

International Corporate Rescue



Published by:

Chase Cambria Company (Publishing) Ltd
4 Winifred Close
Barnet, Arkley
Hertfordshire EN5 3LR
United Kingdom

www.chasecambria.com

Annual Subscriptions:

Subscription prices 2017 (6 issues)

Print or electronic access:

EUR 730.00 / USD 890.00 / GBP 520.00

VAT will be charged on online subscriptions.

For 'electronic and print' prices or prices for single issues, please contact our sales department at:
+ 44 (0) 207 014 3061 / +44 (0) 7977 003627 or sales@chasecambria.com

International Corporate Rescue is published bimonthly.

ISSN: 1572-4638

© 2017 Chase Cambria Company (Publishing) Ltd

All rights reserved. No part of this publication may be reproduced, stored in a retrieval system, or transmitted in any form or by any means, mechanical, photocopying, recording or otherwise, without prior permission of the publishers.

Permission to photocopy must be obtained from the copyright owner.
Please apply to: permissions@chasecambria.com

The information and opinions provided on the contents of the journal was prepared by the author/s and not necessarily represent those of the members of the Editorial Board or of Chase Cambria Company (Publishing) Ltd. Any error or omission is exclusively attributable to the author/s. The content provided is for general purposes only and should neither be considered legal, financial and/or economic advice or opinion nor an offer to sell, or a solicitation of an offer to buy the securities or instruments mentioned or described herein. Neither the Editorial Board nor Chase Cambria Company (Publishing) Ltd are responsible for investment decisions made on the basis of any such published information. The Editorial Board and Chase Cambria Company (Publishing) Ltd specifically disclaims any liability as to information contained in the journal.

Personal Liability of Managing Directors in Self-Administration Proceedings under German Insolvency Law

Dr. Artur M. Swierczok, Senior Associate, and Eduard Baron von Hahn, Associate, CMS Germany, Frankfurt am Main, Germany

Abstract

German insolvency law allows for so-called ‘self-administration’ proceedings, wherein an insolvent company retains possession and control of its assets while undergoing a restructuring process. Up to now, it was heavily disputed whether managing directors of a company in self-administration are personally liable to other parties for any breach of insolvency-related duties. The Federal Court of Justice has now given an answer to this question in a recent decision which brings legal clarity and certainty to the German restructuring and insolvency practice.

I. Introduction

1. Regular insolvency proceedings

Generally, the German Insolvency Code (‘InsO’) foresees that a court appointed insolvency administrator (*Insolvenzverwalter*) is responsible for the restructuring or liquidation of a debtor within insolvency proceedings (*Insolvenzverfahren*). The insolvency administrator is in charge of managing the debtor’s business during the insolvency proceedings and making all necessary dispositions regarding the insolvency estate (*Insolvenzmasse*) (sec. 80 para. 1 InsO). In particular, the administrator is required to

- take possession of all assets belonging to the insolvency estate (sec. 148 para. 1 InsO) immediately after his appointment.
- realise the insolvency estate in the best and quickest way¹ (e.g. by selling the debtor’s assets to third parties).
- distribute the (net) insolvency estate to the debtor’s creditors.

Apart from that the InsO and German case law also postulate various additional duties. In case these insolvency-related duties are intentionally or negligently violated by the insolvency administrator, he or she may be personally liable towards the damaged party (typically the debtor himself, a creditor of the debtor or the body of creditors as a whole). This personal liability is codified explicitly in secc. 60, 61 InsO.

2. Self-administration proceedings

Under certain conditions, an insolvent debtor can file for so-called ‘self-administration proceedings’ (*Eigenverwaltung*) (secc. 270 et seqq. InsO).² If the debtor has applied for such proceedings, the insolvency court may order that virtually all (managing) rights and responsibilities regarding the insolvency estate (especially the duties listed above in sec. 1) remain in the hands of the debtor and are not transferred to an insolvency administrator. In case of a company, the managing directors will regularly perform these rights and duties on behalf of the company.

Further, the insolvency court has to appoint a so-called insolvency custodian (*Sachwalter*) in self-administration cases (sec. 270c sentence 1 InsO). However, the powers of the appointed insolvency custodian are generally limited to the supervision of the debtor’s economic circumstances, the debtor’s management and his personal expenditures.

II. The issue

Up to now it was heavily disputed in German case law and legal literature, whether managing directors of a company in self-administration are personally liable in the same way as insolvency administrators. In particular, it was unclear, whether secc. 60, 61 InsO could be

Notes

¹ BGH, 7 December 1977 – VIII ZR 164/76.

² Consumers may not apply for self-administration proceedings, see sec. 270 para. 1 sentence 3 InsO. The proceeding is only open to merchants and companies.

applied to managing directors analogously.³ This question is of considerable practical importance not only because the number of self-administration proceedings has increased steadily since the last insolvency law reform in 2012 ('ESUG') which made self-administration proceedings much more attractive, but also because numerous new business models have developed in this area since then (e.g. professionals acting as chief restructuring officers etc.).

III. Decision of the Federal Court of Justice

The Federal Court of Justice ('BGH') has recently confirmed the analogous application of secc. 60, 61 InsO to the managing directors of a company in self-administration proceedings.⁴ According to the BGH, since the clear wording of secc. 60, 61 InsO only covers insolvency administrators but not managing directors,⁵ the InsO contains an unintended regulatory gap (*planwidrige Regelungslücke*) regarding managing directors. Further, the InsO does not contain any separate liability provisions for managing directors in self-administration.⁶ However, the fact that managing directors in self-administration proceedings (to a large extent) perform the same (legal) functions as an insolvency administrator in regular insolvency proceedings and are therefore in a comparable position (*vergleichbare Interessenlage*) justifies an analogous application of secc. 60, 61 InsO.⁷ Consequently, managing directors who intentionally or negligently violate their insolvency-related duties may be considered personally liable towards any damaged party.

IV. Practical consequences

The decision of the BGH is convincing.

By confirming the analogous application of secc. 60, 61 InsO to managing directors in self-administration, the BGH creates a harmonised and transparent liability

regime. Furthermore, the case law principles developed in relation to the liability of insolvency administrators in regular insolvency proceedings can now be applied to managing directors in self-administration proceedings. This should simplify the application of the law and create legal clarity and certainty to the benefit of all parties.

On the other hand, managing directors must now assess carefully whether they are prepared to bear the increased liability risks. For this purpose, they should inform themselves on the specific insolvency-related duties and obligations applying within (preliminary) self-administration proceedings well in advance. In this regard, it is important to note that the benchmark for their duty of care is high and is measured against the due care of a prudent business man (*Sorgfalt eines ordentlichen Geschäftsmannes*). This means that individual incapacities, i.e. ignorance and lack of experience, are insignificant.⁸

Further, managing directors entering into self-administration proceedings are from now on well advised to examine the extent of their existing D&O insurances carefully. If liability claims according to secc. 60, 61 InsO are not covered by their existing D&O insurance, the coverage should preferably be extended before the filing for self-administration proceedings.

Finally, it remains to be seen whether the strict liability regime will reduce the willingness of managing directors to pursue self-administration. Concerns as to whether the decision is in line with the objectives of the ESUG which had the goal to improve the German restructuring landscape by strengthening self-administration proceedings, have already been expressed. However, it must be held against these concerns that restructurings should not be carried out at any price. Particularly regarding self-administration proceedings, a clear liability regime is required in order to reduce any excessive willingness of managing directors to take unreasonable risks. Consequently, in our opinion the BGH's decision does not minimise the chances of a successful restructuring, but rather increases them.

Notes

- 3 *Contra*: OLG Düsseldorf, 7 September 2017 – I-16 U 33/17; S. Krüger, 'Keine Außenhaftung des Sanierungsgeschäftsführers einer GmbH für Rechtsgeschäfte während der Eigenverwaltung' [2018] EWIR 53, 54; *Pro*: C. Tetzlaff in *Münchener Kommentar InsO* (3rd edn, C.H. Beck Verlag, München, 2014) § 270 para. 172–180; S. Fiebig in *Hamburger Kommentar InsO* (6th edn, Carl Heymanns Verlag, München, 2017) § 270 para. 43.
- 4 BGH, 26 April 2018 – IX ZR 238/17.
- 5 BGH, 26 April 2018 – IX ZR 238/17, para 12.
- 6 BGH, 26 April 2018 – IX ZR 238/17, para 22 et seqq.
- 7 BGH, 26 April 2018 – IX ZR 238/17, para 47 et seqq.
- 8 BGH, 20 February 1995 – II ZR 143/93.

International Corporate Rescue

International Corporate Rescue addresses the most relevant issues in the topical area of insolvency and corporate rescue law and practice. The journal encompasses within its scope banking and financial services, company and insolvency law from an international perspective. It is broad enough to cover industry perspectives, yet specialized enough to provide in-depth analysis to practitioners facing these issues on a day-to-day basis. The coverage and analysis published in the journal is truly international and reaches the key jurisdictions where there is corporate rescue activity within core regions of North and South America, UK, Europe Austral Asia and Asia.

Alongside its regular features – Editorial, US Corner, Economists' Outlook and Case Review Section – each issue of *International Corporate Rescue* brings superbly authoritative articles on the most pertinent international business issues written by the leading experts in the field.

International Corporate Rescue has been relied on by practitioners and lawyers throughout the world and is designed to help:

- Better understanding of the practical implications of insolvency and business failure – and the risk of operating in certain markets.
- Keeping the reader up to date with relevant developments in international business and trade, legislation, regulation and litigation.
- Identify and assess potential problems and avoid costly mistakes.

Editor-in-Chief: Mark Fennessy, Proskauer Rose LLP, London

Emanuella Agostinelli, Curtis, Mallet-Prevost, Colt & Mosle LLP, Milan; Scott Atkins, Henry Davis York, Sydney; Samantha Bewick, KPMG, London; Geoff Carton-Kelly, FRP Advisory, London; Gillian Carty, Shepherd and Wedderburn, Edinburgh; Charlotte Cooke, South Square, London; Sandie Corbett, Walkers, British Virgin Islands; Ronald DeKoven, DeKoven Chambers, London; Hon. Robert D. Drain, United States Bankruptcy Court, Southern District of New York; Matthew Kersey, Russell McVeagh, Auckland; Prof. Ioannis Kokkoris, Queen Mary, University of London; Professor John Lowry, University College London, London; Neil Lupton, Walkers, Cayman Islands; Lee Manning, Deloitte, London; Ian McDonald, Mayer Brown International LLP, London; Professor Riz Mokal, UCL, London; Mathew Newman, Ogier, Guernsey; Karen O'Flynn, Clayton Utz, Sydney; Professor Rodrigo Olivares-Caminal, Queen Mary, University of London; Christian Pilkington, White & Case LLP, London; Susan Prevezer Q.C., Quinn Emanuel Urquhart Oliver & Hedges LLP, London; Sandy Purcell, Houlihan Lokey Howard & Zuckin, Chicago; Professor Professor Arad Reisberg, Brunel University, London; Daniel Schwarzmann, PricewaterhouseCoopers, London; The Hon Mr Justice Richard Snowden, Royal Courts of Justice, London; Anker Sørensen, De Gaulle Fleurance & Associés, Paris; Kathleen Stephansen, Huawei Technologies U.S.A., New York; Angela Swarbrick, Ernst & Young, London; Dr Artur Swierczok, Clifford Chance, Frankfurt; Dr Shinjiro Takagi, Frontier Management, Inc., Tokyo; Lloyd Tamlyn, South Square, London; Stephen Taylor, Isonomy Limited, London; Richard Tett, Freshfields, London; William Trower Q.C., South Square, London; Professor Edward Tyler, The University of Hong Kong; Mahesh Uttamchandani, The World Bank, Washington, DC; Robert van Galen, NautaDutilh, Amsterdam; Miguel Virgós, Uría & Menéndez, Madrid; Maja Zerjal, Proskauer Rose, New York; Dr Haizheng Zhang, Beijing Foreign Studies University, Beijing.

For more information about *International Corporate Rescue*, please visit www.chasecambria.com