THE POWERS OF THE FOREIGN BANKRUPT COMPANY AND THE FOREIGN BANKRUPTCY ADMINISTRATOR TO ACT BEFORE THE SWISS AUTHORITIES IN CASE OF FRAUD

Authored by: Natalia Hidalgo - Monfrini Bitton Klein

When a foreign company is defrauded and goes bankrupt, several connections with Switzerland may exist. If the company has been the victim of criminal acts committed by its corporate organs, it is possible that these organs have used accounts in Switzerland to divert funds or to launder them. It is also possible that the company itself has assets in Swiss accounts that will have to be recovered in the foreign bankruptcy proceedings.

In cross-border fraud context, several proceedings may therefore be necessary in Switzerland, not only to establish the liability of legal entities and individuals, but above all to recover funds to reduce the damage caused. This will involve, for example, civil and criminal proceedings against Swiss banks and their employees who participated in the fraud or in the laundering of its proceeds.

In principle, the recognition of foreign bankruptcy decisions leads to the initiation of auxiliary bankruptcy proceedings to liquidate the bankrupt's assets located in Switzerland by a local administrator (the Swiss "ancillary bankruptcy" or mini-bankruptcy).

However, since 2019, at the request of the foreign bankruptcy administrator and in the absence of Swiss preferred creditors, the Swiss competent court can waive the ancillary bankruptcy proceedings, and authorize the foreign bankruptcy administrator to directly bring proceedings in Switzerland.

Knowing the standing of the parties potentially involved (foreign bankrupt company, foreign bankruptcy administrator, ancillary bankruptcy administrator) is particularly important, as Swiss criminal law restricts the actions of the foreign bankruptcy administration in Switzerland.

Indeed, under Article 271 para. 1 of the Swiss Penal Code (PC) it is a crime for agents of a foreign State to carry out acts on Swiss territory which under Swiss law are the prerogatives of Swiss authorities.

Acts of foreign administrators in Switzerland may therefore constitute a criminal offense under Article 271 PC.

I. Action against a debtor in the civil courts

When a foreign bankruptcy administrator intends to act in Switzerland against a debtor to recover assets located in Switzerland, the question arises as to which of the bankrupt company, the foreign bankruptcy administrator or the ancillary bankruptcy administrator can take action before the civil courts. This problem must be solved notably when the bankrupt company wants to act against a Swiss bank for its potential liability in the fraud or the laundering of its proceeds.

First, it should be noted that the principle of territoriality applies in Swiss bankruptcy law. Accordingly, foreign bankruptcy decisions have generally no direct effect on Swiss territory.

Whether the foreign bankruptcy administrator can act and seize assets on behalf of the foreign bankruptcy estate in Switzerland is then determined according to Swiss private international law, i.e. the Federal Private International Law Act (PILA).

Prior to recognition, the foreign bankruptcy administrator would only be entitled to request recognition of the foreign bankruptcy decision and protective measures. In this context, case law is clear that the foreign bankruptcy administrator is not entitled to bring an action against a Swiss debtor or to file a claim in the bankruptcy of a Swiss debtor. The reason is that the acts mentioned would circumvent the system designed by the PILA, which aims notably to give preference to creditors domiciled in Switzerland.

However, even when the foreign bankruptcy decision is recognized in Switzerland, the PILA and the case law of the Swiss Federal Supreme Court also strongly limit the scope of action of the foreign bankruptcy administrator in Switzerland.

We can mention the following hypotheses of actions:

- Firstly, the foreign bankruptcy administrator may act in accordance with the powers provided for in the PILA, in particular the avoidance claim provided for in Articles 285–288a und 292 of the Federal Debt Enforcement and Bankruptcy Act (DEBA) (art. 171 PILA).
- Secondly, the foreign bankruptcy administrator has special powers of action in the event of a waiver of ancillary bankruptcy proceedings (art. 174a PILA).
- Thirdly, the foreign bankruptcy administrator can act when it has been assigned the rights of the ancillary bankruptcy estate according to the terms of article 260 LP. Indeed, as soon as the foreign bankruptcy administrator has requested the recognition of the foreign bankruptcy decision and the ancillary bankruptcy is opened, the ancillary bankruptcy administrator has the possibility to pursue the claim for the ancillary bankruptcy estate. If both the ancillary bankruptcy administrator and the creditors waive their right to bring action, the foreign bankruptcy administrator may request the application of article 260 DEBA which will give him the possibility to bring the action against a debtor, such as a Swiss bank.
- Fourthly, the foreign bankruptcy administrator can bring an action in Switzerland when the assets in question are not located on Swiss territory. The hypotheses of such an action in Switzerland in the absence of assets located on Swiss territory seem rare, but we can mention an action based on a choice of court.

According to the Swiss Federal Supreme Court, if the foreign bankruptcy administrator were granted the same powers as the ancillary bankruptcy administrator, in particular the power to bring an action directly against a Swiss debtor, the admission of the action would have the effect of taking assets away from the Swiss creditors admitted to schedule of claims of the ancillary bankruptcy, which would be contrary to the purpose of the system established by the PILA.

Therefore, when assets are in Switzerland and the foreign bankruptcy decision has been recognized, the enforcement of a claim can take place through the following channels:

- by the ancillary bankruptcy administrator, who will remit the net proceeds to the foreign banruptcy estate once the foreign schedule of claims has been recognized;
- by the foreign bankruptcy administrator in case of a waiver of the ancillary bankruptcy proceedings;
- by the foreign bankruptcy administrator if he is assigned the claim, the proceeds of which will be remitted to him once the foreign schedule of claims has been recognized.

Thus, Swiss law takes a restrictive approach to the powers of action that a foreign bankrupt administrator may bring to recover assets located in Switzerland through civil proceedings when the foreign company was victim of a fraud. It cannot itself act directly in Switzerland against its debtor, since this competence is in principle exercised by the ancillary bankruptcy administrator. The foreign bankruptcy administrator is drastically limited in its powers of action when it follows the classic path of PILA (recognition of the foreign decision and subsequent opening of ancillary bankruptcy proceedings). The foreign administrator has, however, more proactive options, such as to request the assignment of the claim or the waiver of the ancillary bankruptcy, which give the foreign bankruptcy administrator more room for maneuver and control.

II. Participation of the foreign bankrupt company in criminal proceedings

In addition to civil proceedings, the defrauded company will have an interest in participating in criminal proceedings in Switzerland against third parties who were part of the fraud or the laundering of its proceeds. For example, when criminal proceedings are initiated against a bank employee who took part in the fraud, it will be important for the company to access all the documents gathered by the Public Prosecutor to obtain evidence in support of actions for damages or other actions.

In Switzerland, the status of party to criminal proceedings gives access to various rights, including the right to be heard provided for in Article 107 of the Swiss Code of Penal Procedure (CPP), which includes notably the right to inspect the documents relating to the criminal proceedings, to take part in procedural acts and to submit requests for further evidence to be taken.

According to Article 104 para. 1 CPP, the plaintiff is considered a party to the criminal proceedings and therefore has these procedural rights.

The question of whether the foreign bankrupt company can be considered a plaintiff must be examined in the light of several provisions of the Swiss Code of Penal Procedure.

According to Article 118 para. 1 CPP, a plaintiff is a person suffering harm who expressly declares that they wish to participate in the criminal proceedings as a criminal or civil claimant. Indeed, in the criminal proceedings, the person suffering harm can either request the prosecution and punishment of the person responsible for the offense (criminal complaint) or request compensation for his damage (civil claim), or both (art. 119 al. 1 CPP).

The concept of “person suffering harm” is therefore essential in criminal law since it is a condition to be a plaintiff.

Article 115 para. 1 CPP defines the person suffering harm as a person whose rights have been directly violated by the offense. Therefore, the person who wants to be a plaintiff must prove that the damage suffered is plausible and that there is a link between the damage and the offense. When a property-related offense is committed against a company, only the latter suffers damage and can claim to be the injured party. This is not the case for its shareholders or beneficial owners.

Therefore, when the company goes bankrupt, it may be granted plaintiff’s status if it can prove that its rights have been directly violated by the offense under investigation.

In a decision rendered in 2017, the Geneva Court of Justice examined the capacity to appeal of a bankrupt Lithuanian bank whose status as plaintiff was disputed.

First of all, the offenses denounced by the foreign bankrupt company - unfair management and money laundering - could be invoked by it, since it had been directly injured by those alleged acts.

In the case at hand, the bankruptcy administrator of the Lithuanian company had obtained in Switzerland the recognition of the Lithuanian bankruptcy decision and the opening of an ancillary bankruptcy, administered by the Swiss Financial Market Supervisory Authority. The latter had assigned, according to article 260 DEBA, to the foreign bankruptcy administrator, the rights that the estate of the ancillary bankruptcy had renounced to enforce.

According to the Court of Justice, despite the assignment, the foreign bankrupt company was still a "person suffering harm" within the meaning of Article 115 CPP and a plaintiff according to Article 118 CPP. It therefore remained a party to the proceedings and had a right to support the prosecution and to appeal against the order to abandon the proceedings issued by the Public Prosecutor.

Swiss law therefore adopts a more flexible approach in criminal proceedings than in civil proceedings, as it directly allows the defrauded foreign company to be a plaintiff against the third party who committed the offense.

The foreign company that goes bankrupt can therefore act on its own without the need to obtain the approval or the assignment of rights by the ancillary bankruptcy. In this way, it acquires procedural rights that could prove advantageous, particularly when there are parallel proceedings in Switzerland that require the provision of evidence.

It should be pointed out that - even if the foreign bankrupt company is a plaintiff in the criminal proceedings - the ability to obtain civil compensation for the damage caused by the offense (whether before the criminal court or in a separate civil action) remains with the ancillary bankruptcy administrator or the foreign bankruptcy administrator in case of assignment or waiver of the ancillary bankruptcy.

CONCLUSION

In conclusion, the bankruptcy of a foreign company with links to Switzerland is likely to trigger numerous administrative, civil or criminal proceedings.

Swiss law offers several legal avenues to obtain compensation in case of fraud.

The powers of the parties entitled to intervene in these proceedings - in particular the foreign company or the foreign bankruptcy administrator - will depend on the type of proceedings and the specific circumstances of each situation. Coordination between the various proceedings and the many actors involved, as well as the establishment of a recovery strategy, is therefore crucial to increase the chances of recovering assets.