



JONES DAY  
**COMMENTARY**

## GERMAN FEDERAL SUPREME COURT DECIDES ON SET-ASIDE OF GLOBAL ASSIGNMENT OF TRADE RECEIVABLES

In a judgment of November 29, 2007 that is of particular interest to financial institutions involved in asset-based lending, the German Federal Supreme Court (*Bundesgerichtshof*) allayed concerns that a global assignment (*Globalzession*)—the assignment of all existing and future trade receivables to a lender to secure loans—would not survive the insolvency of the respective originator.<sup>1</sup> This decision was eagerly awaited because various judgments of German Higher Regional Courts (*Oberlandesgerichte*) had raised concerns lately that the security interest over receivables created in the last three months before the insolvency application of the originator could easily be set aside by an insolvency administrator and thus become unenforceable. A set-aside was deemed possible if the receivables were created in the last month before the originator's insolvency application or the receivables were created in the second and third month before the insolvency application and (i) the

originator was unable to settle its due liabilities at the time, or (ii) the lender was aware that the assignment would disadvantage other creditors.

This meant that the most recent and generally most valuable trade receivables, specifically the ones created in the last month prior to the insolvency application, were no longer part of the collateral. A further cause for concern was that the other popular form of “revolving” security interest in Germany—the transfer of ownership by way of security of current and future goods stored in a warehouse (*Sicherungsübereignung eines Warenlagers*)—would have been subject to the same set-aside. German banks had taken the view in official press releases that these Higher Regional Court judgments seriously impair their ability to finance *Mittelstand* companies and called for a change in the law in the event that the Federal Supreme Court upheld this jurisdiction.

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1. The full text of the decision was not yet available at the time this *Commentary* was written. The *Commentary* is based on a press release published by the press office of the Federal Supreme Court.

In its recent judgment, the Federal Supreme Court discarded this jurisdiction by the Higher Regional Courts. As was expected, the court has not ruled out a set-aside entirely, but the requirements will be much more difficult to meet. The security interest over trade receivables created in the critical three-month period prior to the application can, as a rule, only be set aside if the originator was unable to settle its due liabilities at the time *and* the lender was aware of this fact.

The main advantages for secured lenders are that the security over receivables created during the last month prior to the application cannot just be set aside without any further (substantial) requirements and that only security rights over trade receivables created after the lender became aware of the originator's inability to pay will be affected by any set-aside. Once lenders know of the originator's inability to pay, they can take appropriate action to secure their rights.

## LAWYER CONTACTS

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