Published on *The National Law Review* https://natlawreview.com

Restructuring and Insolvency in Germany and EU - Road Ahead for 2017

Article By:

Andreas Lehmann

While the number of corporate insolvencies in ***Germany*** has declined over the last couple of years, the general market perception is that the number of insolvencies may increase again in 2017. Also, as more larger companies are facing distressed situations, the overall value of distressed debt is therefore expected to rise as well.

The legal framework for restructuring and insolvency in Germany will also change in 2017, not only based on domestic legislation, but also because of developments on the EU level.

On the domestic level, the first change in the ***German Insolvency Code*** has already come into effect. The new law addresses practical questions related to the close-out (netting) procedure for fixed term and financial contracts. This law became necessary after the German Federal Court issued an unexpected judgement in this respect in June 2016, which contradicted the legislator's intentions as well as the common understanding of the relevant market participants, threatening the invalidity of close-out netting provisions in existing derivatives contracts in a German insolvency.

Another piece of German insolvency legislation is currently in the pipeline, which could, amongst other things, substantially limit the right of a German insolvency administrator to challenge certain transactions made by the debtor with the intent to disadvantage its creditors generally at a time prior to the insolvency filing where the debtor was already in a status of imminent illiquidity. However, since the draft of this new law was discussed for the first time in the German Bundestag in January 2016, there has not been any significant progress made to adopt this law. The main reason for this delay seems to be a disagreement on the question of whether certain tax claims should receive priority status in the insolvency proceedings or not. Whether or not the discussions on this draft law will resume in 2017 is currently unclear. Should there not be an agreement early in 2017 to get the law passed, it may well be that it won't be passed before the next general election which is scheduled for September 2017, in which case the legislation process would need to be started anew once the new parliament is in office.

Throughout the EU (with the exception of Denmark), the European Insolvency Regulation (Recast) (the "New Regulation") will enter into force on 26 June 2017. Amongst other things, the New Regulation will slightly change the COMI definition. In particular, the presumption that the COMI is situated at the registered seat of a company shall not apply if the registered seat has been shifted to another EU member state within three months prior to the insolvency filing. Also, co-ordination proceedings will be introduced for insolvencies over groups of companies within various EU member states. As the New Regulation has been agreed on the EU level in June 2015 already, all market participants should have had sufficient time to prepare for the new framework. Still, there are likely to be uncertainties remaining regarding the interpretation of the new rules which may result in an increase of court decisions being initiated to establish legal certainty. Although the New Regulation will automatically become applicable without the requirement of additional domestic regulation in the member states, the German government has proposed a draft law in November 2016 to align the German Insolvency Code with the New Regulation.

On 22 November 2016, the European Commission presented a proposal for a directive on Insolvency, Restructuring and Second Chance, which would provide a legal framework where more viable companies can survive, legal certainty resulting from similar rules on insolvency and restructuring across the EU attracts cross-border investors, and where early restructuring measures will result in increased recovery rates for creditors. It will remain to be seen whether the further discussions on this directive among the member states in the EU Council as well as in the European Parliament will result in the directive (with whatever changes will be made to the draft proposed by the European Commission) being adopted in 2017, and what timeline will be given to the member states to implement the directive into national legislation. It cannot be excluded that other priorities may arise which could cause delay in this project, e.g. in the context of the Brexit discussions.

National Law Review, Volume VII, Number 9