

Bridge-financing of EPR payments (outstanding wages) – now also possible in Poland

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In Germany the instrument of the so called bridge-financing of EPR payments (outstanding wages owed by the insolvent company) is currently considered as a kind of standard procedure in preliminary insolvency proceedings, if and in so far as the preliminary insolvency administrator intends to continue the business of the insolvent company.

As is known, the predicament of bridge-financing of EPR payments in Germany is based on the fact that the exchequers for those claims, a part of the Federal Employment Agency (similar to the NIF) is authorized to pay the wages as owed by the insolvent company up to a maximum period of three months, that arose and became due before the insolvency proceedings were opened, providing that the insolvent company was not able to pay itself. Admittedly in practice this requires a continuation of business during the preliminary insolvency proceedings by the appointed preliminary administrator, whereas the disbursement of those EPR claims by the Agency may only take place after insolvency proceedings were opened, respectively insolvency proceedings were closed due to a lack of assets. The existing applicable law does not provide for the possibility of payments of EPR claims during the preliminary proceedings. Therefore the preliminary insolvency administrator must face the predicament that the company's employees are demotivated by the prospect of not receiving their wages promptly but with a delay of appx. 4 months. The consequence in practice thereof can be that the production lies idle during the preliminary insolvency proceedings, or even worse, the employees commit sabotage out of frustration. A company, that in principle could have had prospects of continuance, loses any attraction for potential new investors and must be liquidated.

In order to counteract such a scenario, the aforementioned bridge-financing of EPR payments has been established and proved itself in practice. Under such scheme the appointed preliminary insolvency administrator and the management of the insolvent company, obtain a payment confirmation in principle from the Federal Employment Agency, approach a bank and obtain a loan (whose legal backing is that of a DIP-loan - Massekredit), in order to cover the employees' wages claims for the duration of the preliminary proceedings (at maximum a period of three months). To secure such loan the employees assign their prospective EPR payment claims to the bank. After insolvency proceedings have been opened, the Federal Employment Agency will pay out the outstanding wages, which will directly be set-off against the loan as granted by the financing bank. The fees for the loan are borne by the insolvent estate, so that the employees do not suffer any disadvantages by these bridge-financings. The estate on the other hand does not have to pay for the wages despite a continuation of production during preliminary proceedings.

In Germany those procedures go without saying; however in Poland they are brand-new.

The legal provisions for EPR payments of outstanding wages are indeed comparable in both countries, as they both are based upon EU legal standards, however the development of the bridge-financing of EPR claims have been left for practical experience.

Consequently such a system has been unknown in Poland and to our knowledge has not yet been processed until now.

Our law firm acted as special counsel for Poland in two insolvency proceedings over the assets of a Polish subsidiary in which, in accordance with EC Regulation 1346 / 2000, a German insolvency administrator has been appointed administrator over the assets of the Polish subsidiary. During those proceedings in close collaboration with the Fundusz Gwarantowanych Świadczeń Pracowniczych (Polish exchequer for EPR claims – FGSP), our law firm managed to establish in both cases a procedure where a bridge-financing of EPR claims was made possible. In both cases (a subsidiary of a group of companies producing aluminum alloy casting), the EPR exchequer confirmed the willingness of repayment of the bridge loan.

Considering the innovative nature of such scheme, some allowances had to be made in Poland:

Since for instance no bank in Poland was willing to provide such bridge-financing on acceptable terms and within an acceptable time-frame, the German preliminary insolvency administrator over the assets of the German holding company had to raise a bridge loan with a German bank more familiar to such schemes and has made that loan available to the employees of the Polish subsidiary on an interest-free basis. In exchange the employees have concluded individual loan agreements with the administrator of the holding company and have assigned their EPR claims held against the FGSP.

Due to the open and transparent way in which the procedure was implemented and the extensive communication and involvement of the employees, the relationship towards between employees and the employer/administrator was preserved during the preliminary insolvency of the company and initial skepticism could be overcome.

An additional peculiarity derived due to the legal provisions on the payment of EPR claims in Poland. In general a summary application for the entire staff is also possible in Poland, however in the described proceeding the peculiarity was in the fact that a foreign (German) insolvency administrator was appointed as administrator in terms of the EC Regulation 1346/2000. In such cases Polish law does not provide for the possibility of summary applications, but obliges each and every employee to file his own application. Also this issue had been tackled in a pro-active manner and the human resource department of the Polish insolvent estate conducted the filing in close collaboration with the (about 150 in each case) employees.

By introducing the aforementioned procedure, the company could continue its business during preliminary proceedings, preserving a significant amount of cash for the insolvent estate, and a motivated staff could be retained for the benefit of the future investor (in both cases the companies have been successfully restructured and sold).

Dr. Artur Bunk qualified in 1995 and was admitted to the Frankfurt Bar as Attorney-at-Law in 1997 after obtaining an LL.D. in European Law at the University Viadrina in Frankfurt (Oder). He started his career with the German law firm Pünder, Volhard, Weber & Axster (now Clifford Chance). From 1998 to 2000, he was Head of Office at Rödl & Partner in Poland, leading a team of 10 lawyers and support staff. He acted as head counsel in various M&A transactions and counsel for various banks (finance and leasing law). From 2000 to 2006 he was the Senior Legal Counsel at the Legal and Restructuring Department of KfW (Kreditanstalt für Wiederaufbau, Frankfurt am Main). At that time, he was responsible for a restructuring portfolio of Euro 1.6 bln and was counseling the bank in the restructurings of ISPAT International, Essar Steel, (both India) Qualitech Steel, NRG Energy (both USA), Orinoco Iron (Venezuela, subsidiary of BHP Billiton), Fairchild Dornier, Lloyd Werft Bremerhaven (both Germany) a.o. In 2003 he established the law firm bunk-alliance; he acts inter alia as special counsel in various cross-border insolvency proceedings (ae group, Kögel, Trevira). In addition to German, he also is fluent in English and Polish.

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