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Switzerland – New International Insolvency Law

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Synopsis

On 1 January 2019, a revision of the Swiss international insolvency law came into effect. The amendments concern the eleventh chapter on bankruptcy and restructuring of the Federal Act on Private International Law ('PILA') and are expected to significantly simplify the recognition of foreign bankruptcy and composition decrees in Switzerland. First and most importantly, the new rules facilitate the recognition of foreign bankruptcy and composition decrees in Switzerland by explicitly acknowledging the 'COMI' approach and abolishing the former requirement of reciprocity. In addition, the new law provides for a long awaited coordination between branch bankruptcy proceedings and so-called 'secondary bankruptcy proceedings' that are opened in case of recognition of foreign proceedings in Switzerland. Finally, the revised law gives the foreign insolvency administrator the right, under certain conditions, to request dispensation of secondary bankruptcy proceedings, thereby enabling the foreign insolvency official to directly collect assets in Switzerland and, thus, accelerating the transfer of such assets to the foreign bankruptcy estate.

Introduction

In Switzerland, insolvency proceedings are governed by two federal codes: the Federal Debt Enforcement and Bankruptcy Act (the 'DEBA') and chapter eleven of the PILA (articles 166–175). The DEBA regulates Swiss insolvency proceedings in general, whereas the PILA contains the rules for international insolvency proceedings. In essence, chapter eleven of the PILA provides that under certain conditions, the assets of the debtor located in Switzerland can be handed over to bankruptcy and composition proceedings instated abroad. However, as a general rule, a foreign insolvency administrator is not allowed to gather the assets located in Switzerland or take relevant legal steps without the foreign insolvency proceedings having been recognised in Switzerland. Only upon completion of this procedure will the assets located in Switzerland be released to the bankruptcy or composition proceedings instituted abroad, provided that all relevant conditions are met.

The procedure to be completed in Switzerland pursuant to chapter eleven of the PILA comprises the following steps:

- The foreign insolvency administrator or a creditor must request recognition of the foreign bankruptcy decree. The request will be granted, if the conditions set out in article 166 PILA are met.
- As a consequence of the recognition of the foreign bankruptcy decree, the competent Swiss court will open bankruptcy proceedings in Switzerland (so-called 'secondary bankruptcy proceedings') in accordance with the DEBA.
- For secondary bankruptcy proceedings, the distribution of proceeds from the realisation of the debtor's assets among the creditors is different from ordinary insolvency proceedings instituted under the DEBA. Under the previous law, only two types of claims were included in the schedule of accepted claims: collateral secured claims and privileged claims of creditors domiciled in Switzerland. Other claims were not accepted in the schedule of accepted claims.
- After realisation of the debtors' assets, the proceeds are paid out to the creditors whose claims are included in the schedule of accepted claims.
- If there is a surplus, its distribution depends on how the other claims of the creditors domiciled in Switzerland are dealt with in the schedule of accepted claims in the foreign insolvency proceedings. Only if the other claims of the creditors domiciled in Switzerland are adequately included in the foreign schedule of accepted claims, the foreign schedule of accepted claims will be recognised and, thus, the surplus will be transferred to the foreign insolvency proceedings. Otherwise, the foreign schedule of accepted claims will not be recognised and the surplus will be paid out as part of the Swiss secondary bankruptcy proceedings.

In addition to the recognition of a foreign bankruptcy decree and the implementation of secondary bankruptcy proceedings as described above, there is another procedure available if a foreign debtor has a branch in Switzerland. In this case, the law allows for the initiation of separate bankruptcy proceedings with regard to

the relevant branch only. These so-called 'branch bankruptcy proceedings' are also governed by the DEBA.

Pursuant to the amendments to the PILA that took effect on 1 January 2019, a number of important changes were made to the existing Swiss international insolvency law, the key aspects of which are outlined hereinafter.

Facilitation of recognition of foreign bankruptcy and composition decrees

As described above, foreign bankruptcy or composition decree must be recognised in Switzerland in order for the foreign bankruptcy administrator to be allowed to collect assets belonging to the Swiss bankruptcy estate. The changes made to the PILA aim at facilitating this process in various ways.

With respect to the formal requirements, there are two main changes:

- *First*, the new law states that not only the foreign insolvency administrator and the creditors but also the debtor should be entitled to submit an application for recognition. The debtor generally has the best access to information on his financial situation. The extension of the entitlement to make a request should, thus, facilitate cross-border composition and similar proceedings.
- *Second*, the territorial jurisdiction of the competent court was amended. Going forward, the application for recognition of a foreign bankruptcy or composition decree must be filed with the court at the location of the debtor's branch in Switzerland. Under the old rules, the court had jurisdiction where the debtors' assets were located in Switzerland. Pursuant to the revised law, this rule will only apply if the debtor does not have a branch in Switzerland. The primacy of the jurisdiction at the place of the debtor's branch lays the foundation for the coordination of branch bankruptcy proceedings with secondary bankruptcy proceedings.

As far as the substantive requirements are concerned, there are also two main changes:

- The *first* refers to the state where the foreign bankruptcy or composition decree has to be entered. According to the previous rules, a foreign bankruptcy or composition decree was recognised in Switzerland only if it was issued in the state of the domicile of the debtor. Going forward, a foreign bankruptcy or composition decree will also be recognised in Switzerland if it has been issued in the state in which the centre of the debtor's main interests is situated, provided that the debtor did not have his domicile in Switzerland when bankruptcy or composition proceedings were opened abroad.

The new rule specifically aims to ensure that bankruptcy and composition proceedings initiated in accordance with Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 in the state where the centre of the debtor's main interests is situated ('COMI' approach) can be recognised in Switzerland.

- The *second* change relates to the reciprocity. In contrast to the previous law, the revised law no longer requires that the state where the decree was entered grants reciprocity. This prerequisite has turned out to complicate the procedure of recognition of bankruptcy and composition decrees without bringing any benefit to the creditors.

Coordination of branch bankruptcy proceedings with secondary bankruptcy proceedings

Until 1 January 2019, Swiss law did not provide for the coordination of branch bankruptcy proceedings with secondary bankruptcy proceedings. Under the old law, if branch bankruptcy proceedings were initiated before starting secondary bankruptcy proceedings, both bankruptcy proceedings took place simultaneously. The same was true if secondary bankruptcy proceedings had already been opened, as long as branch bankruptcy proceedings were initiated before the schedule of accepted claims in secondary bankruptcy proceedings became final. In the past, the availability of the two proceedings that could take place simultaneously, but with different estates (the branch bankruptcy estate encompassed the assets that functionally belong to the branch and served to pay creditors whose claims are derived from the operations of such a branch), has repeatedly led to unclear situations.

The new rule therefore provides for an integration of branch bankruptcy proceedings into secondary bankruptcy proceedings. The consolidation takes place under the condition that the foreign bankruptcy decree is recognised in Switzerland before branch bankruptcy proceedings are initiated or, if branch bankruptcy proceedings have already started, before the schedule of accepted claims in branch bankruptcy proceedings has become final. To allow for the integration of branch bankruptcy proceedings into secondary bankruptcy proceedings, a third category of claims was created to be included in the schedule of accepted claims in secondary bankruptcy proceedings. Pursuant to the new rules, not only collateral secured claims and privileged claims of creditors domiciled in Switzerland are included in the schedule of accepted claims, but also claims that are derived from operations of the branch. Consequently, going forward, there will only be one bankruptcy proceeding and only one bankruptcy estate. However, compared to the previous law, the proceeds of

the sale of the debtor's assets will be distributed among a larger group of creditors. Going forward, creditors of (unsecured and unprivileged) claims that derive from operations of the branch will be entitled to be paid as well. Only after that may any surplus be transferred to the foreign insolvency proceedings as described above.

Dispensation of secondary bankruptcy proceedings

Secondary bankruptcy proceedings aim to safeguard the creditors of the three types of claims as described above. If there are no such creditors, secondary bankruptcy proceedings becomes unnecessary. Therefore, under this prerequisite, the revised law gives the foreign insolvency administrator the right to request dispensation of secondary bankruptcy proceedings, thereby enabling him or her to directly collect assets in Switzerland and, thus, accelerating the transfer of such assets to the foreign bankruptcy estate.

However, before such a request can be made, it needs to be ascertained whether or not there are any creditors of one of the three types of claims that are entitled to request payment in the secondary bankruptcy proceedings. Therefore, after recognition of the foreign bankruptcy decree, a call to creditors has to be made. The further proceedings depend on whether any relevant claims are produced:

- If claims are produced that belong to one of the three categories of claims entitled to be paid out in the secondary bankruptcy proceedings, secondary bankruptcy proceedings have to be carried out. This means, *inter alia*, whenever there is a branch in Switzerland and creditors produce their claims derived from operations of such a branch, it is not possible to be dispensed from secondary bankruptcy proceedings. However, the foreign insolvency administrator has the possibility to fulfil these claims in order to prevent the creditors from producing them. If these creditors refrain from producing their claims, the conditions for

dispensation of secondary bankruptcy proceedings will be established.

- If claims are produced, but none of them belongs to one of the three types of claims to be included in the schedule of accepted claims, dispensation of secondary bankruptcy proceedings is possible, but only under the condition that these claims will be adequately included in the foreign insolvency proceedings.
- If no claims are produced at all, dispensation of secondary bankruptcy proceedings is possible. In that case, there are no creditors that need special protection from a Swiss perspective.

If dispensation of secondary bankruptcy proceedings is granted, the foreign insolvency administrator has, with due respect to Swiss Law, the same powers in Switzerland as he has pursuant to the law of the state where insolvency proceedings were initiated. In particular, the foreign insolvency administrator is allowed to collect assets located in Switzerland, including by way of litigation, and to include them in the foreign insolvency proceedings. Nevertheless, the foreign administrator is not vested with sovereign authority. This means, *inter alia*, that the foreign insolvency administrator must not use coercive instruments and cannot validly adjudicate on disputes.

Other changes

Apart from these conceptual changes, certain specific provisions on different topics have been modified with a view to further accommodate for international insolvency proceedings. For instance, the new law provides that under certain circumstances, foreign court decisions on the annulment of fraudulent disposal of property will be recognised in Switzerland. Further, the foreign insolvency administrator will receive the right to challenge the schedule of accepted claims in secondary bankruptcy proceedings.

International Corporate Rescue

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