INSOLVENCY & RESTRUCTURING - SWITZERLAND

News from SAirGroup liquidation

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Introduction

The insolvency proceedings for the Swissair companies have yet again proved to be one of the biggest and most important cases in the history of Swiss insolvency law. The Federal Supreme Court recently rendered a groundbreaking decision in the liquidation proceedings for SAirGroup and changed its jurisprudence regarding the legitimacy of an insolvent company's estate to claim for damages incurred by company creditors.

The liquidator of SAirGroup issued a new circular to the creditors, summarising, among other things, the status of SAirGroup's insolvency proceedings, its activities and the next steps.

Swissair insolvency case

Facts

Shortly before the approval of the provisional moratorium, SAirGroup (the holding company of the Swissair group) made several due payments to SAirGroup creditors between September 10 2001 and October 1 2001.

On June 27 2012 the estate of the insolvent SAirGroup lodged a liability claim with the Zurich Commercial Court against some members of SAirGroup's executive body, claiming that the respondents had unlawfully privileged certain creditors to the detriment of the other creditors by paying out the amounts between September 10 2001 and October 1 2001.

The Zurich Commercial Court rejected the claim on July 1 2015 on two grounds. First, the court deemed that with the settlement of due debts SAirGroup did not suffer damage and that the estate of SAirGroup could not legitimately claim for damages incurred solely by the creditors of the insolvent company (eg, damage for the decrease of realisable assets). Second, the court ruled that it could not establish a breach of the duties of the executive body. The mere fact of authorising payments to certain creditors before insolvency – and thus treating these creditors more favourably than creditors which received no payment – did not constitute a breach of duties that could lead to liability of executive board members.

The estate of the insolvent SAirGroup appealed to the Federal Supreme Court, which rejected the appeal on December 10 2015.(1)

Merits

First, the Federal Supreme Court analysed its case law from 2000. In *Raichle*(2) the court deemed that the estate of an insolvent company had legitimately lodged a liability claim against the members of its executive body and claimed for damage that company creditors incurred because of an intentional or negligent breach of the duties committed of the executive body. The court explicitly recognised the estate's legitimacy to claim independently, regardless of whether the insolvent company itself suffered because of the acts of executive body members.

Subsequently, the court explained that the decision in *Raichle* had been rendered at a time when the legitimacy of the insolvent company's creditors to lodge a liability claim against the executive body was extremely restricted. According to the court, *Raichle* was supposed to correct this restriction by allowing at least one claimant – the estate of the insolvent company – to claim against the executive body in situations where creditors were restricted from doing so.

The court noted that the restrictions on creditors claiming against the executive body of the insolvent company had subsequently been abandoned. Therefore, according to the court, the creditors which were directly damaged by the acts of the executive body (because its dividend in the insolvency proceeding was smaller) could now legitimately lodge a liability claim against the executive body. Consequently, there is no reason to allow the estate of the insolvent company to lodge a claim on behalf of all creditors. In other words, the estate of an insolvent company can no longer legitimately lodge a liability claim for damages which it has not incurred itself.

Comment

The court once again changed its jurisprudence relating to the right to lodge liability claims in insolvency proceedings. It remains to be seen for how long the court will stick to these new rules. As a result of this decision, creditors that have suffered damage due to acts of the executive body of a Swiss company in insolvency proceedings should carefully assess whether to lodge an independent liability claim against the fallible bodies.

As the court denied the legitimacy of the insolvent company's estate to claim, it did not have to decide on whether the executive body of a company is obliged to stop payments once it is clear that the company is insolvent in order to treat all creditors equally. However, such payments can in any event be subject to clawback actions against the beneficiaries of the payments.

New circular

The SAirGroup liquidators recently issued the 26th circular to the creditors. They announced, among other things, that the financial situation of SAirGroup would allow the liquidators to proceed to a fourth advance payment of 2% of the dividend to the regular (unprivileged) creditors. This advance payment is expected to take place from mid-May 2016 at the earliest.

Based on the current status of the liquidation of SAirGroup, the liquidators expect a maximum dividend of 18.9% and a minimum dividend of 13%. With the advance payments that were paid out, 10% of the dividend has already been paid to the creditors. Therefore, the expected (net) dividend is between 3% and 8.9%.

The liquidators reported that the claim of Sabena SA (in liquidation) against the schedule of claims of SAirGroup was admitted by the first-instance court in Zurich (January 19 2016) to the amount of Sfr28,684,927, but rejected to the amount of Sfr2,358,783,548.45. Sabena SA may appeal to the Zurich Supreme Court, which could once again open the door to a groundbreaking Federal Supreme Court judgment.

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Endnotes

(1) Federal Supreme Court, December 10 2015, Nr 4A_425/2015, available at www.bger.ch (in German).

(2) Federal Supreme Court, September 19 2000, Nr 5C.29/2000, available at www.bger.ch (in German).

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