SAVE THE APPEAL LAW

Translation from a German advertorial from a special issue on “Die Zukunft der Automobilindustrie” of the HandelsblattJournal, Oktober 2016

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The appeal law in bankruptcy proceedings got exacerbated, compared to the previous bankruptcy act with the insolvency regulation of 1999. This was done to increase the amount of proceedings being filed. Criticism against these new regulations intensified, since even the Supreme Court developed gripping principles. The criticism even demanded the abolition of the appeal law in individual cases. Currently, legislators are working on a reform of the legal regulations.

The expressed criticism mostly draws upon the claim that contract partners of future insolvent debtors are not able to predict whether they will be allowed to keep previously received services in case of an insolvency. This would strain commercial trade with incalculable risks. To illustrate the issue, the following situation is often being exemplified: The case of a creditor, who, after a long and expensive civil process, finally obtained an enforcement instrument – meaning, him doing everything right – but still has to hand his “hard earned” payments over to the liquidator as a result of the insolvency appeal. But this hardly plausible case is indeed not exemplary. Most appeals are directed against creditors (tax offices, social insurance agencies) who are able to create their enforcement instruments by themselves, as well as use their own enforcers, thus being privileged in comparison to “normal” creditors to begin with.

The purpose of the appeal law is to secure the satisfaction of all creditors by correcting certain impairments of those insolvent assets which already existed prior to the insolvency proceedings. This makes sense in cases where the debtor gave away assets to family members to deprive creditors of the money and property. So essentially, those debtors who assumed a strong position against the debtor (advantage of information, position of power) are not supposed to be more privileged in comparison to other creditors.

In the past years, the Supreme Court has developed a finely tuned legislation for this issue. However, this legislation has been the target of increased criticism lately, because the requirements of the so called “Vorsatzanfechtung” (appeal of intention) from §133 InsO, which can, at least in theory, reach back up to 10 years before the application, are unclear and too challengeable. Therefore, legislators are planning a reform of bankruptcy law, which is supposed to complicate or even prevent an appeal in certain cases. The mentioned enforcements are supposed to only be challengeable under aggravated conditions. Surprisingly, this is supposed to apply not only the honest contract partner, but also for so-called “self-enforcers”, who, because of their legal privileges, have an advantage over the other creditors from the beginning. The “Vorsatzanfechtung” also will only be successful with dishonesty as a limiting prerequisite. It seems predictable that the vague legal concept of “dishonesty” is going to raise more issues than it is going to create legal clarity.

This is the reason why the original goal of insolvency appeals, i.e. the even satisfaction of all creditors, should not be lost sight of. To reach these goals, the current regulations with their interpretation through the court have predominantly proven themselves. A weakening or even abolition of the appeal law would lead to a reduction of new trials, since those would have to be rejected due to the lack of ground, just like during the times of the bankruptcy act. Then, debtors could, without sanctions, move assets to people close to them while depriving creditors of those assets. This is not acceptable for any creditor. Honest creditors would even be disadvantaged. The contemplated reform should therefore, as originally intended, at most create minimally invasive changes.

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