Insolvency & Restructuring - Switzerland

Recent restructuring case law developments

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The Zurich High Court,(1) as court of second instance, recently dismissed a liability claim, to the amount of €150 million, initiated by the liquidator of Swissair against former members of Swissair's board of directors.

In 2001 the board decided to increase Swissair's capital to the amount of €150 million, in order to use these funds for the recapitalisation of Belgian airline Sabena to avoid Sabena's bankruptcy. At this time, the Swissair Group held 49.5% of Sabena's shares. According to the liquidator, due to the Swissair Group's poor financial situation, the board of directors' decision to recapitalise Sabena was unreasonable and unsustainable.

In the court's view, the payment to Sabena in 2001 was a lawful and reasonable business decision and therefore the former directors committed no breach of duty. In addition, the Swissair Group was not harmed by the recapitalisation, since the Swissair Group received equivalent value for its investment. Further, the court held that the Swissair Group was not overindebted in 2001 and therefore the company was in a position to invest funds. According to the court's considerations, the directors took into account the fact that the Swissair Group would be confronted with various third-party claims, especially from the Belgian creditors of Sabena, if it refused to recapitalise the company. Since these claims could easily exceed €150 million, letting Sabena fail was not a reasonable option for Swissair.

The liquidator communicated that it would not appeal this judgment.

In another decision, the Swiss Federal Court(2) had to decide whether contractual parties were permitted to exclude the application of the recovery principle (ie, the amount realised by public auction of a pledged good must exceed the sum of the secured claims) laid down in Article 126 of the Debt Collection and Bankruptcy Act.

According to Federal Court practice,(3) due to the protection of the debtor and the owner of pledged assets, pledgees are not entitled to waive the recovery principle, even if they have a priority right against other creditors. In its recent decision, the court emphasised that the protective purpose does not preclude a settlement containing a waiver of the recovery principle if all parties, in particular all secured creditors, as well as the debtor and the owner of pledged assets, have agreed.

Article 174 of the Debt Collection and Bankruptcy Act sets out that an appeal against the opening of bankruptcy proceedings can be filed by a party. In its recent decision,(4) the Swiss Federal Court confirmed its practice that third-party creditors (ie, creditors that did not initiate the bankruptcy proceedings) are not entitled to appeal the decision to open bankruptcy proceedings. According to the court's considerations, the opening of bankruptcy proceedings has only a reflex effect on the creditors' rights. Also, a third-party creditor does not participate in the bankruptcy proceedings as a party. Against this background, the court refused to qualify third-party creditors as 'parties' in the sense of Article 174.

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Endnotes

(1) LB090080/U, March 25 2013.

(2) 5A_1/2013, March 18 2013.

(3) BGE 104 III 79, November 23 1978.

Authors

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(4) 5A_43/2013, March 25 2013.