

Insolvency & Restructuring - Switzerland

Firm that laid 'golden egg' hotel goes bust

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Stilli Park declares bankruptcy Recent case law

Stilli Park declares bankruptcy

On June 2 2014 Stilli Park AG, the leaseholder of the Intercontinental Davos – a hotel with the singular shape of a golden egg – declared bankruptcy.

Stilli Park first acquired the land in Davos and then began work on the hotel project. It then sold the land to Credit Suisse Real Estate Fund, which built the hotel on it.

It was originally planned that the Intercontinental Hotel Group would take on the management of the hotel. However, Credit Suisse was unable to conclude a management contract with the Intercontinental Hotels Group directly because of legal reasons. Therefore, Credit Suisse asked Stilli Park to be the leaseholder of the hotel, which Stilli Park accepted. Stilli Park concluded a management contract with the Intercontinental Hotel Group to transfer the management of the hotel.

The lease was Sfr405,000 per month, which was high, even if the business had performed as expected. In April 2014 it was obvious that Stilli Park was unable to pay the lease. Stilli Park failed to resolve its financial difficulties and filed for bankruptcy.

Despite the bankruptcy declaration, business is continuing seamlessly. On the same day as bankruptcy was announced, Credit Suisse presented a replacement leaseholder, Weriwald AG, which was incorporated and registered in Davos on May 20 and 21 2014.

This demonstrates the difficulty of the corporate restructuring balancing act between the real economy and financial world. The interests of international financial investors of real estate funds are not always compatible with those of the stakeholders conducting the business. In this case, nobody appeared to have an interest in saving Stilli Park from bankruptcy by using the improved instruments provided by the recent reform of the restructuring law (which entered into force on January 1 2014). It is unclear how many creditors will file claims in the bankruptcy and to what extent they will be satisfied. Like in any bankruptcy, it is possible that many creditors will be unhappy with the result of the proceedings. There are signs in the Swiss press that it might come to a legal dispute with regard to a bank guarantee that was called by Credit Suisse shortly before the opening of bankruptcy proceedings. It remains to be seen whether legal proceedings will be initiated in this respect.

Recent case law

Solvency test in appeal proceedings against opening of bankruptcy

The Federal Court has commented on the annulment of the opening of the bankruptcy in the appeal proceedings.⁽¹⁾ Accordingly, in order to annul the opening of the bankruptcy pronounced by the first-instance judge, the debtor must file an appeal with the second-instance court. Before the second instance court, the debtor must make its solvency credible and give documented proof of one of the statutory reasons preventing the opening of bankruptcy (eg, repayment of the debt, deposit of moneys owed with the court or waiver of the creditor to pursue the proceedings). New allegations and documentary evidence about such facts are allowed, regardless of whether they are delivered before or after the first-instance decision.

A debtor passes the solvency test if sufficient funds are available to satisfy the creditors at maturity of their claims. The Federal Court considers only immediate and concrete funds available, but not future, expected or possible funds relevant to establish the debtor's ability to pay. A debtor is basically insolvent if no significant evidence of an improvement in its financial situation can be seen and it looks as if the illiquidity is indefinite. This may be assumed if the debtor is unable to pay even small amounts. In contrast, a debtor's temporary payment difficulties do not constitute insolvency. The assessment of the ability to pay is based on an overall impression of the payment habits of a bankrupt debtor.

Precautionary measures during claw back action proceedings

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In another decision,⁽²⁾ the Federal Court decided on precautionary measures during a claw back action in insolvency proceedings with the aim of returning assets to the bankrupt estate, which were unlawfully given away before bankruptcy.

X was the owner of various companies. Following the financial collapse of these companies, X went into private bankruptcy. Before the bankruptcy, X had transferred all the shares of the company Y AG to his two one-year-old sons. At that time, the members of the board of directors of Y AG were X and his brother. The sole assets of the company were various real estate properties.

Subsequently, numerous creditors brought action against the two sons (the current shareholders of the company) and claimed the revocation of the share transfer of Y AG. In addition, the creditors requested protective measures until the court judgment on the lawfulness of the share transfer. The district court granted the request of protective measures and issued an order with various restrictions on eight of Y AG's properties, even though the object of the main proceedings was not the real estate properties but the shares of the company holding the properties. Y AG's shareholders were the defendants in the main proceedings. These measures consisted of a temporal land register barrier and a restriction of the disposal of the properties, and aimed at the incapacity of the company to sell the properties during proceedings.

The two sons and their mother filed an appeal against these measures, but the Federal Court upheld the initial court order.

In the Federal Court's opinion, the restrictions issued against the properties caused no irreparable harm to the company. In particular, it was not demonstrated that the company's course of business required the sale or encumbrance of the properties. If in the main proceedings the court deemed that the transfer of shares was lawful, the protective measures would become obsolete or would be repealed.

The Federal Court also considered that general preliminary measures can be brought up not only against defendants in main proceedings but also against third parties. In particular, as Y AG was controlled by X's family, the court recognised the risk that the company would sell all its properties (ie, its entire assets) and hence lose its value. The loss of value would be reflected in the value of the shares at stake in the main proceedings. In the court's opinion, the restrictions issued directly against the real estate properties were therefore justified.

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Endnotes

(1) 5A_335/2014.

(2) 5A_853/2013.

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