

Chapter 14

GERMANY

1. Under general law

Since 1 January, 1999 German insolvency law has been governed by the Insolvency Act 1999 (*Insolvenzordnung*, “*InsO*”) and the Introductory Act to the Insolvency Act (*Einführungsgesetz zur Insolvenzordnung*, “*EGInsO*”). These statutes replaced the Bankruptcy Act (*Konkursordnung*), the Composition Act (*Vergleichsordnung*) and the Collective Enforcement Act (*Gesamtvollstreckungsordnung*, “*GesO*”), which were applied in the territory of the former German Democratic Republic. German insolvency law also overlaps with international law, such as the European Regulation on Insolvency Proceedings (“the EU Regulation”), which came into force on 31 May 2002.

Prior to the commencement of the EU Regulation, German cross-border insolvency law used to be fragmentary and limited in scope. Only a framework of core rules based on existing case-law and on *GesO* para.22 were adopted in the *EGInsO* Art.102. The *InsO* and the *EGInsO* were amended with effect from 20 March 2003, with the introduction of a separate chapter (paras. 335 – 358) containing comprehensive provisions for cross-border insolvency proceedings. The *EGInsO* Art.102 contains execution rules for the EU Regulation. These provisions are similar in substance to the EU-Regulation but there are differences, particularly with regard to the formalities governing reciprocal recognition and enforcement of court decisions in insolvency proceedings. Moreover, the German rules also apply to institutional lenders (i.e. banks) and insurance companies, contrary to the EU Regulation. There are no special rules for these entities.

Until a landmark decision of the German Federal Court of Justice (Bundesgerichtshof) on 11 July 1985, foreign insolvency proceedings were regarded as having only territorial effect, whereas German insolvency proceedings were regarded as having universal effect. As a consequence, foreign insolvency orders were not recognised in Germany prior to the decision. The Bundesgerichtshof extended the principle of universality to foreign insolvency proceedings with certain restrictions. This was in order to avoid creditor discrimination in the course of cross-border insolvency proceedings, i.e. to treat all creditors equally.

These general principles were confirmed in the *EGInsO* Art.102 (1) and *InsO* para. 343 contain the principal recognition of foreign insolvency proceedings. According to the legal practice of the Bundesgerichtshof the foreign insolvency order must comply with the following conditions:

- the order must have been made in accordance with the foreign law governing the insolvency.
- the foreign administrator must be authorized under the law governing the insolvent company to administer and dispose of foreign assets.
- under the law governing the insolvency, the order must have effect on all of the debtor's assets, wherever situated.

In addition, recognition according to *InsO* para 343 is limited to cases where:

- the foreign proceedings qualify as "insolvency proceedings" in accordance with German law. Generally, the proceedings must provide some form of collective procedure, usually, but not exclusively, by way of liquidation and distribution of assets;
- the courts where the proceedings were commenced have jurisdiction over the debtor under German international insolvency law;
- recognition of foreign proceeding does not lead to a result that is incompatible with significant principles of German law, including but not limited to, incompatibility with basic rights.

If the aforementioned conditions of recognition are fulfilled, foreign insolvency decisions are automatically recognized. There is no need for further formalities. With recognition, all substantive and procedural legal consequences of foreign insolvency proceedings are determined by the foreign insolvency law. A direct consequence of this is, that a foreign administrator is able to take action in respect of all assets of the debtor situated in Germany.

2. Assisting legislation

Civil proceedings by individual creditors are stayed until the insolvency proceedings are terminated (*InsO* para 352). Paras 336 – 342 and para 351 contain exceptions from the general rule of recognition of foreign insolvency proceedings.

Antecedent and voidable transactions may be challenged under the *InsO* para 339 if the provisions of the avoidance rules of the state opening the insolvency proceedings are fulfilled unless the said act is subject to the law of a state other

than the opening state and that former law does not allow any means of challenging the transaction in question.

The automatic recognition of foreign insolvency orders does not automatically lead to the enforceability of these orders in Germany. A court ruling for such enforcement is required. Only if the foreign insolvency order is declared enforceable, is the foreign insolvency administrator entitled to take compulsory enforcement measures based on this order in Germany.

The *InsO* para 353 adopts the general rules of recognition and enforcement of foreign judgments as set out in the Code of Civil Procedure (*Zivilprozessordnung*, "ZPO") paras 722 & 723. The German Court will only refuse to enforce the foreign insolvency order,

- if the court where the order was rendered has no jurisdiction under German international insolvency law; or
- to the extent that the enforcement of the foreign order would lead to a result that is obviously incompatible with significant principles of German law, including but not limited to, incompatibility with basic rights.

A strictly territorial insolvency proceeding (*Partikularinsolvenzverfahren*) can be initiated without, or prior to, the opening of main proceedings in the main jurisdiction, providing the debtor does not have his principal place of business in Germany, to deal with assets in Germany (*InsO* para 354). If the debtor has no branch in Germany, an application to open an independent territorial insolvency proceeding will succeed only in cases of special legal interest.

The recognition of foreign insolvency proceedings does not prevent the commencement of separate German insolvency proceedings as secondary proceedings covering only the German assets of the debtor (*InsO* para 356).

If foreign insolvency proceedings have already been commenced against the debtor, proof of illiquidity (*Zahlungsunfähigkeit*) or over-indebtedness (*Überschuldung*) is not required for the commencement of German insolvency proceedings. The opening of foreign main proceedings leads to an irrefutable presumption of the facts necessary to open proceedings under German law.

3. Insolvency practice

The new German cross-border insolvency law contains a differentiated codified set of rules on the basis of existing case law principles and similar in substance to the rules of the EU-Regulation. As yet, there is no legal practice with regard to these new rules and it remains to be seen how these rules are applied and developed by case law and insolvency practice.

4. Examples

Bundesgerichtshof 2000

Under previous rules, the court had to deal with the case of a German creditor trying to enforce a French judgment under German jurisdiction. The debtor, a German national who lives in France, had been granted debt release by a French court in insolvency proceedings.

The court ruled, that a decision, granting debt release under French law, has to be recognised in Germany if four conditions are met.

- the foreign insolvency proceedings are comparable to German proceedings with respect to purpose and basic principles;
- the competent court must have international jurisdiction over the debtor;
- the foreign insolvency law is geared towards international recognition; and
- the rules of foreign insolvency law are not contrary to the German public order.

As a result, the debt release under French law was recognised by the court, even though the minimum rate of dividends required by German law was not paid.

The Regional Court, Munich, 2001

The court decided that a creditor's execution of the assets of the German branch of a Polish company should be allowed despite insolvency proceedings against the company being opened in Poland and that according to *InsO* para 89, an execution over the assets of a debtor is not possible in a case of insolvency proceedings.

The court ruled that the execution should be allowed, as the Polish company was not able to prove the existence of a provision in the Polish law that is similar to para 89.

The Regional Court, Munich

The same court had to decide whether separate insolvency proceedings (Partikularinsolvenzverfahren) over the assets of the German branch of a Polish Company were to be opened, despite the fact that insolvency proceedings were already under way in Poland. The Polish receiver referred to the former *EGInsO* Art 102 in his request for the application of Polish insolvency law and to disallow separate insolvency proceedings in Germany. The court however, ruled that for the protection of German interests, it should open separate insolvency proceedings over the assets of the branch.