareness of the debtor's insolvency.<sup>5</sup> At the same time, how-

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ever, the legislative history states that a debtor's non-compliance with an agreed payment plan or proof of actual knowledge that a debtor is unable to satisfy its liabilities to other creditors will rebut the presumption limiting its positive impact in practice.<sup>6</sup>

To a certain extent, other than the reduction of the look-back period from 10 to four years, these changes merely codify existing German Supreme Court case law, thus foreshadowing potentially little change in practice.<sup>7</sup> Further, the changes may merely shift the battle lines: an insolvency administrator must now prove knowledge of actual insolvency; but even there, the administrator can make use of certain indicia and presumptions.<sup>8</sup> In a worst case scenario, old battles will need to be re-fought up through the appellate courts before creditors have sufficient legal certainty. In a best case scenario, lower courts will continue to enforce existing precedent<sup>9</sup> and give a broad interpretation to the new defenses.

#### *New Value Defense*

As noted, Section 142 of the Insolvency Code provides an absolute defense to certain preference actions for contemporaneous exchanges of reasonably equivalent new value. To date, Section 142 does **not** provide a defense to a fraudulent transfer.

The avoidance action reform's most notable amendment to the "new value" statute from a creditor perspective is the requirement that the administrator now provide, in the fraudulent transfer context, that the transferee — in addition to having knowledge of the debtor's insolvency and harm to creditors — have knowledge of the debtor's "dishonesty" (*unlauteres Handeln*).<sup>10</sup> The term "dishonesty" does not appear in the Insolvency Code, derives mainly from German antitrust law and the former German Bankruptcy Act (*Konkursordnung*) and, per German Supreme Court case law, expressly is not required under current law to prove a fraudulent transfer.<sup>11</sup>

As set forth in the legislative history, the intent of the amendment is to require the administrator to demonstrate that the debtor and the transferee actively colluded (*kollusives Zusammenwirken*) to remove assets from the reach of creditors<sup>12</sup> or at least that the transferee had knowledge of the debtor's intent to dissipate assets in connection with the transfer.<sup>13</sup> The amendment to Section 142 effectively seeks to return German avoidance action case law to its pre-2003 state, at which time collusion or dishonesty was required for most ordinary course transactions at value.<sup>14</sup> If interpreted broadly, the effect of the amendment therefore should result in greater protection for creditors and financial investors by increasing the burden of proof on the administrator for most "ordinary course" transactions (i.e., those in which the transferee provide the debtor contemporaneous fair value).

#### *Interest on Avoidance Action Recoveries*

Finally, the amendments also adjust the economic means of recovery in a meaningful way for transferees. Under existing law, the insolvency administrator can collect interest accruing from the commencement date (*Eröffnung*) on avoidance actions that the administrator ultimately wins.<sup>15</sup> As a result, insolvency administrators are incentivized to delay pursuit of avoidance actions for as long as possible (essentially until shortly before case closure). The amendment to Section 143 of the German Insolvency Code makes clear that interest will be payable on a monetary recovery only where the transferee is in default with respect to recovery of the fraudulent transfer.

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### Conclusion

The principle intent of the reform clearly is to weaken the insolvency administrator's hand in pursuing creditors under the fraudulent transfer statute: the look-back period is substantially reduced; the burden of proof to avoid most ordinary course transactions undertaken at fair value has been raised considerably to require, essentially, active collusion as opposed to mere knowledge of a possible insolvency; and creditors now have the benefit of stronger presumptions against knowledge in all other circumstances.

For financial creditors in particular, the requirement that an insolvency administrator prove knowledge of *actual* as opposed to *anticipated* cash flow insolvency is a meaningful improvement: creditors in distressed scenarios engaging in extensive restructuring negotiations with a debtor, notwithstanding the existence of a restructuring opinion meant to negate fraudulent intent, nearly inevitably have knowledge of the debtor's anticipated cash flow insolvency. The fact that the administrator must now prove knowledge of actual cash flow insolvency hopefully will deter the more aggressive uses of the fraudulent transfer statute by administrators and encourage consensual arrangements between debtors and creditors.<sup>16</sup> Indeed, the new law creates considerable incentives for both financial and trade creditors to support a work-out in light of the mitigated risks that a debtor's performance will be subject to avoidance challenge for as long as a decade after the fact based on conjectures as to what the creditor should have known at that time.<sup>17</sup>

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- 1 Practically, a preference action pursuant to Section 131 (i.e., a preference to which the transferee was not entitled, for example, contractually or statutorily) will never be subject to the Section 142 exception. See *Ede/Hirte/Uhlenbruck*, InsO, 14th ed. § 142 ¶ 6 (collecting cases). Further, while avoidance of payments under shareholder loans (Section 135) theoretically is subject to the Section 142 exception, practically, most payments to shareholder rarely will fulfil the contemporaneity requirement. See *Ede/Hirte/Uhlenbruck*, InsO, 14th ed. § 142 ¶¶ 8 & 9 (discussing same and exceptions to same).
  - 2 Whether an exchange occurs contemporaneously depends on the facts and circumstances, in particular the nature of the exchange, the industry in which the parties are active and other factors. For sales of movables, services and transportation of goods, a delay of two weeks between performance and payment generally is fine, while a delay of over a month likely would not be. Compare BGH Judgment, Case No. VIII ZR 40/79 (May 21, 1980) with BGH Judgment, Case No. IX ZR 231/04 (June 21, 2007). Grants of collateral that occur six months after disbursement of the loan likely are not contemporaneous. See BGH Order Case No. IX ZR 116/07 (May 8, 2008). For long-term contracts (e.g., energy supply, framework agreements, etc.), contemporaneity generally is determined by the parties' agreed payment terms and the frequency of performance. See *Kirchhoff/MüKo*, InsO, 3d ed. § 142 ¶ 19.
  - 3 While fraudulent transfers are expressly excepted from the contemporaneous and equivalent value defense in Section 142, the German Supreme Court generally has held that the provision of contemporaneous and equivalent value necessary in the debtor's going concern tends to negate the debtor's intent to defraud creditors, and thus, the avoidance action itself. See *de Bra/Braun* InsO, 7th ed. § 133 ¶ 13 (discussing cases). However, the transferee has the burden of proof and, moreover, the indicia of lack of fraudulent intent falls away to the extent the debtor is unlikely to maintain its going concern. See BGH Judgment, Case No. IX ZR 180/12 (Feb. 12, 2015).

- 4 In an earlier draft of the bill, the government had proposed to amend Section 131 of the Insolvency Code to require that any transfers made under threat of a foreclosure action be subject to the more stringent requirements for avoidance set forth in Section 130. While the ultimately non-adopted amendment would have been only a minor improvement anyway — notably, section 88 of the Insolvency Code voids any liens obtained in the month prior to the petition date or thereafter — its complete removal waters down the creditor-friendly aspects of the reform statute.
- 5 Here too, the final bill departs from a more creditor-friendly version contained in prior drafts. That version had contemplated deeming transferees not to have knowledge of the debtor's fraudulent intent (rather than merely not having knowledge of the debtor's cash flow insolvency, an indicia of intent) to the extent the debtor merely requested a payment accommodation (as opposed to having actually been granted one. Draft Bill, Ref-E at 5, *available at* <http://www.bmjv.de> (Mar. 16, 2015) One positive change from the prior versions is a deletion of the requirement that any payment accommodation plan comport with ordinary business practices.
- 6 BT-Drs. 18/7054 at 18.
- 7 *See* BGH Judgment, Case No. IX ZR 65/14 (May 12, 2016); BGH Judgment, Case No. IX ZR 192/13 (July 10, 2014). A number of proposed clarifications of existing case law, including the defense to fraudulent conveyance arising from transactions entered into pursuant to a bonfide restructuring plan, were not included in the final bill. *See* Draft Bill, Ref-E at 5, *available at* <http://www.bmjv.de> (Mar. 16, 2015). In light of settled case law on this matter, the changes proved to be unnecessary and the existence of a bonafide and workable restructuring concept (optimally supported by a credible restructuring opinion), the initial implementation of which has been undertaken, will protect a creditor from a fraudulent transfer action. *See* BGH Judgment, Case No. IX ZR 65/14 (May 12, 2016).
- 8 Notably, precise knowledge of the debtor's financial condition on the part of the creditor-transferee (e.g., access to books and records) is not necessary. As long as the transferee knows, for example, the general reasons why a debtor is not generally paying debts when due, that will suffice for knowledge of actual cash flow insolvency. BGH Judgment, Case No. IX ZR 143/12 (July 18, 2013).
- 9 While highly persuasive and likely to be followed, German Supreme Court cases technically are not binding even on lower courts. *See, e.g.* Lundmark, JuS 2000, 546, 548-50 (discussing *stare decisis* with jurisdictional comparisons); § 31, para. 1 Fed. Const Ct. Act (*Bundesverfassungsgerichtsgesetz*) (providing for binding effect on lower courts of Constitutional Court decisions); § 325 German Code of Civil Procedure (*Zivilprozessordnung*) (restricting effect of court judgments to the parties to the dispute).
- 10 The amendments also provide further color on the requirement that the exchange of value be "contemporaneous" as well as additional protection for certain payments to employees. The amendment with respect to "contemporaneity" is a mere codification of existing case law. The protections for employees have little significance to investors, lenders and trade creditors and likewise codify existing case law (of the German Supreme Labor Court).
- 11 BGH Judgment, Case No. IX ZR 272/02 (July 17, 2003); BGH Judgment, Case No. IX ZR 17/07 (June 5, 2008).
- 12 BT-Drs. 18/7054 at 29.
- 13 BT-Drs. 18/7054 at 19 (examples provided in the legislative history include purchase of luxury goods having no connection to the debtor's business, transfer of operating assets necessary for the debtor's business, but *not* mere commercial transactions undertaken at a time when, objectively and subjectively, the debtor can continue his business only at a loss).
- 14 *Jaeger/Henckel*, KO, 9th ed. (1997), § 31 ¶ 11; Foerste, NZI 2006, 6, 8 (criticizing BGH Judgment, Case No. IX ZR 272/02 (July 17, 2003) in which the German Supreme Court held for the first time that the replacement of the former Bankruptcy Act with the Insolvency Code in 1999

effectively removed the requirement that the administrator prove collusion on the part of debtor and transferee for avoidance of fraudulent transfers pursuant to which the parties exchanged fair value and to which the transferee was entitled).

- 15 See BGH Judgment, Case No. IX ZR 96/04 (Feb. 1, 2007) (noting reference in current § 143, para. 1, sent. 2 InsO to the unjust enrichment (*Bereicherung*) provisions set forth in § 819 German Civil Code, which provide for payment of interest until restitution of the unjustly obtained item (citing *Krefil/Heidelberger Komm. InsO*, § 143 ¶ 2; *Rogge/Hamburger Komm. InsO*, § 143 ¶ 47)).

The amendment also makes clear that no further claims to compensation exist for monies recovered (e.g., for compensation the debtor otherwise would have been able to obtain from investing the monies elsewhere). Compare BGH Judgment, Case No. IX ZR 271/01 (Sept. 22, 2005) (stating in dicta that insolvency administrator can recover lost profits from investment proceeds that debtor would have obtained had it been able to invest funds paid to a transferee in connection with a fraudulent transfer).

- 16 But see § 17, para. 2 sent. 2 InsO (cash flow insolvency should be assumed when the debtor generally has stopped making payments to creditors (*Zahlungseinstellung*)); BGH Judgment, Case No. IX ZR143/12 (July 18, 2013) (holding that as long as transferee knows, for example, the general reasons why a debtor is not generally paying debts when due, that will suffice for knowledge of actual cash flow insolvency).
- 17 The law goes into effect on the date it is announced in the Federal Gazette (*Bundesgesetzblatt*), anticipated imminently, and applies to all cases commenced prior to that date and to all future cases. See Art. 103, para. 1 EGIInsO-E. The provisions relating to interest accruing on avoidance actions shall apply to pending actions as well. See Art. 103, para. 2 EGIInsO-E.

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