

Insolvency Laws:

How Countries Have Revamped Their Insolvency and Restructuring Laws

November 2022



Germany



Germany made a number of changes to its insolvency and related laws as a result of COVID-19; some of these have now expired including suspending the obligation to file for bankruptcy, however some measures still apply. Also, with effect from 9 November 2022, further temporary amendments to German insolvency law provisions were put in place to mitigate the consequences of the current crisis.

General Amendments to the German Insolvency laws

German insolvency laws were generally amended with effect from 1 January 2021:

- The timeline to file for insolvency in case of over indebtedness has been extended to up to 6 weeks (instead of 3 weeks as applicable until the end of 2020).
- When assessing over-indebtedness, the timeline for a positive going-concern prognosis will generally be set to 12 months.
- A new preventive restructuring framework for enterprises has been introduced (implementation of the European Directive on the Preventive Restructuring Framework).

Ongoing Protection of Measures that Occurred During the Suspension Period initiated in 2020 as a response to Covid-19

In order to give affected companies the opportunity to continue their business and eliminate insolvency risks, the suspension of the obligation to file for insolvency was suspended for certain COVID-19 triggered insolvencies as of 1 March 2020. The suspension period expired (on 30 April 2021). However, the suspension was supported by additional regulations that will also be recognised in future insolvency proceedings:

- Corporate law prohibits certain payments when grounds for insolvency exist. These prohibitions have been relaxed during the applicable suspension period. Transactions made in the ordinary course of business, especially those that serve to maintain business operations or to implement a restructuring plan, are deemed to be made with the diligence of a prudent manager, and will not trigger any liability for the manager.
- New loans granted during the applicable suspension period by banks and other lenders will be protected as follows:
 - i. Repayments of such loans made until 30 September 2023.
 - ii. Loans granted during the applicable suspension period, as well as the secured collateral for such loans, cannot be challenged in a subsequent insolvency. This will only apply to new loans; mere extensions of preexisting loans will not be protected. Collateral granted for such loans is also protected accordingly.
- Newly granted loans by shareholders during an applicable suspension period also have additional protections – repayments of such loans made until 30 September 2023 will not be considered disadvantageous to creditors, and cannot be challenged. Such loans will also not be subject to subordination in insolvency proceedings pursuant to Section 39(1) no. 5 of the German Insolvency Code in case that a subsequent insolvency will be commenced until 30 September 2023. However, such protection does not apply to collateral granted for such loans.
- In cases where a company's creditor agreed prior to 28 February 2021 to defer payments, and has received payment of such deferred liability prior to 1 April 2022, such payment will not be subject to any avoidance claims of the insolvency administrator in case of the company's subsequent insolvency.
- Provisions have also been made to alleviate the concerns of distressed companies' contractual counterparties (such as suppliers, landlords and lessors). Contractual counterparties' receipt of payment (whether through the settlement of claims or through the furnishing of collateral) while the debtor was insolvent during the suspension period will be protected and cannot be voided in the event that the debtor's restructuring efforts fail and the debtor commences bankruptcy proceedings. The protection will apply to any performance in lieu of or on account of performance, payments made by a third party at the debtor's instruction, the furnishing of collateral other than that which was originally agreed if it is not of greater value, the shortening of time allowed for payment and the relaxation of payment terms. This restriction on avoidance actions also applies to companies that are not obliged to file an application (such as sole traders and limited partnerships with a natural person as the general partner) and debtors who are neither insolvent nor over-indebted. However, the restrictions of avoidance do not apply where the other party was aware that the debtor's efforts to restructure and finance the company were not suited to remedying the insolvency that occurred.

Further temporary amendments to the German Insolvency Code

With effect from 9 November 2022 until 31 December 2023, the following measures have been put in place:

- The forecast period relevant for the going concern prognosis which is part of the test whether a company has to file for insolvency due to over-indebtedness, has been reduced from 12 months to 4 months.
- Similarly, the periods for which a financial plan has to be provided (i) in the context of self-administration proceedings, and (ii) in the context of a restructuring proceeding pursuant to the Law on the Stabilisation and Restructuring Framework for Enterprises (StaRUG) is also being shortened from 6 months to 4 months.
- The maximum period to file for insolvency in cases of over-indebtedness is extended from 6 weeks to 8 weeks to provide companies with more time to restructure out of insolvency, or alternatively to properly prepare restructuring proceedings pursuant to StaRUG or self-administration proceedings.



