

Insolvency & Restructuring - Austria

No express withdrawal from purchase of goods contracts under reservation of title

Contributed by **Graf & Pitkowitz**

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Insolvency lawyers frequently encounter problems in relation to goods that are purchased under a reservation of title and the assertion of resulting rights to separate these goods from the debtor's estate. In particular, the obligation to provide notice of withdrawal from the contract regularly raises issues. A recent example of Austrian case law demonstrates that the absence of an express notice of withdrawal can also be problematic.

Basic principles

When a title to purchased goods is reserved, it is agreed that – regardless of delivery of the goods – the seller will retain the title to the goods until the full purchase price has been paid. Only then will the title to the goods be transferred to the buyer. If insolvency proceedings are opened in respect of the buyer's assets before it has paid the purchase price, Section 21 of the Insolvency Code allows the insolvency administrator either to withdraw from or to perform the contract. If the insolvency administrator does not accede to the contract, the seller may request that its goods be released (the so-called 'right of separation'), where possible.

From a practical standpoint, it is advisable for a seller to file the residual outstanding purchase price as a claim in the insolvency proceedings and insist on the separation of its goods, as it is often uncertain whether the goods to which the title was reserved can be released.

If neither the insolvency administrator nor the creditor withdraws from the contract by express notice, the contractual relationship between them theoretically remains in force. Although this may be irrelevant if the business is closed and sold, any rights and obligations arising from the contractual relationship will be restored should the business be continued after the successful implementation of a rescue plan. Consequently, the filing of a claim (and its acknowledgement by the insolvency administrator) or any request to separate certain goods from the debtor's estate constitutes conclusive notice of withdrawal and makes an express notice of withdrawal superfluous.

However, the Supreme Court has recently ruled that this is not always the case. While the absence of an express notice of withdrawal can create problems, it may also offer unusual opportunities.

Facts

In the case at hand, the insolvency administrator and the seller had not expressly withdrawn from the contract, although the seller applied for recovery of the residual purchase price during the insolvency proceedings and insisted that his goods be separated from the debtor's estate. The goods were not separated and the seller was initially paid only the recovery rate. The rescue plan was then successfully implemented and the insolvency proceedings suspended. When the enterprise was continued, the seller successfully sued for recovery of the residual purchase price (apart from the recovery rate that he had already received), arguing that the contractual relationship between him and the debtor was still in force. Eventually, he was paid the entire purchase price, although he would have received only the recovery rate applicable to the purchase price had he effectively withdrawn from the contract.

Decision

In making its decision, the Supreme Court considered the special circumstances of the case. The insolvency administrator argued, among other things, that it was impossible to separate the respective goods from the estate (although this was untrue) and thus he had not withdrawn from the contract. On the other hand, the creditor's pleadings in support of his claim against the debtor and his entitlement to separate his goods were also contradictory. Therefore, the Supreme Court ruled in favour of a valid contractual relationship, rather than a conclusive withdrawal from the contract (to the evident dissatisfaction of the former insolvency administrator, whose statement – contrary to his true intention – was not interpreted as a withdrawal by the Supreme Court).

Comment

Although this case is unique, no automatic withdrawal from contracts concerning goods that are purchased under a reservation of title exists. While in practice these special cases will be rare, whether express notice of withdrawal has been given or should be given must be examined on a case-by-case basis. As this case has demonstrated, failing to provide express notice of withdrawal may offer sellers the opportunity to get more than the recovery rate during insolvency proceedings.

For further information on this topic please contact Alexander Isola at Graf & Pitkowitz Rechtsanwälte GmbH by telephone (+43 316 833 777) or email (isola@gpp.at). The Graf & Pitkowitz website can be accessed at www.gpp.at.

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Author

Alexander Isola



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