Recognition of Foreign Bankruptcy and the Requirement of Reciprocity (Swiss Federal Court)

The Swiss Federal Court recently issued a noteworthy judgment (scheduled for publication in the official reports) concerning the requirement of reciprocity with respect to the recognition of foreign bankruptcy decrees. The judgment (in German) is available here.

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Introduction

Under Swiss international bankruptcy law, the access of a bankruptcy administrator to a bankruptcy debtor's assets located in Switzerland requires a successful recognition of the foreign bankruptcy order by the competent Swiss court. The recognition of a foreign bankruptcy order and the effects of such recognition (including the opening of mandatory secondary insolvency proceedings over the assets located in Switzerland) are regulated by art. 166 et seq. SPILA (Swiss Private International Law Act). According to art. 166 para. 1 lit. c SPILA a foreign bankruptcy order shall be recognized provided that, amongst other prerequisites, reciprocity is granted by the state in which the order was rendered. In the decision of the Swiss Federal Supreme Court discussed hereinafter, it was disputed whether Dutch law grants reciprocity.

Summary of the facts of the case

The parent company C Ltd., Rotterdam (the Netherlands), filed a claim in the debt-restructuring moratorium over the company B Ltd., Zug (Switzerland). The respective claim was for the most part provisionally admitted by the trustees and for the remaining part contested.

By judgment of August 6, 2012 the district court of Rotterdam opened bankruptcy

proceedings over C Ltd. and appointed A as bankruptcy administrator.

By judgment of February 18, 2013 the cantonal court of Zug approved a composition agreement entered into between B Ltd. and the creditors.

On September 13, 2013, the foreign bankruptcy administrator (A) filed a request for recognition of the Dutch bankruptcy order of August 6, 2012 with the cantonal court of Zug.

By judgment of October 8, 2013 the cantonal court of Zug rejected the request for recognition of the Dutch bankruptcy order by reasoning that the prerequisite of reciprocity (art. 166 para. 1 lit. c SPILA) is not granted by Dutch law. After rejection of the appeal by the High Court of the Canton Zug, A filed an appeal in civil matters to the Swiss Federal Supreme Court and requested annulment of the judgment of the High Court of the Canton of Zug, recognition of the Dutch insolvency order of August 6, 2012 and in consequence of the latter, the opening of secondary bankruptcy proceedings over C Ltd.'s assets located in Switzerland.

Considerations

The Swiss Federal Supreme Court refers to earlier case law, according to which the prerequisite of reciprocity is to be interpreted in a broad sense. Reciprocity is granted if the law of the state concerned recognizes the effects of Swiss bankruptcy proceedings on similar (but not necessarily on identical) grounds. In other words, it suffices if the foreign law recognizes a Swiss bankruptcy order under conditions not considerably stricter than those established by Swiss law regarding the recognition of a foreign bankruptcy order.

The decision furthermore refers to the European trend of abolishing the prerequisite of reciprocity, which is also reflected in Swiss legislation. Since September 1, 2011 the Swiss Financial Market Supervisory Authority (FINMA) *may* recognize under certain conditions foreign bankruptcy orders and insolvency measures pronounced against banks abroad without a mandatory opening of secondary bankruptcy proceedings in Switzerland (cf. art. 37g para. 2 Swiss Banking Act) and without the state in which the bankruptcy order was rendered granting reciprocity (cf. art. 10 para. 2 Regulation on Banking Insolvencies by the Swiss Financial Market Supervisory Authority). As a consequence thereof, the Swiss Federal Supreme Court acknowledges that the bar should not be set too high regarding the prerequisite of reciprocity where it still exists.

In the Netherlands, the opening of foreign bankruptcy proceedings cannot be formally recognized and no formal and comprehensive effects of seizure occur. Thus, according to Dutch law a foreign bankruptcy administrator has to "compete" with other creditors, since their rights over seized assets are to be respected. However, the foreign bankruptcy administrator has rights of action and enforcement rights on Dutch territory. Furthermore, he is able to directly access the bankruptcy debtor's assets located in the Netherlands. Consequently, the Dutch international bankruptcy law appears to be equal in qualitative terms, although technically differing fundamentally from Swiss international bankruptcy law. According to the decision of the Swiss Federal Supreme Court, with regard to the prerequisite of reciprocity, it is not decisive that the formal recognition of a foreign bankruptcy order and an overall liquidation of local assets are alien to Dutch international bankruptcy law. Instead, the quality of mutual assistance is decisive. Moreover, the Swiss Federal Supreme Court acknowledges that a foreign bankruptcy administrator is not in a worse position but presumably in numerous cases even in a better position in the Netherlands compared to the position of a foreign bankruptcy administrator in Switzerland.

In consequence thereof, the Swiss Federal Supreme Court concludes that Dutch law grants reciprocity according to art. 166 para. 1 lit. c SPILA and provided that the remaining prerequisites are fulfilled, the Dutch bankruptcy order shall be recognized.

Comment

It has to be welcomed that the Swiss Federal Supreme Court has adopted a liberal interpretation based on a contemporary understanding of tendencies in international insolvency law and especially in Swiss international banking insolvency law. The former case law of the Swiss Federal Supreme Court was shaped by a highly restrictive interpretation of art. 166 et seq. SPILA insisting on a protective interpretation of Swiss international insolvency law. The present decision delivers the impression that the Swiss Federal Supreme Court finally considers international trends and – even more important – trends in Swiss law. However, it is incomprehensible and intolerable that Swiss international banking insolvency law contains a far more liberal regulation than Swiss international insolvency law; the latter being applicable much more frequently. This unsatisfactory legal situation is the result of the uncoordinated process of revising and adopting Swiss legislation. Hopefully, the Swiss Federal Supreme Court will

continue to follow international trends and adopt a more generous approach also on other issues of Swiss international insolvency law, for example with regard to the power of the bankruptcy administrator in Switzerland.