

Contesting payments of a debtor by the insolvency administrator in different European countries

A risk exists for suppliers that payments received from a customer for the delivery of goods have to be repaid if the customer goes bankrupt afterwards and the payments are contested by the insolvency administrator. Not all payments are affected only those payments made within a certain period of time prior to the insolvency. Though, different periods apply in the European countries. Further, in some countries the periods count already from the filing of the application to commence an insolvency proceeding in other countries not before the opening of the insolvency proceeding.

Under German law (§§ 130, 133, 134 of the German Insolvency Act, *Insolvenzordnung-“InsO”*) the following periods apply:

1. Contestable are payments made by the debtor within the last three months prior to filing the insolvency application if he was unable to pay his debt at that time and the creditor had knowledge from the inability to pay.
2. Contestable are gratuitous transfers made by the debtor within 4 years prior to the filing of the insolvency application regardless whether the debtor was unable to pay his debt at that time and whether the creditor had knowledge thereof.
3. Contestable are payments made by the debtor within 10 years prior to the filing of the insolvency application if the debtor made such payments with the intention to damage the creditors and the receiver of the payment had knowledge from the intention of the debtor. This knowledge is assumed if the receiver of the payment had knowledge that the inability to pay threatened and such payment would be disadvantageously for the other creditors.

Generally, these opportunities to contest payments are given in other European countries as well. However, the periods for payments subject to contestation are different: The period in which payments made with the intention to damage the other creditors are subject to contestation is 10 years in Austria as well but only 5 years in Hungary, Czech Republic, Finland, Greece and Turkey. In Russia this period is 3 years. In England, Iceland and Luxembourg the period for contestable payments made with the intention to defraud the creditors is unlimited.

On the other side some countries have no separate periods for contestation in case of intentionally disadvantage of creditors but in these countries generally all payments made within a certain period of time are subject to contestation whereupon as further condition the knowledge of the creditor from the inability to pay is sometimes required, i.e., in Portugal, Spain, Malta, France, The Netherlands, Slovenia, Italy and Poland. The period for payments subject to contestation for which knowledge of the creditor from debtor's inability to pay is required is in other countries far longer as the three-months-period in Germany. In Portugal this period is 2 years prior to the commencement of the insolvency proceeding. In Greece and Spain the period is 2 years as well but for those payments made within normal business activities or where the payment is made simultaneously with the delivery of the goods the contestation is excluded.

A period of one year prior to the commencement of the insolvency proceeding for payments subject to contestation which are made with knowledge or assumed knowledge of the creditor from debtor's inability to pay is given in Italy, Slovenia, The Netherlands, Czech

Republic and Turkey. In Russia, England, Iceland and Austria the period is six months. In Luxembourg and Malta generally all payments made by the debtor within six months prior to filing the application or commencement of the insolvency procedure can be contested.

As a result it can be said that the risk that payments received from a customer will be contested due to a subsequent insolvency of this customer is given in all European countries. Significant differences are given, however, in the periods prior to the insolvency in which payments made by the debtor are subject to contestation and the conditions under which the insolvency administrator can request the repayment. This has to be examined in each country for each case separately.

In addition, the application of the contestation provisions by the courts has to be considered as well. In Germany, the IX. senate for civil law cases of the Federal High Court (BGH) has developed a case law which makes it easier for the insolvency administrator to contest payments made with the intention to disadvantage the creditors. Concerning the intention of the debtor to disadvantage the creditors the BGH has decided already in 2005 that this intention can be assumed if the debtor was already unable to pay his debt at the time making the contestable payment (see BGH, judgement from December 8, 2005 – IX ZR 182/01). This can be proven by the insolvency administrator without difficulties also afterwards by examining the liquidity of the debtor if bank statements from the time of the payment or economically evaluations are available. With respect to the further required knowledge of the receiver of the payment from the intention of the debtor the legal assumption set forth in § 133 para. 1 sentence. 2 InsO has to be considered first. Pursuant to this provision the knowledge of the payment receiver is assumed if he knew that the debtor's inability to pay threatened and that the payment disadvantages the other creditors. This legal assumption rule was interpreted by the BGH in several decisions since 2010 more and more in the favor of the insolvency administrator. Pursuant to these decisions the "knowledge" of the payment receiver from the debtor's threatened inability to pay is practically assumed, if the payment receiver knew certain circumstances from the debtor by which he could conclude the inability to pay. Such circumstance shall be among others the knowledge that the debtor does also not pay other creditors, the claim of the receiver was not paid to a greater extent for a longer period of time, enforcement measures are undertaken against the debtor, the bank has given back cheques or returned debit notes etc.

As a result the BGH allows further assumptions to be sufficient to fulfill the legal assumption rule of § 133 para. 1 sentence. 2 InsO with the consequence that at the end the payment receiver is forced to proof that the assumptions are not given which might be difficult for him as usually the payment receiver does not have all relevant evidences. Against these overflow of court decisions of the BGH protest was raised by the industry and the German government has issued on September 29, 2015 a draft act concerning the improvement of the legal security in case of contestation pursuant to the insolvency act and the contestation act. The contestation for intentionally disadvantage of creditors set forth in § 133 InsO shall be amended in favor for the creditors according to the draft act as follows:

- In case of so called congruence acts (i.e., payment for delivered goods) the period for contestation shall be reduced from 10 years to 4 years.
- As far as the creditor could request the provision of a security or fulfillment of the claim at that time and in that kind the contestation shall only be possible if the creditor

was aware that the debtor was already unable to pay his debt. The knowledge of the threatened inability to pay shall not be sufficient.

- Grant the creditors accommodations for payments to the debtor (i.e., an installment payment agreement) to help the debtor to overcome the problems of liquidity, this will not justify a contestation for intention. In favor for the creditors it will be assumed by law that in case of later received payments they had no knowledge of the debtor's inability to pay. The insolvency administrator has to proof the respective knowledge of the creditors.

Should the draft act really be transformed with this content the contestation in case of intention would initially be defused. But it has to be awaited how the courts will interpret the new rules concerning the burden of proof.

At the moment the risk that payments received already several years ago have to be repaid to the insolvency administrator cannot be excluded. Normally the supplier has to refuse payments from a customer if he knows from financial difficulties of the customer. This cannot be a practicable solution if the supplier is also in need for liquidity. It can only be hoped that the draft act for the reformation of the contestation rules will be transformed as soon as possible. It is expected that the act will probably come into force later this year.

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