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ARTICLE

Announced Revision of Swiss Rules on the Recognition of Foreign Bankruptcy Proceedings in Switzerland: What Is It About?

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On 14 October 2015 the Swiss Federal Council published a project of revision of the Private International Law Act (PILA) regarding the recognition and coordination of foreign insolvency proceedings in Switzerland. In the same project, the Swiss Federal Council also proposed to amend the Swiss Debt Enforcement and Bankruptcy Act (DEBA) in order to take into account foreign proceedings about a claim in the insolvency proceedings of a Swiss debtor.

The proposed revision reflects the need for more modern rules in Switzerland in this area, similar those already in force regarding insolvency proceedings of a banking institute.

1. The limited powers of a foreign trustee in Switzerland

Under current Swiss law, a foreign trustee of a foreign insolvent company has no power to act in Switzerland as such but to seek the recognition of the foreign insolvency decree and seek for immediate protective measures. Once the competent Swiss court has recognised the foreign insolvency decree, the foreign trustee may only request from the court appointed Swiss trustee the assignment of inventoried claims in Switzerland if no admitted privileged creditor requests the same.

Because of the very limited powers of a foreign trustee in Switzerland, it is essential to seek recognition of the foreign insolvency decree if assets of the foreign insolvent company are located in Switzerland. Once the foreign insolvency decree is recognised by the competent court, the same court will appoint a Swiss trustee to lead the proceedings in Switzerland. In particular, the Swiss trustee (if no claim is assigned to the foreign trustee) will take over the enforcement and collection of the assets in Switzerland.

2. The recognition of foreign insolvency decrees in Switzerland

2.1 Situation under the current rules

Currently, a foreign insolvency decree can only be recognised in Switzerland upon request of the foreign liquidator or a creditor upon three conditions:

a) The decision was rendered in the state of the debtor's registered domicile and is enforceable in the state where it was rendered;

b) Such recognition is not manifestly incompatible with Swiss public policy;

c) Reciprocity is granted in the state where the decision was rendered (i.e. a Swiss insolvency decree would also be recognised in this state).

These conditions are restrictive for many reasons:

– In particular, if the insolvency decree was rendered in the state of debtor's center of main interests but this state is not the debtor's registered domicile, the insolvency decree cannot be recognised in Switzerland.

– Moreover, the reciprocity requirement often forces the applicant to file a legal opinion on the legal system of the state where the insolvency decree has been rendered with a comprehensive analysis of the question of whether this foreign state would recognise a Swiss insolvency decree. The example below shows the complexity of this requirement (see below, 2.2). If the court deems that recognition is not granted in the state in which the insolvency decree was rendered, there is no possibility for the foreign trustee to access assets of the foreign insolvent company located in Switzerland (for example, the Swiss doctrine deems that there is no reciprocity or the reciprocity is problematic among others for Denmark and Japan).

Once the foreign insolvency decree is recognised by the competent court in Switzerland, it will have the effect of bankruptcy under Swiss law. The Swiss Bankruptcy Office will then initiate an auxiliary proceeding (known as *mini-konkurs*) on the assets located in Switzerland.

The main goal of this Swiss system is to protect privileged creditors domiciled in Switzerland and creditors secured by a pledge. However, the auxiliary proceeding has to be conducted, even if there are no such creditors and thus no need for protection. The obligation to go through an auxiliary proceeding even if there is

no need for protection is problematic as the auxiliary proceeding is time-consuming and not efficient.

2.2 An example of the difficulty to have a foreign insolvency decree recognised in the light of recent case law

The Swiss Federal Supreme Court ruled in a decision of 27 March 2015,[1] after a long period of uncertainty and contradictory case law, that the Netherlands grant reciprocity to Swiss insolvency decrees.

In the case at hand, debt restructuring proceedings were opened over a Swiss company, B AG, registered in Zug. The mother company, C AG, registered in Rotterdam, filed a claim in the debt restructuring (composition) proceedings of B AG. The liquidator of B AG partially admitted the claim in the list of claims. In the meantime, insolvency proceedings were opened in Rotterdam and A was designated as the trustee of C AG during the insolvency proceedings. A decided to challenge the composition agreement to the extent that C AG's claim had been rejected. Therefore in order to be entitled to file an appeal, A needed to seek recognition of the Dutch insolvency decree of C AG in Switzerland (Zug).

The court of first instance of Zug rejected A's request to recognise the insolvency decree of C AG. The court of second instance of Zug confirmed this decision on appeal. Both courts found that according to Swiss scholars, the Netherlands would not grant reciprocity to Swiss insolvency decrees.

The Swiss Federal Supreme Court rejected this view and argued that the opinions of the scholars quoted in the judgment of the court of second instance were twenty years old, did not always dwell on the reasoning of such a conclusion and did not take into account the amendments in Dutch law that occurred since.

The Swiss Federal Supreme Court emphasised that the relevant criterion in order to establish whether reciprocity is granted in a certain state is related to the effects given to the Swiss insolvency decree in the state in question. Reciprocity is deemed to be granted if the foreign rules give effect to a Swiss insolvency decree in a similar (it does not need to be identical) way as Swiss law gives effect to a foreign insolvency decree, meaning that the conditions on recognition according to foreign rules are not essentially worse than the Swiss rules on recognition of a foreign insolvency decree. The Swiss Federal Supreme Court mentioned that the question of reciprocity should not be analysed too strictly, in particular because – even if not applicable in this case – the banking rules on the recognition of a foreign insolvency decree of banking institutions are less strict than the PILA rules.

According to the Swiss Federal Supreme Court, even though it is true that Dutch law does not grant the effect of a formal insolvency decree to the Swiss insolvency decree and that the creditors who could attach the assets of the Dutch company have to be respected, Dutch law offers various other possibilities for the Swiss trustee to have efficient access to the assets of the company in the Netherlands. For example, the Swiss trustee is entitled to claim directly in the Netherlands without having to go through tedious exequatur proceedings as is the case in Switzerland. In the end, according to the Swiss Federal Supreme Court, the estate of the Swiss insolvent company can be even better off in the Netherlands than an estate of a foreign insolvent company in Switzerland. Dutch law does not just ignore the Swiss insolvency decree, on the contrary. Therefore, it is deemed that the Netherlands grant reciprocity and the Dutch insolvency decree has to be recognised. The Swiss Federal Supreme Court sent the case back to the court of second instance to assess whether the other formal conditions were met.

This example shows that unless the case law of the Swiss Federal Supreme Court or the opinion of existing Swiss scholars expressly states that reciprocity is granted in the state in question, the applicant will have to file a legal opinion on the rules of recognition in the state in question and – in the worst case – go through appeal proceedings if it is not deemed to be enough to prove reciprocity.

2.3 The planned revision

In its project for revision, the Swiss Federal Council suggests among others to amend and modify the conditions of recognition of foreign insolvency decrees. In particular, it proposes to give up the requirement of reciprocity. This is an important step to simplify the proceedings, as the applicant would no longer have to prove that the state in which the insolvency decision has been rendered recognises Swiss insolvency decree. In the case mentioned above (see above, 2.2), it would have saved approximately two years of proceedings for the trustee of C AG if this law change was already in place.

In addition, the Swiss Federal Council wants to limit the opening of an auxiliary proceeding to the situation when there are privileged creditors in Switzerland and creditors secured by a pledge. In the absence of such creditors, the foreign liquidator may request to renounce the opening of the auxiliary proceeding so that the assets located in Switzerland can be remitted directly

Notes

1 Decision ATF 141 III 222, available in German at www.bger.ch.

to the foreign trustee. In this case, the Swiss court will assess whether the claims of creditors domiciled in Switzerland are taken into account in an appropriate manner in the foreign bankruptcy proceedings, meaning, for example, that they are not discriminated against in comparison with local creditors. Such Swiss creditors will have the right to be heard before the Swiss court. After this, the Swiss court will decide on the renunciation of the auxiliary proceeding.

A further change is the recognition of foreign insolvency decrees that have been rendered in the state of debtor's centre of main interest. This is an important move to a harmonisation with the European Insolvency Regulation.

3. The coordination between insolvency proceedings in Switzerland and foreign proceedings

3.1 Situation under the current rules

3.1.1 Swiss national pending litigation

In Swiss national cases where no international proceedings are involved, when insolvency proceedings are opened over a Swiss debtor, the trustee will establish a list of claims based on the claims filed in the insolvency proceedings. If a claim filed is subject to pending proceedings (litigation) in Switzerland which has not yet led to a decision, the trustee will list the claim as a 'pro memoria claim' in the list of claims and the pending proceedings will be stayed until the trustee decides whether to pursue the pending proceedings or not. If the decision taken is to continue the pending proceedings, the competent court will end the litigation by ruling on the claim. The decision will be considered as binding in the insolvency proceedings and will be taken into account in the list of claims.

3.1.2 Foreign pending litigation

On the other hand, when a claim filed in the insolvency proceedings of a Swiss debtor is subject to foreign pending proceedings that have been initiated prior to the opening of the bankruptcy proceedings but that have not yet led to a decision, the trustee cannot formally list the claim as a 'pro memoria claim'. The trustee will have to decide independently of the pending foreign proceedings whether the claim has to be admitted in the debtor's bankruptcy or not. The Swissair case law issued by the Swiss Federal Supreme Court in the past years[2] shows the complexity of coordinating or better put taking into account foreign decisions on a claim in Swiss bankruptcy proceedings.

3.2 The planned revision

In its project of revision, the Swiss Federal Council intends to create a new provision in the DEBA which obliges the Swiss trustee:

a) to list a claim which is subject to foreign pending litigation as a 'pro memoria claim' in the list of claims; and

b) to take into account the foreign judgment in the Swiss insolvency proceeding.

However, this new provision shall only apply if the foreign proceedings have been initiated prior to the opening of the bankruptcy proceedings in Switzerland and if it is to be expected that the foreign court will, within a reasonable time, render a decision capable of being recognised in Switzerland. This means that there is still no coordination possible for foreign litigation that has been opened prior to the insolvency proceedings and that has led to a decision prior to the publication of the list of claims in the Swiss insolvency proceedings. In such cases, the trustee will still be entitled to rule on this claim without taking into account the foreign judgment.

4. Conclusion and outlook

The proposed revisions of the PILA and the DEBA are more than welcome. In times where insolvency proceedings are more common and have international consequences, it is important to simplify the administrative proceedings in order to optimise the result whilst maintaining certain standards that are deemed to be important from a Swiss perspective.

It is not expected that these proposals will encounter much opposition so that one hopes that these revisions can be adopted rather smoothly. The consultation deadline ended on 5 February 2016 and the opinions in favour or against the revisions on the topic have been published on the website of the Swiss Confederation.[3] It is expected that the planned revision will enter into force on 1 January 2019.

Notes

2 S. Schellenberg/S. Oneyser, 'A New Chapter in the Swissair Insolvency Proceedings in Switzerland' (2014) 11 *International Corporate Rescue* 375 et seq., see in particular pp. 377 et seq.

3 See www.ejpd.admin.ch/ejpd/de/home/aktuell/news/2015/2015-10-141.html.

International Corporate Rescue

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