

Position of secured creditor in German Insolvency Law

Presentation in Poznan on June 4, 2019

Economic background

- Roughly 75 % of the German economy is debt-based (i.e. about 25 % equity)
- Constant need and search for securitizable assets → extensions of retention of title in the past, nowadays digital assets (bitcoin, website, data, etc.)

Legal background

- In German law: Kreditsicherungsrecht (= law of secured transactions) encompasses rights over the entire property (Vermögen) of the debtor – i.e. immovables, movables including intangibles such as claims, rights, etc.
- big new questions:
 - what are data? And are they part of the debtor's assets? – catastrophic scenario: what happens in case of Facebook's insolvency?)
 - What is a creditor with a CDS?

Key norm in insolvency

Sec. 38 InsO:

„The insolvency estate shall serve to satisfy the well-founded claims held by the personal creditors against the debtor on the date when the insolvency proceedings were opened (insolvency creditors).“

→ Key word: personal creditors as opposed to creditor with a right in rem

Critical interlude

- Creditor with a right in rem is usually a creditor who has negotiated for such right (exception: enforcement creditor or statutory lien holders such as landlord or contractor, etc.)
- But: there is an entire industry that has managed by means of lobby work to get privileged treatment that works like a security
→ On this cf. *Paulus*, IILR 2014, 366 ff.

Treatment of unsecured part of claim

- Can be lodged in the full amount when and if the secured claim is owed by the insolvent debtor
- Voting right in the full amount (problem of the so called „empty creditor“ → credit-default-swap)
- Dividend up to the amount of satisfaction through the collateral

Treatment of secured part of claim 1

- Right to separate satisfaction, sec. 49 ff. InsO
- If collateral = real estate → sec. 165 InsO: IA applies for court auctions or sequestration
- If collateral = movable → sec. 166 par. 1 InsO: if it is in the IA's possession the IA has the right to dispose; if not done → sec. 169 InsO: adequate protection from the report meeting on

Treatment of secured part of claim 2

- The proceeds of the sale belong to the secured creditor up to the amount of the secured claim:
 - If proceeds are lower or match the amount: entire amount goes to the creditor; to the degree that he is not fully satisfied → unsecured creditor
 - If proceeds are higher: creditor receives full satisfaction, the surplus goes into the general estate of the debtor.

Dziękuję bardzo za uwagę!

Prof. Dr. Christoph G. Paulus, LL.M. (Berkeley)

christoph.paulus@rewi.hu-berlin.de

<http://paulus.rewi.hu-berlin.de/>