

Abstract – doctoral thesis

The insolvency of hospitals

Economic crisis and insolvency of a hospital owner in the light of public responsibility

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The insolvency of hospitals – an inconceivable situation until a few years ago – tends to become a core challenge in the German healthcare sector.

Outline

The thesis comprises three chapters. Firstly, it concisely illustrates the basic structures of hospital regulation and analyses the main reasons for an economic crisis. Whereas mismanagement and unprofitable investments lead to problems in any business area, the idiosyncrasies of the demand planning as well as the financial regulations in the hospital sector bear additional multiple risks for the management.

Secondly and from a constitutional point of view, the thesis outlines the dormant conflict between the public interest in an incessant and complete medical care and the “playing rules” laid down by the German Insolvency Code, namely the purpose of collective and best possible satisfaction of the debtor's creditors. Initially the market orientation of the Insolvency Code is shown followed by a deeper insight into the public obligation to secure an appropriate and need-based hospital supply (*bedarfsgerechte Krankenhausversorgung*).

The thesis is centrally concerned with deducing the key principles of a warranty law in the hospital sector (*Krankenhausgewährleistungsrecht*), which further needs to consider the challenges arising out of the continuing demographic change.

Thirdly, the thesis deals with selected and so far little noticed questions under insolvency law, mainly in connection with the financial structures of hospitals in Germany, which are subject to several and complex statutory provisions.

Key findings

Analysing the principles of German hospital law reveals that the hospital owner is facing a high regulatory intensity in the relevant market. Not only is it necessary to consider the demand planning, i.e. the admission and the determination of the supply mandate (*Versorgungsauftrag*), but it is also important to mention the financial structures.

By pursuing an economic approach, the thesis shows in detail that the hospitals are in competition with each other, whereas crucial elements of a competitive market, such as market transparency,

unlimited market access and a decentral process of price determination via a competitive process are absent. The decision as to what extent services are offered is not subject to the hospital's free disposal. Instead, the owner is obliged by statutory requirements to provide a comprehensive catalogue of health services. Hence, no limitation or variation of services can be carried with regard merely to economic reasons. So, hospitals authorised to the treatment of statutory insured patients are offering their services with a regulated price on the basis of an obligation to contract.

Under constitutional aspects, the State has to secure a minimum provision of hospitals. This derives from Art. 2 para. 2 s. 1, Art. 1 para. 1 of the German Constitution in conjunction with the principle of the social state, rooted in Art. 20. The duty is closely linked with the concept of a warranty law in other fields of public services (*öffentliche Daseinsvorsorge*), such as energy supply and telecommunication services. The responsibility to secure an appropriate hospital supply is imposed upon the Federal States. Whereas this does not lead to a duty to operate own hospitals, it does mean, that the Federal States bear the final responsibility to take countermeasures in cases of undersupply with hospitals. This may result in a conflict in cases where a hospital owner must file for insolvency.

Taking the results obtained by comparing the hospital sector with other sectors of public services into account, the author pleads for an alteration of parameters on which the structure of the German hospital sector is currently based on. Instead of trying to operate a decentralized hospital structure, inevitably leading to several unprofitable sites, the focus must shift to fewer, but larger hospitals combined with ensuring the emergency care (also) through other concepts, for instance the expansion of air rescue. In contrast, the existing structures cause a partially inefficient use of financial resources, which may result in the close-down – due to insolvency - of hospitals in areas already facing an undersupply. First and foremost, this is a problem mainly faced by rural areas, whereby the development is further intensified by certain effects of demographic change.

Lastly, the thesis proofs that all question arising at the interface between hospital and insolvency law can be addressed, provided that the characteristics of both fields of law are sufficiently borne in mind.