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Insolvency Tourism - A View From The Bench

**Professor Dr Heinz Vallender, Chief Justice at the Cologne
Bankruptcy Court**

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Reasons for the Insolvency tourism of German debtors to the UK

- ↘ The long duration of a German Insolvency proceeding until the decision on discharge of residual debt (see sec. 287 IC)
- ↘ Refusal of Discharge of residual Debt (see Sec. 290 and Sec. 295 IC)

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Which debtors 'escape' to England?

- ← Lawyers,
- ← physicians,
- ← accountants,
- ← tax consultants,
- ← notary public
- ← and other debtors who have sufficient financial resources.

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Discharge of Residual Debt

Section 286: Policy

If the debtor is an individual he shall be discharged under sections 287 to 303 of his obligations not performed by way of the insolvency proceedings and due to the creditors of the insolvency proceedings.

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Section 287: Debtor's Request

(1) Discharge of residual debt shall require a request on the part of the debtor, which should be joined with his request to open the insolvency proceedings. If it is not joined with the latter, it shall be submitted within two weeks of the reference in accordance with section 20 subs. 2.

(2) Such request shall be accompanied by a statement assigning the debtor's garnishable claims to emoluments due to him under a service relationship or to emoluments replacing them to a trustee to be appointed by the court **for a period of six years following opening of the insolvency proceedings**. If the debtor had assigned or pledged such claims to a third party already prior to his request he shall indicate such assignment or pledge in his statement.

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Hurdles on the way to Discharge of Residual Debt

Section 290: Refusal of Discharge of Residual Debt

(1) The order shall refuse discharge of residual debt if such refusal has been requested by a creditor of the insolvency proceedings at the final meeting and

- 1. if the debtor has received a final verdict for commission of a criminal offence under sections 283 to 283 c of the Criminal Code;*
- 2. if the debtor by wanton act or gross negligence has given a false or incomplete statement on his economic condition in writing in the last three years prior to the request to open the insolvency proceedings or subsequent to this request in order to obtain a loan or grants from public funds or to avoid making payments to public funds;*
- 3. if the debtor has obtained discharge of residual debt in the last ten years prior to the request to open the insolvency proceedings or subsequent to this request, or if such request has been refused pursuant to section 296 or 297;*

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4. the debtor by wanton act or gross negligence has impaired the satisfaction of the creditors of the insolvency proceedings in the last year prior to the request to open insolvency proceedings, or subsequent to this request, by entering into inappropriate obligations, by wasting property or by delaying the opening of the insolvency proceedings without any expectancy of an improved economic condition;

5. if the debtor by wanton act or gross negligence has infringed the obligations of disclosure or cooperation under this statute during the insolvency proceedings; or

6. if in the lists of his property, income, creditors and claims against him, which are to be submitted pursuant to section 305 subs. 1 No. 3, the debtor has by wanton act or gross negligence made false or incomplete statements.

(2) A creditor's request of refusal shall be admissible only if a reason why a discharge of residual debt should be refused is shown to the satisfaction of the court.

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Hurdles on the way to Discharge of Residual Debt

Section 295: Obligations of the Debtor

(1) During the period of the statement of assignment the debtor shall be obliged to

- 1. engage in adequate gainful employment or seek such employment and not refuse any reasonable activity;*
- 2. transfer to the trustee half the value of property acquired by him by way of succession or with respect to his future status as heir;*
- 3. inform the insolvency court and the trustee immediately of any change of residence or place of employment, not conceal any emoluments covered by the statement of assignment or any property covered by No. 2. and disclose to the court and the trustee at their request his gainful employment or his efforts to find such employment as well as his emoluments and his property;*

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4. make payments to satisfy the creditors of the insolvency proceedings only to the trustee, and not provide an individual creditor with an advantage.

(2) If the debtor is self-employed he shall be obliged to satisfy the creditors of the insolvency proceedings by payments to the trustee as if he had entered into an adequate service contract.

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Hurdles on the way to Discharge of Residual Debt

Section 296: Contravention of Obligations

(1) At the request of a creditor of the insolvency proceedings the insolvency court shall refuse discharge of residual debt if the debtor contravenes any of his obligations during the period of the statement of assignment and thereby impairs satisfaction of the creditors of the insolvency proceedings; this shall not apply to debtors without faulty conduct. Such request may be filed only within one year of the date when the creditor became aware of the contravention of an obligation. It shall be admissible only if the facts mentioned in the first and second sentences are shown to the satisfaction of the court.

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Hurdles on the way to Discharge of Residual Debt

2) Prior to its decision on the request, the court shall hear the trustee, the debtor and the creditors of the insolvency proceedings. The debtor shall provide information concerning fulfilment of his obligations and at the request of the creditor confirm the correctness of his disclosure by an affidavit. If without a reasonable excuse he does not provide the disclosure or the affidavit within the deadline set for him, or does not appear at a meeting docketed by the court for him to provide the information or the affidavit, although properly summoned and without giving a reasonable excuse, discharge of residual debt shall be refused.

(3) The requesting party and the debtor may bring an immediate appeal against the decision. Refusal of discharge of residual debt shall be published.

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Actions by creditors

Request to open a secondary Insolvency proceedings.

Problem:

Is there a debtor's domestic establishment in the sense of Art. 2 lit. h of the EIR?

see: **District court of Hannover**, 10.4.2008, file number: 20 T 5/08, Source of information: NZI 2008, 631

guideline

An establishment in the sense of Art. 2 lit. h of the EIR is in Germany if a debtor residing in England works as a chief physician and officer in a German clinic.

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Effects of residual debt issued in England

According to Art. 4 (2) sentence 2 lit k of the EIR, the rights of the creditors after the closure of the proceedings is governed by the *lex fori concursus*. This primarily concerns the issue of a discharge of residual debt in favour of the creditor after the closure of the proceeding.

Recognition of discharge of residual debt in Germany?

- ↘ The EIR does not contain an explicit provision for the recognition of outstanding debts in a member state of the European Community.

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↘ Art. 16 of the EIR shall not apply.

But:

↘ The recognition of residual debt affects the rights of creditors after the bankruptcy proceedings.

↘ Therefore it is appropriate to recognize the decision as another decision in the sense of Art. 4 (2) sentence 2 lit k of the EIR without any formalities

or

↘ Art. 25 (1) subpara 2 contains the discharge of residual debt as an insolvency-related proceedings.

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Result:

The recognition of residual debt is regarded as a consequence of the recognition effect of the opening decision.