

# Seminar on Logistics and Business Opportunities in (Hamburg) Germany

Hamburg is well known for its role as a gateway to the European market due to its excellent infrastructure and logistics connections to hinterland Eastern Europe. It is home to more than 400 Chinese companies and regarded as one of the most dynamic centres in Europe.

On 7<sup>th</sup> December, Hamburg Business Development Corporation organised a seminar 'Hamburg – Gateway to Europe: logistics competence for Hong Kong companies' to inform local companies the logistics and business opportunities in Hamburg. The event was supported by Hong Kong Trade Development Council, The Chinese General Chamber of Commerce, Hong Kong Association of Freight Forwarding and Logistics Ltd., Hong Kong Logistics Association, Transport and Logistics Services Council, and the Hong Kong R&D Centre for Logistics and Supply Chain Management Enabling Technologies.

Speakers included: Dr. Jürgen Glaser, Mr. Ralf Fiedler and Ms. Aresa Brand of Logistics Initiative Hamburg, Ms. Claudia Roller of Chairman Port of Hamburg Marketing Association, Mr. Thomas Mandelkau, Managing Director of Hapag-Lloyd (China) Ltd. Hong Kong, Mr. Florian von Ortenberg of Roedel & Partner, and Mr. Andreas Gehrmann of TÜV Rheinland Japan. The event attracted 50 participants. ■



# China (Shenzhen) International Logistics and Transportation Fair 2009

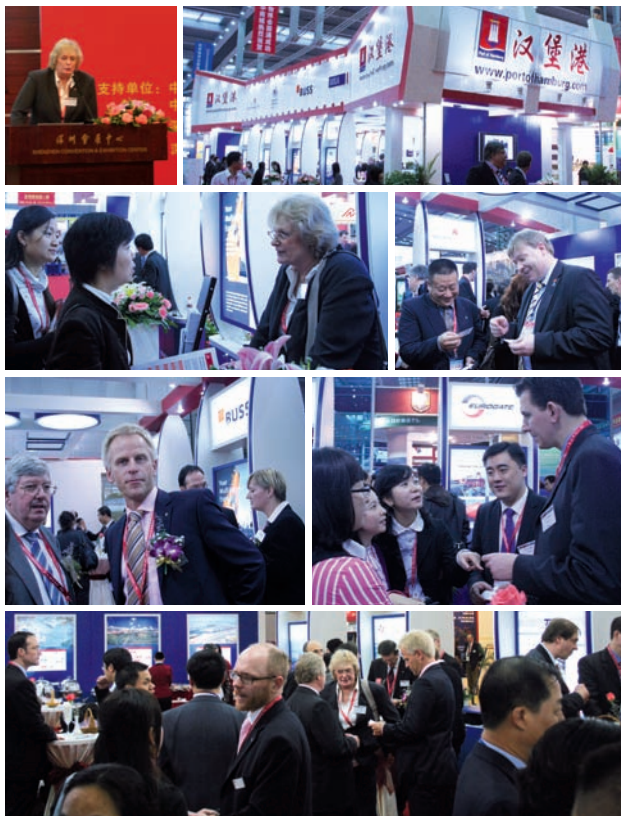
## Port of Hamburg (HHM)'s Participation

Under the common banner of 'The Port of Hamburg', Port of Hamburg Marketing (HHM) led a delegation of 22 people to take part at the China (Shenzhen) International Logistics and Transportation Fair 2009 in Shenzhen (CILF) from 9<sup>th</sup> to 11<sup>th</sup> December 2009. It was the third time for HHM to exhibit, and 2009 saw the largest stand size of 144 sq.m, 50 percent more than in the previous years.

The stand is co-exhibited by HHM member companies Brunsbüttel Ports GmbH, Buss, EUROGATE GmbH & Co. KGaA KG, Hamburger Hafen und Logistik AG (HHLA), Hamburg Port Authority (HPA), TCI International Logistics GmbH, and TCO Transcargo GmbH.

During the three-day trade fair representatives of the Hamburg companies, together with Port of Hamburg Marketing representatives Ms. Claudia Roller and Mr. Mathias Schulz and representatives of the Port's Hong Kong branch office, fostered contacts with partners and customers in the import and export, port, and transport industries, especially at a booth cocktail reception held on 9<sup>th</sup> December.

On 10<sup>th</sup> December, Ms. Roller gave a speech on 'Forward Strategy of the Port of Hamburg Amid the Economic Crisis' at the CILF Forum. Hamburg Port Authority also had a brief discussion with Mr. Zhang Siping, Vice Mayor of the Shenzhen Municipality Government to exchange and intensify partnership with the Shenzhen ports in the near future. ■



# Corporate Investments in Germany

## Foreign Economy Law brings New Hurdles for Foreign Investors

The global financial and economic crisis has led to decreased share prices and enterprise values of many companies. Therefore takeovers of distressed or undervalued targets become more important – also in Germany where many board members negotiate with foreign investors about entering as new shareholders. In this environment the new German Foreign Economy Law (FEL / Aussenwirtschaftsrecht) is of importance since it enables the German Federal Ministry of Economy to prohibit purchases of German enterprises by investors from outside the European Union (EU).

Investors from all over the world have repeatedly been involved in M&A transactions in German enterprises. Porsche, Daimler, Opel, Monier and Escada are some well-known examples in this context. And there is likelihood for more acquisitions of enterprises in several German industries given that many economists foresee only a slight upward of the economy in 2010. However, the FEL has brought new hurdles for acquisitions in German enterprises. The Federal Ministry of Economy is now entitled to assess and restrict acquisitions if a domestic target is being purchased directly or indirectly by an investor from outside the EU or EFTA or by a domestic investor being owned by a non-EU shareholder with a stake of at least 25 percent.

The new law is applicable to every German enterprise – irrespective of its legal form, size or capital market access. Furthermore the target need not belong to any certain industry which is one of the most important changes. The former FEL had also contained restrictions for foreign investors on purchases of German enterprises but was limited on German defence technology industries. Because of this narrow scope the former law was hardly of practical importance. Meanwhile, the new law contains no industry-related limitations and could therefore be relevant for many M&A transactions.

External investors are qualified as such if they are located neither in the EU nor in a member state of the EFTA (i.e. Iceland, Norway, Liechtenstein, Switzerland). The Channel

Islands (e.g. Jersey, Guernsey) also belong to the territory of the community. In contrast, investors from the Cayman Islands, Bermuda and other islands situated overseas qualify as external. Moreover, the purchase must be based on a certain legal act and lead to a stake of at least 25 percent (blocking minority) after closing for the external investor. Stakes below this threshold cannot be subject to any assessments by the Ministry.

Furthermore, a factual and serious threat to the public order or to public safety has to result from the purchase. The government intended that the new limitations should meet high standards and prohibitions should be exceptional cases. Thus, the threat must affect a basic interest of the German community (e.g. supply of electricity and services of general interest such as telecommunications, postal services). Hence, there is a risk for prohibitions with regard to corporate transactions within industries of strategic relevance for the public supply: huge pharmaceutical or chemical companies, railway networks, harbour services or companies providing the public with energy are sensitive. But this also depends on the size of the enterprise and on its relevance to the supply with strategically relevant goods and services.

External investors striving for acquisitions in Germany could apply for a document of compliance by the German Federal Ministry of Economy beforehand, but are not obliged to do so. If they desist from an announcement they should bear in mind that the Federal Financial Supervisory Authority (BaFin) or the Federal Cartel Office (Bundeskartellamt) could inform the Ministry, thereby triggering an assessment. In case of a prohibition the Ministry is entitled to enforce its decision by forbidding or limiting the voting rights of the external investor. Furthermore the Ministry could also appoint a trustee that unwinds the purchase. Therefore external investors should consider an application for a document of compliance at an early stage, ideally in combination with passing on the complete transaction files to the Ministry. Only in this way is a high level of transaction safety achieved. ■

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# Legislative Proposal on Corporate Rescue Procedure

In response to the financial tsunami, the Government, in January 2009, adopted the recommendation made by the Task Force on Economic Challenges, chaired by the Chief Executive, to advance its review of the introduction of a corporate rescue regime – Provisional Supervision (PSN). It is intended to provide a relief measure or breathing-space to businesses that are fundamentally sound but suffer from short-term financial difficulties, and ultimately creating better outcomes for creditors.

On 29 October 2009, Financial Services and the Treasury Bureau (FSTB) announced a three-month public consultation on the review of legislative proposals on corporate rescue procedure (Proposal), and invited public views on proposals and options to the following key elements:

- Initiation of provisional supervision
- Moratorium
- Employees' outstanding entitlements
- Provisional supervisor
- Insolvent trading
- Secured creditors
- Voting at meetings of creditors

Since the 1997 Asian Financial Crisis much attention has been paid to insolvency law reform in the region which resulted in formal, informal and quasi-formal workout procedures being developed. Over the years, Hong Kong SAR has been competing against its neighbouring cities to be the Asian financial centre, yet it is still lacking a formal corporate rescue regime to date. Even Mainland China has its new Enterprise Bankruptcy Law, with a major goal to facilitate corporate rescue, promulgated on 27 August 2006 and came into operation on 1 June 2007.

The existing options to companies in Hong Kong in financial difficulties are; Scheme of Arrangement

(Scheme) under section 166 of the Companies Ordinance (Cap 32); restructuring through provisional liquidation; and non-statutory arrangement with creditors. However, each option has its own shortcomings. The Scheme is costly and time consuming due to heavy court involvements. Similar to non-statutory arrangement, Scheme also lacks the necessary moratorium that creates uncertainty to all parties. On another hand, the messages from Court decisions are clear that provisional liquidators should only be appointed where the company's assets are in jeopardy, and not solely for the corporate rescue purposes.

The key advantages of PSN include:

- the transfer of control of the company, timely and at minimum costs to Provisional Supervisor (PSR) during the period of PSN, and this is likely to appeal to creditors who may well have lost faith in the directors;
- protection of the company from attacks from creditors while PSR formulates a rescue plan;
- minimum court involvement to save time and costs;
- as creditors are the ones affected, they are also the ones who will be given power to decide on fate of the company;
- that PSN is not lengthy, so creditors are not precluded for any substantial period from taking action against the company if a rescue plan is not viable; and
- that if creditors do not support the rescue plan or extend moratorium, PSN will end and creditors' voluntary winding up of the company is deemed to commence.

## The Proposal – Provisional Supervision Moratorium

One of the key features of PSN is the statutory moratorium period, where all civil proceedings (with some exceptions) against the company would be stayed, for the PSR to formulate a voluntary arrangement proposal for restructuring of the company which will be put on vote at the creditors' meeting. PSR may apply for extension if more time is needed, but this is subject to the approval of creditors and the Court upon certain conditions being met.

## Provisional Supervisor and Personal Liability

It was proposed that only certified public accountants and solicitors registered in accordance with the Professional Accountants Ordinance (Cap 50) and Legal Practitioners Ordinance (Cap 159) respectively may take up the appointment of PSR.

Unlike liquidation which consists of mainly procedural matters, PSR has to review the financial position of a company, assess the feasibility of carrying out a corporate rescue, and formulate a restructuring plan. Qualified accountants and solicitors cover a wide spectrum of professionals with varying levels and areas of experience and competence, and there is a real risk that the process could be easily mishandled or even abused if not properly performed. Certain insolvency practitioners and professional bodies recommended that only qualified accountants and solicitors with relevant restructuring knowledge and experience should act as PSR.

It was also proposed to make the PSR personal liable for any contracts they had entered into when performing their functions. The purposes of personal liability are (i) to encourage PSR to exercise prudence and good judgement; (ii) to bolster creditors' confidence to continue trading with the company; and (iii) to prevent unqualified or connected persons from taking on the appointment of PSR.

While some of the insolvency practitioners and professional bodies support the proposal to impose personal liability, PSR should be indemnified out of the assets of the subject company. The value of the assets of a financially-distressed or insolvent company is another matter.

## Employees' Outstanding Entitlements

Treatment of arrears of wages, severance payments and other statutory entitlements remain the most controversial and difficult issue to date. The views from representative bodies of employees, employers, banks, professionals and academics were divided.

A number of options based on previous proposals are being put forward in the current Proposal, but each has some pros and cons. The good news is that all options removed the onus of having to set aside sizeable funds to cover employees' outstanding entitlements and replace with arrangement that are more attainable for a financially-distressed company to commence PSN.

Reaching consensus and finding balance between protecting employees' interest, and trying to rescue a

distressed company for the benefit of the general body of creditors is not an easy task.

## Insolvent Trading

Insolvent trading (INST) occurs when a company incurs debts when it is insolvent. In order to dampen corporate wrong-doing and initiate greater director responsibility, the Government, among other issues, intends to introduce INST to Hong Kong for the first time. The objectives are simple enough. The directors, including shadow directors, should not be able to hide behind the corporate veil to do irresponsible mischief to others who trade with them in good faith.

The INST provisions are intended to be applicable to companies in general and not only in the context of PSN. These provisions will complement PSN by encouraging directors to act on insolvency and seek professional help earlier rather than later. However, directors will be discouraged if the appointment of PSR would trigger the enforcement of personal guarantees against them. The business community would most probably be concerned with the effects of INST to directors.

Most insolvency practitioners and professional bodies support the introduction of INST as the "stick". On the other hand, I have proposed to the FSTB that the directors should also be given the "carrot" of safe haven if they have provided personal guarantees to financial institutions in typical scenarios in relation to money owed by their company, because at least while a company is subject to PSN, guarantees cannot be enforced against the directors (without leave of the Court) where they relate to company liabilities. Once the voluntary arrangement proposal is accepted or rejected at the creditors' meeting with no further extension of moratorium, PSN ends and proceedings can then be taken against the guarantors.

The Government has to balance the needs of the business community to take risks, and prevent insolvent trading and dishonest behaviour. Introducing the Proposal into the Legislative Council and winning the support from legislators representing various interested parties makes it even a more delicate matter. ■

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