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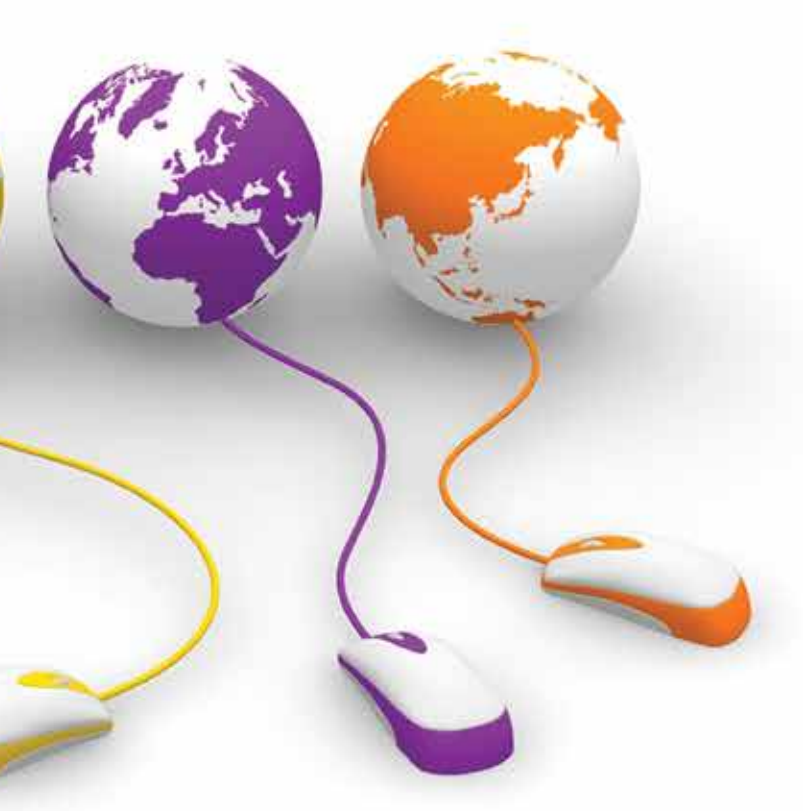
TOP LAWYERS, LAW FIRMS, AND IN-HOUSE LEGAL TEAMS VIED FOR THE SPOTLIGHT AT THE STAR-STUDDED 7TH ANNUAL INDIAN LEGAL AWARDS (LEGAL ERA AWARDS) 2017-18 CEREMONY HELD IN MUMBAI

Switzerland: Improving Cooperation To Recover Assets In Cross-Border Insolvency Cases

This article deals with the new provisions under Swiss law concerning the use of cross-border insolvency tools in relation to asset recovery. India has dozens of cases of cross-border willful default loans, ranging in value between US$250 million and US$5 billion. These cases typically involve Indian companies borrowing large sums of money from Indian banks, defaulting, and then falsely asserting that they have no means to repay.

Frequently, willfully defaulting borrowers use offshore counterparties to manufacture a loss, while in reality, they beneficially own and control these counterparties. The proceeds of such credit fraud are then laundered through offshore companies holding bank accounts abroad, notably in Switzerland.

Switzerland is thus highly relevant to Indian lenders both to gather information and to recover assets since it remains



a strong financial center in which significant portions of the assets may be well protected.

On 16 March 2018, Swiss Parliament adopted a bill on cross-border insolvency, which is expected to enter into force early 2019. Considering preserving the Swiss particularities of cross-border insolvency necessary, the Swiss legislator regretfully refrained from fully incorporating the UNCITRAL Model Law on Cross-Border Insolvency. Rather than adopting an independent bill on cross-border insolvency, it incorporates this bill in the Swiss Federal Code on Private International Law (CPIL). International creditors can thus expect that in the foreseeable future, Switzerland will grant broader, faster and more coordinated international cooperation to foreign insolvency office holders.

Complex structures of offshore companies should not be seen as an insurmountable obstacle to asset recovery. The three essential steps to be taken in this regard are: (1) locate the assets, (2) freeze them, (3) recover them.

To recover his assets, a defaulted lender has three powerful tools at his disposal that can be used in parallel: (1) civil discovery and substantive proceedings in common law countries, together with civil mutual assistance; (2) participation as plaintiff in criminal proceedings in civil law countries; and (3) use of cross-border insolvency tools.

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Being a civil law jurisdiction, Swiss law does not foresee wide civil disclosure orders. The creditor can, therefore, only request specific bank documents, such as a particular credit or a debit advice. Generic applications for all credit or debit advices regarding a certain account are unlikely to be granted. This is why one should consider using alternative instruments of cross-border insolvency and criminal proceedings, in which banking secrecy is substantially limited. Insolvency office holders in particular have the authority to request banks and other third parties to disclose information regarding the insolvent debtor's assets.

Main Features Of The New Swiss Bill On Cross-Border Insolvency

- Abolishing the reciprocity requirement
- Obtaining recognition of foreign insolvency office holders
- Permitting foreign insolvency office holders to take direct action to locate, freeze and recover assets

The bill on cross-border insolvency authorizes a foreign insolvency office holder to directly act in Switzerland for the purpose of locating, freezing (through a court order), and recovering Swiss assets in favor of worldwide creditors. Doing so will no longer violate the Swiss Blocking Statute (whereas this used to be considered a violation of Swiss sovereignty punished under Article 271 of the Swiss Criminal Code) once the insolvency office holder is recognized by a Swiss court.

The abolition of the reciprocity requirement will facilitate and accelerate the proceedings of recognition of foreign insolvency office holders, since the Swiss judge will no longer need to verify whether or not Swiss insolvencies would be recognized in the applicant jurisdiction.

Swiss privileged and secured creditors will remain protected. This condition should not be overrated; however, since in most cases where offshore companies hide assets in Swiss banks, there are no Swiss creditors.

One ought to keep in mind that the foreign insolvency office holder will always be subject to the supervision of the Swiss judge and will not be authorized to take coercive measures on Swiss territory without breaching the Swiss Blocking Statute.

Conditions For Indian Insolvency Office Holders To Identify And Recover Assets Located In Switzerland

Large-scale willful default cases often lead the defaulted lender to insolvency. The Indian insolvency office holder will likely find out that the assets of the insolvency estate have been disseminated all around the globe.

Under the new law, an Indian insolvency office holder suspecting that information in relation to or the assets

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themselves of the insolvency estate may be located in Switzerland needs to apply for recognition before Swiss civil courts following the procedure described above. An application for recognition can also be filed by any creditor under foreign insolvency.

Pursuant to the abolition of the reciprocity requirement, the Swiss judge will merely check that the Indian insolvency decree is not contrary to the Swiss public order, that there are no Swiss protected creditors and that Swiss ordinary creditors (if any) can be duly taken into account in the Indian insolvency proceedings. To that effect, the Indian insolvency office holder will need to describe how the funds recovered in Switzerland will be distributed in India. In addition, the Indian insolvency office holder will have to show that the insolvency decree does not lead to confiscation in favor of the Indian State. Most likely, Switzerland would accept that certain groups of creditors are protected (e.g. in case there are secured claims, wages or social contributions).

An Indian insolvency decree will not be recognized if the Indian State is the only creditor based on its sovereign powers (e.g. taxes or duties), or if it was triggered by punitive damages awarded in a common law jurisdiction.

Once recognized, the Indian insolvency office holder will be entitled to directly gather information on the Indian insolvent company in Switzerland and to initiate civil legal action before Swiss courts. In particular, the Indian insolvency office holder will have legal standing to apply for pre- or post-judgment civil attachment orders on identified Swiss assets or to bring civil claims for damages.

Conclusion

From 2019, Switzerland will be able to provide broader, faster and better international cooperation to foreign insolvency office holders. This will facilitate the task of Indian insolvency office holders who are seeking to locate, freeze and recover assets in relation to defaulted loans on behalf of the creditors.