Newsletter Commercial

Issue 1 2024

Content

Commercial.Restructuring:
Insolvency administrator of Wirecard AG reclaims dividends 4

Commercial.Logistics:
Expiry of Block Exemption Regulation for Liner Shipping Consortia –
Background and outlook 6

Commercial.Restructuring:
New customer bonus and set-off under insolvency law 9

Commercial.Compliance:
Compromise at EU level regarding the Directive on due diligence obligations
in supply chains 11

Commercial.Litigation:
Federal Court of Justice: Extension of lawyers' liability in the event
of failure to provide insolvency advice 14

Commercial.Restructuring:
Creating the circumstances for a set-off to creditors' detriment 16

Authors of this issue... 18

Events, publications and blog... 19

Dear readers,

We are happy to welcome you with our first newsletter of the new year. There have been numerous exciting developments in the areas of transport law, insolvency law and commercial law, which our authors will discuss in this newsletter. They will be highlighting current court decisions and new legislation that may be of importance to your company. Our aim is to ensure that you can effectively protect your company from legal risks. If you have any questions on these and other legal topics or require more in-depth legal advice, please do not hesitate to contact us at any time.

We would also like to use this newsletter to wish you a Happy New Year on behalf of our team. We hope that our articles and analyses will continue to provide you with valuable assistance in dealing with legal issues in business life in 2024.

Dr Steffen Gaber, LL.M. (Sydney)
Head of Commercial

Dr Paul Derabin
Legal Content Creator

Commercial.Restructuring: Insolvency administrator of Wirecard AG reclaims dividends

Following massive losses from share transactions, fund companies are now additionally expected to pay back the dividends distributed.

Background

By final judgment, the Munich I Higher Regional Court has declared the 2017 and 2018 annual financial statements of Wirecard AG null and void due to balance sheet manipulation. This opens up various possibilities for holding liable the persons whose negligence enabled and promoted the fraudulent business model of Wirecard AG. In spite of this fact, in the opinion of Wirecard AG's insolvency administrator, Dr Michael Jaffé, the investors should pay for most of the damage. The administrator has now started to reclaim dividend payments from the years 2017 and 2018, the main focus being on institutional investors – including those from abroad – whose funds held comparatively large numbers of the shares on the respective dividend record dates.

Unclear legal situation and conflicting values

The reclaim is based on the avoidance of gifts under insolvency law. There is little doubt in this respect that the requirements for avoidance are generally met. There is, however, considerable doubt as to whether investment management companies can be the debtors of such claims for repayment. Furthermore, chances are good – in particular for institutional investors – that the enrichment no longer exists, in particular in light of the fact that the administrator reclaims from the investors not only the dividends paid out but also taxes already paid.

Overall, the question of whether such a claim for repayment can be enforced depends on various value issues that have not yet been subject to judicial review. Besides, the general confidence of investors in the integrity and stability of the capital market, which is intended to play a greater role in public finance in future, is also at stake. Finally, there emerges a conflict of values in a recent, and controversial, decision by the German Federal Court of Justice, according to which the good faith of a recipient of dividends is not an obstacle to avoidance under insolvency law even though Section 62 (1), second sentence, of the German Stock Corporation Act expressly provides otherwise in a corporate law context.

Doubts as to the correct party opposing avoidance

There is reason to question the assertion of claims against the investment management companies or the respective funds, under the law governing the avoidance of debtor transactions and also under capital markets and corporate law. The choice of the correct party opposing avoidance most likely depends on who is to be considered the intended recipient of the dividends paid. Based on the principles of both capital markets and corporate law, the investment management company is not to be regarded as a shareholder and, therefore, is not the recipient of the dividends paid. Furthermore, it must be taken into account that regardless of which of the possible forms of organisation provided for in the German Capital Investment Code is chosen, the respective fund company has no beneficial ownership of the managed investment scheme and is subject to a strict separation of assets. In this respect, there are good grounds to question whether an asset was even obtained for the purposes of avoidance law (not for the purposes of enrichment law). Finally, the repayment of dividends from the respective investment schemes of the funds raises concerns in particular with regard to the protection of investors under capital markets law. Such repayments could – at least in the case of public funds – result in completely uninvolved investors being held liable, which additionally gives rise to constitutional concerns (Article 14 (1) of the German Basic (Constitutional) Law).

Defence of loss of enrichment

Furthermore, those against whom the insolvency administrator asserts a claim for repayment might be able to plead loss of enrichment under Section 143 (2) of the German Insolvency Code. This defence is likely to be successful if the dividends paid are no longer part of the fund's assets or the amount disbursed has been otherwise reduced. Distributions since made to the investors of the fund and tax payments are particularly relevant in this respect. Here, too, the insolvency administrator is entering uncharted legal territory, as there is no case law dealing with similar cases.

Outlook

Against this background, institutional investors might find it worth their while to oppose the insolvency administrator's claims, not least because the administrator has only limited access to information. This applies both to the number of Wirecard shareholders, and their identity and holdings, and to the amount of the dividends paid out; consequently, the notices of avoidance are partly based on incorrect information about the numbers of shares and their owners. Whether the administrator will be able to assert a right to information against the investment management companies remains to be seen. After all, the administrator is running out of time: the (alleged) claims might become time-barred already at the end of 2023.

Authors

Henning Brockhaus
Frankfurt a.M.

Dr Boris Ober
Cologne

Commercial.Logistics: Expiry of Block Exemption Regulation for Liner Shipping Consortia – Background and outlook

The EU Commission has announced that it will not extend the Consortia Block Exemption Regulation, which exempts certain consortium agreements in the liner shipping industry from the ban on anticompetitive agreements. As a result, the Regulation will finally expire on 25 April 2024. Even though consortia can continue to exist and new consortia be formed, the legal framework for their admissibility will be subject to the general EU antitrust rules without the current – less strict – special rules and, therefore, will be more stringent in future.

1. Background

As a general rule, European competition law prohibits companies from entering into agreements that affect trade between Member States and appreciably restrict competition (Article 101(1) of the Treaty on the Functioning of the European Union – "TFEU"). Article 101(3) TFEU provides, however, that certain agreements or categories may be exempt from said prohibition. The EU Commission made use of this provision for consortium agreements in the liner shipping industry by issuing Regulation (EC) No. 906/2009, referred to as the Consortia Block Exemption Regulation (hereinafter, "CBER"), in 2009. According to the CBER, shipping companies may, under certain circumstances, form consortia (frequently in the form of "alliances") in order to offer and provide joint international liner shipping services from or to one or more Community ports. This sector-specific block exemption thus exempts numerous consortia on a general basis from the prohibition of anti-competitive contractual clauses.

A consortium is an association of shipping companies that agree to pool their respective vessel capacities and jointly organise liner shipping activities. The application of the CBER is limited to liner shipping services, i.e. regular shipping services for the transport of goods in accordance with a timetable. This means that consortia use their vessels jointly and coordinate their timetables with each other. The world's largest shipping companies are all organised in consortia in the liner shipping business. In order to qualify for an exemption, the consortium members' combined market share in the relevant market may not exceed 30%, calculated by reference to the total volume of goods carried.

The aim was for shipping companies to benefit from the special treatment under antitrust law in the area of liner shipping because investments are particularly high in that industry. The CBER was intended to enable shipping companies to achieve efficiency gains by better utilising the

capacity of their vessels and increasing the number of departures and direct connections, thus improving productivity and the quality of services for the benefit of customers. The CBER aimed at improving the competitiveness of the European liner shipping industry and at developing trade.

Upon adoption of the CBER in 2009, the EU Commission extended it in 2014 and then again in 2020, both times after respective evaluations of the market situation and public consultations. The reason given by the EU Commission for the latest extension was that in previous years, both the costs incurred by the shipping companies and the prices paid by their customers had fallen by about 30% per 20-foot container (TEU) while the quality of the services had remained stable. The EU Commission thus considered the purpose of the CBER to continue to be achieved and the special rules, therefore, to be justified.

2. Stakeholders' views

However, there was much controversy as to whether the CBER was justified already prior to its most recent extension in 2020.

The shipowners' associations still consider the special treatment under antitrust law to be justified and necessary. They argue that the CBER brings legal certainty to shipping companies, assuring them that they will be able to continue to provide their services. They claim that the CBER leads to an improved offer of transport services and lower prices, as intended, and that it also brings significant environmental efficiencies. In addition, they hold that the CBER is important for trade routes where the continued existence of several competitors wouldn't be possible if it wasn't for the pooling of freight volumes.

The majority of loaders', forwarding companies' and port companies' associations, on the other hand, have been strongly criticising the CBER and its market impact. They claim to be benefitting less and less from the promised advantages. In their opinion, the situation is just the opposite: the exemption is believed to give shipping companies above all significant negotiating and market power and to lead to higher prices; the quality of the services has in their opinion rather declined; they hold that due to of ever bigger vessels, not all ports are (directly) served anymore and that there is a lack of transparency for customers. They further take the view that the consortia coordinate their actions also beyond the specified core area (which is operational agreements aimed at better utilising the capacity of vessels), for example, with regard to the operation of port terminals and hinterland traffic.

3. No further extension after 25 April 2024

In a statement dated 10 October 2023, the EU Commission summarised the findings of the public consultation carried out in 2022 and its evaluation, ultimately siding with those criticising the regulation, according to which another extension of the CBER would not be justified. The EU Commission has based its conclusion in particular on the following considerations:

- The evaluation period from 2020 to 2023 has been characterised by dramatic changes in market circumstances, compared to when the CBER was first adopted in 2009. In particular, there has been a transitory and exceptional phase of excess demand for effective capacity and of record profits for shipping companies. The previous conditions of oversupply and low profitability in the liner shipping sector have thus ceased to exist.
- The data collected for the evaluation period show that the CBER is no longer very effective or efficient. No relevant savings appear to have been achieved, nor has the CBER fulfilled its goal of promoting competition by enabling smaller carriers to cooperate between themselves and offer alternative services in competition with larger carriers. This is because each consortium includes a carrier from among the largest shipping companies worldwide.
- In addition, the submissions made during the consultation have shown that the CBER does not normally play an important role for a company's decision as to whether or not to enter into a consortium; instead, this decision is guided first and foremost by commercial considerations.
- Furthermore, the CBER is not necessary to achieve environmental efficiencies, given that the sector is subject to binding international requirements and EU measures to reduce environmental pollution.

4. Outlook

Even after the expiry of the CBER on 25 April 2024, the existence and formation of consortia will continue to be permitted. However, their admissibility will then no longer be determined by the less strict requirements stipulated in the CBER but by the general EU antitrust rules.

This is why companies will first have to examine, with the assistance of their lawyers, by means of a so-called self-assessment whether the specific co-operation that is being practiced or envisaged for the future has as its object, or

brings about, an (appreciable) restriction of competition. If so, the next question to be examined will be whether the requirements for an individual exemption are met. There are four requirements that need to be fulfilled for an exemption:

- The specific co-operation must generate demonstrable efficiencies ("consumer benefits"), such as cost savings which also lead to reduced prices, a wider range of freight routes or more frequent departures or – more recently and only to a certain extent – sustainability benefits.
- These benefits/efficiencies must, at least in part, be passed on to customers.
- The restrictions must be limited to what is indispensable. The relevant question in each individual case will be whether there are other, less restrictive agreements/types of co-operation that achieve the same efficiency gains.
- Finally, consortium agreements may not eliminate competition entirely, or a substantial part of competition. Where large companies participate in consortia, this latter issue will be an important aspect to be taken into consideration when assessing an individual exemption. The question will be whether the consortia still face sufficient competition.

In an overall assessment, the positive effects on competition will have to outweigh the negative effects. Unlike under the CBER, it will no longer be assumed that the four criteria are fulfilled under the co-operation agreements; instead, their fulfilment will have to be analysed in each individual case and will have to be demonstrable. The new Guidelines on horizontal co-operation agreements, issued by the EU Commission on 1 June 2023 (see PDF), provide guidance to companies and also to competition authorities. and national courts on how to assess whether an appreciable restriction of competition exists in any particular case and if so, whether the criteria for an individual exemption are met.

Consequently, the formation of consortia will continue to be permitted, but will require such a case-by-case assessment. Companies that are currently operating in a consortium of the described type should examine timely before the CBER expires whether their consortium can be continued unchanged or whether the co-operation has to be modified or even terminated.

Authors

Jette Gustafsson, LL.M. (Boston)
Hamburg

Anne Caroline Wegner, LL.M. (European University Institute)
Dusseldorf

Commercial.Restructuring: New customer bonus and set-off under insolvency law

Initial situation

By judgment of 27 July 2023 (IX ZR 267/20), the German Federal Court of Justice (Bundesgerichtshof, BGH) ruled on the admissibility of a model declaratory action brought against an insolvency administrator and additionally dealt with the questions of how provisions in energy supply contracts providing for a new customer bonus are to be interpreted under the law governing general terms and conditions and whether the netting with a new customer bonus has to be considered an inadmissible set-off under insolvency law. The present blog post focuses on the latter question.

Facts of the case

A consumer protection association brought a model declaratory action against an energy supplier's insolvency administrator. The energy supplier had solicited customers for gas and electricity supply contracts by offering, amongst other things, a new customer bonus depending on annual turnover. In 2019, the energy supplier stopped supplying its customers following its insolvency. The insolvency administrator carried out the billing for the contracts of more than 100,000 customers and, in cases where a minimum contract term of one year had not been reached beforehand, did so without taking the new customer bonus into account. The insolvency administrator took the view that the deduction of a bonus would be an inadmissible set-off under insolvency law, asking instead that the consumers concerned file their claims in this connection in order for them to be entered into the insolvency administrator's schedule of claims. The consumer protection association responded by bringing a model declaratory action, applying for a declaratory judgment to the effect that the energy supplier's fee claims must be reduced by the respective new customer bonus in the final invoices and that such a deduction does not constitute an inadmissible set-off under insolvency law.

General admissibility of set-offs in insolvency proceedings

As a general rule, a set-off requires the existence of two mutual, independent claims that are of the same nature, pursuant to Section 387 of the German Civil Code (BGB). In insolvency proceedings, however, there may be a conflict between the principle of equal treatment of creditors and the individual creditors' interests. Sections 94 et seqq. of the German Insolvency Code (InsO) attempt to take this fact into consideration. Pursuant to Section 94 of the German Insolvency Code (InsO), the right to make a set-off is not

affected by the opening of insolvency proceedings if, at the time the insolvency proceedings are opened, the insolvency creditor is entitled, by operation of law or based on an agreement, to make a set-off. The date of opening the insolvency proceedings and the existence of circumstances allowing a set-off to be made are thus decisive for the question of whether the prohibition of set-offs under insolvency law applies. If the circumstances allowing a set-off to be made do not arise until after the opening of insolvency proceedings, no set-off may be made. With conditional claims, the decisive question is which of the claims involved – the insolvent debtor's claim or the claim of the creditor concerned – becomes unconditional and due first, Section 95(1), third sentence, of the German Insolvency Code (InsO). In addition, pursuant to Section 96(1) no. 3 of the German Insolvency Code (InsO), a set-off is inadmissible if the underlying transaction enabling the insolvency creditor to make a set-off can be contested.

The judgment

The Federal Court of Justice held that taking a new customer bonus into account in the annual consumption billing under an energy supply contract does not constitute an inadmissible set-off or netting transaction under insolvency law if the new customer bonus takes the form of a discount (rebate) that depends on annual turnover. It argued that the new customer bonus was (merely) a dependent invoice item and, alongside the base price and the price of the energy consumed, the third calculation element in the tariff to be applied to determine the consumption-based fee and that it had been designed as a discount to be deducted from the total bill. The Federal Court of Justice further held that as a result of the new customer bonus that had been promised by the energy supplier, the remuneration for the energy supplied in the first year was to be reduced by the agreed percentage rate, rather than being calculated in accordance with the generally agreed tariff. It also held that even though the provisions of Section 96(1) no. 3 of the German Insolvency Code (InsO) apply also to netting transactions, they do not apply to the netting of dependent invoice items, and pointed out that especially deductions which directly reduce a claim do not constitute a set-off when determining the amount of a claim. Crucially, in the opinion of the Federal Court of Justice, the requirements for a set-off – i.e. the existence of two mutual, independent claims – are not met and, therefore, the applicability of a set-off prohibition under insolvency law can be categorically ruled out.

Conclusion

The Federal Court of Justice's judgment of 27 July 2023 (IX ZR 267/20) has been much discussed in connection with the Court's holdings as to the admissibility of a model declaratory action. The judgment is, however, also significant with regard to the Court's holdings as to the admissibility of set-offs. From a creditor's perspective, the judgment is to be welcomed inasmuch as it clarifies that the prohibition of set-offs does not apply to the netting of dependent invoice items. While this holding may not be "new", it is nevertheless noteworthy in view of the current increase in insolvencies. It shows the importance of how contracts are drafted and the opportunities that may result from this regarding securing potential insolvency-proof set-offs.

In the final analysis, the crucial point was that the new customer bonus promised by the energy supplier was granted in the form of a discount (rebate) depending on the annual turnover. This made it possible to interpret the new customer bonus as a dependent deduction directly reducing the relevant claim, thus ruling out the applicability of the prohibition of set-offs under insolvency law.

Authors

Christiane Kühn, LL.M. (Hong Kong)
Munich

Patrick Diessner, LL.M. oec.
Munich

Commercial.Compliance: Compromise at EU level regarding the Directive on due diligence obligations in supply chains

Introduction

On 14 December 2023, the Council of the European Union and the European Parliament agreed to a compromise regarding the contents of the future EU Directive on corporate supply chain due diligence. The concrete wording of the provisions is not yet available; the key aspects of the Directive have, however, been communicated and lead to certain conclusions in relation to German commercial undertakings. The current legislative process regarding the draft EU Directive raises the question of whether and to what extent the German Supply Chain Act will have to be adjusted in future to take account of the forthcoming EU Directive and what practical legal implications this may have for companies.

Development of the draft EU Directive

After the German Bundestag passed the Act on Corporate Due Diligence to Prevent Human Rights Violations in Supply Chains (the "German Supply Chain Act") on 11 June 2021, which came into force on 1 January 2023, the European Commission published a draft Corporate Sustainability Due Diligence Directive (the "Commission's draft CSDDD") on 23 February 2022. The Council of the European Union examined this draft and, on 1 December 2022, adopted its own negotiating position ("general approach") in relation to the European Commission's draft. Following the first reading on 1 June 2023, the European Parliament proposed changes (the "EP's draft CSDDD") that were intended to tighten and expand the scope of the Directive and of the due diligence obligations thereunder. The European Parliament and the Council of the European Union have now agreed to a compromise.

Objective of the draft EU Directive

Like the German Supply Chain Act, the draft CSDDD also aims to oblige companies to fulfil human rights and environmental due diligence obligations, both for themselves and within their supply chains. Companies that fall within the scope of the draft CSDDD are to carry out risk analyses and take preventive and corrective measures to identify, prevent and put an end to adverse impacts on the environment and human rights. Furthermore, companies must establish a complaints mechanism and regularly prepare and submit an accountability report on the fulfilment of the obligations incumbent upon them.

Scope

The scope of the Directive has been adjusted. The personal scope of the Directive is defined in Article 2 of the Commission's draft CSDDD. The obligations laid down in the Directive are now intended to apply to companies that have a worldwide turnover of more than EUR 150 million and at least 500 employees. The obligations are further intended to apply to companies with at least 250 employees and a minimum turnover of EUR 40 million, provided that at least EUR 20 million of this turnover was generated in certain risk sectors.

In this respect, the draft is now somewhat less strict than the version that was prepared by the European Parliament. However, in view of the fact that the companies that fall within the scope of the Directive will contractually pass on the existing obligations in relation to their supply chains to their business partners, as far as possible, this aspect will not lead to diminished relevance for smaller companies engaged in trade.

Of relevance is, however, the temporary exception that has been agreed for companies operating in the financial sector: these companies are to be excluded from the scope of supply chain due diligence for the time being. Specific details are not yet known. The draft version that had been prepared by the European Parliament still contained comprehensive provisions in this respect, in Articles 3, 6, 7 and 8 of the EP's draft CSDDD.

By contrast, according to the currently applicable Section 1 (1) of the German Supply Chain Act, the German Supply Chain Act only applies to companies that have their head office, their headquarters, a branch or their statutory seat in Germany and regularly employ more than 3,000 (from 1 January 2024: 1,000) employees in Germany, regardless of legal form.

Even though the EP's draft CSDDD reduces the minimum number of employees, it requires at the same time a certain minimum turnover, thus putting said reduction into perspective. The Commission nevertheless estimates that around 13,000 companies from the EU and approximately 4,000 third-country companies will be affected by the Directive, and these figures could be even higher if going by the European Parliament's proposal. All in all, the scope would increase, as far as German companies are concerned.

Due diligence obligations

At the core of this Directive are the due diligence obligations stipulated in Articles 5 to 11 of the Commission's draft CSDDD, as listed in Article 4 of the Commission's draft CSDDD. The system is similar to that of the German Supply Chain Act and includes integrating due diligence into companies' policies (Article 5), identifying actual or potential adverse impacts (Article 6), preventing and mitigating potential adverse impacts, bringing actual adverse impacts to an end and minimising their extent (Articles 7 and 8), establishing and maintaining a complaints procedure (Article 9), monitoring the effectiveness of their due diligence policies and measures (Article 10), as well as publicly communicating on due diligence (Article 11). According to recital 15 of the Commission's draft CSDDD – as well as according to the German Supply Chain Act – the companies concerned do not owe any particular success, but are merely obliged to make efforts, which is why the appropriate measures include in particular actions to identify or prevent adverse impacts.

In addition to the above, the European Parliament has also provided for stricter due diligence obligations. Instead of carrying out annual updates, companies are to update their policies continuously, upon the occurrence of changes (Article 5(2) of the EP's draft CSDDD).

According to Section 2 (5) of the German Supply Chain Act, the due diligence obligations under the German Supply Chain Act only relate to the upstream supply chain within a company's own area of business. By contrast, according to the EP's draft CSDDD, the due diligence obligations are linked to a company's business relationships. According to Article 3(e) of the EP's draft CSDDD, this means any direct or indirect relationship of a company with any of the legal entities in the company's value chain. In recital 18 of the EP's draft CSDDD, it is expressly stated that this concerns the entire value chain, including distribution, sale and waste management of a product, which means that the due diligence obligations also relate to customers and indirect business partners. This significantly increases the scope of the due diligence obligations.

Civil liability

Finally, it should be noted that Article 22(1) of the Commission's draft CSDDD provides for civil liability. The compromise that has now been negotiated also provides that victims of a violation of due diligence obligations in the supply chain are to be given the right to directly claim compensation for the damage suffered. The final EU Directive can thus be expected

to provide a concrete basis for claims by the parties concerned, which basis must then be transposed into national law.

By contrast, the German Supply Chain Act does not provide for civil liability and even expressly excludes it in Section 3 (3). While, according to Article 22(1) of the Commission's draft CSDDD, only failure to comply with the obligations laid down in Articles 7 and 8 of the Commission's draft CSDDD can give rise to liability, the EP's draft provides that non-compliance with any of the obligations laid down in the Directive can give rise to liability.

Over and above this, as already provided in Article 22(2a) of the EP's draft CSDDD, a minimum limitation period of ten years is to apply to such claims, and it must be ensured that the costs of the proceedings are not prohibitively expensive and that claimants are able to seek injunctive measures, including summary proceedings.

Official action against violations of due diligence obligations in supply chains

For the enforcement of the due diligence obligations in supply chains, the compromise envisages that the Member States designate supervisory authorities to supervise compliance, empowering them to investigate companies, where appropriate. The compromise provides for the possibility of sanctions in the form of pecuniary fines of up to five per cent of the worldwide turnover.

As a further measure, there will probably also be "naming and shaming". The precise meaning of this concept is not yet clear. It can be assumed, however, that the names of companies violating their due diligence obligations will be published on an EU portal.

Impact on the legal situation in Germany

The planned EU Directive will not apply directly in Germany – it must first be transposed into national law. However, as a result of the compromise reached with regard to the draft EU Supply Chain Directive, the recently adopted German Supply Chain Act will need to be adjusted in order for it to comply with future EU law.

The scope of the now final draft of the EU Supply Chain Directive exceeds the scope currently defined in Section 1 of the German Supply Chain Act: in future, companies with 500 or more employees and – upon fulfilment of further requirements – even companies with only 250 employees are to fall within the scope of the due diligence obligations in relation to their supply chains. In Germany, as of 1 January 2024, companies with 1,000 or more employees fall within the scope of the German Supply Chain Act.

Section 24 of the German Supply Chain Act provides for pecuniary fines of up to two per cent of the annual turnover. Compared to this, the limit for pecuniary fines that is now being planned, namely up to five per cent of the worldwide annual turnover, constitutes a huge increase and, therefore, a considerable economic risk for the companies concerned.

Unlike the German Supply Chain Act, which currently expressly excludes civil liability, the EU Directive will provide for civil liability of companies. In addition to this, there will be a limitation period of at least ten years, which is unusually long by German legal standards. This, too, involves an enormous legal and economic risk for the companies concerned.

Conclusion

The concrete wording of the provisions of the final draft EU Directive on due diligence obligations in supply chains is not yet available, so the precise content of the core requirements and legal consequences of said Directive cannot yet be finally assessed. It is, however, already becoming apparent that the German Supply Chain Act will be subsequently tightened in certain respects in response to the Directive. Corporate decision-makers should start preparing for the new situation and, to this end, should review and appropriately adjust their processes already today.

Authors

Jens-Uwe Heuer-James
Hanover

Dr Paul Derabin
Hanover

Commercial.Litigation: Federal Court of Justice: Extension of lawyers' liability in the event of failure to provide insolvency advice

(Judgment of 29 June 2023, IX ZR 56/22)

In a landmark decision, the German Federal Court of Justice dealt comprehensively with the question of whether to include (de-facto) managing directors as third parties in the scope of protection of an advisory agreement. The case to be ruled upon regarded a claim for damages asserted by two managing directors against the lawyer having previously advised their company due to insufficient advice on a potential claim for damages under Section 64 of the German Limited Liability Companies Act (old version).

Facts of the case

In late 2009, M. formally succeeded his father M.sen. as managing director of M GmbH & Co. KG (hereinafter: KG). At the same time, M.sen. de facto continued to act as a managing director of the KG. From 2009 onwards, the sued lawyer was repeatedly instructed to provide "legal advice to the KG" (the closer details and matters concerned were not disclosed). Three years later, insolvency proceedings were opened against the assets of the KG and, in that context, M. as the formal managing director and M.sen. as a de-facto managing director were held liable for prohibited payments made at a time when a reason to open insolvency proceedings had already existed. An amount of EUR 85,000 was paid to the insolvency administrator by way of settlement. The claimants then asserted a corresponding claim for damages against the lawyer who had been acting at the time (or rather against that lawyer's liability insurer).

Decision

The appeal on points of law brought against the decision of the Higher Regional Court denying the claim for damages was successful, leading to the contested judgment being set aside and the matter referred back to the Higher Regional Court. With its recent decision, the Federal Court of Justice has extended and complemented its previous rulings.

According to the judgment of 26 January 2017 (IX ZR 285/14), an advisor may be liable for delay in filing for insolvency even

if he or she was (merely) instructed to compile the annual financial statements for a limited liability company.

In its more recent judgment, the Federal Court of Justice has, in addition, expressly established the general protection afforded by advisory agreements to third parties. The Court argued that even though the advisory agreement existed only with the company, the company's managing directors must be included in the protective scope of the agreement, according to the principles governing agreements with protective effect for the benefit of third parties.

As a result, even de-facto managing directors may benefit from third-party protection, as they are subject to the same duties (to file for insolvency) as formal managing directors. The third-party protection for managing directors must be determined on a case-by-case basis and depends on how closely the duties to inform and warn are associated with the principal obligation to be performed under the relevant contract.

Assessment

The ruling of the Federal Court of Justice constitutes another extension of the liability of advisors: managing directors and senior members of supervisory bodies must now be advised of their duties resulting from the possible existence of a reason to open insolvency proceedings as soon as indications to that effect become known or are obvious or ought to be identified by the advisor if properly doing his or her work, provided that it must be assumed that the client is not aware of the possible existence of a reason to open insolvency proceedings.

Consequences for practice

In light of the increased liability risk, we would recommend that when drafting new advisory agreements or providing advisory services, particular attention should be paid to potential reasons to open insolvency proceedings. This might apply not only to lawyers and tax advisors but also, and in particular, to management consultants, who generally have in-depth insights into the (future) debtor's figures.

Author

Reinhard Willemsen
Munich, Cologne

Commercial.Restructuring: Creating the circumstances for a set-off to creditors' detriment

(Judgment of the German Federal Court of Justice of 19 October 2023, IX ZR 249/22)

Initial situation

By judgment of 19 October 2023 (IX ZR 249/22), the German Federal Court of Justice (*Bundesgerichtshof*, BGH) ruled once again on the admissibility of set-offs in insolvency proceedings, pointing out that the creation of the circumstances for a set-off involving claims (for damages) from other contractual relationships may place creditors at a disadvantage. This applies even if notice of termination for cause ("extraordinary termination") was validly given beforehand.

Facts of the case

The defendant commissioned the debtor with metal construction work on the basis of two written orders. After learning that the debtor had filed for insolvency, the defendant terminated these – and other – contracts for cause without prior notice in accordance with Section 8 (2) of Part B of the German Construction Contract Procedures (VOB/B), accepting the work already carried out by then.

The insolvency administrator held the defendant liable for payment of the remaining remuneration for the debtor's metal construction work on the basis of the two written orders in accordance with two final invoices totalling approximately EUR 182,000. The defendant made a set-off involving disputed claims for damages in the approximate amount of EUR 383,000 from another construction project (which had also been terminated for cause without prior notice).

The regional court decided in favour of the claimant to the extent of an approximate amount of EUR 173,000, taking into account deductions for parts of the work not carried out. The defendant's appeal was only successful insofar as the ruling ordered with regard to an amount of EUR 10,000 that payment should be made in return for the provision of warranty bonds. The defendant then filed an appeal on points of law, further pursuing its application to dismiss the action.

General admissibility of set-offs in insolvency proceedings

As a general rule, a set-off requires the existence of two mutual, independent claims that are of the same nature, pursuant to Section 387 of the German Civil Code (BGB). In insolvency proceedings, however, there may be a conflict between the principle of equal treatment of creditors and the individual creditors' interests. Sections 94 et seqq. of the German Insolvency Code (InsO) attempt to take this fact into consideration. Pursuant to Section 94 of the German Insolvency Code, the right to make a set-off is not affected by

the opening of insolvency proceedings if, at the time the insolvency proceedings are opened, the insolvency creditor is entitled, by operation of law or based on an agreement, to make a set-off. The date of opening the insolvency proceedings and the existence of circumstances allowing a set-off to be made are thus decisive for the question of whether the prohibition of set-offs under insolvency law applies. Creditors who acquire their right of set-off in a transaction that can be contested are not worthy of protection. Such set-offs are inadmissible, pursuant to Section 96 (1) no. 3 of the German Insolvency Code. As Section 96 (1) no. 3 of the German Insolvency Code refers to the general provisions regarding contesting transactions in insolvency proceedings (Sections 129 et seqq. of the German Insolvency Code), the transaction must fulfil all requirements for contestation. Accordingly, there must be a transaction which places creditors at a disadvantage and also a reason to contest such transaction (for example, Section 130 of the German Insolvency Code).

The judgment

The Federal Court of Justice held that the defendant's set-off was inadmissible pursuant to Section 96 (1) no. 3 of the German Insolvency Code in conjunction with Section 130 (1), first sentence, no. 2 of the German Insolvency Code. The Federal Court of Justice argued that the validity of the special termination did not mean that the defendant was entitled to make a set-off with regard to its claim for reimbursement of additional costs resulting from the termination. The circumstances for a set-off involving the counter-claims, if any, under Section 8 (2) no. 2, second sentence, of Part B of the German Construction Contract Procedures were not created until the defendant, who was aware of the debtor's own application to open insolvency proceedings, gave notice of termination. Consequently, the set-off by the defendant involving the debtor's claims for remuneration was inadmissible.

The Federal Court of Justice took the view that the requirements for contestation set out in Section 130 (1), first sentence, no. 2 of the German Insolvency Code were met, given that the termination for cause had resulted in the existence of two mutual claims – the debtor's claim for remuneration and the counter-claim for damages from another contractual relationship – that could be sett off against each other. The Federal Court of Justice further took the view that the set-off placed creditors at a disadvantage. Creditors were in any case at a disadvantage, even if the transaction that led to the circumstances for a set-off had also the effect of benefitting the debtor's estate, as the claims resulted from different contracts.

The defendant's appeal on points of law was, therefore, unsuccessful.

Conclusion

The decision of the Federal Court of Justice is especially noteworthy in light of the growing number of insolvency proceedings in the construction industry. Insolvency administrators can (continue to) directly plead invalidity of a set-off under Section 96 (1) no. 3 of the German Insolvency Code. The Federal Court of Justice expressly pointed out the distinction between transactions that are invalid under insolvency law and the underlying transaction (such as the termination in the case at issue).

Even though the right of termination for cause under Section 8 (2) of Part B of the German Construction Contract Procedures remains valid in principle, its validity cannot prevent set-offs from being invalid. This means that the claim for damages arising from a termination for cause is not intended to enable the customer to recover its losses by turning the disadvantages suffered into money. While there is no doubt that the insolvency-proof right of termination for cause can help a customer get quickly out of its contract and pursue its own interests without regard to insolvency law, said right does not upgrade the item of loss economically (by allowing a set-off to be made instead of having to file a claim that is then entered into the insolvency administrator's schedule of claims).

Consequently, contracting parties should continue to consider suitable types of security (for example, security from third parties) already during their contract negotiations to hedge against economic risks that may arise in the event of the other party's insolvency.

Authors

Christiane Kühn, LL.M. (Hong Kong)
Munich

Patrick Diessner, LL.M. oec.
Munich

■ GENERAL INFORMATION

Authors of this issue

Dr Steffen Gaber, LL.M. (Sydney)
Lawyer, Partner,
Head of Commercial
Stuttgart
T +49 711 9338 19192
steffen.gaber@luther-lawfirm.com

Henning Brockhaus
Lawyer, Partner
Frankfurt a.M.
T +49 69 27229 10602
henning.brockaus@luther-lawfirm.com

Dr Boris Ober
Lawyer, Partner
Cologne
T +49 221 9937 18764
boris.ober@luther-lawfirm.com

Jette Gustafsson, LL.M. (Boston)
Lawyer, Certified Specialist in Transport and Forwarding Law, Partner
Hamburg
T +49 40 18067 25775
jette.gustafsson@luther-lawfirm.com

Anne Caroline Wegner, LL.M. (European University Institute)
Lawyer, Partner
Dusseldorf
T +49 211 5660 18742
anne.wegner@luther-lawfirm.com

Christiane Kühn, LL.M. (Hong Kong)
Lawyer, Partner
Munich
T +49 89 23714 24756
christiane.kuehn@luther-lawfirm.com

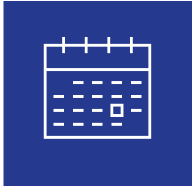
Patrick Diessner, LL.M. oec.
Graduate in Business Law,
Senior Consultant
Munich
T +49 89 23714 21832
patrick.diessner@luther-lawfirm.com

Jens-Uwe Heuer-James
Lawyer, Partner
Hanover
T +49 511 5458 20226
jens.heuer-james@luther-lawfirm.com

Dr Paul Derabin
Lawyer, Senior Associate
Hanover
T +49 511 5458 24785
paul.derabin@luther-lawfirm.com

Reinhard Willemsen
Lawyer, Partner
Munich, Cologne
T +49 89 23714 25792
reinhard.willemsen@luther-lawfirm.com

Events, publications and blog



You will find an overview of our events here.

You will find a list of our current publications here.

You will find our blog here.

Legal information

Published by: Luther Rechtsanwaltsgesellschaft mbH
Anna-Schneider-Steig 22, 50678 Cologne, Germany
Telephone +49 221 9937 0
Fax +49 221 9937 110, contact@luther-lawfirm.com
Responsible for the content (V.i.S.d.P.): Dr. Steffen Gaber, LL.M. (Sydney) Luther Rechtsanwaltsgesellschaft mbH Lautenschlagerstraße 24, 70173 Stuttgart, Telefon +49 711 9338 19192
steffen.gaber@luther-lawfirm.com
Copyright: All texts of this newsletter are protected by copyright. You are welcome to use excerpts, provided the source is named, after written permission has been granted by us. Please contact us for this purpose. If you do not wish to receive information from Luther Rechtsanwaltsgesellschaft mbH in the future, please send an e-mail with the stating „Commercial“ to unsubscribe@luther-lawfirm.com
Picture credits: TippaPatt/Adobe Stock: page 1; ipopba/Adobe Stock: page 4; m.mphoto/Adobe Stock: page 6; TippaPatt/Adobe Stock: page 9; jamesteohart/Adobe Stock: page 11; relif/Adobe Stock: page 14; renaschild/istockphoto: page 16; Jörg Modrow/FRANK EIDEL: page 18

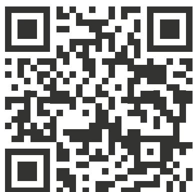
Disclaimer

Although this newsletter has been carefully prepared, no liability is accepted for errors or omissions. The information in this newsletter does not constitute legal or tax advice and does not replace legal or tax advice relating to individual cases. Our contact persons at the individual locations are available for this purpose.

Luther.

Bangkok, Berlin, Brussels, Cologne, Delhi-Gurugram, Dusseldorf, Essen, Frankfurt a.M., Hamburg, Hanover, Ho Chi Minh City, Jakarta, Kuala Lumpur, Leipzig, London, Luxembourg, Munich, Shanghai, Singapore, Stuttgart, Yangon

You can find further information at:
www.luther-lawfirm.com
www.luther-services.com



unyer GLOBAL ADVISORS