

Insolvency & Restructuring - Switzerland

Supreme Court decision on provisional removal of debtor's objections

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Introduction

Under Swiss law, debt enforcement proceedings can be initiated by a debt enforcement office at the creditor's request, without the need for court approval. Immediately after receipt of the creditor's request, the enforcement office will issue a formal summons to pay and will notify the debtor. The debtor may raise an objection against the claim within 10 days of notification. A debtor's objection against the claim temporarily halts the enforcement proceedings. In order to remove the debtor's objection and continue with the enforcement, the creditor must initiate summary court proceedings.

In order to achieve the court's provisional removal of the debtor's objection, the creditor must possess certain kinds of documentation which is deemed a sufficient title (ie, written recognition of debt in the form of a notarised deed or a document signed personally by the debtor). With such a qualified title, the court will remove the objection provisionally, unless the debtor immediately produces evidence opposing recognition of debt.

In case of the court's (provisional) removal of the objection, the debtor can then submit a claim for denial of the creditor's claim. After the debtor has filed this submission, it is up to the court to decide in ordinary proceedings whether the claim is proved. To the creditor's advantage, the debtor must take over the role of plaintiff in the proceedings.

If the debtor's claim is dismissed, the creditor may request that enforcement be continued (ie, that the debtor's assets be realised in order to satisfy the creditor's claims).(1)

Facts

Person X was the sole shareholder of company Z. Based on a current account relationship, X was also a debtor of Z, which became insolvent in 2009. The trustee acting on behalf of Z initiated debt enforcement proceedings against X, to the amount of Sfr12 million. Since X raised objections against the summons to pay, the trustee filed a claim for the provisional removal of X's objections with the Kriens District Court. To provide sufficient title for the removal, the trustee filed a current account balance statement reflecting X's debt to Z of approximately Sfr6.8 million as of December 31 2008, signed by X. The trustee alleged that the Sfr6.8 million debt was recognised by X's signature, and that the signed current account balance statement qualified as sufficient title in order to remove the objection.

The court granted the provisional removal of the debtor's objections of approximately Sfr6.8 million. X appealed this decision. It argued that the signed outstanding current account balance document did not qualify as sufficient title to remove the debtor's objections against the summons to pay because the balance was carried forward to a new accounting period and therefore the current account balance was continued.

Supreme Court decision

The Supreme Court had never previously ruled on whether a signed outstanding current account balance statement is deemed as proper title for the provisional removal of a debtor's objections against a summons to pay and, in case the outstanding current account balance is continued, under what circumstances a signed statement would lose its qualification as sufficient title. Before this decision, it was unclear whether the signed balance sheet of an outstanding current account balance would lose its

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qualification as sufficient title for the provisional removal of the debtor's objection if the balance were carried forward to a new accounting period. It was unclear whether the continuation of the account would lead to the conclusion of a new contract replacing the debtor's signed recognition (novation).

The Supreme Court has now rendered a decision⁽²⁾ on this question. Where the balance for a specific accounting period shows non-payment of the debt and the balance is carried forward on to new accounting period, the recognition of an outstanding amount for the previous period will lose its independent nature. From an insolvency law perspective, if the balance is integrated in a new calculation, the signed outstanding current account balance sheet regarding the previous period will lose its qualification as sufficient title for provisional removal of the debtor's objection.

In line with X's arguments, the court confirmed that a signed outstanding current account balance document can qualify as a title for the provisional removal only if the following conditions are met:

- The signed document was issued after cancellation of the contract determining the current account balance;
- The account balance approved by the debtor is not carried forward to a new accounting period; and
- The balance sheet shows that there were no other transactions on the account.

In this case, the court concluded that none of these prerequisites was met. Therefore, it decided in favour of X and refused the trustee's request for provisional removal of the debtor's objection.

Comment

The courts' relatively strict approach to the procedure for provisional removal of a debtor's objections against the summons to pay, and this Supreme Court decision applying strict requirements on the proper title for provisional removal, may reflect an attempt to counterbalance the low hurdles for initiating an enforcement proceeding. Consequently, where a creditor seeks to enforce claims without prior court approval, it runs the risk of paying the procedural costs without finally obtaining any payments from the debtor.

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Endnotes

(1) By contrast, if the creditor is in possession of a judicial decision, settlement or a decision rendered by an administrative authority, it can request the court's definitive removal of the debtor's objection. In this proceeding, the debtor's objections to challenge the title were limited. As the term 'definitive' indicates, the debtor cannot raise a claim for denial of the debt as in the proceeding for a provisional removal. Hence, it is more difficult for the debtor to object against the definitive removal and, as a result, to block the continuation of the debt enforcement.

(2) 5A_133/2012, August 30 2012.

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