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Insured damage claims in case of insolvency of the damaging party

1. INTRODUCTION

The assertion of claims against insolvent debtors is difficult and often unsuccessful. The creditor can usually realize only a small fraction of the claim in the insolvency proceedings, if any.

The legislator alleviates this unsatisfactory situation for the assertion of insured claims by sections 110, 115 et seqs. Insurance Contract Act.

Insofar as the creditor has a damage claim against the insolvent debtor and liability insurance cover according to sec. 100 Insurance Contract Act exists for this claim, the creditor can assert separate satisfaction.

If a compulsory insurance contract grants insurance cover for the damage claim within the meaning of sec. 113 Insurance Contract Act, the damaged party has a direct right of action against the insurer in case of the damaging party's insolvency.

This preferential treatment of the damaged party allows to assert damage claims despite the debtor's insolvency.

2. FATE OF NORMAL CLAIMS IN INSOLVENCY PROCEEDINGS

In case of insolvency of a debtor, the settlement of claims of the insolvent debtor's creditors follows the German Insolvency Code. Measures of enforcement aiming at the debtor's assets are not allowed anymore.

Creditors can register their claims in the insolvency table. The insolvency administrator examines the claims and settles justified claims proportionately with the insolvency assets available.

Since the insolvency assets are usually lower than the sum of the individual claims, the creditors in the insolvency proceedings receive only a proportional part of their claim (often between three and six percent). Experience shows that the insolvency creditors must write off more than 90 percent of their claims.

3. POSSIBILITY OF SEPARATE SATISFACTION FOR LIABILITY INSURED CLAIMS

The legislator recognized that a proportional payment to the creditors – independent of the legal basis of the claim – may cause injustices.

3.1 Right to separate satisfaction of damage claims

The legislator therefore protects those creditors who have a damage claim against the liability insured debtor in insolvency proceedings. This works on the basis of the right to separate satisfaction of sec. 110 Insurance Contract Act. Through the separation according to sec. 110 Insurance Contract Act, the damaged third party has a preferential right compared to other creditors (cf. Littbarski, Münchner Kommentar about Insurance Contract Act, 2011, sec. 110 VVG, No. 21).

Sec. 110 Insurance Contract Act says:

> *„In the event of insolvency proceedings being opened in respect of the assets of the policyholder, the third party may request separate satisfaction from the policyholder's right of recourse on account of the claim due him against the policyholder. “*

A third party (creditor) according to sec. 110 Insurance Contract Act is for example a customer of an insolvent, liability insured building contractor who destroyed the customer’s pipelines when working on excavations. According to sec. 110 Insurance Contract Act, the creditor (the building constructor’s customer) may request separate satisfaction from the policyholder’s right of recourse (building constructor) against his liability insurer. The right of recourse obliges the liability insurer to pay for the customer’s justified damage claim instead of the damaging building constructor.

The damaged party receives more than the proportional satisfaction from the insolvency assets. The damaged party is entitled to the proceeds resulting from the usage of the indemnification claim up to the full amount of his damage claim (cf. Kirchof, in Münchener Kommentar zur Insolvenzordnung, Vorbem. Secs. 49-52 No. 1).

If the damaging policy holder has provided for sufficient liability insurance cover and the insured sum corresponds with the amount of the damage claim, the damaged party may obtain full indemnification.

3.2 Requirements of the right to separate satisfaction according to sec. 110 Insurance Contract Act

The following requirements must be fulfilled if the damaging party's creditor asserts separate satisfaction from the insurance claim (right of recourse).

3.2.1 Opening of insolvency proceedings

The right to separate satisfaction requires the opening of insolvency proceedings.

3.2.2 Liability insurance cover for damages occurred

The insolvent debtor needs to have a liability insurance contract which grants insurance cover in accordance with sec. 100 Insurance Contract Act for damaging acts.

If the liability insurance contract does not cover the risk realized in the damage, the insolvency does not change this situation. A separate satisfaction based on an indemnification cannot be considered due to a lack of insurance cover.

A precondition is that the liability insurer does not raise justified objections against his obligation to perform resulting from the insurance contract with the insolvent policy holder. In particular, no risk exclusions should be fulfilled. If, for example, the policy holder damages the creditor with intent within the meaning of sec. 103 Insurance Contract Act, a risk exclusion is fulfilled. Independent of the insolvency, there is no obligation for the insurer to perform due to the facts of exclusion and thus there is also no right to separate satisfaction.

3.2.3 Establishment of the damage claim

The damage claim of the creditor against the insolvent debtor, needs to be established bindingly (cf. sec. 106 Insurance Contract Act).

It is irrelevant whether the damage claim was established by the damaged party before the insolvency (e.g. by judgment or notarial acknowledgement of debt) or after the opening of insolvency proceedings.

After the opening of insolvency proceedings, an establishment of the liability claim through the insolvency administrator might be possible. On the one hand, the insolvency administrator may acknowledge a damage claim by the damaged party in writing (gap in Prölss/Martin, Versicherungsvertragsgesetz, 28. edition 2010, sec. 110 Insurance Contract Act, No. 5).

On the other hand, the creditor may register the claim in the insolvency table. The insolvency administrator may leave the claim uncontested and acknowledge the claim without contradiction. (cf. Higher Regional Court Celle VersR 2002, 602).

If the aforementioned requirements are fulfilled (3.2.1 – 3.2.3), the damaged party has a right to separate satisfaction resulting from the damaging party's right of recourse.

3.3 Assertion of the right to separate satisfaction

The damaged party may assert the right to separate satisfaction in two ways.

3.3.1 Assertion of the right to separate satisfaction in the examination procedure following insolvency law

The damaged party can register the liability claim as well as the right to separate satisfaction resulting from the indemnity claim to the insolvency table. As soon as the liability claim and the right to separate satisfaction have been established, the damaged party receives, in analogue application of sec. 1282 BGB (German Civil Code), a direct collection right towards the liability insurer. The damaged party is then entitled to demand the compensatory payment directly from the insurer of the insolvent damaging party.

3.3.2 Assertion of the right to separate satisfaction by suit against the insolvency administrator

Instead of running through the insolvency examination procedure, which takes a long time, the damaged party may assert the right to separate satisfaction resulting from the insurance claim through action for payment against the insolvency administrator (cf. Littbarski in Münchener Kommentar about Insurance Contract Act, first edition 2011 about sec. 110 Insurance Contract Act, No. 28). Since insurance cover determined in the liability insurance contract may be lower than the damage claim of the damaged party, the damaged third party has to limit the amount of the claim to the performance owed by the liability insurer.

In so far as the injured third party attains an enforceable title against the insolvency administrator, this will also be effective against the liability insurer and initiates the collectability of the cover claim (cf. Littbarski reference as above, No. 29).

If the liability insurer denies the payment obligation despite the enforceable title, the damaged party must file a cover claim against the liability insurer.

4. PROTECTION OF THE DAMAGED PARTY IN CASE OF INSOLVENCY OF THE COMPULSORILY INSURED DAMAGING PARTY

The protection which the damaged party enjoys in case of the damaging party's insolvency, is extended by the compulsory insurance according to sec. 113 et seqs. Insurance Contract Act as a special form of the liability insurance contract.

The damaged party may, in case of the existence of a compulsory insurance cover of the insolvent debtor, sue the liability insurer directly (direct action).

4.1 Compulsory insurance contract

In so far as the policy holder is obliged by law to conclude a liability insurance contract due to a activity classified as dangerous, this is called a compulsory insurance (cf. sec. 113 Insurance Contract Act).

The obligation to conclude a compulsory liability insurance contract exists for example for tax advisors and legal advisors (sec. 67 StBerG, sec., sec. 45 PAO, secs. 19a, 67 para. 3 No. 3 of BNotO, sec. 51 of BRAO). The pecuniary damage liability contracts concluded by tax advisors and lawyers are compulsory insurance contracts.

4.2 Direct right of action

According to sec. 115 para. 1 cypher 2 the damaged party may, in case insolvency proceedings are opened over the assets of the compulsorily insured damaging party, directly sue the liability insurer.

If, for example, a compulsorily insured tax advisors gives wrong advice to his customer and the customer suffers a causal financial damage, the injured customer can sue the compulsory insurer if the tax advisor files for insolvency.

In this direct legal action, the insurer may raise all liability relevant legal objections against the damage claim. If the liability insurer is for example of the opinion that the damaged party is partially responsible for the damage and that this might reduce the cover claim, the liability insurer may use this argument in the direct legal action.

5. CONCLUSION

The opening of insolvency proceedings over the assets of a damaging party constitutes a turning point for the assertion of damage claims. The realization of damage claims becomes complex. The complexity should though not distract the damaged party to assert justified damage claims.

Insofar as the damaging party possesses liability insurance cover for the damage, the liability claims are still enforceable with good chances of success despite the insolvency.

Furthermore, there are simplified possibilities to realize claims by means of a direct action against the insurer in case of compulsory insurance contracts.

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