CORPORATE
SWISS INSOLVENCY LAW

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The recognition of foreign insolvency decrees in Switzerland is sometimes problematic

In an insolvency of a multinational group the debtor's assets are located in different jurisdictions. To what extent foreign insolvency administrators and creditors of a foreign debtor can access assets located in another jurisdiction depends on the local legal framework. Switzerland currently applies the concept of territoriality, according to which a foreign bankruptcy decree does not have any effect unless it has been formally recognised in Switzerland. Foreign insolvency administrators and creditors of a foreign debtor may only make claims for assets located in Switzerland after recognition of the foreign decree (and the opening of ancillary proceedings). From 2010 to 2014 there were approximately 50 applications for recognition of a foreign insolvency decree in Switzerland.

Since the May 2015 Council Regulation on insolvency proceedings does not apply to Switzerland and Switzerland has not adopted the UNCITRAL Model Law on Cross-Border Insolvency, the rules of articles 166 et seq. of the Swiss Private International Law Act (PILA) determine whether a foreign insolvency decree can be recognised in Switzerland. In particular, the foreign insolvency decree has to meet the requirements of article 166 PILA (the same requirements apply to the recognition of a foreign composition agreement or similar proceedings):

- The decree must have been rendered by the competent court at the seat of the debtor.
- The decree is enforceable in the issuing country.
- The recognition of the decree is not incompatible with Swiss public policy (*ordre public*).
- Reciprocity is granted by the issuing country.

If a foreign bankruptcy decree meets these requirements and thus can be recognised in Switzerland, ancillary proceedings are opened and a local administrator will be appointed. The purpose of ancillary proceedings is the protection of Swiss creditors. Secured and privileged Swiss creditors have a priority right to be satisfied from assets located in Switzerland. Only a potential surplus after liquidation of the assets will be remitted to the foreign insolvency estate and the foreign creditors, provided that unsecured and unprivileged Swiss creditors are adequately considered in the foreign proceedings. Otherwise, the

1 MINUTE READ

In international insolvencies, insolvency administrators and creditors have to look for assets in other jurisdictions. To what extent this is possible depends on the local legal framework. Switzerland applies the concept of territoriality according to which foreign bankruptcy decrees need to be formally recognised. Because in practice the strict legal requirements have sometimes made the recognition of a decree difficult, Swiss legislation has now been revised.
A new law removes some of the major burdens and will facilitate the recognition of foreign insolvency decrees. The practical implications of this new law will still have to be looked into

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surplus will be distributed to the unsecured and unprivileged Swiss creditors.

Problems with the current rules of PILA

In practice, the requirements of article 166 PILA can make the recognition of a foreign insolvency decree cumbersome.

Foreign bankruptcy decrees cannot be recognised in Switzerland if they were issued at the centre of main interests (Comi) and this place does not correspond with the statutory seat of the debtor. Because bankruptcy decrees from EU jurisdictions are often issued at the Comi, this creates recognition problems.

The reciprocity criteria has shown to be another area of concern. This requirement makes it necessary for the applying party to produce costly legal opinions und conduct complex clarifications which delay the recognition process. In the recent international bankruptcy of an international oil company (Petroplus), the Dutch insolvency administrator applied for recognition of the Dutch insolvency degree in Switzerland. However, the first and second instance courts in Zug/Switzerland denied recognition because they decided that Dutch law does not grant reciprocity. Only after the Swiss Federal Tribunal confirmed that Dutch law does grant reciprocity and overturned the decisions of the lower courts (BGE 141 III 222), the Dutch insolvency decree could finally and almost two years after the initial application be recognised in Switzerland.

Finally, since ancillary proceedings are aimed at protecting secured and privileged Swiss creditors, ancillary proceedings are only justified if such creditors actually exist. The same argument applies to restrictions on the foreign insolvency administrator's ability to act in Switzerland in connection with the collection of local assets that must not be done without including the Swiss authorities. The PILA does not distinguish whether there are secured and privileged creditors or not; ancillary proceedings need to be opened in either case.

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It's worth noting that due to substantial costs in connection with an application for recognition of a foreign insolvency decree, assets in Switzerland need to be worth at least CHF 10,000 ($10,300 approximately) to make ancillary proceedings cost-effective.

The factors listed above may delay or even prevent the recognition of a foreign insolvency decree. This may have the undesirable effect that a debtor is bankrupt in one jurisdiction but in Switzerland the debtor can still dispose over its assets. In addition, individual compulsory enforcement proceedings remain possible. Individual creditors can access the debtor's assets to the detriment of other creditors. Further, restructuring proceedings that benefit employees and creditors may not be possible if a foreign composition agreement cannot be recognised due to the strict requirements of the PILA. Finally, since it is unclear to what extent Swiss authorities may coordinate their actions with domestic and foreign proceedings, it can lead to inefficiencies and parallel proceedings. This is of particular relevance in insolvencies of a multinational group or insolvencies of a Swiss branch of a foreign insolvent entity when in parallel ancillary proceedings are opened.

Revision of the PILA

The Swiss Federal Council has recognised the burdens created by the PILA. On May 24 2017, the Swiss Federal Council adopted the dispatch on a revision of the PILA in connection with the recognition of international insolvency decrees and foreign composition agreements to the Swiss Parliament. The amended articles were published in the Swiss Federal Gazette on March 27 2018 and the deadline for the optional referendum expired on July 5 2018. The Federal Council is now expected to determine the date of entry into force of the revised PILA shortly, which is likely to be set to late 2018 or early 2019.

The new PILA proposes five important amendments:

1. **The reciprocity requirement will be deleted.**

The intention behind the reciprocity requirement was to improve foreign jurisdictions' willingness to cooperate. However, this goal has not been achieved. The only effect of the reciprocity requirement was the creation of a major hurdle for the recognition of foreign insolvency decrees in Switzerland. Since the reciprocity requirement has not provided Swiss creditors who seek foreign recognition of their claims with any advantages, the new PILA deletes the provision in its entirety.

2. **Insolvency decrees issued at the Comi can be recognised in Switzerland**.

Currently, foreign bankruptcy decrees need to be issued at the (statutory) seat of the debtor to be recognised in Switzerland. This rule is inconsistent with the provisions of the EU Insolvency Regulation and the UNCITRAL Model Law which both provide for a place of jurisdiction at the Comi to open insolvency proceedings. Since requests for recognition of decrees predominantly come from EU countries with decrees issued at the Comi, such requests cannot be granted in Switzerland. To solve this issue and to reflect the EU Insolvency Regulation and the UNCITRAL Model Law, the new PILA states that also insolvency decrees issued at the Comi can be recognised in Switzerland. However, an exception has to be made if the debtor has its seat in Switzerland but the COMI is abroad, in which case the Swiss authorities have exclusive authority.

3. **Swiss courts can waive ancillary proceedings in favour of a foreign insolvency administrator where there are no secured or privileged creditors or creditors of a Swiss branch.**

According to the current PILA, ancillary proceedings need to be opened in Switzerland irrespective of whether there are any secured and privileged Swiss creditors. However, if there are no secured or privileged Swiss creditors or creditors of a Swiss branch that warrant protection, ancillary proceedings should be waivable for reasons of procedural economy (for the recognition of foreign restructuring proceedings this option already exists today according to case law, see BGE 140 III 379). This concern has been reflected in the new PILA. According to the revised law, foreign insolvency administrators can request a waiver of ancillary proceedings. The Swiss court may, at its sole discretion, grant such request if no secured or privileged creditors or creditors of a Swiss branch register with the court within the deadline set after publication of the recognition of the foreign decree. If there are any unsecured Swiss creditors, their claims need to be adequately taken into account in foreign proceedings for the request to be granted. The Swiss court can also make its decision subject to conditions and requirements to be fulfilled by the foreign insolvency administrator (eg reporting requirements). If the Swiss court grants the request and waives the ancillary proceedings, the foreign insolvency administrator takes the legal position of the debtor before insolvency proceedings were opened. This means that the foreign administrator may remit Swiss assets abroad, initiate court proceedings and request information. These actions would otherwise constitute illegal actions for a foreign state. Sovereign measures (eg the threat of penal consequences) are excluded from these competences and have to be requested with the Swiss authorities.

The Swiss court can also make its decision subject to conditions and requirements to be fulfilled by the foreign insolvency administrator

4. **Swiss authorities can cooperate with foreign bankruptcy authorities on related matters.**

In an insolvency of an international group of companies' insolvency proceedings in different jurisdictions are opened. These proceedings need to be coordinated to avoid inefficiencies and to ensure a coherent outcome.

Switzerland has a long tradition of international cooperation in relation to insolvencies and was the first civil law country to enter into a cross-border insolvency agreement (so called insolvency protocols) to facilitate international insolvency proceedings. The case was AIOC (*In Re Aioc Resources AG*, cases nos. 96-B 41895 and 96-B-41896 (Bankr. S.D.N.Y. 1996)) with parallel insolvency proceedings in the US and in Switzerland that did not defer to one another. The two involved courts negotiated a protocol which established joint jurisdiction of both courts over the debtor's assets and provided for cross-recognition of the creditors' claims filed in the other proceedings.

Even if coordination is in general considered to be legal under the current PILA, there is no explicit statutory basis. The revised PILA provides for an explicit provision on the coordination of proceedings. The statutory basis is useful because it can help to remove potential uncertainties of authorities regarding their powers to coordinate (for example, in a case between Germany and the UK (ISA-Daisytek) from 2007 the German court was uncertain whether it had the powers to conclude a cross-border agreement and conditioned the effectiveness of the agreement on its approval by the creditors). The new provision leaves much discretion to the authorities how they implement coordination in a specific case. Coordination can relate to the exchange of information (subject to data protection laws and restrictions on confidential information), coordination of parallel proceedings or coordination on the management of the debtor's assets. It goes without saying that the authorities may only coordinate on matters that fall within their scope of authority.

5. **Improvements for creditors of a Swiss branch of a foreign insolvent entity.**

According to the current PILA, creditors of unsecured and unprivileged claims of a Swiss branch of a foreign insolvent entity have to

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apply for separate insolvency proceedings of the Swiss branch in order to have their claims recognized. Under the new PILA, in order to prevent parallel proceedings, such requests need only be made if ancillary proceedings have not been opened. In case ancillary proceedings have been opened, unsecured and unprivileged claims against the Swiss branch will also be registered (along with secured and privileged claims) in the schedule of claims of the ancillary proceedings. An exception has to be made if the deadline to contest the schedule of claims of the Swiss branch has already expired. The bankruptcy proceedings of the Swiss branch will then have to be finished irrespective of the ancillary proceedings.

Under the current PILA, it is also unclear what assets the insolvency estate of a Swiss branch of a foreign insolvent entity includes because the Swiss branch is not a separate legal entity and thus, not a separate asset structure. Should the bankruptcy estate merely include the assets of the Swiss branch, it needs to be distinguished between assets belonging to the branch and the main debtor. The revised PILA makes clear that the bankruptcy estate of a Swiss branch includes all of the debtor's assets in Switzerland, irrespective of whether they economically belong to the branch or the main debtor.

6. Other significant changes.

Other significant changes include that in addition to creditors and foreign insolvency administrators the debtor may also request the opening of ancillary proceedings. This is of particular importance in restructuring proceedings where the debtor is usually the most informed on its overall financial situation. The new PILA also clarifies that ancillary proceedings will be conducted as summary proceedings unless the foreign insolvency administrator or creditors request ordinary proceedings. In this context it is also important to note that foreign insolvency administrators will have a right to contest the schedule of claims in ancillary proceedings. Currently only secured and privileged Swiss creditors have this right. Finally, if a defendant does not have their domicile in Switzerland, foreign decisions on avoidance actions and other actions that harm creditors shall under certain conditions be recognizable and enforceable in Switzerland.

Outlook

The revised PILA is an important step towards the harmonisation of international insolvency law and will facilitate the recognition of foreign insolvency decrees in Switzerland. However, foreign administrators and creditors should be aware that Switzerland's new recognition regime still differs from the EU Insolvency Regulation and the practical implementations of the revised PILA will have to be elaborated. For example, it remains to be seen what the exact scope of the competences of a foreign liquidator in Switzerland under the revised PILA will be.