

Good to know: As of 1 January 2019 numerous forms of relief for cross-border bankruptcies and insolvencies will become effective in Switzerland.

Starting point

With Switzerland neither being subject to the EU Insolvency Regulation nor having adopted the UNCITRAL Model Law on Cross-Border Insolvency, foreign bankruptcy and "like orders" are not given direct effect in Switzerland; to collect debtor's assets located in Switzerland for the benefit of the main foreign proceeding specific rules must be observed. Having analysed the development of international law the Swiss legislator has identified a number of weaknesses of the pre-existing regime which had been put in place in 1989 as an addition to Switzerland's Private International Act ("PILA"). In a comparatively short legislative process the Swiss legislator has now revised the specific sections of PILA; it attempted to align the rules with those which are already in place under the legal regime which applies to qualified financial institutions and attempted to modernise the regime considerably by reflecting certain principle rules set forth under the UNCITRAL Model Law. The Swiss cross-border insolvency regime is designed as a legal assistance proceeding, whereby the competent Swiss bankruptcy officer is guiding a secondary/auxiliary Swiss proceeding. The focus is on bankruptcy proceedings, but the law equally applies to insolvency proceedings and respective "like orders" such as for debt moratoria and composition agreements, respectively. While before 2019 the foreign receiver was con-
 doned to a fairly passive role, the foreign receiver has now gained importance, as to be set forth more in detail below. As a basic rule remains that once a secondary proceeding is opened in Switzerland indi-

vidual enforcement proceedings against local assets can no longer be carried out. In addition (apart from the foreign receiver and a creditor), the revised act explicitly recognizes the legitimacy of a foreign debtor in possession to initiate the Swiss secondary proceeding on its own. One other concern was the enhancement of cooperation in cross-border bankruptcy and insolvency proceedings. Without stipulating specific rules Swiss authorities are now explicitly called to coordinate a multi-jurisdictional proceeding with the relevant foreign authorities and bodies involved.

Key elements of revised PILA on cross-border bankruptcies and insolvencies are:

- Recognition of the foreign enforceable bankruptcy/insolvency order by the Swiss court continues to be required. However, the previous requirement of reciprocal recognition by the jurisdiction of the main proceeding is eliminated (new). This should significantly enhance the availability of cross-border bankruptcy and insolvency proceedings;
- In addition to the order opening the main proceeding at the statutory domicile of the non-Swiss resident debtor, Switzerland now recognizes the order opening the main proceedings at its main center of interest ("COMI") (as the term is used under the EU Insolvency Regulation) (new).
- The request for recognition can be made by either the foreign receiver, a creditor or (new) by the debtor, notably by a debtor in possession;
- At the request of the foreign receiver the Swiss secondary proceeding may not need to be carried out, if there are no secured or prioritized Swiss creditors or claims relating to a Swiss registered branch involved (new). In such circumstances this easement should allow for a quick and cost saving transfer of Swiss assets to the main proceeding;
- Once the Swiss court has established that a secondary Swiss proceeding does not need to be conducted, the foreign receiver may take such acts as he is authorized to under the main foreign proceeding. This includes arrangements to transfer Swiss assets to the main proceeding, to conduct litigation, request information, initiate a debt collection proceeding, the lodging of Paulian (claw-back) actions before Swiss courts and under Swiss law (new). Sovereign acts, as interpreted by Swiss law, may not be taken by the foreign receiver, however;
- If the secondary proceeding is conducted the foreign receiver or a Swiss privileged creditor can request that an ordinary (instead of a summary) bankruptcy proceeding will be conducted in Switzerland (new). This will allow to elect a creditors' committee or the appointment of an extraordinary bankruptcy administrator for the Swiss proceeding;
- A separate bankruptcy proceeding already pending for a registered branch of a foreign company will be suspended and joined with the secondary proceeding (new);

- provided a secondary proceeding is being conducted in Switzerland certain orders rendered in the main proceeding such as on claw-back actions can be recognized in the secondary proceeding, provided they do not relate to a Swiss domiciled defendant (new).
- the revised PILA specifically supports coordination in case of multiple proceedings between the involved authorities (including the foreign receiver) and its direct communication including protocols, basically in line with Articles 25-27 UNCITRAL Model Law;
- the revised PILA aligns the regime for cross-border bankruptcies and insolvencies with the rules which have been in place for a number of years for financial institutions which are subject to the Swiss bank insolvency regime.

Effective: the amended law will become effective as of 1 January 2019.

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We are available to assist in navigating through Switzerland's cross-border rules for foreign bankruptcies and insolvencies.



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