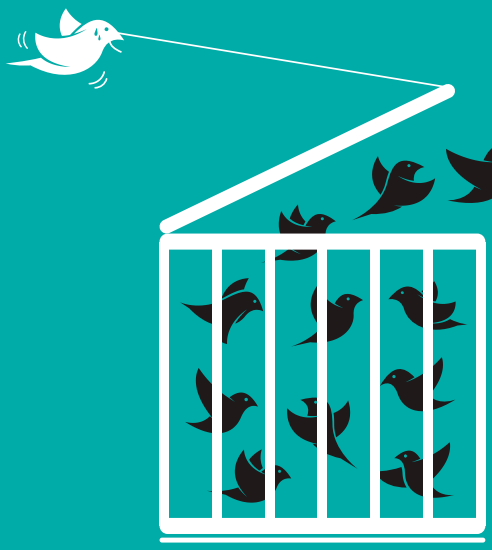
# TO WAIVE BUT NOT FALTER:



## WHEN SHOULD FOREIGN BANKRUPTCY LIQUIDATORS APPLY FOR A WAIVER OF THE SWISS ANCILLARY BANKRUPTCY?

CORPORATE PARTNER

MBK.LAW
SWISS LITIGATORS

**Authored by: Yves Klein (Partner), Evin Durmaz (Senior Associate) & Elisa Branca (Associate) - Monfrini Bitton Klein**

Foreign bankruptcy liquidators often face significant hurdles when attempting to recover assets or enforce claims in Switzerland. These challenges largely stem from Article 271 of the Swiss Criminal Code (SCC), which acts as a blocking statute, prohibiting foreign officeholders from taking direct legal or administrative actions in Switzerland or litigants to obtain evidence in support of foreign proceedings. This provision is designed to protect Swiss sovereignty, ensuring that foreign actions do not infringe on the jurisdiction of Swiss authorities. However, Swiss lawmakers have developed mechanisms to balance this principle with the practical needs of cross-border insolvency cases, particularly through the recognition of foreign bankruptcies. In particular, since 2019, the sometimes-cumbersome Swiss ancillary bankruptcy can be waived, when this is compatible with the interests of Swiss creditors.

## 1. The Recognition of Foreign Bankruptcies and Mini-Bankruptcy Proceedings

Swiss law mandates that foreign bankruptcy decisions be formally recognized by local courts.

In principle, this recognition initiates a “mini-bankruptcy” or “ancillary bankruptcy” proceeding, which functions as a sort of mutual assistance mechanism.

Mini-bankruptcy proceedings involve the collection and liquidation of Swiss-based assets under the supervision of the local bankruptcy office. Bankruptcy offices are bestowed with coercive authority and can request document production from third parties (including from Swiss banks for example) based in Switzerland.

The proceeds are then used to satisfy privileged Swiss creditors. Any surplus can then be remitted to the foreign bankruptcy estate following the recognition of the foreign schedule of claims.

Once the Swiss privileged claims have been settled and once the foreign schedule of claims has been recognized by the local court, the bankruptcy office may apply with the local court to close the ancillary bankruptcy proceedings. This closure does not prevent the continuation of actions which right to conduct litigation has been assigned to the foreign liquidators.

While this system has provided a structured approach to cross-border insolvency, it has often been criticized for being cumbersome and unnecessary in cases where Swiss assets are minimal or where no local creditors exist who need to be protected.

## 2. The 2019 PILA Amendment and Waiver of Mini-Bankruptcy

Recognizing these inefficiencies, a key amendment to the Swiss Private

International Law Act (PILA) was introduced in 2019. The new Article 174a PILA allows for the waiver of the mini-bankruptcy under specific conditions:

- the foreign bankruptcy decision must be recognized by Swiss courts ;
- the foreign bankruptcy liquidators should file the waiver application ;
- there should be no privileged Swiss creditors ; and
- the non-privileged creditors must be able to file their claims in the foreign bankruptcy proceedings.

This provision streamlines the process for foreign liquidators.

The introduction of Article 174a PILA reflects Switzerland's commitment to adapting its legal framework to modern insolvency challenges. It aligns with international trends toward greater cooperation and efficiency in cross-border cases, making Switzerland an attractive jurisdiction for resolving complex insolvencies.

## 3. Practical Application and Swiss Courts' Approach

The implementation of this PILA amendment has led to significant case law, shaping how foreign liquidators can operate in Switzerland.

Swiss courts have demonstrated a pragmatic approach, prioritizing efficiency and international cooperation in cross-border insolvency matters.

In Geneva, in particular, two key decisions illustrate this trend and established that:

- **No Temporal Limitation on Waiver Requests:** the Geneva Court of Appeal clarified that there is no strict temporal limitation on when a waiver of the mini-bankruptcy can be requested. This flexibility allows foreign liquidators to adapt their strategies as the insolvency process unfolds, even if delays occur (Decision of the Geneva Court of Appeal ACJC/1691/2023 dated 14 December 2023). This ruling notably confirms and validates the practice of lower courts that a waiver of the ancillary bankruptcy may be granted merely after a call for Swiss privileged creditors has been published without result, namely without formally opening the ancillary bankruptcy.
- **Possible Waiver Even After Mini-Bankruptcy Closure:** the Geneva Court of Appeal has also held, in a groundbreaking interpretation, that a waiver can be granted even after a mini-bankruptcy proceeding has been closed in Switzerland. This ensures that foreign liquidators are not unduly restricted by procedural technicalities and can still act effectively in recovering assets, even after the Swiss proceedings are closed (Decision of the Geneva Court of Appeal ACJC/1545/2024 dated 2 December 2024).

## 4. Strategic Implications for Foreign Liquidators

These developments have opened the door for innovative recovery strategies.

For example, foreign bankruptcy liquidators can, first, leverage the local bankruptcy office coercive powers to obtain documents or evidence from third parties during a mini-bankruptcy proceeding. Once the necessary information and evidence is gathered, the liquidators can request a waiver, enabling them to act directly in Switzerland based on the evidence obtained.

This two-step approach combines the advantages of the coercive powers of the bankruptcy office with the streamlined execution enabled by the PILA amendment.

Another possibility is to file simultaneously the recognition of the foreign bankruptcy decision and the request for waiver of the mini-bankruptcy, when it is suspected that no Swiss privileged creditors exist and the coercive powers of the local bankruptcy office will not be necessary. This will allow to avoid the opening of any mini-bankruptcy in Switzerland and provide the foreign liquidators the ability to act directly in Switzerland. Such strategy significantly reduces costs and time.

This is particularly advantageous in cases where the potential Swiss assets or claims are already known to the foreign liquidators.

## 5. Conclusion

The 2019 PILA amendment and the evolving case law surrounding it represent a significant shift in Swiss cross-border insolvency practice. By allowing foreign bankruptcy liquidators to bypass the mini-bankruptcy process in appropriate cases, Switzerland has enhanced its reputation as a jurisdiction that values practicality and international cooperation. For foreign practitioners, understanding the nuances of these provisions and the strategic opportunities they present is essential when dealing with Swiss assets.

As more cases test the boundaries of these provisions, further clarity and opportunities will likely emerge, reinforcing Switzerland's pivotal role in international insolvency law.