

Update

Newsflash April 2018

Revision of Swiss International Insolvency Rules

On 16 March 2018, the Swiss Parliament adopted the revision of the international insolvency provisions of the Swiss Private International Law Act ("PILA"). Such revision particularly aims at simplifying the recognition of foreign insolvency proceedings in Switzerland which shall lead to a reduction of costs and improved efficiency. The revised PILA is now subject to an optional referendum. If no referendum is requested by 5 July 2018, the Swiss Federal Council will determine the date of entry into force of the new international insolvency regime which will likely be towards the end of this year or in early 2019.

1. Background

The regime on the recognition of foreign insolvency proceedings pursuant to Art. 166 et seq. of the Swiss Private International Law Act ("PILA") as currently in force is rather restrictive and follows the principle of territoriality. Accordingly, a foreign bankruptcy (or any similar proceedings) has no effect in Switzerland unless it has been recognized which, *inter alia*, requires that the proceedings were opened in the state of the debtor's seat or domicile and that such state grants reciprocity.

As a result of these strict requirements as well as of the fact that the recognition of a foreign bankruptcy automatically leads to the opening of ancillary bankruptcy proceedings, the recognition of a foreign bankruptcy decree under the current regime is a rather burdensome and cost-intensive process. In addition, assets of a foreign

debtor located in Switzerland are only handed over to the foreign bankruptcy estate to the extent that there is an excess following the satisfaction of all secured and privileged claims of creditors in Switzerland.

In a bid to simplify the recognition of foreign insolvency proceedings, the new Swiss international insolvency rules pursuant to the revised PILA aim at softening the strict application of the principle of territoriality as well as at avoiding unnecessary ancillary proceedings in constellations where there are no secured or privileged creditors in Switzerland, considering that the protection of such creditors is one of the main goals of ancillary bankruptcy proceedings.

2. Key amendments

In particular, the revised PILA will introduce the following main amendments:

a) Recognition of bankruptcy decree rendered in the state of debtor's main interest (COMI)

Under the current regime, a foreign bankruptcy decree can only be recognized in Switzerland if rendered in the state of the debtor's seat or domicile. Such provision will now be amended in the revised PILA in order to make it possible that also bankruptcy decrees rendered in the state where the debtor has its centre of main interest ("COMI") can be recognized in Switzerland. The definition of "COMI" mirrors the one as set out in the EU Insolvency Regulation (EU 2015/848). COMI will not apply to debtors with registered seat in Switzerland, though.

b) Possibility for debtor to file petition

Today, the petition for the recognition of foreign insolvency proceedings can only be introduced by the insolvency administrator or by a creditor but not by the debtor itself. Under the revised PILA, such petition may additionally be brought forward by the debtor itself. This is primarily relevant in restructuring type of proceedings which are mainly driven by the debtor. This is reflected in the revised PILA which aims at increasing efficiency of the recognition process and, consequently, avoiding the occurrence of further damages due to delays and lengthy procedures at the outset of the recognition proceedings in Switzerland.

c) Abolition of reciprocity requirement

Pursuant to applicable Swiss law as currently in force, it is required that the state in which a foreign debtor was declared insolvent grants reciprocity (*Gegenrecht*). This means that the Swiss court competent for the recognition of foreign insolvency proceedings must examine if the foreign jurisdiction would also recognize, under similar circumstances, a Swiss decree, under conditions that are not sensibly less favourable than the ones stipulated by Swiss law. In practice, the reciprocity requirement not only entails considerable uncertainties as to which jurisdictions can be considered as "reciprocity jurisdictions" but also leads to additional costs triggered by the necessity to obtain legal opinions from

foreign counsel as to the reciprocal nature of a certain jurisdiction. Such cumbersome, time and cost intensive procedure is no longer required under the revised PILA which will significantly facilitate the recognition process.

d) No mandatory ancillary proceedings

Another major amendment in relation to the recognition of a foreign insolvency is that the opening of ancillary insolvency proceedings in Switzerland will no longer be mandatory. The competent court can decide not to open such ancillary proceedings if (i) a request to this effect is made by the foreign bankruptcy administration, (ii) there are no creditors in Switzerland the claims of which are privileged or secured by a pledge and (iii) the claims of non-privileged and unsecured creditors in Switzerland are adequately taken into account in the foreign proceedings and such creditors were granted an opportunity to be heard. In case no ancillary proceedings are opened, the foreign insolvency administration may carry out all actions to which it is authorized pursuant to the applicable foreign law in Switzerland, including, most notably, the transfer of assets of a foreign debtor located in Switzerland to the foreign insolvency estate. In this context, the foreign insolvency administration must at all times comply with all applicable Swiss laws and, in particular, must not perform any official acts or use any means of coercion.

e) Recognition of court decisions for avoidance claims and claims for actions harming creditor interests

The Swiss law rules on the recognition and enforcement of foreign court decisions as currently in force *de facto* do not provide for the possibility of a recognition and enforcement of foreign court decisions on avoidance claims and similar claims with a close link to a foreign bankruptcy procedure (such as liability claims). Under the revised PILA, it will be possible to have such decisions recognized in Switzerland, provided that they have been rendered or recognized in the same state as the bankruptcy decree and that the defendant was not domiciled in Switzerland at that time.

f) Further amendments

In addition to the amendments set out above, the revised PILA brings some further changes which namely include the following:

- › Improvement of procedural efficiency and clarification of relationship between the opening of ancillary proceedings for a foreign bankruptcy and the opening of (domestic) bankruptcy proceedings with regard to a Swiss branch of a foreign debtor (*Niederlassungskonkurs*).
- › Enhancement of cooperation with foreign bankruptcy administrations and other foreign authorities.
- › Start date of the calculation of suspect periods and statute of limitations for avoidance claims brought forward in the context of a foreign insolvency recognized in Switzerland

shall be the date of the foreign insolvency decree.

- › Minor amendments in other bankruptcy-related provisions for regulated entities.

3. Entry into force of new rules

As final part of the legislative process, the revised PILA will now be subject to a so-called optional referendum (*fakultatives Referendum*). Provided that no referendum is requested by the necessary quorum of Swiss voters during the referendum period expiring on 5 July 2018, the Swiss Federal Council will establish the date of entry into force of the revised PILA which will likely be in late 2018 or at the beginning of 2019.

Please do not hesitate to contact us in case of any questions.

Legal Note: The information contained in this UPDATE Newsflash is of general nature and does not constitute legal advice. In case of particular queries, please contact us for specific advice.

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