



Insolvency Law Newsletter Switzerland

Foreign Insolvency Administrator only Competent to Take Legal Action in Switzerland after Recognition of the Foreign Insolvency Decree in Switzerland

Summary of Decision

On October 26, 2011, the Federal Supreme Court confirmed that a foreign insolvency administrator is not competent to file legal action in Switzerland without first seeking recognition of the foreign insolvency decree in Switzerland, where the purpose of the legal action in Switzerland is to collect assets located in Switzerland for the benefit of the estate (see Decision of the Federal Supreme Court 4A_389/2011)

Facts

On Mai 1, 2000 the German court in Karlsruhe opened insolvency proceedings over A. and designated B. as the insolvency administrator. B. discovered that there may be an avoidance action against A's wife and concluded a settlement agreement with A's wife, according to which A's wife was required to transfer the largest portion of her assets, including real estate located in Switzerland to the estate.

Subsequently A's wife sold the real estate in Switzerland and kept the proceeds from the sale in the amount of CHF 17'500'000 for herself.

B. filed an action against A's wife in the district court Switzerland for the payment of the proceeds based upon the settlement and assignment agreement. The district court first limited the case to the question of authority to sue which it upheld. The appellate court reversed the decision of the district court. The plaintiff filed an appeal against the decision of the appellate court.

Decision

The Federal Supreme Court confirmed that the international insolvency law in Switzerland is based upon the principle of territoriality which is mitigated by the application of Art. 166 et seq. Swiss Private International Law Act which deals with the recognition of foreign insolvency decrees in Switzerland.

In general, a foreign insolvency administrator will have to apply for recognition of the foreign insolvency decree in Switzerland which, upon recognition, leads to an ancillary insolvency proceeding in Switzerland under Swiss law and under the auspices of the competent Swiss insolvency office. It is this office which is exclusively competent to exercise the rights of the foreign insolvency estate, in as far as assets located in Switzerland are concerned. A foreign insolvency administrator is only competent to bring avoidance action, if and when the Swiss insolvency office and the creditors listed in the Swiss creditor's ledger have abstained to do so. The Federal Supreme Court has already held in an earlier decision (Decision of the Federal Supreme Court 5A_415/2011 of September 21, 2011) that a foreign insolvency estate is only entitled to commence legal action in Switzerland after having sought recognition of the foreign insolvency decree.

The requirement of seeking first recognition in Switzerland applies to all cases of legal actions, where a foreign insolvency administrator seeks to increase the assets of the estate by attempting to collect assets located in Switzerland which was the case.

The Court finally confirmed the decision of the cantonal appellate court.



Comment

The decision rendered by the Federal Supreme Court is a consequence of the general principle that the hands of a foreign governmental authority are not permitted to reach into the Swiss territory.

The principle of territoriality does, according to Swiss law, however, not restrict a Swiss insolvency administrator to reach for assets outside the Swiss territory. This issue will have to be answered by the foreign jurisdiction, where the assets are located.

In today's globalized economy, the principle of territoriality in insolvency law matters, as understood by Swiss law, appears to be a relict from the Stone Age and does not foster an efficient administration in international insolvency law matters in the interest of all creditors. Rather, it tends to complicate matters and increase administrative costs to the detriment of all the creditors.

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