

Insolvency & Restructuring - Austria

Securing rights of apartment buyers following developer insolvency

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The Property Developers Contracts Act aims to secure the rights of individuals who intend to buy newly built apartments in Austria. The act further aims to protect both the down payments made by buyers and such buyers' rights, including (but not limited to) warranty rights and damages towards a developer in case of the latter's insolvency.

Under Section 16 of the act, a buyer is entitled to insist on the developer assigning rights to warranty and damages towards subcontractors in case of the developer's insolvency. These rights are transferred to the buyer after insolvency proceedings have been opened with receipt by the trustee of a written request. There is no need for participating action on the part of the trustee or the developer. The claims are assigned on account of payment, which means that the warranty claim against the developer expires only insofar as the subcontractors rectify any defects. This provision was introduced in the interest of granting greater protection to buyers and overrides the principle of equal treatment of creditors enshrined in insolvency law.

In a recent judgment⁽¹⁾ the Supreme Court ruled that the developer's entitlements will transfer to the buyer exactly as they have already been held by the developer. In particular, the subcontractor will retain any objections towards the developer that have arisen until it was notified of the assignment. As a consequence, all agreements made by the developer with the subcontractor that limit the developer's warranty and damage claims due to unsatisfactory construction will remain effective towards the buyer, provided that they have been made before procuring the transfer of rights (ie, receipt of a written request to assign warranty rights and damages). The same is true if the trustee waives such claims in the developer's insolvency proceedings.

This case law restricts buyers' rights to collateralisation following any irregularities in the construction of an apartment building. If such claims were waived before the rights to warranty and damages were transferred to the buyer, the buyer's only option is to assert his or her claim in the course of the insolvency proceedings, in which case he or she will receive a certain recovery rate.

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Endnotes

⁽¹⁾ March 14 2012, 3 Ob 227/11w.

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