Switzerland's new (or updated...) international insolvency law

Rodrigo Rodriguez and Marjolaine Jakob report on the revised Swiss recognition act

RODRIGO RODRIGUEZ
Professor at the University of Lucerne, attorney at law, head of the Federal Supervisory Authority for Debt Enforcement and Bankruptcy at the Federal Office of Justice, Bern

MARJOLAINE JAKOB
Associate and member of the Insolvency & Restructuring Law Practice Group at CMS von Erlach Poncet AG, Zurich, Switzerland

Switzerland's international insolvency law – the relevant provisions being contained in Art. 166-175 of the Swiss International Private Law Act ('SPILA') of 1989 – is governed by the principle of passive territoriality – or must we say "was"?

Lacking formal recognition by the competent Swiss court, foreign insolvency proceedings have no effects on Swiss territory. Foreign insolvency administrators *may neither collect assets* located in Switzerland *nor take any legal actions* to this aim on Swiss territory prior to such recognition (according to some views they may even risk criminal sanctions for such actions).

International developments towards a universalisation of cross-border insolvencies (EU Insolvency Regulation, UNCITRAL Model Law on cross-border insolvency) have led to increased criticism of Switzerland's adherence to its highly territorial (and thus costly and burdensome) approach. Efforts to reform the provisions on international insolvency law were initiated years ago. The outcome of these efforts is a recast of Switzerland's international insolvency law provisions ('**revSPILA**') adopted by the Swiss parliament in March 2018 that will have entered into force on 1 January 2019.

To get straight to the point: the revised law is less of a revolution than an evolution of the existing provisions, "loosening" rather than abandoning the territorial approach, with Swiss courts and authorities still retaining a considerable amount of decision and control powers. This article gives a short overview over the most important aspects of the revised regime.

The requirements for recognition of a foreign insolvency decree

Swiss law not only requires formal recognition of the foreign insolvency order by the competent Swiss court, but also subjects such recognition to strict conditions. The revSPILA retains the fundamental recognition requirement, but loosens its conditions. Firstly, by abolishing the controversial proof of reciprocity. Secondly, by extending the indirect competence to the debtor's centre of main interest (COMI), which is now considered – together with the place of incorporation, formerly the sole criterion – a proper ground for indirect competence. Other recognition requirements have remained unaltered. To sum up, under the revSPILA's provisions, recognition is granted if:

- the foreign insolvency order is *enforceable* in the state in which it was rendered;
- there is no ground to deny recognition for reasons of violation of the Swiss *ordre public* and
- the foreign insolvency order was rendered in the state of the debtor's domicile (under Swiss law only the *registered office*), or in the state of the *debtor's centre of main interests* under the condition that the debtor was not domiciled in Switzerland at the moment of opening of the foreign insolvency proceedings.

It is worth noting that the latter condition still excludes a recognition in Switzerland of a foreign proceeding opened in respect of *any company formally incorporated in Switzerland* (even if its COMI is located in that foreign country).

Effects of recognition of a foreign insolvency order and waiver of ancillary proceedings

The recognition of the foreign insolvency order still entails the mandatory opening of ancillary insolvency proceedings in Switzerland. Those ancillary proceedings encompass all assets of the foreign debtor located in Switzerland, but only serve the satisfaction of certain preferential claims (unlike the ancillary proceedings under the EuInsReg). These preferential claims are those secured by a pledge, privileged claims of creditors domiciled in Switzerland (such as, among others, employees) and – as introduced with the recast – claims related to a branch of the foreign debtor registered in the Swiss commercial register (if any).

Under the revSPILA – and following the example of the regime introduced a few years ago in the Swiss Federal Banking Act for cross-border banking insolvencies – the conduct of ancillary proceedings is no longer mandatory in all cases. Upon a request of the foreign insolvency administrator with the competent court, the court may *waive the conduct of ancillary proceedings*, provided that *no preferential* claims were lodged. However, in the event that creditors with domicile in Switzerland have lodged *non-preferential claims*, the court may order a waiver of the ancillary

proceedings only if these claims are "adequately considered" in the foreign bankruptcy proceedings.

The waiver of the ancillary insolvency proceedings provides the foreign insolvency administrator with the authority granted by the *lex fori concursus generalis*. The foreign insolvency administrator may in particular transfer assets abroad and litigate before Swiss courts, but the given authority does not include acts of sovereignty, the use of means of coercion or the power to adjudicate on disputes (see also art. 21 of the EuInsReg, from which the new provision draws some inspiration).

Where ancillary proceedings are not waived – be it because no request for waiver is filed or such request is rejected – the proceedings are not altered by the recast: After satisfaction of the creditors of preferential claims a remaining surplus shall be made available to the foreign insolvency administrator or to the creditors in bankruptcy entitled thereto. However, such surplus will only be made available after a (further) recognition decision concerning the foreign schedule of claims. The Swiss court will thereby examine whether non-preferential claims of Swiss-domiciled creditors were "adequately considered" (i.e. not unduly discriminated against) in the foreign schedule of claims. As seen, where ancillary proceedings (which are generally conducted by a public office) take place, foreign insolvency administrators will continue to have very limited powers to act on Swiss territory.

Cross-border cooperation

So far, Swiss law has lacked a rule on the admissibility of cooperation of Swiss authorities with foreign authorities. Although cooperation did take place nevertheless in some cases, there remained a severe legal uncertainty. The revSPILA now provides for an explicit rule allowing Swiss authorities to cooperate with foreign authorities in the event that the Swiss and foreign proceedings have an intrinsic connection. This will ultimately also allow for so-called "insolvency protocols" to be applied in Switzerland.

Possibility to recognise foreign avoidance actions and other similar decisions

As a consequence of Switzerland's strictly territorial approach on the effect of foreign insolvency proceedings, up until the enactment of the new law foreign judgments on avoidance claims could not be recognised and enforced in Switzerland. Such claims had to be filed in Switzerland within the ancillary insolvency proceedings and could only be based on Swiss law, i.e. art. 285 et seqq. of the Debt Enforcement and Bankruptcy Act. These provisions provide – in comparison to many foreign laws – a rather restrictive basis for avoidance claims.

The revised provisions now allow for the recognition of foreign judgments on avoidance claims and other acts detrimental to creditors. Such recognition essentially requires a close connection to a bankruptcy order that has been recognised in Switzerland. However, an important limitation has been introduced: The foreign avoidance judgment will *not* be recognised if the defendant was domiciled in Switzerland at the time the claim was filed. This limitation – introduced to protect Swiss defendants from "forum shopping" by claimants abroad – will significantly limit the practical relevance of the new provisions on recognition of avoidance actions and similar decisions.

Improved coordination of branch insolvency proceedings with ancillary insolvency proceedings

The former SPILA allowed for parallel insolvency proceedings, on the one hand proceedings over the Swiss branch of a foreign debtor and on the other hand parallel ancillary insolvency proceedings following the recognition of the foreign insolvency of the main debtor. This former regime led to legal inconsistencies and delimitation problems, since these concurrent insolvency proceedings encompassed different insolvency estates.

Against this background, the revSPILA provides for an integration of the branch of insolvency proceedings into the ancillary insolvency proceedings (similar to the proceedings under the EuInsReg). A consequence of this unification is the inclusion of a third category of preferential claims into the new "unified" ancillary proceedings, namely those of (secured and unsecured) creditors of the Swiss branch. All these claims will have to be satisfied in such ancillary proceedings before any surplus is transferred to the foreign main proceedings.

So sum up: still a challenging path to simplicity

The new Swiss provisions on recognition of foreign insolvencies draw some inspiration from the EuInsReg and the UNCITRAL Model Laws (including its newest Model Law on insolvency related judgements). However, the revised articles 166-175 revSPILA remain an autonomous and unique system. Its relative generosity in terms of recognition requirements (having now dropped reciprocity and embraced COMI) is tainted with a comparatively high degree of involvement and control of the proceedings of and by Swiss public authorities.

In particular, the new "simplified" proceedings (i.e. waiving ancillary proceedings) may be interesting for administrators and thus highly relevant in practice. These proceedings come, however, with additional requirements and – if granted – with additional responsibilities for the foreign insolvency administrator who will have to act "in accordance with Swiss law" on Swiss territory. Consequently, even under the "simplified" conditions of the revSPILA, our recommendation remains: do not try this without local counsel! ■

> **LACKING FORMAL RECOGNITION BY THE COMPETENT SWISS COURT, FOREIGN INSOLVENCY PROCEEDINGS HAVE NO EFFECTS ON THE SWISS TERRITORY**

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