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Press Release

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Already more than 30,000 claim registrations made for insolvent German P&R companies - positive response from investors

Insolvency administrators provide information in response to current questions

Munich, 23 August 2018 The forms for registering claims in the insolvency proceedings for the German P&R container management companies have all be sent. In the first two weeks of August more than 87,300 letters were sent to a total of around 54,000 investors. "So far we have received more than 30,000 claim registrations. This is a very strong response. We have also had positive feedback from many investors for the good design of the registration form, which matches their own calculations", says Dr Michael Jaffé today, the insolvency administrator appointed by the District Court in Munich.

P&R investors have about four weeks in which to register their claims. The court set a deadline of the 14 September 2018 for this in accordance with the requirements of the insolvency code (Section 28 (1) InsO (Insolvenzordnung [Insolvency Code])). The other reason for this deadline was the fact that the registrations must be received and evaluated before the creditors' meetings are held (report meetings). Given the volumes of data, this creates a great deal of work, so the insolvency administrators are grateful to investors for returning the registration forms as soon as possible.

The first report meetings are on 17 and 18 October 2018. The Olympiahalle in Munich has been booked for this in order to allow the largest possible number of interested investors and creditors to participate.

Service and hotline for investors for claim registration

The forms and explanatory notes for claim registrations were produced and sent out under high pressure because it was not possible to start until after the insolvency proceedings were opened on 24 July. The range of contract data represented a particular challenge. In addition, the data were checked and recalculated multiple times in order to ensure their accuracy. Only after this was complete was it possible to print and send out more than 87,300 letters and individually pre-filled registration forms.

“Given the very large quantities of data and addresses that needed to be taken into account, we are very happy that we were able to provide the investors with the forms for registering claims in the first two weeks of August as planned. It is a good sign of the positive reception of the claim registration by the investors that, one week later, we have already had more than 30,000 forms returned, frequently with an indication that the investor agrees with the approach of the insolvency administration and that the calculations match their own calculations. We would like to express our gratitude to the investors for their positive cooperation”, said the insolvency administration in summary.

A hotline has been set up to answer individual questions associated with the claim registration and the creditors' meetings under the numbers 089 6416060 and 089 64160659. In addition, detailed questions from investors are evaluated and the relevant answers for all P&R investors have also been made available on the website www.frachtcontainer-inso.de.

“Our aim is to keep creditors and investors as well informed as possible and to make the processes in the insolvency proceedings as transparent as possible. The questions and answers are therefore updated regularly”, says Dr Jaffé.

Various complexities have arisen from the responses received so far, and the insolvency administrators would like to provide some brief information about them in this notice:

Why have the insolvency administrators declared non-performance of existing contracts with the investors?

When the insolvency proceedings are opened, the insolvency administrators must declare whether they (can) perform the existing contracts or not. In this regard, the Insolvency Code (InsO) specifies the following (Section 103): “If a mutual contract was not or not completely performed by the debtor and its other party at the date when the insolvency proceedings were opened, the insolvency administrator may perform such contract replacing the debtor and claim the other party's consideration. If the administrator refuses to perform such contract, the other party shall be entitled to its claims for non-performance only as an insolvency creditor.”

In the case of P&R, in a situation in which the regular rental income does not come close to being sufficient, the insolvency administrator has no other option than to declare non-performance of all rental contracts. Indeed, the fact that claims arising from the rental contracts can no longer be fulfilled was precisely the circumstance that triggered the insolvency. If the insolvency administrator chose to perform the contracts with the investors, which he cannot meet out of the insolvency assets due to a lack of funds, the administrator would be in breach of duty.

The legal consequence of the declaration of non-performance of the contracts means that the investors can no longer enforce any contractual claims, instead they have a statutory claim for damages for non-performance, which they can register to the table (see above, Section103 InsO). According to this, the investor must be put into the position he would have been in if the contract had been performed properly. This is taken into consideration in the forms for claim registration according to the interests of the investors.

When registering a claim, are the investors required to consent to the declaration of non-performance?

No, the declaration of non-performance of the contracts is a legally prescribed (see above, Section 103 InsO), "unilateral" declaration of intent by the insolvency administrator and thus does not require the consent of the investors. For the investors, this results in a claim for damages due to non-performance, which they can register to the table (see again above, section 103 InsO). According to this, the investor must be put into the position he would have been in if the contract had been performed properly. This is taken into consideration in the forms for claim registration according to the interests of the investors.

When registering a claim, are the investors required to waive any rights to preferential settlement or to separate satisfaction?

No. However, according to the regulations in the insolvency code, you must make a declaration stating whether you are claiming such rights. This is set out in the legislation (section 28(2) InsO): "In the order opening the insolvency proceedings the creditors shall be required immediately to inform the insolvency administrator which security interests they claim to have in personal property or rights of the debtor. Details are to be provided of the object of the claimed security interest, the nature and causal origin of the security interest, as well as the secured claim. Any person who by fault omits to provide this information, or provides it late, shall be liable for the consequent damage."

The claims specified in the forms have been calculated based on the fact that the investors are not claiming any rights to preferential settlement or to separate satisfaction. This is because no such rights exist based on a legal examination of the facts. However, the fact that the investors do not have any valid security interests is not due to the election of non-performance but due to other reasons:

A right to separate satisfaction (according to Section 47 InsO) may only be claimed by persons who claim that an item is not part of the insolvency assets as a result of a right *in rem* (the right to a particular piece of property). In this case, the sale is not made by the insolvency administrator but by the creditor outside of the insolvency proceedings. Any person who claims a right of separate satisfaction in insolvency proceedings can consequently not demand at the same time that the insolvency administrator sells the item in question on his behalf but would have to sell it himself, which also has an influence on the amount of the claims that he can make in the insolvency proceedings. Any revenue from the sale would, of course, have to offset. As it is factually and legally impossible for the investors to sell the leased containers, the calculation of the amount of the insolvency claim to be registered would be subject to the investors not demanding any rights to separate satisfaction.

In fact, no such rights exist either: In order to claim a right of separate satisfaction, the investors must first state and prove that they have acquired ownership of specific containers. This is not possible in this case for multiple reasons.

Investors who do not have a certificate cannot show this proof and can also not produce a relationship to specific rental income. In legal protection proceedings, the Landgericht München I (Munich Regional Court) confirmed that there is no transfer of ownership in the absence of compliance with the certainty principle. Moreover, it emphasised that it would be up to the investors to prove which right applied to the transfer of ownership.

But even investors who have been issued with a certificate have not acquired ownership. The investors would, specifically, have to prove that they had acquired a specific container and that the company from which it had acquired this container was the owner, and from whom that company had, in turn, acquired ownership, via P&R in Switzerland down to the manufacturer of the container. There is also the fact that some of the containers - and particularly those that are named in certificates - were sold multiple times in succession to different investors and bought back, sometimes by different companies and usually without or with insufficient internal documentation of the processes. Moreover, some of the containers named in the certificates are not (or no longer) present or they refer to completely different containers than those that the investors wanted to acquire.

A right to preferential settlement in accordance with Section 51 InsO would presuppose that a certain item had been transferred to provide security for a claim. This is also not the case here (see above). While some of the agreements with the investors may include assignment provisions, in some cases also formulated as a contract transfer, from a legal perspective there is a lack of at least the required specificity, causing such assignments to have no meaning. In addition, the assignment in accordance with the formulations in the contracts presupposes the acquisition of property, which was not the outcome in this case.

Moreover, it would not make economic sense for investors to attempt to enforce individual claims against the Swiss company E&F. This company is merely a service provider, whose task it was and is to manage to container fleet and to pass on the rental income to the German companies. It was precisely the fact that E&F was no longer in a position to provide sufficient funds to the German companies to meet the demands of the investors that triggered the insolvency. Nothing has changed in this respect.

It remains in the interest of all investors to avoid a collapse of the structures in Switzerland, which could lead to a total loss for the investors. Because without E&F, the contractual rents could no longer be collected. There would be a risk that the container fleet would be abandoned. Pledging the shares in favour of the German companies also ensures that any assets present in Switzerland will be credited to the German creditors.

Creditors who have no right of separate satisfaction or preferential settlement, however, profit equally from the quota payments on their justified claims from the revenues generated by the insolvency administrator as part of the sale of the assets available.

What happens if my claim has not been received by 14 September?

The court set a deadline of 14 September 2018 for claim registrations in accordance with the requirements of the insolvency code (Section 28 (1) InsO). This deadline was also justified by the fact that the registrations must have been received before the creditors' meetings, which will start to be held from 17 October 2018. However, investors/creditors can still register claims after 14 September 2018. The insolvency court may charge a small fee if a later examination date needs to be set to examine the claim registrations that are received later.

Can I send a representative to the creditors' meeting?

Any person who cannot participate individually in the creditors' meetings can also send a representative. The insolvency

administrators have prepared a form for this situation which the investors can use if, for example, they want to be represented by a family member. The form is available on the information website on the Internet set up specifically for P&R investors at www.frachtcontainer-inso.de.

The legislation provides that only creditors may participate in creditors' meetings, in this case they are almost exclusively the P&R investors (Section 74 (1) InsO). As the report meetings are non-public court dates, representation by persons other than family members is generally only possible by lawyers, because the representation of a creditor in a creditors' meetings is a legal consultation, which is reserved for lawyers under the provisions of the Legal Services Act (Rechtsdienstleistungsgesetz). Otherwise, only the competent district court can decide who may participate in creditors' meetings.

What will happen in the creditors' meetings, what will be voted on?

The report meeting is the first creditors' meeting in insolvency proceedings to which all creditors are invited. The procedure in the report meetings is largely prescribed by law: According to Section 156 (1) InsO, in the report meeting, the insolvency administrator must report on the economic situation of the debtor (in this case the insolvent P&R Companies) and their causes. The insolvency administrator must also set out whether there is any prospect of carrying on the debtor's company in whole or in part, what possibilities exist for an insolvency plan and what the implications for the satisfaction of the creditors would be in each case. In addition, various key votes take place at the report meeting, for example the confirmation of the insolvency administrator and confirmation or supplementation of the creditors' committee.

Creditors and investors will find continuously updated answers to other questions on the official information website specifically set up for the insolvency administration at www.frachtcontainer-inso.de.

Objective: Minimise the losses for investors and achieve the best possible sale of the containers

The primary objective for the insolvency administrators is still to minimise the losses for investors by achieving the best possible sale of the existing container fleet. "Such a sale and satisfaction of investor claims outside the German insolvency proceedings is legally and factually excluded. Only a coordinated sale as part of the insolvency proceedings will keep the losses for the investors as low as possible. The investors will receive a share of the revenue from the coordinated sale though the quota paid on their insolvency claims. However, such a sale can only be successful if it can proceed without disruption. Disruptions to the coordinated sale process

could lead to significant losses for the individual investor as well as for all the creditors, potentially leading to total loss. The many positive responses demonstrate that almost all investors are in agreement with this approach. We would like to thank the investors for their trust", says Dr Michael Jaffé.

The container rental business operated by the non-insolvent Swiss P&R company currently remains stable. In particular, the business relationships of the Swiss P&R company to leasing companies and end-users remain intact, so revenue continues to be generated. Due to the contractual and historically developed structures, the Swiss company acts as a service provider which collects the revenues and should pass them on.

The protection and stabilisation measures that were achieved temporarily and are planned to continue, the revenue from the marketing of the containers as well as the revenue from the sales of the assets of the Swiss company, including their holdings, should ultimately be credited to all investors and creditors of the German P&R companies and will be distributed to the creditors as part of the German insolvency proceedings.

At this stage, a rushed sale of the container fleet, which is rented on good terms and almost fully loaded, would destroy value unnecessarily. "The aim is to achieve the best possible results for creditors. We have received multiple expressions of interest for the containers from third parties who only want to pay a fraction of their value. However, our objective is to minimise the losses for investors and to prevent third parties from exploiting the opportunity to make a profit at the expense of the investors", say Dr Jaffé.

Additional information

Dr Michael Jaffé is one of the most experienced and renowned insolvency administrators in Germany. For over two decades he has regularly been appointed by the courts in difficult and large insolvency cases where the objective is to secure the assets for the creditors and to realise the best possible value. Dr Jaffé's best-known national and international insolvency proceedings include the media group KirchMedia of the late Dr Leo Kirch, the former global memory chip manufacturer Qimonda and the German subsidiaries of the Petroplus group, formerly the largest independent refinery operator in Europe, whose shares were also held by a company in Switzerland. In the insolvency proceedings over the assets of Petroplus Raffinerie Ingolstadt GmbH, he was recently in a position to inform the creditors that their claims could be recovered in full. In addition, he has successfully concluded the restructuring of the caravan producer Knaus Tabbers, Grob Aerospace and Cinterion Wireless Modules Holding GmbH.

As insolvency administrator of Stadtwerke Gera Aktiengesellschaft, a holding company for the investments of the city of Gera, which was concerned with providing public services for approximately 200,000 people, he was able to quickly stabilize the operations after the insolvency application and subsequently maintain them without restrictions. In the

meantime, a permanent solution to continue operations was implemented for all holdings. As the insolvency administrator for the insolvent fund company NARAT GmbH & Co. KG, Dr jur. Michael Jaffé sold one of the largest commercial real estate portfolios in North Rhine-Westphalia. He is currently the appointed insolvency administrator for ProHealth AG, Phoenix Solar AG and Dero Bank AG.

Dr Philip Heinke has been a lawyer at the law firm JAFFÉ for fourteen years, and for ten years has been appointed nationally as insolvency administrator. He has extensive experience in cross-border insolvency as well as capital investment cases.

The law firm **JAFFÉ Rechtsanwälte Insolvenzverwalter** has been one of the leading law firms in the areas of insolvency administration, insolvency law and litigation for more than two decades, in particular for complex and cross-border proceedings. The firm's lawyers do not view company crisis and insolvency as an expression of business failure, instead they make every effort to ensure success for the company in insolvency through restructuring, maintaining jobs and at the same time ensuring that creditors needs are met in the best possible way. This applies in traditional insolvency proceedings as well as in self administration and umbrella proceedings. The firm's lawyers are regularly appointed as insolvency administrators and trustees in difficult cases; their experience and independence guarantee fair and successful proceedings.

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