ECJ clarifies that “rights in rem” under Art. 5 Insolvency Regulation also includes “rights in rem” of public or tax administrations

On 26 October 2016, the Court of Justice of the European Union has rendered a decision (case C-195/15) on the interpretation of “rights in rem” under article 5 of the Insolvency Regulation (Regulation 1346/2000). Meanwhile, this provision has been replaced by Article 8 of Regulation 2015/848, which will come into force on 26 June 2017. The same interpretation can reasonably be expected to apply to the latter article.

Article 5 (1) Insolvency Regulation reads as follows: “The opening of insolvency proceedings shall not affect the rights in rem of creditors or third parties in respect of tangible or intangible, moveable or immoveable assets—both specific assets and collections of indefinite assets as a whole which change from time to time—belonging to the debtor which are situated within the territory of another Member State at the time of the opening of proceedings.”

This provision is an important exception to the principle that the law applicable to insolvency proceedings– as well as their consequences– opened under the Insolvency Regulation shall be that of the Member State within the territory of which such proceedings are opened (art. 4 Insolvency Regulation).

Facts

A French real estate company owned real property located in Germany. By decision of 6 May 2013, it was put under court-supervised administration by the tribunal de grande instance de Mulhouse (France).

On 15 May 2013, the German local authority applied for the forced sale of that property in order to recover arrears of real property tax.

French law governed the court-supervised administration, i.e. the insolvency procedure of the French company (art. 4 Insolvency Regulation). Pursuant to French law, the opening of any insolvency procedure hampers the compulsory sale of the real property in Germany.

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However, pursuant to Article 5 (1) Insolvency Regulation, the opening of the French insolvency procedure does not affect the rights in rem of a creditor in respect of assets belonging to the French company located in another Member State. According to German law, debts due in respect of real property taxes give rise to a property charge, and such charge is considered a right in rem. Consequently, the German tax authority could, under its national law, initiate a public auction.

The Bundesgerichtshof was, however, unsure whether the existence of a right in rem, for the purposes of applying Article 5 (1) of that regulation, had to be assessed in accordance with German law or should be interpreted autonomously.

Decision

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Any security created by virtue of a provision of national law, by which real property of a person owing real property taxes is subject to a public charge, constitutes a right in rem within the meaning of Article 5 (1) Insolvency Regulation. Hence, that property owner must accept enforcement of the decision recording the tax debt against that property, notwithstanding the existence of insolvency proceedings in another Member State.

**Reasoning**

The qualification of a right in rem, for the purposes of Article 5 (1) Insolvency Regulation, must be examined under national law, i.e. the *lex rei sitae* (in the present case, German law). Hence, German courts must apply German law for the qualification of a right as a right in rem.

Article 5 does not define the notion “right in rem”. It does, however, explain through a number of examples the scope and limits of the protection afforded by Article 5. In the present case, the security of the German tax authority satisfied the criteria listed in Article 5 (2) Insolvency Regulation:

- The charge directly and immediately encumbers taxed real property;
- The owner of the real property must accept enforcement against that property; and
- The tax authority is a preferential creditor on the basis of the charge over the property.

Article 5 must be interpreted strictly, since it is an exception to the general rule under Article 4 of the Insolvency Regulation. The conclusion of the ECJ does not undermine such strict interpretation, since the provision may not deprived of its effectiveness.

Neither the wording, nor its objectives make it possible to interpret Article 5 to the effect that it does not cover rights in rem granted outside the context of a commercial transaction. The ECJ does not allow for an unfavorable treatment of rights in rem granted in the context of transactions other than commercial transactions.

**Conclusion**

“Right in rem” under Article 5 of the Insolvency Regulation cannot be restricted to rights in rem granted in the context of transactions other than commercial transactions.

More generally, this decision is another confirmation by the Court that the issue of qualification of rights as “rights in rem” for the purposes of Article 5 (1) of the Insolvency Regulation is governed by national law.