Switzerland's new cross-border insolvency regime

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On 16 March 2018, the Swiss Parliament adopted the "Amendment of the Private International Law Act (Chap. 11: bankruptcy and composition)", which entered into force on 1 January 2019 (see an unofficial English translation at the end of this article).[1]

1. The provisions previously in force

The provisions of the Private International Law Act ("**PILA**"[2]) in force until 31 December 2018 required, following the recognition of a foreign insolvency on the basis of reciprocity, the opening in Switzerland of an ancillary (or secondary) bankruptcy, the so-called "mini-bankruptcy", in which a Swiss liquidator is appointed for the purpose of liquidating the Swiss assets, with a priority given to the Swiss privileged and secured creditors in the distribution of the proceeds of such assets. The foreign schedule of claims must be recognized in Switzerland before the Swiss assets are remitted to the foreign liquidators.

The Swiss mini-bankruptcy is notoriously costly and cumbersome.

As a consequence of these shortcomings, between 2010 and 2016, only 60 requests for recognition of foreign insolvencies were presented in Switzerland, 80% of which from EU countries.[3]

In addition, the Swiss blocking statute (Art. 271 of the Swiss Penal Code "**SPC**") punishes with up to three years of imprisonment unauthorized activities conducted on Swiss territory on behalf of a foreign authority, including foreign insolvency officeholders.

Asset recovery by foreign insolvency officeholders in Switzerland was thus particularly difficult.

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1 The provisions that entered into force on 1 January 2019 were published in the Official Record of Federal Law of 2 October 2018 in German, French and Italian (an unofficial English translation prepared by MBK may be found on www.mbk.law/en/cross-border-insolvency).
The debates before the Swiss Parliament are available in German, French and Italian.
The 24 May 2017 dispatch of the Federal Council to Parliament is available in German, French and Italian.
The webpage of the Federal Department of Justice and Police dedicated to the project of new cross-border insolvency provisions, together with reports of consultation of interested parties may be found in German, French and Italian.
For more resources, see www.mbk.law/en/cross-border-insolvency.

2 Private International Law Act (PILA): available in German, French and Italian.

3 See 24 May 2017 Dispatch of the Federal Council to Parliament, p. 5.

2. Changes introduced by the new regime

The amended PILA in force since 1 January 2019 brings seven important changes to the Swiss regime on the recognition of foreign insolvency proceedings:

1. the requirement of reciprocity is abolished (Art. 166 PILA);
2. insolvency decrees rendered at the "*center of main interests - COMI*" may now be recognized in Switzerland (Art. 166 PILA);
3. the ordinary (non-secured and non-privileged creditors) of Swiss branches of foreign entities in bankruptcy may be listed in the schedule of claims of the ancillary bankruptcy (Art. 166 PILA);
4. the debtor subject to insolvency measures outside of Switzerland now also has standing to apply for recognition of the insolvency decree (Art. 166 PILA);
5. in the absence of privileged or secured creditors, as well as of creditors of a Swiss branch of the foreign insolvent entity, the court of the recognition may, upon request from the foreign liquidators, waive the ancillary bankruptcy procedure in favor of recognizing the powers of the foreign insolvency officeholder (Art. 174a PILA);
6. the list of the "*protected creditors*" in international insolvencies is extended, and an ancillary bankruptcy must be opened in Switzerland not only where there are privileged and secured creditors, but also where there are creditors of a Swiss branch of the foreign insolvent entity (Art. 174a PILA);
7. a legal basis has been created so as to allow Swiss authorities and bodies to cooperate with foreign bankruptcy authorities and bodies (Art. 174b PILA).

From a practical point of view, the main change to PILA is the possibility to waive the ancillary bankruptcy and allow the foreign insolvency officeholder to directly act on the Swiss territory and to dispose of the Swiss assets (Art. 174a PILA).

This simplified liquidation procedure of the Swiss assets is directly inspired by the foreign bank insolvencies recognition procedure provided for in Article 37g of the Federal Act on Banks and Saving Banks[4] ("**BA**"), which entered into force on 1 September 2011.

Under Article 174a of the amended PILA, upon request from the foreign insolvency officeholder, the Swiss court of recognition may waive the ancillary bankruptcy, provided there are no protected creditors within the meaning described above. If ordinary Swiss creditors file claims, the court may waive the ancillary bankruptcy provided it is demonstrated that the foreign bankruptcy proceedings take due account of their claims. The waiver of the ancillary bankruptcy may be subject to specific requirements and limitations ordered by the court.

Article 174a para. 4 PILA provides that in case the waiver is granted, the foreign officeholder may exercise all the powers conferred by the law of the State where the foreign insolvency decree was issued, within the limits of Swiss law. Among the rights of the foreign officeholder (as primarily defined by its domestic law), the amended PILA provides for the right to transfer the Swiss assets outside of Switzerland and to bring actions in Switzerland without being exposed to the risk of criminal sanctions based on the Swiss Blocking Statute.

The restrictions on the powers of the foreign officeholder provided for by Swiss law are all the acts that concern public authority such as the threat of criminal sanctions or the use of force. The foreign officeholder may thus request third parties to disclose information, but may not threaten criminal proceedings or fines in case of refusal to cooperate. Such acts remain the domain of Swiss authorities (acting in the recognition proceedings or in execution of letters rogatory).

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4 Federal Act on Banks and Saving Banks: available in German, French and Italian.

3. Comparison between two procedures

As an illustration of the difference between the previous and the new Swiss cross-border insolvency regime, one may compare the Swiss foreign insolvency proceedings regarding Stanford International Bank Ltd (In Liquidation) and those regarding Banca Turco Romana SA In Liquidation, two foreign insolvent banks. The former had to undergo an ancillary bankruptcy procedure, while the latter was granted recognition with a waiver of the ancillary procedure on the basis of Article 37g BA.

Stanford International Bank Ltd ("**SIB**") was a bank with registered headquarters in St John, Antigua and Barbuda. It was owned and operated by Texan billionaire Robert Allen Stanford, who was sentenced in 2012 by a US criminal court in Texas to 110 years in prison for having run the second-largest Ponzi scheme in history after Bernard Madoff's, defrauding 25,000 investors with losses in excess of US$7 billion.[5] In 2009, the High Court of Antigua ordered the bankruptcy of SIB. Concurrently, the U.S. Securities and Exchange Commission ("**SEC**") appointed a receiver to liquidate Robert Allen Stanford's assets, including SIB. Both the Antiguan liquidators and SEC Receiver applied for recognition with the Swiss Financial Markets Supervisory Authority FINMA ("**FINMA**"), the competent authority for the recognition in Switzerland of foreign bank insolvencies.

On 8 June 2010, FINMA ruled[6] that the joint liquidators of SIB appointed by the courts of the registered headquarters of the bank, in Antigua and Barbuda, could obtain the recognition of the Antiguan insolvency proceedings in Switzerland. In FINMA's reasoning, in the presence of two concurrent applications for recognition, the recognition of the proceedings at the registered headquarters of SIB had to be examined in priority, and it was only if such recognition could not be granted that the recognition of the proceedings at the place of the alleged effective activities of SIB should be considered. Having examined all conditions of recognition of the Antiguan insolvency proceedings (authenticated decision of recognition; decision in force; reciprocity; no breach of public policy; and universality of the Antiguan bankruptcy), FINMA recognized the Antiguan joint liquidators and ordered the opening of a Swiss ancillary bankruptcy procedure. Consequently, FINMA did not examine whether the receivership ordered by the US authorities at the alleged place of effective activities of SIB met the conditions of recognition of a foreign insolvency under Swiss law.

The Swiss ancillary bankruptcy of SIB is still pending.[7] Despite recoveries of US$11.5 million through SIB's participation as plaintiff in Swiss criminal proceedings[8], the appeals filed by a bank in the ancillary proceedings have so far delayed the remittances of the Swiss assets to the foreign liquidators.[9]

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5 See US Department of Justice webpage on the Stanford case.

6 FINMA decision of 8 June 2010 (in French, redacted).

7 See FINMA's page on the SIB ancillary proceedings.

8 "*Switzerland compensates Victims in the Case of Allen Stanford*", press release of the Office of the Attorney General of Switzerland (10.03.2014).

9 See *Eighth Report of the joint liquidators of Stanford International Bank Ltd (In Liquidation)*, 24 March 2017.

In contrast with SIB's situation, one may mention the example of Banca Turco Romana SA In Liquidation ("**BTR**"). BTR, a Romanian bank, went into bankruptcy in 2002 because of acts of criminal mismanagement of public interests committed by members of its board of directors. On 30 April 2015[10], FINMA recognized BTR's bankruptcy without ordering the opening of a Swiss ancillary bankruptcy.[11] Instead, on the basis of Article 37g BA, FINMA authorized the bank, acting through its liquidator, to bring proceedings and to transfer to Romania its Swiss assets. The only conditions imposed were that the powers of the liquidator were limited to the extent authorized by FINMA, that the decision on recognition be entered in force prior to such remittance abroad, and that the liquidator had to inform FINMA about the transfer of the Swiss assets outside of Switzerland. BTR was authorized to: a) bring civil claims in the criminal proceedings initiated by the Attorney General's Office of Geneva; b) enforce its US$180 million award in damages and interests obtained in the context of the criminal judgment rendered against the members of its Board of Directors in 2012; and c) bring actions for damages against third-party Swiss banks that were suspected of being complicit in the commission of the fraud. As no appeal was filed against the FINMA decision, the recoveries could be directly remitted to BTR's liquidator, without any delay or possible objection from a third party.

Whereas the liquidator of the Swiss ancillary bankruptcy of SIB joined the criminal proceedings the foreign bankruptcy officeholder of BTR could directly join the proceedings once authorization to do so had been granted by FINMA. Indeed, under Swiss law of criminal procedure, bankruptcy holders may only participate in criminal proceedings as legal successors of the patrimonial rights of the bankrupt entity to bring civil claims in the context of the criminal trial.[12] It should be noted that in both cases, the insolvent entities, SIB and BTR, participated as criminal plaintiffs in the Swiss criminal proceedings to support the prosecution, as is provided by the Swiss Code of Penal Procedure (the "**CPP**").[13]

This comparison clearly shows the enhanced effectiveness allowed by the waiver of ancillary bankruptcy proceedings.

Conclusion

There is a strong hope that the new PILA provisions on cross-border insolvency will allow a better protection of Swiss and foreign creditors' interests by facilitating the recognition of foreign insolvency proceedings, effective cross-border asset recovery and international cooperation.

From less than 10 a year, the number of recognitions of foreign insolvencies in Switzerland should greatly increase, notably by allowing foreign officeholders to seek recognition even in the absence of assets in Switzerland, for the mere purpose of bringing proceedings and obtaining evidence in support of foreign asset recovery proceedings.

There are still many open questions regarding the new Swiss regime on cross-border insolvency, as the first decisions of recognition are being issued, and time will show how the new provision will work in practice.

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10 Summary of FINMA's decision of 20 April 2015 (in French).
11 See FINMA's page on the BTR proceedings.
12 Articles 121 and 122 CPP.
13 Articles 118 and 119 CPP.

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Federal Act on Private International Law (PILA)

As amended on 16 March 2018 (entry into force: 1 January 2019)

Chapter 11 Bankruptcy and Composition

I. Recognition

Art. 166

1 A foreign bankruptcy decree shall be recognized in Switzerland on application of the trustee in foreign bankruptcy, of the debtor or of a creditor:

a. if the decision is enforceable in the State where it was rendered;

b. if there is no ground to deny recognition within the meaning of Article 27; and

c. if the decision has been rendered:

1. in the State of the debtor's domicile, or

2. in the State of the debtor's center of main interests, if the debtor was not domiciled in Switzerland at the moment of opening of the foreign proceedings.

2 If the debtor has a branch in Switzerland, the procedure provided for in Article 50, paragraph 1, of the Federal Act on Debt Collection and Bankruptcy of 11 April 1889 (DCB) may be followed until such time as the decision of recognition within the meaning of Article 179 of this Act is published.

3 If a procedure within the meaning of Article 50, paragraph 1, DCB is already pending and the term provided for in Article 250 DCB has not elapsed, the procedure is stayed after the recognition of the foreign bankruptcy decree. Claims that have already been produced are admitted in the schedule of claims of the ancillary bankruptcy in accordance with Article 172. Procedure costs are reported passed on the procedure of ancillary bankruptcy.

II. Procedure
1. Jurisdiction

Art. 167

1 If the debtor has a branch recorded in the trade registry in Switzerland, the application for recognition of a bankruptcy decree rendered in a foreign country must be brought before the court of the place where the branch is located. In all other cases, the application must be brought before the court of the place where the assets are located in Switzerland. Article 29 applies by analogy.

2 If the debtor has branches or assets in multiple locations, the court before which the application was first brought has exclusive jurisdiction.

3 The rights of the bankrupt debtor are deemed to be located at the place of the bankrupt debtor's domicile.

2. Conservatory measures

Art. 168

As from the filing of the petition for recognition of the bankruptcy decree rendered in a foreign country, the court may, on application of the petitioner, order conservatory measures as provided in Articles 162 to 165 and 170 DCB.

3. Publication

Art. 169

1 The decision granting recognition to a bankruptcy declared in a foreign country shall be published.

2 Such decision shall be communicated to the Debt Collection and Bankruptcy Office, to the commissioner of the land registry, to the head of the trade registry at the place where the assets are located and, where appropriate, to the Federal Office for Intellectual Property. The same applies to the decisions closing or staying the ancillary bankruptcy proceedings, as well as the decision to revoke the bankruptcy and to waive the ancillary bankruptcy proceedings.

III. Legal effects
1. In general

Art. 170

1 Unless otherwise provided in this Act, the recognition of a bankruptcy decree rendered in a foreign country has the same effect for the debtor's estate located in Switzerland as provided for a bankruptcy under Swiss law.

2 The time limits set forth by Swiss law start to run as from the publication of the decision granting recognition.

3 A summary liquidation of a bankruptcy shall intervene unless the trustee in foreign bankruptcy or a creditor within the meaning of Article 172, paragraph 1, requests the bankruptcy office, before distribution of the proceeds and providing sufficient security for the costs that will probably not be covered, that the liquidation is effected in the ordinary form.

2. Claw-back action

Art. 171

1 The claw-back action is governed by Articles 285 to 292 DCB. Such action may also be initiated by the foreign trustee in bankruptcy or by one of the creditors entitled to bring such action.

2 The opening of the bankruptcy abroad is relevant for determining time limits under Articles 285 to 288a and 292 DCB.

3. Admission and ranking of debts

Art. 172

1 The schedule of claims shall only include:

a. the claims secured by a pledge defined in Article 219 DCB[4];

b. the claims not secured by a pledge but belonging to privileged creditors who have their domicile in Switzerland, and

c. the claims related to a branch of the debtor recorded in the trade registry.

2 Only the creditors within the meaning of paragraph 1 as well as the trustee in foreign bankruptcy may bring the action to challenge the schedule of claims as provided in Article 250 DCB.

3 Then a creditor has already been satisfied in part in a foreign proceeding connected with the bankruptcy, the amount thus obtained shall be applied, after deduction of the cost incurred, against the distribution to be paid to such creditor in the Swiss proceeding.

4. Distribution
a. Recognition of the foreign schedule of claims

Art. 173

1 After distribution of the proceeds within the meaning of Article 172, paragraph 1, any balance shall be remitted to the foreign bankruptcy estate or to those creditors that are entitled to it.

2 Such balance may only be remitted after recognition of the foreign schedule of claims.

3 The Swiss court having jurisdiction for the recognition of the foreign bankruptcy decree also has jurisdiction for the recognition of the foreign schedule of claims. Such court shall review in particular whether the creditors domiciled in Switzerland have been included fairly in the foreign schedule of claims. Such creditors shall be granted an opportunity to be heard.

b. Non-recognition of a foreign schedule of claims

Art. 174

1 When a foreign schedule of claims may not be recognized, the balance is distributed among the creditors of the third category according to Article 219, paragraph 4, DCB, provided they are domiciled in Switzerland.

2 The same applies when the schedule of claims is not filed for recognition within the time-limit set by the court.

5. Waiver of the ancillary bankruptcy proceedings

Art. 174a

1 On application of the trustee in foreign bankruptcy, it is admissible to waive the ancillary bankruptcy proceedings if no claim within the meaning of Article 172, paragraph 1, was lodged.

2 If the creditors domiciled in Switzerland lodge claims other than the ones defined in Article 172, paragraph 1, the court may waive the ancillary bankruptcy proceedings provided that the foreign proceedings take due account of their claims. The creditors concerned shall be heard.

3 The court may attach conditions and obligations to the waiver.

4 If the court waived the ancillary bankruptcy proceedings, the trustee in foreign bankruptcy may, within the limits of Swiss law, exercise all the authority granted by the law of the country where the bankruptcy is opened; the trustee may in particular transfer assets abroad and initiate proceedings. This authority does not include acts of sovereignty, use of means of coercion or dispute resolution.

IIIbis. Coordination

Art. 174b

If there is a nexus between the proceedings, the authorities and bodies involved may coordinate their actions between themselves as well as with the foreign authorities and bodies.

IIIter. Recognition of foreign decisions concerning claw-back actions and other similar decisions

Art. 174c

Foreign decisions closely connected to a bankruptcy decree recognized in Switzerland concerning claw-back actions and other acts detrimental to creditors are recognized pursuant to Articles 25 to 27 if they have been rendered or recognized in the country from which the bankruptcy decree emanated and if the defendant is not domiciled in Switzerland.

IV. Composition and similar proceedings. Recognition

Art. 175

A composition or a similar proceeding approved by a foreign authority shall be recognized in Switzerland. Articles 166 to 170 and 174a to 174c apply by analogy. Creditors domiciled in Switzerland shall be granted an opportunity to be heard.