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Austrian Supreme Court allows sale of insolvency avoidance claims in recent landmark ruling - new dynamics ahead!

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Under Austrian law the prevailing view and by and large unquestioned sentiment for decades had been that insolvency avoidance claims must be asserted by the administrator and cannot be assigned to a third party. Only in recent times a few scholars started to question this position. Now, in a very recent landmark ruling of 17 June 2019 (17 Ob 6/19k), the Austrian Supreme Court overruled the prevailing view and declared the assignment of avoidance claims by the administrator permissible. This is a game changer and will bring more flexibility and new dynamics in Austrian insolvencies.

Facts of the Case

A company (the plaintiff) sold real estate prior to insolvency to the defendant (who was the wife of the shadow director of the company) for an amount of around EUR 770,000. The sale was arguably to the detriment of the company's creditors. After insolvency proceedings had been opened over the company, the insolvency estate lacked funds to sue the defendant out of this real estate deal. The appointed insolvency administrator therefore sold all possible claims against the defendant in connection with the real estate deal to the plaintiff for a purchase price of EUR 5,000 (this arguably low amount was mainly justified by litigation and collection risks and related costs).

The plaintiff sued the defendant claiming an amount of around EUR 470,000 and *in eventu* asked the court to unwind the purchase agreement. The plaintiff's main arguments were based on Austrian insolvency avoidance law, just like an administrator would usually do. The defendant, among others, brought forward that the plaintiff was not entitled to assert avoidance claims because such claims could only be asserted by an administrator who could not validly assign such claims. The first and second instance courts both declined the claim and decided in favor of the defendant. The Supreme Court took the opposite view and ruled that avoidance claims can validly be assigned by the administrator and that the plaintiff is therefore, formally entitled to this suit. The case was therefore referred back to the first instance court to decide again.

Arguments of the Supreme Court

For decades Austrian scholars took the position that the assignment of avoidance claims is not possible. Main arguments were the "avoidance monopoly" (*Anfechtungsmonopol*) of the administrator and the fact that the only purpose of avoidance claims is to serve the interest of the

creditors as a whole (it shall therefore inseparably be linked to the insolvency estate and only exist as long as proceedings are running). Only in recent years a few scholars started to take a different view, also in the light of the fact that the German Supreme Court has started allowing the assignment of avoidance claims under certain circumstances in 2011 (Austrian and German insolvency avoidance regimes are similar in certain aspects).

The above developments are not least owed to practical needs. Many insolvencies lack sufficient assets and administrators therefore often face the situation of not being able to pursue avoidance claims. Raising external financing often proves difficult (in particular in smaller cases) and selling the claim was not an option so far. Besides, lengthy court disputes often block insolvency proceedings from being terminated or, in order to avoid such blockage, proceedings are terminated and administrators get appointed as trustees in order to enforce possible avoidance claims.

The Supreme Court made lots of efforts and weighed many arguments, analyzing literature dating back to the 1880s. In the end, it concluded that the main purpose of avoidance claims shall not be the avoidance monopoly of the administrator but rather the fact that such claims are assets of the insolvency estate which can be realized to the benefit of the insolvency creditors as a whole by selling them. Note that this general clarification of the Supreme Court does not mean that in individual cases, the assignment may still not be permissible (e.g. because the specific avoidance claim is not suitable for assignment or the purchase price for the avoidance claims is too low or even zero and therefore obviously contrary to the purpose insolvency law).

New dynamics ahead

The ruling is definitely good news for Austrian insolvency practice. It brings more dynamic in insolvency proceedings and gives administrators more flexibility in finding the best way to realize assets to the benefit of the creditors. It may also lead to shorter insolvency proceedings and bring new players on the table interested in purchasing avoidance claims from administrators.

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