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Insolvency & Restructuring - Austria

Retention of title and confusion of goods in insolvency cases

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Introduction

With the sale and delivery of a large quantity of branded goods subject to a larger retail chain's retention of title clause, confusion often arises over which goods were delivered by the seller at an earlier point and have been paid for and which are still unpaid goods.

In insolvency cases (especially when the buyers' inventory management system is insufficient), the question of the legal fate of the goods sold under a retention of title clause frequently arises. This is because it is unclear whether ownership is lost when paid and unpaid goods have been confused or whether a claim for separation and recovery can successfully be made during the retail chain's insolvency proceedings.

Ownership rights

Section 371 of the Civil Code governs the acquisition of ownership by confusion of "assets which cannot be distinguished, like coinage... or bearer bonds". It stipulates that the party that confused the goods has sole ownership if the items cannot be differentiated, or where such differentiation would be possible only through unreasonable expenditure. According to Section 371, if not limited to the confusion of assets, the retail chain that, before the insolvency, inseparably confused the goods subject to the retention of title clause with its own (paid) stock on hand will have sole ownership of all goods. In practice, insolvency administrators often attempt to stop suppliers from asserting such ownership claims.

However, according to Section 414 of the Civil Code – which deals with the issue of "artificial accession by way of processing or amalgamation in general" – the supplier does not lose its ownership. Where fungible goods have been confused, these provisions stipulate 'quantity ownership' in favour of both the insolvent retail chain and the supplier. Quantity ownership may be dissolved if the parties can prove which shares are theirs. To determine the shares, the goods subject to the retention clause and the retailer's own goods are combined.⁽¹⁾ For example, if 50 television sets are stored in the central warehouse (30 of which are not paid for and 20 of which are paid for), the seller is entitled to repossess 30 units of the total quantity, irrespective of whether these 30 units originated from the paid or the unpaid delivery.

The right to separation continues to apply if part of the goods that should have been delivered to the retailer's branches and the retained goods were confused with paid goods at the new storage locations.⁽²⁾ The seller's share will be determined from the total stock according to the inventory. For example, if 30 unpaid television sets are among a total quantity of 60 television sets, which have been distributed to the central warehouse and branches, the conditional vendor is still entitled to the separation of 30 units.

However, the question often arises as to what happens when a retail chain sells goods to consumers between the time of delivery and the opening of bankruptcy proceedings. Under these circumstances, it is undisputed that *bona fide* customers will acquire ownership of the goods.⁽³⁾

Based on the legal assumption that a dealer acting in good faith would first sell its own goods and then the goods under the retention of title clause, the goods that were already paid for will be sold first, followed by the unpaid goods, which will be sold under the retention of title clause.⁽⁴⁾ For example, if there are 50 television sets delivered (30 of which have not been paid for and 20 of which are paid for) and 15 television sets are sold between the time of delivery and the opening of the insolvency proceedings, the supplier has the right to separate 30 of the television sets; the liquidator may sell only the remaining five

television sets without restriction. The matter becomes problematic only if the dealer sells more than 20 television sets. This will then be at the expense of the seller's still unpaid goods.

Comment

A seller protected by a retention of title clause need not be concerned that it will lose its right to separation in cases where a contractual partner – after confusing paid and unpaid (identical) goods in its warehouse or outlets – files for bankruptcy. Therefore, it is imperative that sellers ensure that an inventory is taken immediately after insolvency proceedings are opened.

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Endnotes

⁽¹⁾ *Harnoncourt/Spitzer*, Eigentumsvorbehalt, Vermengung und Individualisierbarkeit, *ÖJZ* (Austrian lawyers' journal) 2014, 491.

⁽²⁾ *Harnoncourt/Spitzer*, *ÖJZ* 2014, 491 *et seq.*

⁽³⁾ Section 367 of the Penal Code.

⁽⁴⁾ *Harnoncourt/Spitzer*, *ÖJZ* 2014, 493.

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