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THE NEW SWISS INTERNATIONAL INSOLVENCY LAW - HOW DOES IT AFFECT FOREIGN INSOLVENCY PRACTITIONERS?

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On 1 January 2019, the revised Section of the Swiss Private International Law Act (PILA) regarding cross-border insolvencies entered into force. The revision became necessary as the previous regulation was criticised in particular for its protectionist elements, which also were a recurring topic in discussions with foreign colleagues and insolvency practitioners. Particularly compared to other European countries, Switzerland had apparent modernisation potential.

The major points for discussion in recent years were:

- How can insolvency practitioners of foreign main proceedings access the debtor's assets in Switzerland?

- How can they pursue claims against debtors in Switzerland?

- How can assets be transferred to the estate of foreign main proceedings?

All this was difficult and costly until end of 2018, namely for the following reasons:

Contrary to the rules of the European Insolvency Regulation (EIR), foreign insolvency proceedings and the powers of foreign insolvency practitioners are not automatically recognised in Switzerland. Foreign insolvency practitioners could not become active in Switzerland and confiscate assets for the foreign estate without recognition of the foreign insolvency opening order and subsequent conduction of ancillary insolvency proceedings by a bankruptcy office (an authority). Neither could they enforce claims against third-party debtors in court or initiate debt collection proceedings. This necessity of a recognition process has led to criticism – in Switzerland as well as abroad; so have the exaggerated recognition requirements and the mandatory ancillary insolvency proceedings.

A further point of discussion in advising foreign insolvency practitioners was that foreign decisions on claw back claims and other creditor-damaging acts could not be recognised in Switzerland. Instead, such claims had to be pursued in Switzerland in the course of the ancillary insolvency proceedings and only claims according to Swiss law were valid.

With the revised PILA, the Swiss legislator has responded to this criticism. This article outlines the fundamentals of the new Swiss cross-border insolvency law and analyses to which extent the above issues have been addressed.

It can be anticipated that the innovations are not groundbreaking. It is still necessary to have the foreign insolvency decision recognised in Switzerland in a first step, although the recognition requirements have been slightly loosened (cf. Section I). In principle, an ancillary insolvency procedure remains necessary (cf. Section II). Consequently, accessing assets located in Switzerland and transferring them to a foreign estate will continue to be difficult and costly for foreign insolvency practitioners. Besides, a provision was introduced as part of the revision which, in principle, allows the recognition of foreign decisions on claw back claims (cf. Section III). However, this only applies if the defendant was not domiciled in Switzerland at the time of the judgment. As a result of this restriction, foreign decisions on claw back claims will often still not be recognisable in Switzerland in the future.

I. Recognition requirements

Under the revised PILA, a foreign insolvency decision is recognised in Switzerland upon request of the foreign insolvency practitioner, the debtor or one of its creditors if:

- The decision was issued in the state of the debtor's place of registered seat or the state in which the debtor's COMI is situated (the latter only if the debtor did not have a registered seat in Switzerland at the time the foreign proceedings were opened);

- it is enforceable in the state in which it has been issued and

- there are no grounds for refusal (in particular infringement of the Swiss Ordre public).

These new recognition requirements entail two simplifications compared to the old regime: First, an insolvency decision issued in the state in which the debtor's COMI is situated can now be recognised in Switzerland, too, if the debtor had no registered seat in Switzerland at the time the foreign proceedings were opened. Second, the previously applicable, strongly criticised requirement of reciprocity was waived, according to which it had to be demonstrated in the request for recognition that the state in which the insolvency decision was issued recognised Swiss insolvency decisions under equivalent conditions. This waiver

of the reciprocity requirement leads to slightly lower costs for the recognition procedure, since legal opinions on foreign law had to be filed so far in order to prove that the foreign state grants reciprocity.

II. Recognition and ancillary insolvency proceedings

Foreign insolvency decisions are still not automatically recognised in Switzerland under the revised PILA. Hence, if a foreign insolvency practitioner wants to move assets from Switzerland to the foreign estate or pursue a claim against a debtor in Switzerland, the first step is to request recognition of the foreign insolvency decision.

The recognition proceeding is set out as a single-party court procedure. In the recognition proceeding, the recognition requirements (cf. Section I) must be proven. Furthermore, it must then be demonstrated that there are assets located in Switzerland belonging to the foreign insolvency estate. In case the recognition requirements are fulfilled, the court will recognise the foreign insolvency decision.

The further procedure depends on whether there are any Swiss creditors and if so, what kind of creditors: If there are no claims secured by a pledge and no preferential claims of creditors domiciled in Switzerland, the foreign insolvency practitioner may file an application to waive the ancillary insolvency proceedings. If there are Swiss domiciled creditors of other claims, the court can waive the conduct of ancillary insolvency proceedings upon request, if the claims of these creditors are adequately taken into account in the foreign proceedings. This has to be proven by the foreign insolvency practitioner.

However, it is uncertain how it can be proven in the recognition procedure that there are no pledge-secured or preferential creditors domiciled in Switzerland. It is discussed that the application for recognition may also include a request for the execution of a call for creditors. However, the result of this call for creditors is then decisive for the justification of the application for recognition, which makes this approach appear rather impractical. Another solution could be to not initially apply for a waiver of the ancillary insolvency proceedings in the application for recognition of the foreign insolvency decision. Together with the recognition of the foreign insolvency decision, the court opens ancillary insolvency proceedings in Switzerland. The competent bankruptcy office then issues a call for creditors. If no claims are filed by Swiss creditors, it would be conceivable to apply for a waiver of the continuation of the ancillary insolvency proceedings at this stage. However, until a practice has developed under the revised PILA, there are still many uncertainties with regard to the concrete procedure.

If an application for waving the ancillary insolvency procedure is approved, the foreign insolvency practitioner may carry out all actions to which it is authorized pursuant to the foreign law. He may in particular pursue claims and transfer assets abroad without further authorization or further legal proceedings. He must, however, comply with all applicable

Swiss laws and must not perform any official acts, use any means of coercion or decide disputes.

In all other cases, where no application to waive the ancillary insolvency proceedings is filed, or if such a request is rejected, the procedure remains unchanged. Ancillary insolvency proceedings are opened by the court that decides on the recognition of the foreign insolvency decision. These proceedings are conducted by a state authority, the bankruptcy office, and are limited to the debtor's assets located in Switzerland. With certain adjustments the rules of Swiss insolvency law are applied. The bankruptcy officer will set up a list of assets located in Switzerland belonging to the debtor's estate, publish a call for creditors and draw up the schedule of claims.

The debtor's assets located in Switzerland are drawn into the insolvency estate and liquidated in the course of these proceedings. This also includes the enforcement of claims against third-party debtors domiciled in Switzerland. The proceeds of the liquidation fall into the Swiss ancillary insolvency estate. After deduction of the costs for the proceedings, secured and preferential creditors domiciled in Switzerland are satisfied first. If there is a surplus, the funds will be handed over to the foreign insolvency practitioner, provided judicial recognition of the foreign list of creditors is granted. For this recognition, a second court proceeding is required. In this second court proceeding, the same court that decided on the recognition of the foreign insolvency decision examines whether the claims of non-preferential creditors domiciled in Switzerland have been adequately taken into account in the foreign list of creditors.

III. Claw back claims

In addition to the amendments discussed, the revised PILA brings some facilitation regarding insolvency related claims.

According to a new provision, foreign rulings on claw back claims or other claims regarding creditor damaging actions which are closely related to the foreign insolvency proceeding shall be recognisable in Switzerland.

However, this only applies if:

- The foreign insolvency decision was recognised in Switzerland;
- such judgment was issued in the state of origin of the main insolvency proceedings or is recognised in that state and
- the defendant was not domiciled in Switzerland.

In cases in which the defendant was domiciled in Switzerland at the time of judgment, however, a foreign ruling on claw back claims cannot be recognised in Switzerland. In this case, a claw back claim according to Swiss law must be filed within the ancillary insolvency proceedings. Thus, the scope of this new provision is very limited.

IV. Critical appraisal

The revised PILA entails some simplification – particularly the loosening of the recognition requirements is to be welcomed. However, the Swiss legislator has not succeeded in making the big step forward with this revision, and the opening-up to foreign countries has not taken place to the extent that many foreign insolvency practitioners had hoped for.

There is still no automatic recognition of the foreign insolvency decision. If a foreign insolvency practitioner wants to move assets from Switzerland to the foreign estate or pursue a claim against a debtor in Switzerland, the recognition of the foreign insolvency decision in a court proceeding continues to be necessary. With regard to the new possibility of applying for a waiver of ancillary insolvency proceedings, a number of procedural issues are unresolved. Even after resolving these issues, it seems questionable whether waving the ancillary insolvency proceedings can actually save much time. Such a waiver is only possible, if there are no creditors in Switzerland or there are solely unsecured and non-preferential creditors, which are taken into account adequately in the foreign insolvency proceedings.

Until now, in such constellations an ancillary insolvency proceeding had to be conducted – nonsensically indeed –, but due to the lack of Swiss creditors it was very lean and did not take up much time. The recognition of the foreign insolvency decision as well as the recognition of the foreign list of creditors before assets could be transferred abroad were the time consuming and costly factors. As mentioned, no separate procedure is required for the recognition of the foreign list of creditors when waiving the conduct of ancillary insolvency proceedings. Instead, however, the absence of pledge-secured creditors or preferential creditors domiciled in Switzerland and the appropriate consideration of any other Swiss creditors in the foreign proceedings must now already be proven in the proceedings for recognition of the foreign insolvency decision. This procedure therefore becomes more complex.

This can be problematic, as it often only became apparent after recognition of the foreign insolvency decision during the ancillary insolvency proceedings whether sufficient assets were available and whether claims could actually be enforced. In these cases, the foreign insolvency practitioner was able to save the expense of the second court proceeding for the recognition of the foreign list of creditors, as it had already been established before that there were not sufficient assets. The proof that there are no Swiss creditors or that certain kinds of creditors are appropriately taken into account in the foreign proceedings has now, however, already to be provided during the proceedings for recognition of the foreign insolvency decision and thus irrespective of whether it later turns out that, for instance, a claim cannot

be enforced. In this respect, the new regulation may even prove to be disadvantageous in cases where the enforceability of claims is uncertain. It is obvious that under the new law, it is still only worthwhile for foreign insolvency practitioners to initiate proceedings in Switzerland if there is sufficient security that there are enough assets in Switzerland.

It is regrettable that the protectionist character of the Swiss international insolvency law in favor of Swiss creditors has not been abolished. In our opinion, Switzerland's revised international insolvency law still does not comply with modern standards and will continue to cause a lack of understanding abroad.

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