

Application of the Insolvency Claw-Back Barrier under Article 16 of the EU Insolvency Regulation to Cross-Border Shareholder Loans

Article By:

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Article 7(m) of the EU Insolvency Regulation (2015/848) provides that the law of the EU Member State in which insolvency proceedings have been commenced in respect of a company determines whether certain acts carried out prior to the commencement of insolvency proceedings, (such as payments made by the company), are void, voidable or unenforceable and may therefore be clawed back by the insolvency administrator.

However, Article 16 of the same Regulation provides an exception to this. This applies where the relevant relationship under which the payment was made is subject to the law of another EU Member State and under the law of that other Member State the payment cannot be challenged – the claw back barrier provisions.

Application of the “claw back” barrier provisions in practice

The impact of the “claw back” barrier provisions under the EU Insolvency Regulation is currently being considered by the European Court of Justice (ECJ). In this case, an Austrian holding company had provided an Austrian law governed shareholder loan to its German subsidiary. Before insolvency proceedings were opened in Germany against the subsidiary, the Austrian parent received payments of interest and principal under that loan. The German insolvency administrator wishes to claw back these payments and wishes to treat the claims of the Austrian holding company as subordinated to all other creditors of the German subsidiary.

The German Federal Supreme Court (Bundesgerichtshof – “**BGH**”) in an interim decision dated 16 January 2025 put forward a number of questions for the ECJ to consider, the answers to which will be relevant to how Article 16 of the EU Insolvency Regulation is applied throughout the EU. Although the decision of the BGH relates to Article 13 of EU Insolvency Regulation (1346/2000), that provision is materially identical to Article 16 of the Regulation and thus any judgment of the ECJ is likely also to apply to Article 16.

The reason for the challenge is based on arguments that local laws and rules in the jurisdiction where the insolvent company has its centre of main interest and which are based on corporate law should

take priority over Article 16.

Under German insolvency law, shareholder loans granted to a German company would in principle be subordinated in a German insolvency of the German company. Therefore, any payments (like payments of principal and interest) can more easily be challenged and clawed back in the insolvency than other third-party payments. The litigation in this case has arisen, because Austrian law rules differ from such German corporate law rules and therefore the holding company invoked Austrian law and Article 16 in the German proceedings.

Impact of the ECJs findings

The ruling of the ECJ will be significant in determining whether, and to what extent, the risk of claw-back (in the context of shareholder loans) can be mitigated by choosing the law of another EU Member State as the law governing the shareholder loan.

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