



Insolvency Law Newsletter Switzerland

Foreign Insolvency Administrator Lacks Standing to Be Sued in Switzerland for Claims Related to Assets Located in Switzerland

Introduction

The Federal Supreme Court has confirmed its long standing practice that a foreign insolvency administrator has no standing to bring an action in Switzerland for the collection of assets located in Switzerland for the foreign estate, without first seeking recognition of the foreign insolvency decree in Switzerland according to Art. 166 et seq. Swiss Private International law ("SPILA"). Upon recognition, the foreign insolvency has the effects of a Swiss insolvency proceeding and an ancillary insolvency proceeding regarding the assets located in Switzerland will be initiated under the auspices of a Swiss insolvency administrator.

Under the Swiss ancillary insolvency proceeding only parties secured by a pledge on the Swiss assets and the privileged creditors domiciled in Switzerland such as employees will be admitted in the ancillary creditors' ledger (Art. 172 para. 1 SPILA). Any surplus remaining after distribution to the secured and privileged creditors¹ will, upon recognition of the foreign creditors' ledger, be submitted to the foreign estate (see Art. 173 SPILA).

Decision

In the decision rendered on February 13, 2013², the Federal Supreme Court reaffirmed and clarified its previous holdings, namely that it falls within the exclusive competence of the Swiss ancillary insolvency office to exercise the rights of the foreign insolvency administrator in as far as assets located in Switzerland are concerned. Without recognition of the foreign insolvency decree, the hands of the foreign

insolvency administrator are not permitted to reach into the Swiss territory for the collection of assets for the foreign estate. The intent of the legislator with the recognition was to provide for some assurance that the foreign insolvency administrator does not discriminate Swiss domiciled creditors and hence to foster mutual recognition.

In the case at hand, the Federal Supreme Court had to decide whether a counterclaim lodged by the Swiss domiciled defendant, pursuant to which the defendant sought to annul an agreement entered into by the defendant and the foreign insolvency administrator according to which Swiss assets (real estate) were to be contributed to the foreign estate, may be filed against the foreign insolvency administrator in Switzerland. In the case at hand, no efforts were made to have the foreign insolvency decree recognized in Switzerland.

The Federal Supreme Court found the action for annulment to be closely linked to the agreement entered into between the foreign insolvency administrator and the defendant. Such agreement, the purpose of which was the contribution of assets located in Switzerland to the foreign estate, was found to be illicit as it would have fallen under the exclusive competence of the Swiss ancillary insolvency administrator upon recognition of the foreign insolvency decree. Hence the Federal Supreme Court concluded that the Swiss courts are not competent to hear the counter claim in Switzerland against the foreign insolvency administrator since the foreign insolvency administrator was lacking standing to be sued in Switzerland.

¹ According to Art. 219 Swiss Debt Enforcement and Insolvency Law ("SDEIL"), certain claims of employees, claims for family support and certain claims for the payment of withholding tax are privileged.

² Decision of the Federal Supreme Court 4A_380/2012, Section 4.5.



Conclusion

Typically, the cases handled by the Federal Supreme Court in the past dealt with the standing of the foreign insolvency administrator to bring an action in Switzerland for the collection of assets located in Switzerland for the estate. The Federal Supreme Court has - despite certain critics - maintained its jurisprudence, namely that recognition of the foreign insolvency decree is required for the collection of assets in Switzerland. The decision rendered by the Federal Supreme Court regarding the foreign insolvency administrators standing to be sued, in relation to assets located in Switzerland, is just the flip side of the coin of this long standing jurisprudence.

Recommendation

When dealing with a foreign insolvency with substantial assets located in Switzerland always make sure that the foreign insolvency decree be recognized in Switzerland. Otherwise, the estate may risk not being able to collect the assets in Switzerland or bring claims for avoidance against persons or legal entities located in Switzerland. The petition for recognition may be filed by the estate or any creditor of the estate against the posting of a security to cover the costs.

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