Ruling against Sabena shareholders in debt restructuring liquidation

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Introduction

The Federal Supreme Court recently rendered an important new decision in the SAirGroup and SAirLines proceedings (for further details please see "SAirGroup's debt restructuring liquidation leads to new decision"). It upheld the Zurich High Court decision in which the claims of three Sabena shareholders (the Belgian state, Société fédérale de Participations et d'Investissement SA and SA Zephyr-Fin) in the SAirGroup and SAirLines debt restructuring liquidation proceedings were rejected and not admitted in the schedule of claims. Moreover, the Federal Supreme Court upheld the Zurich High Court decision refusing to recognise the Brussels Appeal Court ruling of January 27 2011, which was partially about these claims.

The Federal Supreme Court held that foreign judgments issued after the opening of insolvency proceedings shall not be taken into account in the schedule of claims, even if the foreign proceedings were initiated before the insolvency proceedings opened.

Facts

Sabena's shareholders filed a claim of several billion Swiss francs in SAirGroup and SAirLines' debt restructuring liquidation proceedings. The liquidators rejected the claims and did not admit them in the schedules of claim.

On August 8 2006 Sabena's shareholders appealed and lodged a claim against the insolvency estates of SAirGroup and SAirLines with the Zurich District Court. In essence, Sabena's shareholders claimed that they had initiated proceedings in Belgium regarding the same claim before the debt restructuring moratorium of SAirGroup and SAirLines. They argued that the claims they had filed were the same as those in Belgium and concluded that the liquidators should have waited until the end of the Belgian proceedings and have taken into account the Belgian court ruling. After many intermediary proceedings, the Zurich District Court rejected the claims on February 22 2011.

Sabena's shareholders appealed to the Zurich High Court and produced the Belgian judgment rendered in the meantime. In the Belgian judgment, the court had partially accepted claims, partially rejected other claims and stayed the proceedings regarding further claims. Sabena's shareholders requested recognition of that part of the Belgian judgment admitting their claims and a stay of the proceedings until the end of the second part of the Belgian proceedings. The Zurich High Court rejected the appeal on May 28 2013.

On July 1 2013 Sabena's shareholders appealed the Zurich High Court decision to the Federal Supreme Court. On May 29 2015 the Federal Supreme Court (5A_491/2013) rejected the appeal and upheld the Zurich High Court decision.

Decision

The Federal Supreme Court first stated that insolvency proceedings do not fall within the scope of the Lugano Convention; neither do accessory proceedings relating to or arising from insolvency proceedings.

The possibility to lodge a claim against the insolvency estate to contest the schedule of claims is a procedure relating to insolvency proceedings and forms an integral part of them. The only goal of this procedure is to revise and rectify the schedule of claims and thereby establish the debts of the company (ie, the claims that must be taken into account when the insolvency proceeds are distributed). Thus, such a claim does not fall within the scope of the convention.

The court then discussed the issue of recognition of a foreign judgment in the proceedings against the insolvency estate, during which the claimants can contest the schedule of claims. It stated that it had already ruled on two situations:

- If the claim is based on a foreign judgment that has become binding and enforceable before the opening of the insolvency proceedings, the liquidators (and judge, if the creditors appeal) are bound by the judgment and must take it into account in the schedule of claims.
- If the creditors filed a claim abroad against the company after the opening of insolvency proceedings, the liquidators (and judge, if the creditors appeal) need not take the foreign proceedings into account and may decide independently whether the claim should be admitted in the schedule of claims and at what amount.

In previous judgments the court had only partially ruled on the question of whether a judgment issued by a foreign court can be recognised in any case and thus taken into account in the schedule of claims in the event that:

- the claim was filed abroad before the opening of insolvency proceedings; and
- the judgment was issued or had become binding and enforceable after the opening of the insolvency proceedings.

In this latest decision the court held that liquidators are not bound or influenced by foreign proceedings. The schedule of claims must be established independently by the liquidators (or a judge, if a creditor contests the schedule of claims). All claims and proceedings directly relating to the company insolvency fall within the jurisdiction of the state in which the proceedings have been opened.

Comment

The court clarified its jurisprudence and ruled that only a binding and enforceable foreign judgment issued before the opening of insolvency proceedings must be taken into account when establishing the schedule of claims. In all other cases a foreign judgment need not be taken into account in the Swiss insolvency proceedings.

It is better and more efficient for a creditor that intends to initiate proceedings against a Swiss company in

financial difficulties either to:

- find a jurisdiction in Switzerland and initiate court proceeding there – in which case, the lawsuit will be coordinated with the insolvency proceedings if insolvency proceedings are opened in the meantime; or
- stay the proceedings initiated abroad (if there is no jurisdiction in Switzerland) as soon as the Swiss insolvency proceedings have been opened and participate actively in the Swiss proceedings by filing a proof of claim in the debtor's insolvency estate in Switzerland, and request (if possible under foreign law) the foreign judge to coordinate the proceedings with the insolvency proceedings according to Swiss law.

The Federal Supreme Court gives more weight to the principle of the *vis attractiva concursus* (ie, the concentration of insolvency proceedings at specific insolvency courts) than the EU Insolvency Regulation provides. Indeed, in Article 15 the regulation foresees that the effects of insolvency proceedings on a pending lawsuit concerning an asset or right of which the debtor has been divested shall be governed solely by the law of the member state in which that lawsuit is pending.

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