Mergers & Acquisitions in Germany

Bearbeitet von
Dr. Joachim Rosengarten, Dr. Frank Burmeister, Dr. Martin Klein

2. Auflage 2016. Buch. XV, 174 S. Kartoniert
ISBN 978 3 406 68701 3
Format (B x L): 16,0 x 24,0 cm

not yet been decided upon by the Federal Court of Justice. Prudence would dictate having a share transaction notarised.

This raises the next question, namely whether notarisation by a non-German notary fulfils the requirement of notarial form under German law. There is no clear answer to this question either. With regard to GmbH shares, the prevailing opinion acknowledges the sufficiency of notarisation by non-German notaries, provided that their legal education, professional standing and recording procedure are equivalent to that of a German notary. This equivalence is acknowledged, again by the prevailing opinion, in the case of most Swiss notaries (depending on the canton) and Austrian notaries, but not in the case of US notaries. Because of the controversy surrounding this issue, a risk-averse party will take the safer route and insist on notarisation in Germany despite the higher costs. The transfer of German real estate *(Auflassung)* must always be recorded by a German notary in order to be valid.

2. Consents and Approvals

The acquisition of a business may require consents or approvals under both civil and public law. The most important examples are:

- Where the acquisition is subject to mandatory pre-merger control, it may not be completed without receiving the prior approval of the Federal Cartel Office or the European Commission (see D.I.3., above).
- Where a public licence is required for the operation of a business, whether or not the acquisition requires the approval of the licensing authority, or whether the acquirer must apply for a new licence, will depend on the nature of the licence and the structure of the acquisition.
- A married individual living in the statutory matrimonial relationship *(Zugewinngemeinschaft)* and selling all or practically all of his or her assets can validly do so only with the consent of his or her spouse.
- A minor involved in an acquisition must be represented by his or her parents who, in turn, often need the consent of the guardian court *(Vormundschaftsgericht)*.
- A variety of restrictions under inheritance law must be considered if the business to be acquired is part of an estate. If an executor *(Testamentsvollstrecker)* has been appointed, the heirs may require his or her consent, or the executor may require the heirs' consent, to a disposal of the business.
- A contract by which an AG or KGaA undertakes to transfer the whole of its assets and liabilities only becomes effective upon receiving the consent of its shareholders' meeting. The consent of the shareholders' meeting is also necessary where the essential business assets of the corporation are being transferred.
- Any transfer of interests in a partnership requires the consent of all partners, which may be granted on a general or individual basis. The transfer of shares in a GmbH may be subject to the fulfilment of certain requirements, such as the consent of all shareholders, the company or its management. The transfer of shares in an AG may require the consent of the company.
- Contracts can only be transferred with the consent of all contract parties. The assignability of claims and rights without the approval of the debtor may have been contractually excluded. Liabilities can only be transferred with the consent of the creditor.

3. Registration

An acquisition agreement does not need to be registered or filed in order to be valid. Indeed, there is no office or authority which would accept such an agreement for registration or filing. Major acquisitions, however, must, in general, be notified to the Federal Cartel Office, or to the European Commission for the purposes of merger control (see D.I.3., above).

K. Corporate Insolvency Law

The primary purpose of insolvency proceedings under German law is to allow for an equal satisfaction of all creditors of the insolvent company or for its restructuring in accordance with an insolvency plan (Insolvency Code, s. 1). The aim is to avoid a race among the creditors by way of independent and individual enforcement proceedings. Instead, the creditors shall be satisfied collectively.

I. Tests for Insolvency

There are three reasons for the opening of insolvency proceedings (Insolvency Code, ss. 17 – 19):
- illiquidity *(Zahlungsunfähigkeit)*,
- imminent illiquidity *(drohende Zahlungsunfähigkeit)*, and
- over-indebtedness *(Überschuldung)*.

1. Illiquidity

A company is illiquid if it cannot meet its payment obligations when due (Insolvency Code, s. 17 para. 2 sent. 1). German courts have developed the so called 90/10-rule, according to which a company is illiquid if it is unable to cover more than 90 % of payment obligations which become due within the next three weeks:
- If, following a liquidity analysis, the remaining liquidity gap is larger than 10 % of the total due payables, the debtor is illiquid unless it is nearly certain that this gap will be closed in the near future.
- On the other hand, illiquidity has not occurred if the gap is smaller than 10 %, unless it is foreseeable that such gap will become bigger than 10 % in the near future.

Illiquidity is presumed if a company actually ceases to make payments to its creditors (Insolvency Code, s. 17 para. 2 sent. 2).

2. Imminent Illiquidity

A company is imminently illiquid if it is more likely than not that it will become illiquid within the current or the next fiscal year (*cf.* Insolvency Code, s. 18 para. 2).

3. Over-Indebtedness

A company is over-indebted if, based on liquidation values of the assets, its liabilities exceed the value of its assets (so-called “technical over-indebtedness”), unless the continuation of the business of the company is, based on a reasonable and careful assessment, more likely than not (so-called “positive going-concern” – *positive Fortführungsprognose*) (Insolvency Code, s. 19 para. 2 sent. 1). This means that, effectively, technical over-indebtedness does not render a company insolvent if and as long as the continuation of the business is more likely than not.

The continuation of the business requires that, during a medium term extending to at least the current and the subsequent financial year, the company will be able to pay its debts when due. Hence, a positive going-concern forecast requires (i) a realistic business plan, (ii) realistic cash-planning corresponding to such business plan extending to at least the current and the following financial year; and, resulting therefrom, (iii) an analysis that the business plan and the cash-planning provide sufficient confidence that the company will be able to pay its debts when due.

Technical over-indebtedness is tested by drawing up a so-called over-indebtedness balance sheet *(Überschuldungsstatus)* which does not follow normal accounting principles but special insolvency law accounting rules. Such over-indebtedness balance sheet would, in particular, need to be based on liquidation values (*i.e.*, showing hidden reserves and taking into account potential distressed sales discounts) and include the costs of liquidation.

II. Filing for Insolvency

The creditors of the company may file for the opening of insolvency proceedings only in case of illiquidity and over-indebtedness (Insolvency Code, s. 14). For creditors, filing is an opportunity, not an obligation. Only the company itself has filing obligations. Its management (in exceptional cases also its shareholders or supervisory board members) is under a duty to file for the opening of insolvency proceedings in due course, but no later than within three weeks after the company's illiquidity or over-indebtedness (Insolvency Code, s. 15a). The management may also file for insolvency in the case of imminent illiquidity, but is not obliged to file.

The three week-period commences when either illiquidity or over-indebtedness become recognisable *(erkennbar)* by the management. Case law indicates that the burden of proof for lack of such recognisability is on the management. The three week-period is only applicable if there are restructuring efforts already under way that may be expected to be successful (*e.g.*, negotiations with creditors). Otherwise the management must file for insolvency immediately.

Negligent or wilful failure to file for insolvency in time is a criminal offence and may expose the management to personal liability for damages resulting from their failure to act (Insolvency Code, s. 15a paras. 4 and 5). Therefore, if there is doubt as to the insolvency related obligations of the management in a given situation, it should get independent legal advice from an insolvency lawyer in order to make sure that they comply with their personal obligations under the law. Typically, the company would cover the expenses.

III. The Insolvency Proceedings

In general, German insolvency proceedings have two phases:
- preliminary insolvency proceedings and
- main insolvency proceedings.

1. Preliminary Insolvency Proceedings

Preliminary insolvency proceedings serve the purpose of assessing whether main proceedings will be opened while at the same time preventing detrimental changes in the insolvency estate. If the company has filed an application for the opening of (i) insolvency plan proceedings *(Insolvenzplanverfahren)* and/or (ii) self-administration *(Eigenverwaltung)*, the insolvency court also assesses whether the legal requirements for the ordering of insolvency plan and self-administration proceedings, respectively, are met (for further details regarding these alternative types of insolvency proceedings please refer to K.VIII., below).

To protect the estate of the insolvent company, the insolvency court may, *inter alia*, appoint a preliminary insolvency administrator *(vorläufiger Insolvenzverwalter)* (Insolvency Code, s. 21). The main tasks of a preliminary insolvency administrator are to (i) secure and preserve the insolvent company's estate, and (ii) continue the business operations until the insolvency court decides on the opening of main insolvency proceedings, and (iii) verify if the insolvency estate covers the costs of the proceedings.

2. Main Insolvency Proceedings

Main insolvency proceedings serve the purpose of winding down the insolvency estate by disposing of the company's assets (including a disposal of the entire business or parts thereof as a going-concern) and distributing the proceeds to the creditors in accordance with the applicable priority provisions (see K.III.3., below), or restructuring the company in accordance with an insolvency plan to be confirmed by the creditors (see K.VIII.1., below). The insolvency court opens main insolvency proceedings if one of the insolvency reasons outlined above exists and the insolvency estate is likely to cover the costs of the insolvency proceedings.

If insolvency proceedings are opened, the insolvency court will appoint a regular (non-preliminary) insolvency administrator which may only be an individual, not a legal entity (Insolvency Code, s. 56). The first task of the insolvency administrator is to determine the creditors' claims. Creditors are required to file their claims with the insolvency administrator within a certain period of time to be specified in the opening order of the insolvency court (Insolvency Code, s. 174). In the so-called verification meeting *(Prüfungstermin)*, the amount and appropriate ranking of the claims that have been filed will be verified (Insolvency Code, s. 176). Both the insolvency administrator and the creditors have the right to dispute any filed claim. In this case, the creditor can apply to the courts for a decision as to whether his claim should be admitted (Insolvency Code, s. 179).

Before realization of the assets, the insolvency administrator will try to increase the value of the insolvency estate by (i) enforcing open claims of the company and (ii) cancelling under the claw-back rules of certain transactions regarded as being detrimental to the creditors (see K.VII., below).

In case the insolvency administrator pursues a winding down (rather than a restructuring of the company pursuant to an insolvency plan), the realization of assets would be next. Basically, two alternatives for such realization of assets are available:

- Liquidation entails closing down the operations, laying-off employees, terminating agreements of the company and selling off any remaining assets. Funds obtained from the sale of assets are distributed to the creditors. Liquidation will generally only be chosen if the business cannot be sold to an investor or restructured by means of an insolvency plan (see K.VIII.2., below).
- In case of a sale of the business or parts thereof as a going-concern the purchase price paid by the investor is distributed among the creditors in their order of priority. If the insolvency administrator opts for the sale of the business as a going-concern, he may use special insolvency law mechanisms to restructure the business before selling it off, *e.g.*, by terminating or re-negotiating non-profitable contracts, such as supply contracts, real estate lease and employment contracts (see K.VI., below).

3. Rank of Creditors

The following classes (ranks) of creditors need to be distinguished as they determine how and to what extent claims will be satisfied:

- **First rank (creditors entitled to segregation of assets):** These are beneficiaries of assets that do not form part of the insolvency estate, *e.g.*, because the company does not own them. The Insolvency Administrator will need to segregate those assets and hand them over to the owner or other beneficiary (Insolvency Code, s. 47).
- **Second rank (creditors entitled to separated proceeds):** These are creditors who hold security rights over assets of the company (Insolvency Code, ss. 49 – 51). The assets encumbered with a right to separate satisfaction (*e.g.*, ownership by security) will be liquidated by the administrator. After deduction of a liquidation fee (around 9 per cent.), the proceeds go directly to the secured creditor (Insolvency Code, s. 171).
- **Third rank (preferential creditors):** The law provides that the claims of certain creditors need to be settled preferentially, *e.g.*, if their claims have been created after the opening of the proceedings (Insolvency Code, s. 55).
- **Fourth rank (unsecured insolvency creditors):** These are creditors whose claims have arisen before the opening of the insolvency proceedings and who are not subordinated creditors (Insolvency Code, s. 38). They are entitled to the proceeds of the unencumbered assets after preferential creditors have been paid. Employees would normally qualify as unsecured insolvency creditors with respect to their salary claims to the result that such claims would only be satisfied in the amount of the insolvency quota. However, salary claims relating to the last three months prior to the opening of main insolvency proceedings are covered by the so called employee compensation funds *(Insolvenzgeld)* provided by the Federal Employment Agency *(Bundesagentur für Arbeit)*. The same goes for pension claims under direct pension schemes, *i.e.*, schemes under which pension claims of the employee are directed against the employer rather than against a pension fund being financially independent from the employer: Pension claims under a direct pension scheme would qualify as un-

secured insolvency claims. They are covered by the Pension Protection Fund *(Pensionssicherungsverein)*.

- **Fifth rank (subordinated creditors):** These are creditors whose claims are subordinated by contract or by law (Insolvency Code, s. 39). Claims under shareholder loans are subordinated by law. The same goes for claims of direct or indirect shareholders of the insolvent company which did not come into existence under formal loan agreements but under any other intragroup contract (*e.g.*, service agreements) but where either (i) payment was explicitly deferred or (ii) the shareholder abstained from collecting the claim for a time period going beyond market standard credit terms *(marktübliche Zahlungsziele)*.
- **Sixth rank (shareholders):** Any remaining proceeds will be distributed to the shareholders (Insolvency Code, s. 199). However, distribution proceeds do typically not cover the claims of all creditors so that shareholders do regularly not receive any liquidation proceeds.

IV. Creditors' Influence on the Insolvency Proceedings

In an insolvency scenario, the shareholders are normally "out of the money" and the insolvency estate is factually "owned" by the creditors. Correspondingly, insolvency proceedings are mainly controlled by the creditors rather than by management or the shareholders. The creditors assert influence via the creditors' assembly *(Gläubigerversammlung)* and the creditors' committee *(Gläubigerausschuss)*:

1. Creditors' Assembly

Core decisions regarding the insolvency proceedings, such as the decision whether to liquidate the insolvency estate or to temporarily continue the business operations of the insolvent company, are taken by the creditors' assembly (Insolvency Code, s. 157). If no creditors' committee is appointed (see K.IV.2., below), certain fundamental decisions, such as the disposal of the business (or parts of it), require the prior consent of the creditors' assembly (Insolvency Code, s. 160). Unlike a sale of the business operations to any other buyer, the sale of the business operations to a shareholder of the insolvent company does require the prior approval of the creditors' assembly irrespective of whether a creditors' committee is in place or not. Decisions of the creditors' assembly are taken by simple majority according to outstanding amounts (Insolvency Code, s. 76 para. 2). Subordinated creditors and creditors entitled to segregation do not have any voting rights in the creditors' assembly (Insolvency Code, s. 77).

2. Creditors' Committee

The creditors' assembly can set up a creditors' committee or recall any court appointed creditors' committee (Insolvency Code, s. 67). The main task of the creditors' committee is to assist and to supervise the Insolvency Administrator (Insolvency Code, s. 69). Certain fundamental decisions, such as the disposal of the business (or parts of it) require the prior consent of the creditors' committee (Insolvency Code, s. 160 para. 2 no. 1). The creditors' committee shall consist of representatives of (i) the secured creditors, (ii) the insolvency creditors with the highest claims, (iii) creditors with small claims and (iv) the employees (Insolvency Code, s. 67 para. 2).

The members of the creditors' committee are elected by the creditors' assembly (Insolvency Code, s. 68). Shareholders of the insolvent company cannot be members of the creditors' committee. Typical other creditors are banks, trade creditors, the Federal Employment Agency and the Pension Protection Fund. Decisions of the creditors' committee are taken by a simple majority of the members being present at the relevant meeting (Insolvency Code, s. 72).

V. Role of the Insolvency Administrator

Upon opening of main insolvency proceedings, the power to dispose of and administer the insolvency estate shifts to the insolvency administrator (Insolvency Code, s. 80). The insolvency administrator must act in the best interest of the creditors. He or she is not responsible towards the shareholders of the insolvent company. Correspondingly, the powers of management and the shareholders are limited to internal affairs not affecting the insolvency estate, such as appointing managing directors and filing applications with the commercial register. For practical purposes, this means that agreements are signed by the insolvency administrator or his/her proxies rather than by management, with senior executives reporting to the insolvency administrator and not to the management. This concept is changed under so called self-administration, an alternative to regular insolvency proceedings and being similar to US debtor in possession proceedings, where management takes over the role of the insolvency administrator, *i.e.*, it continues administering and disposing of the insolvency estate (please see K.VIII.2., below for further details).

VI. Restructuring of Unfavourable Contracts

In general, the opening of neither preliminary insolvency proceedings nor the main insolvency proceedings affects the validity or contents of an agreement to which the insolvent company is a party. However, with regard to contracts under which both the insolvent company and its counterparty have not (or not completely) performed their obligations at the date on which main proceedings are opened, the insolvency administrator has a right to choose whether to continue or cancel the further implementation of the contract (Insolvency Code, s. 103).

If the insolvency administrator chooses to continue the contract, he or she may claim the other party's performance of the contract, and the other party has a claim for receiving its benefits under the contract as a preferential creditor.

If the insolvency administrator chooses to reject the contract, the other party has a damage claim for non-performance as a regular unsecured creditor of the insolvency proceedings. This principle only applies to the as yet uncompleted part of the contract. To the extent the counterparty has rendered its performance first (in whole or in part) its counterclaim based on such performance will be an unsecured insolvency claim (Insolvency Code, s. 105).