NEW SWISS CROSS-BORDER INSOLVENCY BILL: FIRST EXPERIENCE ONE YEAR ON

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On 1 January 2019, the new provisions of Articles 166ff. of the Swiss Private International Law Act on cross-border insolvency entered into force. The main improvements of the new PILA provisions lie in the abolition of the reciprocity requirement and in the possibility for foreign insolvency office holders to request from courts the authorization to directly act on Swiss territory without the intermediary of a Swiss ancillary liquidator.

Monfrini Bitton Klein filed the first application in Switzerland under the new bill on behalf of Grant Thornton UK LLP acting as Joint Liquidators of Bilta (UK) Limited (In Liquidation).

In 2007, Bilta was used as a vehicle for the purpose of committing a VAT carousel fraud on the market of carbon certificates. This let Bilta with a tax liability of GBP 38.7 Mio. In 2009, at the request of Her Majesty's Revenue and Customs, the High Court of Justice of England and Wales ordered the winding-up of Bilta and appointed joint liquidators.

In 2015, the High Court of Justice found the directors of Bilta as well as a Swiss company and its director liable for the damage caused to the debtor corresponding to Bilta's liability for VAT.

In a judgment of 6 May 2019, on request of the Joint Liquidators of Bilta, the Court of First Instance of Geneva recognized the insolvency of Bilta in Switzerland and ordered the opening of an ancillary bankruptcy in order to enable the Bankruptcy Office of Geneva to conduct the first steps of the liquidation of Swiss assets.

Abolition of the reciprocity requirement

The first important change in the provisions on cross-border insolvency is the abolishment of the reciprocity requirement. The only remaining ground of refusal of recognition of a foreign insolvency decree is the breach of Swiss public policy.

Therefore, the procedure of recognition is simplified, as the foreign insolvency office holder only has to file a certified copy of the decree and proof of its enforceability and final nature, as well as an affidavit describing the liquidation process and a legal opinion on applicable insolvency provisions of the State of issuance of the decree.

In Bilta's case, in accordance with Swiss federal case law, the Court ruled that there was no ground of refusal on the only motives that the insolvency proceedings were instituted by HMRC and that the sole claim in the English insolvency proceedings was a tax claim.

Authority of foreign insolvency office holders to directly act in Switzerland

The second and most important change is that in absence of Swiss protected creditors, foreign insolvency office holders may apply to court for a waiver of the ancillary bankruptcy procedure. If granted, the foreign bankruptcy office holder is vested with the authority to accomplish certain acts directly on Swiss territory without the intermediary of an ancillary liquidator. In principle, the foreign insolvency office holder is vested with all the powers that it is allowed to exercise pursuant to the laws of the main insolvency proceedings, with the exception of any coercive powers.

In Bilta's case, the Court refused to grant the Joint Liquidators immediate authorization to act on Swiss territory, namely before the publication by the Bankruptcy Office of a call for Swiss creditors in the Official Gazette. An ancillary bankruptcy had therefore to be opened in order to vest *de jure* the Bankruptcy Office with authority to proceed to the publication of the call for creditors.

The call for creditors aims to identify any protected Swiss claims that would prevent the foreign insolvency office holder to act directly in Switzerland, especially to be remitted with Swiss assets for the benefit of the foreign estate. Protected claims are privileged (wages, social contribution claims and alimonies) and secured claims (pledges), as well as claims related to a Swiss branch recorded in the Register of Commerce. The rights of other

Swiss ordinary creditors must be duly taken into account in the foreign insolvency proceedings.

If the waiver of the ancillary bankruptcy procedure is granted, the foreign insolvency office holder receives authority to accomplish certain acts in Switzerland, with support of Swiss courts and bankruptcy offices in case orders to compel are need, notably:

- request information on the debtor to third parties;
- transfer Swiss assets abroad without prior recognition of the foreign schedule of claims;
- bring claw-back actions;
- bring enforcement proceedings of judgments and awards;
- obtain civil freezing orders, seizure and remittance of Swiss assets;
- bring civil claims before civil or criminal courts and authorities.

A Pitfall or An Opportunity?

The position of the Court of First Instance of Geneva that an ancillary bankruptcy procedure must automatically be opened at the recognition of the foreign insolvency decree for the only purpose of publication of the call for creditors may seem at first sight overly formalistic.

This being said, the involvement of Swiss bankruptcy offices immediately after recognition has also the advantage that it entails *de jure* a duty for them to administrate the Swiss ancillary estate. In their mission, and contrary to foreign insolvency office holders duly authorized to act on Swiss territory, bankruptcy offices are vested with coercive powers, which may be used in an efficient manner at the earliest stage of the Swiss liquidation process for the purpose of preservation of assets and evidence.

Bankruptcy offices have in particular authority to serve compulsory orders to third parties, notably:

1) requests of information and documents, with orders to compel, on third parties against whom the debtor has claims or that hold information on the debtor, like banks, fiduciaries or family offices;
2) freezing of assets of the debtor held with main Swiss banks and any other known Swiss debtor.

In this regard, it is stressed out that neither banking secrecy nor attorney-client privilege (except in cases of personal insolvencies) may be opposed to a duly authorized foreign insolvency office holder or to bankruptcy offices.

The decision of the Court of first instance gives therefore a concrete opportunity to create synergies between the bankruptcy offices and the foreign insolvency office holders for the ultimate benefit of all creditors.

The necessity of a new trade-off between law enforcement authorities and insolvency office holders

The recognition of the insolvency of Bilta is the first and only case precedent under the new provisions on cross-border insolvency. This is not surprising as Switzerland has been well known for decades to be very protective with regard to the remittance of assets abroad.

Of particular importance is the so-called Swiss blocking statute that prevents foreign officers from acting in Switzerland without authorization and exposes them to the risk of breaching criminal law.

The entry into force of specific provisions authorizing foreign insolvency office holders to accomplish certain actions in Switzerland considerably reduces this risk.

Foreign insolvency office holders should not overlook the new avenues given by these new provisions that are similar to EU regulation 2015/848 on insolvency proceedings and with the UNCITRAL Model Law on Cross-Border Insolvency.

An important issue remains open, however, regarding the scope of the powers granted respectively to bankruptcy offices and foreign insolvency office holders. Swiss law authorizes office holders to request information on the debtor to third parties that hold assets of the debtor or *"against whom the debtor has claims"*. In practice, this second option is overlooked by office holders, although it might grant them the legal basis to request information for the purpose of evaluating the chances of success of legal actions to be brought against the debtor and of collecting evidence.

Faced with little case law and legal uncertainty in this regard, victims of fraud often have no other choice than instituting criminal proceedings in order to obtain broad disclosure and freezing orders.

The express intent of the Swiss legislator when it adopted the new bill was to improve international cooperation in insolvency matters. Having this in mind, I believe that giving more powers to insolvency office holders, but less than the ones of law enforcement authorities, would have the merit to keep criminal proceedings for what they are meant to be: an *ultima ratio*.