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Insolvency Law Newsletter Switzerland

Foreign Insolvency Authority Competent to Bring Avoidance Action in Switzerland, where Foreign Insolvency Has Been Recognized by the Competent Swiss Court

Facts

In the decision rendered on July 7, 2009 (5A_134/2009), the Federal Supreme Court upheld the decision of the court of lower instance, which found the foreign insolvency administrator competent to bring an avoidance action in Switzerland, where the foreign insolvency has been recognized by the competent Swiss court.

On April 1, 2004, the court Ludwigsburg, Germany opened insolvency proceedings over Z GmbH, a German company. On May 26, 2006, upon motion of the foreign insolvency administrator, the competent Swiss court recognized the foreign insolvency decree according to Art. 166 Swiss Private International Law Act ("**SPILA**").

On August 25, 2006, the foreign insolvency administrator filed an avoidance action pursuant to Art. 285 et seq. Swiss Debt Enforcement and Bankruptcy Act against X GmbH, for restitution of the amount of CHF 280'000 received from Z GmbH as consulting fees, arguing that at the time of the payments, Z GmbH was already in a state of over-indebtedness.

The court of lower instance limited the proceeding to the question of the foreign insolvency administrator's standing to bring the avoidance action in the Swiss court. The court rejected the objection raised by X GmbH in respect of the foreign insolvency administrator's standing to sue. The decision was then appealed to the cantonal appellate court which upheld the decision of the court of first instance.

X GmbH then filed an appeal against the decision of the cantonal appellate court with the Federal Supreme Court.

Decision of the Federal Supreme Court

The Federal Supreme Court found it was undisputed that the issue of international insolvency is dealt with by the SPILA, absent a specific treaty dealing with the specific question.

The Federal Supreme Court first analysed whether the treaty between the Swiss Confederation and the Crown Wuertemberg, which dates back to 1825 ("**Treaty**"), is still applicable. The Federal Supreme Court reasoned that according to the majority of the legal doctrine the Treaty was still applicable, but that a few authors concluded that the Treaty has become largely irrelevant. Some authors seem to argue that the Treaty does not contain any procedural rules, which have been enacted through the SPILA and that, therefore, the Treaty can not be applied to deviate from federal law.

In its decision BGE 104 III 68 E. 3 p. 69, the Federal Supreme Court confirmed that the Treaty constituted cantonal law and is applicable only to the extent there is no federal law dealing with the issue. Consequently, the Federal Supreme Court argued that the question of recognition of the foreign insolvency decree is exclusively governed by the SPILA. The Federal Supreme Court held that the foreign insolvency decree has been recognized in Switzerland based upon Art. 166 SPILA and that the appellant did not argue that the Treaty would preclude the recognition of the foreign insolvency decree.

The effect of the recognition of the foreign insolvency decree in Switzerland is that the foreign insolvency administrator (or an authorized creditor) is competent to bring an avoidance action in Switzerland.

The Federal Supreme Court conceded that an avoidance action by the foreign insolvency administrator may be brought only if the Swiss insolvency office and their privileged creditors in Switzerland have waived the right to such action. Since the appellant X GmbH has not contested that these conditions were met, the Federal Supreme Court rejected its argument that the decision of the lower court violated the principle of territoriality.

Finally, the Federal Supreme Court did not hear the appellant's arguments that the insolvency administrator should have brought the action not in its own name but as representative of the insolvency estate.

The court reasoned that the question as to whether the insolvency administrator is entitled to bring such action in its own capacity is determined by the law at the place of the foreign insolvency. The court of lower instance has found the German insolvency administrator competent according to German law to bring an action in its own name with effect for the estate.

However, since in pecuniary matters the Federal Supreme Court is not competent to review whether the court of lower instance has correctly applied the foreign law and the appellant did not argue that the respective finding of the court of lower instance was arbitrary, the Federal Supreme Court did not hear the argument that the insolvency administrator should have brought the avoidance action as representative of the estate in insolvency and not in its own name.

Therefore, the Federal Supreme Court rejected the appeal on the above grounds.

Comment

The decision of the Federal Supreme Court is in line with previous decisions which clarified under which circumstances a foreign insolvency administrator has standing to bring legal actions in Switzerland.

In order to bring legal action in Switzerland, the foreign insolvency must be recognised in Switzerland and, in case of avoidance actions, the Swiss insolvency administration and the privileged creditors in Switzerland must have refrained from pursuing such action.

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