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ARTICLE

The Establishment of Preferential Claims in Preliminary Self-Administration Proceedings under German Insolvency Law: A Happy Ending?

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Synopsis

After the filing of a petition for the opening of insolvency proceedings over the assets of a debtor it is crucial that the debtor can secure the confidence and trust of his existing business partners. This is in particular the case if it is intended to restructure the business of the debtor. The decision of the German Federal Court of Justice discussed in this article establishes a powerful tool for the debtor to achieve this aim.

I. Introduction

1. Main and preliminary insolvency proceedings

In Germany, insolvency proceedings (*Insolvenzverfahren*) are regularly opened by a formal order of the insolvency court (sec. 27 para 1 sentence 1 German Insolvency Code ('InsO')). Such court order may only be issued if preceded by the filing of a petition for the opening of insolvency proceedings by the debtor or, under certain circumstances, also a creditor.

In general, the InsO foresees that a court appointed insolvency administrator (*Insolvenzverwalter*) is responsible for the restructuring or liquidation of a debtor within insolvency proceedings. 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).

For the period between the filing of a petition and the opening of insolvency proceedings, the insolvency court may order a so-called preliminary insolvency proceedings (*vorläufiges Insolvenzverfahren*) (sec. 21 InsO). The primary function of such preliminary proceedings is to secure the insolvency estate of the debtor. For this purpose, the insolvency court may for example appoint a preliminary insolvency administrator (*vorläufiger Insolvenzverwalter*) (sec. 21 para 2 no. 1 InsO). During the interim period the insolvency court will regularly analyse, whether the debtor suffers from any insolvency grounds, in particular illiquidity (*Zahlungsunfähigkeit*) or over-indebtedness (*Überschuldung*), justifying the opening of insolvency proceedings. This analysis often takes up to three months or even longer.

2. The establishment of claims during a preliminary self-administration proceeding

Under certain conditions, an insolvent debtor can file for so-called self-administration proceedings (*Eigenverwaltung*) (sec. 270 et seqq. InsO). This also applies for preliminary insolvency proceedings, which are then called preliminary self-administration proceedings (*vorläufige Eigenverwaltung*) (sec. 270a InsO). If the debtor has applied for such proceedings, the insolvency court may order that virtually all (managing) rights and responsibilities regarding the insolvency estate remain in the hands of the debtor and are not transferred to an (preliminary) insolvency administrator. In case of a company, the managing directors will regularly (continue to) perform these rights and duties on behalf of the company. Further, the insolvency court has to appoint a so-called (preliminary) insolvency custodian ((*vorläufiger*) *Sachwalter*) in self-administration cases (sec. 270a para 1 sentence 2 and 270c sentence 1 InsO). The powers of the appointed (preliminary) insolvency custodian are generally limited to the supervision of the debtor's economic circumstances, the debtor's management and his personal expenditures.

(Preliminary) self-administration proceedings are often applied for in restructuring cases. However, it is clear that such proceedings will only have a prospect of success, if the debtor is able to continue existing contracts and to establish new contractual obligations, which are essential for the continuation of its business. This, though, will only be possible, if the debtor can secure the confidence and trust of his business partners. In order to achieve this goal and to create an incentive for its business partner, one option could be, to grant the debtor the power to establish preferential claims (*Masseverbindlichkeiten*). Under German insolvency law such claims do not only participate *pro rata* from the insolvency estate like simple insolvency claims

(*Insolvenzforderungen*, sec. 38 InsO). Rather they have to be paid in full from the estate and prior to any insolvency claims.

Over the last couple of years the possibility and legal basis for the establishment of preferential claims by the debtor within preliminary self-administration proceedings was one of the most controversial issues in German insolvency law, fostering massive legal uncertainty and hampering successful restructurings. The present article deals with the decision of the Federal Court of Justice ('BGH') dated 22 November 2018 – IX ZR 167/16. Within this decision, the BGH comments on the possibility and the conditions for the establishment of preferential claims in preliminary self-administration proceedings under sec. 270a InsO.

II. Problem

As already mentioned, over the last couple of years the possibility and legal basis for the establishment of preferential claims by the debtor within preliminary self-administration proceedings was one of the most controversial issues in German insolvency law. The different opinions which have been proposed in German case law and legal literature in this context can be summarised as follows: One view assumes that the debtor through his actions inherently establishes preferential claims, regardless and independently of any judicial authorisation.[1] Another extreme position suggests that preferential claims cannot be established at all by the debtor in preliminary self-administration proceedings.[2] The prevailing opinion so far in German case law and in legal literature, on the contrary, assumes that the establishment of preferential claims by the debtor in preliminary self-administration proceedings is possible on the basis of a judicial authorisation.[3] In this case, the subject of the authorisation should be the debtor himself and not the preliminary insolvency custodian, who only has a supervisory function.[4] It is also widely accepted that the insolvency court can grant an authorisation in such a way that the debtor should only be authorized to establish preferential claims together with the consent of the preliminary insolvency custodian (see also sec. 277 InsO).[5]

The establishment of preferential claims within the preliminary self-administration insolvency proceedings has also been the subject of a recently published insolvency law evaluation (*ESUG-Evaluation*).[6] The evaluation confirms that the currently unclear and confusing legal situation regarding the establishment of preferential claims in preliminary self-administration proceedings complicates the conduct of insolvency proceedings and successful restructurings and is an important aspect of a possible insolvency law reform.

Therefore, it is all the more gratifying that the BGH, after not having used this opportunity in 2013[7] and 2016,[8] makes some urgently needed clarifications in this context.

III. Facts of the case

Beginning of January 2014, the debtor filed for the opening of (preliminary) self-administration proceedings. The insolvency court appointed the plaintiff as preliminary insolvency custodian the same day. The later sued finance authority (defendant) was informed about these developments.

In the course of the preliminary self-administration proceedings, the debtor continued to operate its business: In March 2014, the debtor paid a total of EUR 85.843,00 in value added tax for the months of January and February 2014 to the finance authority. On 1 April 2014 the insolvency court released the order initiating the commencement of (main) self-administration proceedings and the plaintiff was appointed as insolvency custodian.

Shortly thereafter, the plaintiff requested the finance authority in vain for the repayment of the payments

Notes

1 AG Montabaur [2013] NZI 350, 351; AG Hannover [2015] ZInsO 1112, 1113 et. seq.; R. Foltis in Frankfurter Kommentar InsO (9th edn, Luchterhand Verlag, 2018), § 270a para. 25.

2 AG Hannover, Beschl. v. 1.7.2016 – 908 IN 460/16, 908 IN 460/16 – 2, Rn. 15 ff; AG Fulda [2012] ZIP 1471 et. seq.; D. Blankenburg, 'Begründung von Masseverbindlichkeiten in Eigenverwaltungsverfahren' [2016] 27 *ZInsO* 1345.

3 OLG Dresden [2015] ZIP 1937 et. seq.; LG Hannover [2016] ZInsO 1861, 1863; LG Duisburg [2012] ZInsO 2346 et. seq.; AG Hannover [2016] ZInsO 1535 et. seq.; C. Pleister and F. Kunkel, 'Reparaturbedarf am ESUG-Instrumentenkasten' [2017] 4 *ZIP* 160; S.-H. Undritz in Beck'scher Kommentar InsO (19th edn, C.H. Beck Verlag, München, 2016), § 270a para. 6.

4 LG Duisburg [2013] NZI 91; AG Köln [2012] ZInsO 790; AG München [2012] ZIP 1470, 1471 et. seq.; D. Blankenburg, 'Begründung von Masseverbindlichkeiten in Eigenverwaltungsverfahren' [2016] ZInsO 1337, 1341; against AG Hamburg [2012] ZIP 787, 788.

5 AG München [2012] ZIP 1470, 1471; G. Pape, 'Entwicklungstendenzen bei der Eigenverwaltung'[2013] 48 *ZIP* 2292; M. Hofmann 'Einzelermächtigung zur Begründung von Masseverbindlichkeiten im vorläufigen Eigenverwaltungsverfahren auch für Schuldner' [2012] 11 *EWiR* 360; H.-G. Landfermann in Heidelberger Kommentar InsO (8th edn, C.F. Müller, Heidelberg, 2016), § 270a para. 30; dissenting D. Blankenburg, 'Begründung von Masseverbindlichkeiten in Eigenverwaltungsverfahren' [2016] 27 *ZInsO* 1344.

6 F. Jacoby, S. Madaus, D. Sack, H. Schmidt and C. Thole, 'Evaluierung – Gesetz zur weiteren Erleichterung der Sanierung von Unternehmen (ESUG) vom 7. Dezember 2011', p. 125 et. seq. <www.bmjv.de/SharedDocs/Downloads/DE/News/Artikel/101018_Gesamtbericht_Evaluierung_ESUG.pdf;jsessionid=20376CE636CC819A292CACF456E18402.1_cid324?__blob=publicationFile&v=2.>, 21 February 2019.

7 BGH [2013] MDR 490.

8 BGH [2016] NJW-RR 690; A. Swierczok, 'BB-Kommentar zu BGH, Beschluss vom 24.03.2016, IX ZR 157/14' [2016] BB 1364.

effected by the debtor on the grounds that they are subject of an insolvency claw-back (*Insolvenzanfechtung*). The Regional Court (*Landgericht*) dismissed the lawsuit. The Higher Regional Court (*Berufungsgericht*) has sentenced the defendant as pled. It stated, among other things, that the debtor's payments were not affected on the basis of preferential claims and therefore are not exempt from claw-back.

The defendant has appealed to the BGH against the decision of the Higher Regional Court.

IV. Decision

The BGH confirms the correctness of the decision of the Higher Regional Court. In its ruling, the BGH deals extensively with the question of whether and, if so, under what circumstances, preferential claims may be established in preliminary self-administration proceedings by a debtor or by a preliminary insolvency custodian. As a result, according to the BGH, preferential claims against the debtor may only be established on the basis of a judicial authorisation (*gerichtliche Ermächtigung*) granted by the insolvency court. Such an authorisation was not available in the present case. [9]

Regarding the possibility of granting a judicial authorisation to establish preferential claims, the BGH first points out the purpose pursued by the Germany legislator with the last major insolvency law reform in 2012, which was to ease the debtor's access to (preliminary) self-administration proceedings, thereby improving the debtor's overall chances of a successful restructuring. [10]

The BGH emphasises that a successful restructuring will regularly require the continuation of the debtor's business. However, such continuation will often only be possible if, for the benefit of certain business partners, preferential claims can be established. At the same time, it must be considered that an excessive establishment of preferential claims could lead to a depletion of the remaining insolvency estate, jeopardising other insolvency creditors and, negatively affecting the continuous operation of the business and a successful restructuring. [11] Against this background, in the opinion of the BGH, the legal view which assumes that the debtor has an original competence to establish preferential claims in the preliminary self-administrative procedure must be rejected.

According to the BGH, preferential claims in preliminary self-administration proceedings can rather only be established if the insolvency court issues the necessary authorisation for this purpose. The legal basis for an authorisation is sec. 270 para. 1 sentence 2 in connection with sec. 21 para. 1 sentence 1 InsO. The provision states, that the insolvency court has to take the necessary measures to prevent lasting changes in the financial position of the debtor. Further, the granting of the judicial authorisation is at the sole discretion of the insolvency court. An obligation to grant an individual authorisation does not exist.[12]

According to the BGH, the authorisation should be directed to the debtor and not to the preliminary insolvency custodian. It should not leave the establishment of preferential claims at the discretion of the debtor. It must, as precisely as possible, refer to claims which have been defined in advance, individually or at least by nature (e.g. tax claims), to constitute preferential claims ('individual authorisation'). Whether a 'general authorisation' (*Generalermächtigung*) of the debtor is also possible, could remain open in the present case and was not cleared by the BGH.[13]

V. Comment and practical consequences

The decision of the BGH is to be welcomed. The BGH affirms with convincing arguments that based on sec. 270 para. 1 sentence 2 in connection with. sec. 21 para. 1 sentence 1 InsO the debtor (and not the preliminary custodian) can be granted a judicial authorisation for the establishment of preferential claims with preliminary self-administration proceedings. Further, the fact that the authorisation may not leave the establishment of preferential claims at the discretion of the debtor is absolutely understandable for reasons of legal certainty.[14]

From a practical point of view, the decision creates legal clarity and legal certainty. It should strengthen the German restructuring culture and limit the practice of insolvency 'forum shopping' within Germany. So far, debtors had sometimes filed (preliminary) self-administration petitions in court districts in which they could count on the granting of an individual authorisation.[15]

Finally, it remains to be seen how the numerous German insolvency courts (over 180!) will position themselves in the future with a view to granting individual authorisations. It would be desirable to have an open and not too restrictive attitude, which 'fills the decision of the BGH with life' and does not circumvent it again through the 'back door'.

Notes

9 BGH [2019] NJW 224, 225.
10 BGH [2019] NJW 224, 225.
11 BGH [2019] NJW 224, 225.
12 BGH [2019] NJW 224, 226.
13 BGH [2019] NJW 224, 226.
14 Fundamental BGH [2002] NJW 3326; BGH [2017] NZI 542, 544; BGH [2015] NJW 1171.
15 C. Pleister and F. Kunkel, 'Reparaturbedarf am ESUG-Instrumentenkasten' [2017] 4 *ZIP* 160.

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