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ARTICLE

A New Chapter in the *Swissair* Insolvency Proceedings in Switzerland

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1. Introduction

Swissair, the former Swiss national air carrier group, is now more infamous for its long lasting insolvency proceedings. The proceedings encompass distinct proceedings over several companies of the former group (SAirLines AG, SAirGroup AG, Swissair Schweizerische Luftverkehr AG and Flightlease AG).

In the first half of 2014, the Swiss Federal Supreme Court rendered two decisions in the Swissair proceedings. The first one is about a civil litigation aspect (value at stake and advance on costs), the other one is relevant in several fields: international insolvency and civil litigation (recognition of foreign judgments when insolvency proceedings have been opened over a company in Switzerland).

First we will present briefly the two new decisions. Secondly, we will sum up and analyse in a more detailed way the newest decision of the Swiss Federal Supreme Court on the recognition of foreign judgments linked to insolvency proceedings in Switzerland.

2. Brief summary

2.1 Value at stake and advance on costs

In one of the latest decisions[1] in the Swissair proceedings concerning a claim of ca. CHF 2.4 billion of the estate of the Swiss auxiliary insolvency proceedings of the insolvent Belgian Sabena SA (both 'Sabena') against the SAirGroup AG in liquidation ('SAirGroup'), the Swiss Federal Supreme Court ruled that the Zurich High Court asked for a too high court deposit (CHF 800,000) in the appeal proceedings and sent the matter back to the Zurich High Court without deciding itself on the amount of costs. Sabena requested the Swiss Federal Supreme Court to lower the advance on costs (court deposit) for the appeal proceedings to CHF 300,000.

The proceedings started in October 2006 with the submission of Sabena's contestation of the list of claims issued by the liquidator of SAirGroup with the District Court of Zurich, as Sabena's claim filed in the insolvency proceeding was not accepted in its full amount. The District Court of Zurich ruled in April 2013, upheld a claim of only CHF 28,684,927 and rejected the rest of the claim. Sabena filed an appeal with the Zurich High Court, which first issued an order regarding the advance on costs. The advance on costs of the Zurich High Court was based on the expected dividend of the SAirGroup's creditors which had increased between the submission of the claim and the appeal. Sabena lodged an appeal against this order. The Swiss Federal Supreme Court ruled that the advance on costs for the appeal proceeding could not be affected by this increase.

2.2 Recognition of a foreign judgment linked with Swiss insolvency proceedings

In a dispute opposing the SAirLines AG in liquidation ('SAirLines'), SAirGroup and Sabena, the Swiss Federal Supreme Court had to decide on the recognition of a Belgian judgment. After the opening of insolvency proceedings over the Swissair companies, Sabena had joined an already pending proceeding in Belgium in which the shareholders of Sabena had initiated a damage claim against SAirLines/SAirGroup. Subsequent to the decision of the Belgian Courts in which Sabena was granted the provisional amount of EUR 18,290,800.60, Sabena requested that the Belgian judgment should be recognised in Switzerland. The Swiss Federal Supreme Court decided that the Belgian judgment could not be recognised and enforced according to the Lugano Convention (the parallel agreement to Council Regulation (EC) 44/2001 of 22 December 2000 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters that is applicable in Switzerland, 'LugC') because Sabena had put forward the respective arguments in an amendment of claim first after the opening

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1 Decision BGE 140 III 65, available in German under< www.bger.ch>.

of insolvency proceedings of SAirLines and SAirGroup. In the Swiss Federal Supreme Court's view, Sabena's claim in Belgium was – if not formally – functionally related with the liquidation proceedings of SAirLines and SAirGroup because the only purpose of joining the proceedings in Brussels was to receive a judgment and to present it in Switzerland in the liquidation proceedings of SAirLines/SAirGroup. Therefore, the Belgian judgment had to be considered as an insolvency matter which would not fall under the scope of the LugC.

3. The Swiss Federal Supreme Court's judgment on the non-recognition of the Belgian judgment in particular

3.1 The facts and the proceedings

In Switzerland:

On 5 October 2001, a provisional stay ('*provisorische Nachlassstundung*') was granted to SAirLines and SAirGroup by the competent Swiss tribunal.

On 20 January 2003, a composition agreement with assignment of assets ('*Nachlassvertrag mit Vermögensabtretung*') in both proceedings was approved by the competent Swiss tribunal.

In both proceedings, the liquidators issued the list of claims against which Sabena appealed in both cases because its claims were not accepted in the full amounts.

In Belgium:

In February 2003, Sabena entered pending proceedings which were initiated with the Commercial Court of Brussels by the Belgian shareholders of Sabena against SAirLines and SAirGroup.

Sabena supported its claim with the same arguments as it had brought forward in its proof of claim in the Swiss insolvency proceedings and asserted that SAirGroup and SAirlines breached an agreement between them and Sabena and that an (insolvency) damage resulted from this breach.

On 27 January 2011, the Appeal Court of Brussels rendered a prejudgment and ruled inter alia that SAirLines and SAirGroup had to pay EUR 18,290,800.60 to Sabena ('Belgian judgment').

In Switzerland (again):

On 24 March 2011 while the appeal proceedings against the Swiss list of claim was still pending, Sabena requested with the court in Zurich the recognition and the enforcement of the Belgian judgment under the LugC. On 25 March 2011, the Zurich court declared the judgment regarding the payment of EUR 18,290,800.60 to be enforceable.

On 7 November 2012 the Zurich High Court confirmed the ruling of the Zurich court.

On 8 May 2014 the Swiss Federal Supreme Court ruled that the Belgian judgment could not be recognised and enforced in Switzerland under the LugC because the LugC did not apply in this case.[2]

3.2 Retrospective of two former Swissair judgments

In the merits of its judgment dated 8 May 2014, the Swiss Federal Supreme Court dealt with two former decisions rendered in Swissair proceedings.[3]

In these two cases the Swiss Federal Supreme Court decided that foreign pending proceedings about a claim initiated prior to the insolvency of the debtor cannot suspend the decision about the listing of the claim in the Swiss insolvency proceedings (list of claims, the assessment whether the claims submitted in an insolvency proceedings participate in the insolvency estate of the debtor) and that the appeal proceeding against the list of claims could not be stayed because of a pending proceeding about the same claim abroad. In sum, the Swiss insolvency proceedings will not wait for the result of the foreign pending proceedings and the creditors have to prove their claim in the Swiss insolvency proceedings despite the existence of pending proceedings abroad about the same claim.

On the contrary, a claim that is already subject to pending proceedings in Switzerland at the time of the opening of insolvency proceedings will be listed as a 'pro memoria claim' in the list of claims and the pending proceedings will be stayed until the competent body of the insolvency estate decides how to continue the pending proceedings. If the competent body renounces to continue the proceedings, the creditors have the choice to step in the proceeding by requesting the assignment of the defendant rights. If neither the competent body nor a creditor by way of assignment continues the court proceedings, the respective claim is considered as accepted in the insolvency.

In 2009, the Belgian State submitted an application instituting proceedings with the International Court of Justice in the Hague asserting, amongst others, a violation of the LugC because of the Swiss Federal Supreme Court's decision. However, it withdrew the application because of Switzerland's argumentation putting the Federal Supreme Court's ruling into perspective. In

Notes

2 Decision 4A_740/2012, 8 May 2014, to be officially published, available in German under <www.bger.ch>.

3 Decisions BGE 133 III 386 und BGE 135 III 127, available in German under <www.bger.ch>.

particular, Switzerland argued that the Belgian Court had not issued a judgment at that time so there was not any Belgian judgment to be recognised when the Swiss Federal Supreme Court decided on the matter. In Switzerland's view, the Swiss Federal Supreme Court had not bindingly decided yet on the recognition of a future Belgian judgment.

3.3 The merits of the decision 4A_740/2012 of 8 May 2014

Today, now that a Belgian judgment was issued, the Swiss Federal Supreme Court could decide on its recognition and brought some clarity – at least with regard to some aspects. The main question that had to be treated by the Swiss Federal Supreme Court was whether the Belgian judgment with regard to Sabena's claim can be recognised and enforced under the LugC. Or more exactly, whether Article 1 paragraph 2 litera b LugC was applicable in the case at hand. This article provides that bankruptcy, proceedings relating to the winding-up of insolvent companies or other legal persons, judicial arrangements, compositions and analogous proceedings do not fall under the scope of the LugC.

The Swiss Federal Supreme Court confirmed that – when interpreting the LugC – it followed the established case law of the European Court of Justice ('ECJ') on the European Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (1968, 'Brussels Convention) and of the Council Regulation (EC) No 44/2001 of 22 December 2000 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial matters (which replaced the European convention of 1968, 'Brussels I Regulation'), provided that the ECJ did not base its ruling on communitarian rules which cannot be derived from the LugC or the legal orders of the other State parties to the LugC.

In this context, the Swiss Federal Supreme Court reminded the principles of *Gourdain/Nadler* and stated that article 1 paragraph 2 number 2 Brussels Convention encompassed beside the insolvency proceedings as such (general proceedings) also the so-called single proceedings. However, it is necessary, if decisions relating to bankruptcy and winding-up are to be excluded from the scope of the convention, that they must derive directly from the bankruptcy or winding-up and be closely connected with the proceedings. In *Seagon/Deko Marty Belgium NV*, the ECJ stated that an action with such characteristics does not fall within the scope of that convention. Over the years, the Swiss Federal Supreme Court developed its own practice based on the said decisions and specified that the application of the LugC depended on whether the proceedings had its foundation in the law of debt enforcement and bankruptcy or whether it would have most probably been initiated also without the insolvency of the debtor. In the case of the latter, article 1 paragraph 2 litera b LugC would not apply (i.e. the LugC would be applicable in this regard). Also, the test whether the proceedings serve the augmentation of the bankruptcy estate is relevant. In its analysis of the ECJ's most recent decisions (*Industri/Alpenblume* and *German Graphics/van der Schnee*), the Swiss Federal Supreme Court noted that the ECJ confirmed the rules as established in *Gourdain/Nadler* and specified that there had to be a close and direct connection between the claim and the bankruptcy proceedings in order for the exclusion of article 1 paragraph 2 litera b Brussels I Regulation to apply.

Finally, the Swiss Federal Supreme Court came to the conclusion that the Belgian proceedings that led to the Belgian judgment dated 27 January 2011 did not fall within the scope of the LugC with the following arguments:

- The insolvency proceedings over SAirGroup and SAirLines started when the competent judge granted the composition moratorium on 5 October 2001.
- Outside the composition proceedings, the Belgian judgment dated 27 January 2011 had no relevance/signification.
- Sabena joined the proceedings with the Brussels Commercial Court in February 2003 because of a notification of the dispute to Sabena. It first claimed the damages against SAirGroup and SAirLines in its submission dated 14 February 2003, i.e. a long time after the opening of the bankruptcy proceedings.
- There was an obvious connection between the Belgian proceedings and the Swiss composition procedure. Sabena knew when it submitted the prayer for relief at stake with the Commercial Court of Brussels that the Belgian judgment would be only enforceable in the Swiss composition procedure over SAirGroup and SAirLines. Hence, it submitted its claim with the Belgian Court in the intent to have it admitted in the list of claims in Switzerland by presenting the Belgian civil judgment in the insolvency proceeding. In the Swiss Federal Supreme Court's view, Sabena followed – at least indirectly – the same goal as with an action to contest the list of claims. It ruled that Sabena's claim in Belgium was – if not formally – functionally related with the liquidation proceedings of SAirLines and SAirGroup.
- Based on this functional connection, Sabena's claim in Belgium submitted after the opening of the insolvency proceedings is an insolvency matter according to article 1 paragraph 2 litera b LugC.

Then, the Swiss Federal Supreme Court considered that it had not ruled in the two former Swissair judgments (see 3.2 above) on the question whether a foreign

judgment could be recognised and enforced in Switzerland when insolvency proceedings had been opened on the defendant.

The Swiss Federal Supreme Court was further considering that the Belgian judgment in the present case, the recognition and enforcement of which was object of the proceeding, was a civil judgment on a claim (liability and damages of SAirLines and SAirGroup based on a breach of an agreement) and not an appeal proceeding that was initiated against a Swiss list of claims in an insolvency proceeding. On the other hand, the Swiss Federal Supreme Court considered that in proceedings regarding the contestation of a list of claims, the existence of a claim from a civil law point of view was not direct subject of such a proceeding, the purpose of which is indeed the correction of the list of claims. However, the competent judge in the action to contest the list of claims has to determine as a preliminary issue whether and in what amount the claim that is subject to the contestation proceeding exists in order to rule on its admission.

The Swiss Federal Supreme Court took the opportunity and explained how to coordinate foreign civil proceedings when the respective claim is identical with a claim that was submitted in a Swiss insolvency and based its distinction on the legal force of the foreign judgment at the time of the opening of the bankruptcy proceedings:

- As a matter of principle, the final and binding effect of a foreign judgment within the scope of the LugC must be respected and is a preliminary issue in every domestic proceeding. Hence, a foreign judgment which has entered into force before the opening of the bankruptcy proceedings has to be taken into account in a court proceeding that deals with the admission of a claim in a Swiss insolvency if the conditions for recognition are given.
- On the other hand, if at the time of opening of insolvency proceedings no final and binding foreign judgment is issued, it has to be determined whether
  (1) an already pending or later initiated foreign civil proceedings regarding a same claim as submitted in a Swiss insolvency can take place independently from the Swiss admission proceeding, and
  (2) what happens if such foreign civil proceeding leads to a judgment with legal force on the claim while it has still not been decided about the admission of the claim in the Swiss insolvency.
- In international cases, coordination rules do not exist to answer these questions. Hence, the list of claims procedure in Switzerland goes on and is not influenced by foreign pending proceedings. Therefore, it is possible that a foreign court renders a civil judgment after the opening of the insolvency proceedings over the debtor and that this judgment is presented in the list of claims procedure.

Unfortunately, the Swiss Federal Supreme Court declared that the question of the effects of such a foreign judgment in the Swiss insolvency proceedings could remain unanswered as the Belgian judgment could not be recognised in Switzerland under the LugC for the reasons which were explained above.

3.4 Conclusion

In its judgment of 8 May 2014, the Swiss Federal Supreme Court found that the particular civil proceedings about Sabena's claim against SAirGroup and SAirLines with the Belgian Court was an insolvency matter and refused to recognise it under the LugC. To that extent, this judgment has enlightened the application of the exception of article 1 paragraph 2 litera b LugC.

Two constellations are clear now:

- If a foreign judgment (rendered by a State party to the LugC) entered into force before the opening of insolvency proceedings in Switzerland, it can be recognised in Switzerland in the Swiss insolvency proceedings under the conditions of the LugC.
- On the other hand, if the foreign proceedings have not even been initiated at the opening of the insolvency proceedings in Switzerland, the future foreign judgment (rendered by a State party to the LugC) will be considered to be connected to an insolvency matter within the meaning of article 1 paragraph 2 litera b LugC and will not be recognised in Switzerland.

This decision shows that insolvency proceedings in Switzerland – even though this approach seems to be confirmed by the established case law of the ECJ and is a valid one – are ruled by a territorial way of thinking. In the Swiss perspective, the competent Swiss judge has sole jurisdiction over the claims in the list of claims procedure.

Two central questions remain however unanswered:

- Can a foreign judgment be recognised under the LugC if the foreign proceedings were initiated before the opening of the insolvency proceedings?
- If so: What are the effects of the recognition of this foreign judgment in the insolvency proceedings in Switzerland?

Since the Swiss Federal Supreme Court did not give any hint on this matter, it is difficult to know how to act when foreign pending proceedings were initiated before the opening of the insolvency proceedings in Switzerland.

For sure, it is wise and even mandatory to participate as a creditor in the Swiss list of claims procedure and

try to have a claim admitted here. On the other hand, it is not sure if it is equally economically wise to continue foreign proceedings which were initiated before the insolvency proceedings of the debtor as the recognition and the effects of the recognition of the foreign judgment are now uncertain. On the other hand, since the judgment on the list of claims proceedings does not have a *res iudicata* effect outside the insolvency proceedings, one has to analyse whether a regular civil judgment is needed for other purposes.

This legal uncertainty as to the effect of a foreign civil judgment (where the proceedings were initiated before the opening of the insolvency proceedings) in the Swiss insolvency proceedings is particularly visible when the creditor has to decide about the withdrawal of the civil claim with the foreign courts: Will this withdrawal be considered as an admission of the non-existence of the claim in the Swiss list of claims procedure (if the withdrawal has such effects under the foreign procedure law)?

Some Swiss commentators argue that a foreign judgment rendered after the opening of the insolvency proceedings but before a Swiss ruling on the admission in the list of claims should be recognised and declared enforceable in Switzerland under the LugC if the other conditions are met. However, the Swiss Federal Court does not seem to exclude the fact that a Swiss judge in the Swiss insolvency proceedings might ignore the very same judgment and its *res iudicata*. Hence, the same authors suggest that the Swiss liquidator could continue the foreign proceedings (which were already pending at the moment of the opening of the insolvency proceedings) or that the Swiss liquidator could assign the defence rights in these proceedings to the creditors willing to continue the foreign proceedings.[4] The problem with this solution is – in our opinion – that it is not sure whether the foreign competent court will consider the assignment of the claims to other creditors to defend the debtor's position as a valid one under the local applicable law.

4. Outlook

The Swissair insolvency proceedings are the biggest insolvency proceedings in Switzerland ever seen until now.

In these proceedings, many important questions arose and there was enough money at stake to bring these questions up to the Swiss Federal Supreme Court. This is not always the case in insolvency proceedings.

This explains why there were many leading cases related with the Swissair proceedings. Indeed, all the published Swissair decisions are a cornerstone for the Swiss jurisprudence in insolvency matters and give every time an opportunity to the Swiss Supreme Federal Court to sum up its practice and give new directions. We look forward with great interest to its next decision.

Notes

4 D. Hunkeler/G. Wohl, ‚Wirkungen eines ausländischen Urteils im schweizerischen Kollokationsprozess', Jusletter of 30 June 2014, <www.jusletter.ch>, N 21 et seq.

International Corporate Rescue

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