A few weeks ago, on 25th of March 2020, the German Parliament has set up a law which changes some of its insolvency rules for enterprises who are suffering from the economic close-down. Here are the details:

1° - The most important change is, that the directors of corporations are no longer bound to file for insolvency if the liquidity crisis was caused by the economic close-down *only*. Which means that the company must have been entirely healthy by 31st of December 2019 (which has to be perfectly documented and proved).

There is an exemption of the relief, however, in case that there is no chance to overcome the shortage of cash at any time.

The relief expires by end of September 2020 "maximum", which means that the enterprises are obliged to file for insolvency from 1st of October 2020 on, if the shorting of cash has not been overcome until then, which is unlikely under the actual conditions.

(We are expecting a LOT of filings by October 2020 at the latest, if the time limit will not be extended.)

2° - The directors are relieved from personal liability for undue expenses under par. 64 GmbHG during the privileged period, provided that the above-mentioned circumstances were actually given. The directors are then supposed to have acted with due diligence with respect to the company's financial situation. The future administrators have to provide evidence that this was NOT the case.

3° - Under German law, the directors are bound to file for insolvency not only in the state of illiquidity of their company, but also if the assets of the company are overindebted. This problem may occur, if companies which run short of cash because of the close-down, do lend money to overcome the situation. The government helped and granted that bank credit, which is necessary to overcome the close-down period, is offered at a very low interest rate and is warranted entirely by the German Bank of Reconstruction. By taking these lending opportunities, the companies may however get overindebted and the directors are bound to file for insolvency based on a negative equity. They are relieved from the task of filing under condition that the going-concern-test is positive. It is not quite clear, if the going-concern-test is suspended until end of September 2020, too.

4° - The new law provides subsequently, that credits which were given under the above-mentioned circumstances, may be paid back by the borrowing company even during the crisis and even to a shareholder, and that this payback is entirely privileged under actio Pauliana-aspects. In case he files an actio Pauliana, the admin will have to give evidence that the privileging circumstances had actually NOT been given.

We do hope that these measures will help to get the management safe through this difficult period, and that the close-down will be lifted early enough to enable the enterprises to recover early enough before the privileges will expire by end of September.

April 20th, 2020 by Barbara Brenner, Rechtsanwältin (D)