

Germany extends insolvency relief

A German draft bill proposes to extend temporary relaxation of the over-indebtedness test for German companies until 31 December, 2013.



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By Arnold Buessemaker, a restructuring partner in the Munich office of Weil, Gotshal & Manges.

As part of emergency legislation aimed at curbing the effects of the financial and economic crisis in the aftermath of the Lehman Brothers insolvency, the German parliament amended the Insolvency Act on 17 October, 2008 by temporarily relaxing the over-indebtedness test for German limited liability companies and stock corporations (see Global Turnaround, October 2008 issue).

In a nutshell, a German GmbH was over-indebted under the old law if its assets were not sufficient to cover its existing liabilities.

Under the new law, effective as of 18 October last year, this over-indebtedness test does not apply, if it is more likely than not, over the medium-term, that it will continue to be a going concern, in other words that it will be able to service its debt.

The practical impact of this relaxation is substantial: The managers of an over-indebted German company are required by law to file for insolvency, or risk serious penalties.

Due to its genesis as emergency legislation the original relaxation was, however, time-limited until December 31, 2010.

Meanwhile, it has been widely recognized that the return to the strict notion of over-

indebtedness on 1 January, 2011 will cast a shadow over the company's balance sheet as early as from 1 January, 2010. This is why: Under German GAAP, for purposes of the company's annual financial statements, management has to assess the company's assets at liquidation values, if it has evidence that the company will be over-indebted within the ongoing or the following financial year.

Accordingly, management would have to determine in early 2010, when preparing the 2009 annual financial statements, whether the company would be over-indebted as of 1 January, 2011 applying the strict law which will then (in January 2011) be effective.

The prognosis of an over-indebtedness likely occurring on 1 January, 2011 would not result in an immediate duty to file for insolvency. But preparing the company's 2009 financial statements based on liquidation values would substantially reduce shareholder's equity and, as a consequence, reduce the company's creditworthiness already in early 2010.

On 24 August, 2009, the German governmental coalition parties presented a draft bill which would extend the time-limitation of the relaxation of the notion of over-indebtedness from 31 December, 2010 by three years to 31 December, 2013. In view of the urgency of the matter, the draft bill can be expected to become law prior to year-end.

Schaeffler completes 12 billion euro refinancing

Investors have welcomed a 12 billion euro (US\$17 billion) refinancing of Schaeffler KG since it moves the German ball-bearing maker closer to a merger with tyre and auto-parts manufacturer Continental AG.

The refinancing shores up Schaeffler after it made a hostile bid for Continental a year ago in an effort to challenge Robert Bosch GmbH as the world's biggest producer of car parts.

Schaeffler's existing credit facilities will be split into two tranches with maturities of 4.5 years and 6 years.

Schaeffler Firms & Faces

The banks

Linklaters acted as lead counsel for the five consortium banks. The Linklaters team was lead by **Stephen Lucas** and **Marc Trinkaus** from banking, **Stephan Oppenhoff** and **Dr Jochen Laufersweiler** from corporate, **Florian Lechner** from German tax and **Stephen Land** from US tax.

The five consortium banks also received financial advice from Deloitte, led by **Aidan Birkett**, **David Scott**, **Roger Wightman**, **Roland Haage**, and **Christopher Roeper**.

Willkie Farr & Gallagher also acted for Commerzbank, one of the five consortium banks. The Wilkie team was led by **Professor Dr Michael Schlitt** and **Dr Patrick Meisel**.

Latham & Watkins additionally acted for LBBW, another of the five consortium banks, led by **Dr Andreas Diem**, **Dr Thomas Fox** and **Frank Grell**.

The company

Allen & Overy acting as lead counsel for Schaeffler. The team was led by **Dr Neil George Weiland**, **Dr Walter Uebelhoer** and **Thomas Neubaum** from banking and **Dr Alexander Veith** from corporate.

Schaeffler received financial advice from Ernst & Young, led by **Professor Dr Stefan Koehler** on German tax, **John Martinkat** on US tax and **Andreas Diehm** on transaction advisory.

IFT certification for UK turnaround professionals



Christine Elliott, IFT

The UK-based Institute For Turnaround (IFT) announced a major initiative on

certification and regulation of turnaround managers at its annual conference in London on 10 September.

The trade body issued proposals for an IFT Turnaround Practising Certificate and Professional Licence with the aim of making the role of the turnaround professional "one that is formal, regulated and legally protected".

The IFT said it launched the plans "in response to the needs of the UK's business community for greater promotion of business turnaround solutions of the highest quality.

This is fully supported by the UK's leading banks including Barclays, Lloyds Banking Group and HSBC."

Christine Elliott, CEO of the IFT, said that the proposals had been two years in the making, and that the perfect time had now come to present them to the UK Government, in response to the Insolvency Service's consultation on reforming insolvency laws titled 'Encouraging Company Rescue'.

Elliott said: "It is clear that there is real demand for tougher accreditation of those individuals that undertake executive turnaround appointments."

The IFT plans to implement its proposals on 1st January 2010. This will include a Practising Certificate (PC) renewable annually and ultimately a Turnaround Licence.