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European Court of Justice Rules on Claw-Back of Shareholder Loans – No Safe Harbor Through Choice of Law

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European Court of Justice Rules on Claw-Back of Shareholder Loans – No Safe Harbor Through Choice of Law

The German claw-back regime for shareholder loans also applies if the shareholder loan agreement is governed by the laws of another EU member state, giving full effect to the German equitable subordination regime

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Key Takeaways

The decision[1] of the European Court of Justice ("ECJ") in *SML Maschinengesellschaft mbH v. AK* provides clarity for any shareholder or affiliated lender that provides financing to a company whose center of main interests ("COMI") is in Germany:

- **Cross-border shareholder loans are also subject to mandatory German equitable subordination rules**: German insolvency law governs the ranking of creditor claims and thus the equitable subordination of loans granted by a shareholder or an affiliated lender.
- **Choice of the laws of another EU member state in the underlying loan agreement does not provide a safe harbor**: A governing law clause in a shareholder loan agreement stipulating that the shareholder loan agreement is governed by the laws of another EU member state does not prevent the application of the German claw-back regime with respect to repayments of equitably subordinated shareholder loans. Any repayments of shareholder loans within one year prior to the insolvency filing are subject to claw-back.
- **The same likely applies to the choice of the laws of a non-EU state**: While the ECJ's ruling is confined to EU cross-border scenarios, its reasoning carries strong persuasive weight for situations where the shareholder loan is governed by the laws of a non-EU member state. German domestic conflict-of-laws rules are likely to lead to the same result.
- **Shareholders financially supporting German companies should plan accordingly**: Any shareholder or affiliated entity considering providing debt to a company whose COMI is in Germany should factor in the risk of equitable subordination as well as the risk that repayments made within one year prior to the insolvency filing can be clawed back. This claw-back risk applies regardless of the governing law chosen for the shareholder loan.

Background

The case involved a German company that had received loans from its Austrian sister company. Since the borrower and the lender had the same shareholder, these loans qualify as "shareholder loans" which are subject to the German equitable subordination rules. The parties agreed that the loans would be governed by Austrian law.

In the months before its insolvency filing in Germany, the borrower partially repaid the shareholder loans. After insolvency proceedings were opened in Germany, the insolvency administrator sought to claw-back those repayments from the lender.

Under mandatory German insolvency law, specifically Sections 39 and 135 of the German Insolvency Code, shareholder loans are equitably subordinated (i.e., the claims under the shareholder loan rank behind the claims of all other creditors) and any repayments made within one year before insolvency filing can be clawed back. In addition, any collateral granted to secure such shareholder loans can also be clawed back with a ten-year lookback period. The lender argued that, because the loans were governed by Austrian law which does not provide for a claw-back, the German claw-back regime should not apply.

The lender based its argumentation on Article 13 of the European Insolvency Regulation (now Article 16 of the European Insolvency Regulation (recast), "EIR") which - in deviation from the general principle that the claw-back regime is determined by the applicable insolvency regime (which is German insolvency law in the case at hand) - provides that a transaction is not subject to claw-back where the party benefiting from the disadvantaging act proves that (i) the

[1] Case C-43/25 (*SML Maschinengesellschaft mbH v. AK*) dated 19 March 2026.

disadvantaging act is governed by the law of another EU member state and (ii) that law does not allow any means of challenging the disadvantaging act.

The ECJ's Ruling

The ECJ rejected the lender's argument and ruled in favor of the insolvency administrator.

The ECJ held that Article 16 EIR does not apply from the outset. The court found that the insolvency administrator's claw-back claim was not a traditional challenge to the validity of the loan and/or the repayments. Rather, it was an enforcement of the statutory German insolvency waterfall, i.e., a matter of creditor ranking and the distribution of the insolvency estate. According to the ECJ, this type of claim falls outside the scope of Article 16 EIR since Article 16 EIR only constitutes an exception to sub-para. (m) of Article 7(2) EIR (which sets out the general principle that the claw-back regime is determined by the applicable insolvency regime), but not an exception to other provisions of the European Insolvency Regulation, in particular sub-para. (i) of Article 7(2) EIR (which sets out that the ranking of creditors and the distribution of the insolvency estate is determined by the applicable insolvency regime). The ECJ also confirmed that Article 16 EIR as an exception is to be interpreted narrowly and hence does not protect creditors from claw-back claims that are rooted in the mandatory rules on creditor priority under the applicable insolvency law.

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