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ARTICLE

Personal Liability of Managing Directors in Self-Administration Proceedings under German Insolvency Law

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Abstract

German insolvency law allows for so-called 'self-administration' proceedings, wherein an insolvent company retains possession and control of its assets while undergoing a restructuring process. Up to now, it was heavily disputed whether managing directors of a company in self-administration are personally liable to other parties for any breach of insolvency-related duties. The Federal Court of Justice has now given an answer to this question in a recent decision which brings legal clarity and certainty to the German restructuring and insolvency practice.

I. Introduction

1. Regular insolvency proceedings

Generally, the German Insolvency Code ('InsO') foresees that a court appointed insolvency administrator (*Insolvenzverwalter*) is responsible for the restructuring or liquidation of a debtor within insolvency proceedings (*Insolvenzverfahren*). The insolvency administrator is in charge of managing the debtor's business during the insolvency proceedings and making all necessary dispositions regarding the insolvency estate (*Insolvenzmasse*) (sec. 80 para. 1 InsO). In particular, the administrator is required to

- take possession of all assets belonging to the insolvency estate (sec. 148 para. 1 InsO) immediately after his appointment.
- realise the insolvency estate in the best and quickest way[1] (e.g. by selling the debtor's assets to third parties).
- distribute the (net) insolvency estate to the debtor's creditors.

Apart from that the InsO and German case law also postulate various additional duties. In case these insolvency-related duties are intentionally or negligently violated by the insolvency administrator, he or she may be personally liable towards the damaged party (typically the debtor himself, a creditor of the debtor or the body of creditors as a whole). This personal liability is codified explicitly in secc. 60, 61 InsO.

2. Self-administration proceedings

Under certain conditions, an insolvent debtor can file for so-called 'self-administration proceedings' (*Eigenverwaltung*) (secc. 270 et seqq. InsO).[2] If the debtor has applied for such proceedings, the insolvency court may order that virtually all (managing) rights and responsibilities regarding the insolvency estate (especially the duties listed above in sec. 1) remain in the hands of the debtor and are not transferred to an insolvency administrator. In case of a company, the managing directors will regularly perform these rights and duties on behalf of the company.

Further, the insolvency court has to appoint a so-called insolvency custodian (*Sachwalter*) in self-administration cases (sec. 270c sentence 1 InsO). However, the powers of the appointed insolvency custodian are generally limited to the supervision of the debtor's economic circumstances, the debtor's management and his personal expenditures.

II. The issue

Up to now it was heavily disputed in German case law and legal literature, whether managing directors of a company in self-administration are personally liable in the same way as insolvency administrators. In particular, it was unclear, whether secc. 60, 61 InsO could be

Notes

1 BGH, 7 December 1977 – VIII ZR 164/76.

2 Consumers may not apply for self-administration proceedings, see sec. 270 para. 1 sentence 3 InsO. The proceeding is only open to merchants and companies.

applied to managing directors analogously.[3] This question is of considerable practical importance not only because the number of self-administration proceedings has increased steadily since the last insolvency law reform in 2012 ('ESUG') which made self-administration proceedings much more attractive, but also because numerous new business models have developed in this area since then (e.g. professionals acting as chief restructuring officers etc.).

III. Decision of the Federal Court of Justice

The Federal Court of Justice ('BGH') has recently confirmed the analogous application of secc. 60, 61 InsO to the managing directors of a company in self-administration proceedings.[4] According to the BGH, since the clear wording of secc. 60, 61 InsO only covers insolvency administrators but not managing directors,[5] the InsO contains an unintended regulatory gap (*planwidrige Regelungslücke*) regarding managing directors. Further, the InsO does not contain any separate liability provisions for managing directors in self-administration.[6] However, the fact that managing directors in self-administration proceedings (to a large extent) perform the same (legal) functions as an insolvency administrator in regular insolvency proceedings and are therefore in a comparable position (*vergleichbare Interessenlage*) justifies an analogous application of secc. 60, 61 InsO.[7] Consequently, managing directors who intentionally or negligently violate their insolvency-related duties may be considered personally liable towards any damaged party.

IV. Practical consequences

The decision of the BGH is convincing.

By confirming the analogous application of secc. 60, 61 InsO to managing directors in self-administration, the BGH creates a harmonised and transparent liability regime. Furthermore, the case law principles developed in relation to the liability of insolvency administrators in regular insolvency proceedings can now be applied to managing directors in self-administration proceedings. This should simplify the application of the law and create legal clarity and certainty to the benefit of all parties.

On the other hand, managing directors must now assess carefully whether they are prepared to bear the increased liability risks. For this purpose, they should inform themselves on the specific insolvency-related duties and obligations applying within (preliminary) self-administration proceedings well in advance. In this regard, it is important to note that the benchmark for their duty of care is high and is measured against the due care of a prudent business man (*Sorgfalt eines ordentlichen Geschäftsmannes*). This means that individual inabilities, i.e. ignorance and lack of experience, are insignificant.[8]

Further, managing directors entering into self-administration proceedings are from now on well advised to examine the extent of their existing D&O insurances carefully. If liability claims according to secc. 60, 61 InsO are not covered by their existing D&O insurance, the coverage should preferably be extended before the filing for self-administration proceedings.

Finally, it remains to be seen whether the strict liability regime will reduce the willingness of managing directors to pursue self-administration. Concerns as to whether the decision is in line with the objectives of the ESUG which had the goal to improve the German restructuring landscape by strengthening self-administration proceedings, have already been expressed. However, it must be held against these concerns that restructurings should not be carried out at any price. Particularly regarding self-administration proceedings, a clear liability regime is required in order to reduce any excessive willingness of managing directors to take unreasonable risks. Consequently, in our opinion the BGH's decision does not minimise the chances of a successful restructuring, but rather increases them.

Notes

3 *Contra*: OLG Düsseldorf, 7 September 2017 – I-16 U 33/17; S. Krüger, 'Keine Außenhaftung des Sanierungsgeschäftsführers einer GmbH für Rechtsgeschäfte während der Eigenverwaltung' [2018] EWiR 53, 54; *Pro*: C. Tetzlaff in *Münchener Kommentar InsO* (3rd edn, C.H. Beck Verlag, München, 2014) § 270 para. 172–180; S. Fiebig in *Hamburger Kommentar InsO* (6th edn, Carl Heymanns Verlag, München, 2017) § 270 para. 43.

4 BGH, 26 April 2018 – IX ZR 238/17.

5 BGH, 26 April 2018 – IX ZR 238/17, para 12.

6 BGH, 26 April 2018 – IX ZR 238/17, para 22 et seqq.

7 BGH, 26 April 2018 – IX ZR 238/17, para 47 et seqq.

8 BGH, 20 February 1995 – II ZR 143/93.

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