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New Cross-border Insolvency and Restructuring Law in Switzerland

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Acknowledgement

INSOL International is very pleased to present a technical paper titled New Cross-border Insolvency and Restructuring Law in Switzerland by Roger Bischof, Partner, Bonnard Lawson, Fellow, INSOL International, Switzerland.

On 1 January 2019, a revised law on cross-border insolvency – Chapter 11 of the Swiss Federal Code on Private International Law - will enter into force in Switzerland. The amended rules will not only facilitate the recognition of foreign bankruptcy proceedings and composition agreements but also foster international cooperation between the various courts and other competent authorities in such matters.

This paper provides a brief general overview of the Swiss insolvency regime and details the key changes to be implemented by the amended rules. These include the abolishment of the reciprocity requirement in relation to the recognition of foreign insolvency proceedings; the recognition of foreign insolvency decisions rendered at a debtor's COMI; the waiver of mandatory ancillary proceedings; and increased cooperation with foreign insolvency administrations and other foreign authorities. It is anticipated that the new unilateral provisions will in the future generally lead to simplified Swiss recognition proceedings, reduced costs, improved efficiency and greater coordination among the different participants in cross-border insolvency matters involving Switzerland.

INSOL International sincerely thanks Roger Bischof for providing our members with this interesting and timely technical paper.

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By

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1. Introduction

International insolvency law has recently been subject to significant developments as evidenced by the entry into force of the EU regulation 2015/848 on insolvency proceedings and the adoption of the UNCITRAL Model Law on Cross-Border Insolvency by a growing number of jurisdictions including Singapore.

As in many other areas such as taxation and bank secrecy, the rest of the world has long perceived Switzerland as an isolated island in international insolvency matters.[1] However, it is well known that times have changed and the insular metaphor has become as riddled with holes as Swiss cheese.

For the avoidance of doubt, Switzerland will continue to remain outside the European Union[2] and does not adopt the UNCITRAL Model Law but it is taking steps to implement its own, modern and competitive cross-border insolvency regime which is based on the key elements of the said Model Law.[3]

On 1 January 2019, a revised law on cross-border insolvency – Chapter 11 of the Swiss Federal Code on Private International Law (CPIL) – will enter into force in Switzerland. A non-official English translation of the relevant law may be found at Appendix A hereto.[4] The amendments to the CPIL will not only facilitate the recognition of foreign bankruptcy proceedings and composition agreements but will also foster international cooperation between the various courts and other competent authorities in such matters. The restrictive recognition requirements of the current law, in particular the principle of reciprocity and the mandatory ancillary bankruptcy proceedings, which have in the past impeded or delayed Swiss recognition of foreign insolvencies, are lifted and insolvency proceedings opened at the debtor's centre of main interest (COMI) abroad will be recognised in Switzerland. The new unilateral provisions will in the future generally lead to simplified Swiss recognition proceedings, reduced costs, improved efficiency and greater coordination among the different participants in cross-border insolvency matters involving Switzerland.

Since 2011, the basic features of the changes to be enacted have already proven successful in the separate Swiss banking insolvency laws.[5]

This paper provides a brief general overview of the Swiss insolvency regime and sets forth the main modifications according to the new cross-border provisions.

2. Swiss statutory insolvency framework

Various Swiss laws contain rules applicable to bankruptcy and corporate reorganisation. Swiss formal restructuring and insolvency proceedings are mainly governed by the Swiss Federal Code on Debt Enforcement and Bankruptcy (DEBA).

DEBA regulates debt enforcement regarding claims in money[6] (Article 89 et seq. DEBA) including the enforcement of collaterals (Article 151 *et seq*. DEBA) against individuals and legal entities.

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* The views expressed in this paper are the views of the author and not of INSOL International, London.

1 Bob Wessels, 'Is Switzerland opening up for cross-border insolvency?', May 2012.

2 Therefore, the EU insolvency regulation 2015/848 is not applicable in Switzerland.

3 See Message dated May 24, 2017, of the Swiss Federal Council concerning the revision of the Federal Code on Private International Law (Chapter 11: Bankruptcy and Composition Agreements) (Message), 4134.

4 The original texts of the Code and the amendments have been published in the Swiss official languages German, French and Italian.

5 Article 37f and 37g Banking Act; Article 9 and 10 Financial Market Supervisory Authority (FINMA) Banking Insolvency Ordinance; Art. 54d Swiss Insurance Supervision Act; Article 36a Stock Exchange and Securities Trading Act; Article 138c Federal Act on Collective Investments; See Message, 4126, 4131; Daniel Hunkeler / George J. Wohl, Zur geplanten Revision des internationalen Konkurs- und Sanierungsrechts – und deren Bezug zum internationalen Bankenkonkurs, in: Jusletter November 23, 2015, 1, 8.

6 The enforcement of non-monetary obligations is governed by the Swiss Civil Procedure Code (CPC).

Article 159 *et seq.* DEBA in relation to bankruptcy proceedings provide for the liquidation of the debtor's estate and the distribution of the proceeds to its creditors.

Article 293 *et seq.* DEBA in relation to composition proceedings provide for the debtor to reach a restructuring agreement with its creditors. In accordance with these articles, a debtor in financial distress can request a (provisional) moratorium and initiate composition proceedings by submitting a provisional restructuring plan to the competent composition court.

In addition, the Swiss Code of Obligations (CO) provides for certain out-of-court restructuring measures regarding financially distressed debtors[7], director's liability claims[8] as well as voluntary liquidation of companies.[9]

Special insolvency provisions apply to financial institutions which are stipulated in the relevant sector acts that is Article 28 *et seq.* Banking Act; the Financial Market Supervisory Authority (FINMA) Banking Insolvency Ordinance; Article 51 *et seq.* Swiss Insurance Supervision Act; FINMA Insurance Insolvency Ordinance; Article 36a Stock Exchange and Securities Trading Act; Article 88 *et seq.* Financial Market Infrastructure Act; and Article 137 *et seq.* Federal Act on Collective Investments.

Articles 163 *et seq.* of the Swiss Criminal Code (CC) deal with criminal acts in relation to insolvency such as fraudulent bankruptcy or the disposition of seized assets.

Finally, subject to the special cross-border provisions in the financial market sector Acts, insolvency and bankruptcy involving cross-border issues, such as the recognition of foreign proceedings and foreign arrangements with creditors, are governed by the Swiss Federal Code on Private International Law (CPIL) which is being amended. The main changes to be implemented by the revised CPIL are set out below.

3. Key amendments

3.1 Abolishment of reciprocity requirement

The recognition of foreign bankruptcy and composition decrees in Switzerland will be significantly facilitated when the current requirement of reciprocity in Article 166 paragraph 1 c CPIL is abolished.[10] As a result, the Swiss court competent for the recognition of foreign insolvency proceedings is no longer required to examine whether the foreign state in which a debtor was declared insolvent would, under similar circumstances, also recognise a Swiss insolvency order. The amendment reduces both uncertainties as to the reciprocal nature of a certain jurisdiction and costs in relation to obtaining legal opinions from foreign counsel in the jurisdictions concerned.[11]

3.2 Recognition of foreign insolvency decisions rendered at debtor's COMI

When a debtor domiciled outside Switzerland becomes insolvent or financially distressed, a foreign insolvency judgment is generally without legal effect in Switzerland unless and until it has been formally recognised by the competent Swiss court. Absent such a recognition, creditors may still initiate enforcement measures against the assets of the debtor in Switzerland, which may not only be detrimental to employees as well as domestic and foreign creditors but also disruptive for potential restructuring efforts of the debtor.[12]

Under the applicable Swiss law as currently in force, foreign bankruptcy and composition proceedings can only be recognised in Switzerland if they were opened at the seat of the debtor. However, according to the revised Article 166 paragraph 1 c CPIL, insolvency orders issued in the state of debtor's main interest will in the future be explicitly recognised in Switzerland. The debtor's COMI is not defined by the revised Swiss Code. According to the Message of the Swiss

[7] Article 725 and 725a CO (in conjunction with Article 820 CO); Article 732a CO.
[8] Article 754 CO (in conjunction with Article 827 CO).
[9] Article 736 CO (in conjunction with Article 826 CO).
[10] Article 166 para. 1 a and b remain unchanged. The latter concerns grounds for refusal such as a violation of the public order, irregular summons, violation of fundamental procedural rights, and *res judicata*.
[11] Message, 4129, 4135.
[12] Message, 4128.

Federal Council, which refers to Article 3 paragraph 1 of the EU Insolvency Regulation and the respective European case law,[13] the COMI is understood as the place where the debtor conducts the administration of its interests on a regular basis and which is ascertainable by third parties.[14] There shall also be a (rebuttable) presumption that companies have their COMI in the place where their registered office is situated.

Unlike the EU insolvency regulation, however, the amended Swiss Code and the corresponding Message do not explicitly state that this presumption shall only apply if the registered office has not been moved within a certain period prior to the request for the opening of insolvency proceedings. When interpreting and construing the COMI term and possible means of its shifting, Swiss courts will likely consider foreign case law in relation to the EU insolvency regulation and the UNCITRAL Model Law which, for instance, could also include decisions of the US bankruptcy courts regarding Chapter 15 recognition. In any case, the new regime gives indirect jurisdiction to initiate insolvency proceedings to the courts located at the debtor's COMI in accordance with the EU insolvency regulation. However, since this regulation does not apply in Switzerland, the recognition will not be automatic. Also, pursuant to the revised Article 166 paragraph 1 c CPIL, the COMI approach will not apply to debtors with a registered seat in Switzerland. This caveat is supposed to protect the justified expectations of Swiss creditors and the debtor.[15]

3.3 Possibility for debtor to file petition

Currently, only the foreign insolvency administrator and the creditors are entitled to submit an application for recognition in Switzerland. The amended Article 166 paragraph 1 CPIL states that the debtor itself, for example a debtor in possession under US Chapter 11 proceedings, may also file such petition. The Swiss Federal Council acknowledges that this amendment is extremely important for debtor driven reorganisation proceedings.[16]

3.4 Waiver of mandatory ancillary proceedings

Another major amendment constitutes the new Article 174a CPIL which provides that the opening of ancillary insolvency proceedings[17] in Switzerland will no longer be mandatory in relation to the recognition of main proceedings that were opened with respect to a debtor located outside of Switzerland. The Swiss court can decide not to open such ancillary proceedings if the new statutory requirements are met. In such case, the foreign insolvency representative may carry out all actions to which it is authorised under the applicable foreign law, in particular, it may transfer the foreign debtor's assets located in Switzerland to the foreign insolvency estate in line with Article 174a paragraph 4 CPIL.[18] In other words, upon request and certain conditions (see also 174a paragraph 2 and 3 CPIL), the foreign insolvency representative will soon be able to directly collect assets in Switzerland and repatriate them elswhere. Furthermore, it is also explicitly entitled to file lawsuits in Switzerland such as avoidance actions in accordance with Article 171 CPIL. However, whether the ancillary proceedings may be waived and which protective measures the court may impose, if any, can usually only be determined subsequent to a creditors' call.[19]

3.5 Enhanced international cooperation

Last but not least, pursuant to the new Article 174b CPIL, the overhaul of the Swiss cross-border insolvency regime also provides for increased cooperation with foreign insolvency administrations and other foreign authorities. For instance, this new provision allows for an exchange of

[13] European Court of Justice (ECJ), C-341/04 (Eurofood/Parmalat); ECJ, C-396/09 (Interedil).
[14] Message, 4136.
[15] Message, 4136. However, with respect to Article 174b CPIL, the Message states that in such cases the Swiss main proceedings should ideally be coordinated with any parallel foreign proceedings.
[16] Message, 4137.
[17] Also called secondary bankruptcy proceedings or mini-bankruptcy proceedings. Unlike Swiss ordinary bankruptcy proceedings, which include the debtor's assets located abroad, such ancillary proceedings relate only to assets located in Switzerland. Moreover, not all the debtor's creditors participate in the ancillary proceedings. Participation is restricted to creditors with secured and privileged claims situated in Switzerland (e.g. workers, social insurances). Any proceeds resulting from the realisation of assets located in Switzerland will be distributed among them. Only if their claims are fully satisfied, a remaining surplus, if any, is distributed to the foreign insolvency administration.
[18] Provided that the statutory restrictions are respected, such actions do not constitute forbidden unlawful activities on behalf of a foreign state pursuant to Article 271 CC.
[19] Message, 4140.

information and the entering into of cross-border agreements[20] intended to facilitate the coordination of related proceedings[21] between the courts; between the courts and insolvency representatives; and between insolvency respresentatives. Various cross-border insolvency cases such as Lehman Brothers Group or the collapse of Switzerland's national airline[22] have revealed the need for greater coordination. The latter term shall be broadly interpreted under Swiss law and encompasses particularly all forms of cooperation as per Articles 25 to 27 of the UNCITRAL Model Law on Cross-Border Insolvency.[23] It also includes direct communication between the relevant authorities whereby legal constraints with respect to data protection and trade secrets must be considered.[24]

4. Conclusion

The new unilaterally implemented Swiss international insolvency and restructuring law, which applies outside the specifically regulated financial sector, is a remarkable step for an independent civil law jurisdiction that has so far been perceived as remaining in national redoubt.[25] Considering the traditional doctrines in international insolvency law, it is a victory for the principle of universalism over the concept of territoriality which is expected to be widely welcomed by both stakeholders and insolvency practitioners. The new Swiss law provides effective mechanisms for dealing with cross-border insolvency cases in the interest of all creditors, debtors, and other interested parties. The amended rules acknowledge today's reality in relation to the cross-border activities of companies and simplify multi-jurisdictional restructurings by facilitating the recognition and coordination of several insolvency proceedings and related verdicts involving different countries. Furthermore, the new law leads to greater legal certainty and the protection and maximization of the value of the debtor's assets. As such, it indeed implements the essential principles of the UNCITRAL Model Law on Cross-Border Insolvency as included in the latter's preamble.

[20] Also called protocols, insolvency administration contracts, cooperation agreements, and memorandums of understanding. See UNCITRAL Practice Guide on Cross-Border Insolvency Cooperation (2009); Message, 4142.

[21] E.g. if several entities of an insolvent group of companies are subject to domestic and foreign insolvency proceedings.

[22] SAirGroup AG, the holding company of Swissair, and its subsidiaries have been in composition proceedings since 2001 (see http://www.liquidator-swissair.ch).

[23] Message, 4142.

[24] Message, 4143, 4148.

[25] The Swiss National Redoubt (Réduit) was a historic defensive plan developed by the Swiss government to respond to foreign invasion. During the Second World War, the plan was developed to deal with a potential German invasion that was planned, but fortunately never carried out. The National Redoubt strategy would have allowed the Swiss army to preserve at least part of Swiss territory by building fortifications in the mountains.

Appendix A

Swiss Federal Code of Private International Law (CPIL)

Chapter 11: Bankruptcy and Composition Agreement

I. Recognition

Art. 166

1. A foreign bankruptcy decree shall be recognised upon application of the foreign trustee in bankruptcy, the debtor or one of the creditors if:
   a. the decree is enforceable in the State where it was entered;
   b. there are no grounds for refusal under Article 27 of this Code; and
   c. it was entered:
      1. in the State of domicile of the debtor, or
      2. in the State of the centre of main interest of the debtor, provided that the debtor did not have its domicile in Switzerland when the foreign proceedings were opened.

2. If the debtor has a branch in Switzerland, the proceeding provided for under Article 50 paragraph 1 of the Federal Code on Debt Enforcement and Bankruptcy (DEBA) is permissible until the publication of the recognition under Article 169 of this Code.

3. If a proceeding under Article 50 paragraph 1 DEBA has already been opened and the time period according to Article 250 DEBA has not lapsed, this procedure will be suspended after the recognition of the foreign bankruptcy decree. Claims that have already been submitted will be included in the schedule of creditors of the ancillary bankruptcy proceeding under Article 172. The accumulated costs of proceedings are added to the ancillary bankruptcy proceeding.

II. Procedure

1. Jurisdiction

Art. 167

1. If the debtor in Switzerland has a branch that is registered in the register of commerce, the application for recognition of a foreign bankruptcy decree must be filed with the competent court at its seat. In all other cases, the application must be filed with the court at the place where the assets are located in Switzerland. Article 29 is applicable by analogy.

2. If the debtor has several branches or there are assets in several places, the court in which an application was first filed shall have jurisdiction.

3. Claims of the bankrupt shall be deemed to be located at the domicile of the debtor of the bankrupt.

2. Protective Measures

Art. 168

Upon filing of an application for the recognition of a bankruptcy decree entered abroad, the court may, at the request of the applicant, order protective measures under Articles 162 to 165 and 170 of the DEBA.

3. Publication

1. The decision recognising the foreign bankruptcy decree shall be published.

2. The decision shall be communicated to the office for the Prosecution for Debts, the Bankruptcy Office, the Registry of Real Estate, and the Registry of Commerce at the

place where the assets are located and, if necessary, to the Federal Office of Intellectual Property. The same applies to the conclusion and the suspension of the ancillary bankruptcy proceeding, to the revocation of the bankruptcy and to the waiver of conducting an ancillary bankruptcy proceeding.

III. Legal consequences

1. In general

Art. 170

1. With respect to the assets of the debtor located in Switzerland, the recognition of a foreign bankruptcy decree shall have the effects of bankruptcy as set forth under Swiss law unless otherwise provided in this Code.

2. The time limits fixed by Swiss law shall commence to run with the publication of the decision of recognition.

3. The bankruptcy will be carried out in summary proceedings, unless the foreign trustee in bankruptcy or a creditor under Article 172 paragraph 1 prior to the distribution request with the Bankruptcy Office the ordinary proceedings and provide sufficient security for the cost expected to be uncovered.

2. Avoidance action

Art. 171

1. An avoidance action shall be governed by Articles 285 to 292 DEBA. It may be also brought by the foreign trustee in bankruptcy or by one of the creditors who has the right to do so.

2. The date of the opening of the foreign bankruptcy shall be relevant for the calculation of the time periods according to Articles 285 to 288a and 292 DEBA.

3. Schedule of creditors

Art. 172

1. Only the following shall be included in the schedule of creditors:
   a. The claims secured by way of pledge pursuant to Article 219 DEBA;
   b. The unsecured but privileged claims of Swiss-domiciled creditors; and
   c. The claims from liabilities that have been incurred on account of a registered branch of the debtor.

2. Only those creditors set forth in paragraph 1 and the foreign trustee in bankruptcy may bring an action to contest the schedule of creditors provided for under Article 250 DEBA.

3. If a creditor has been partially paid in a foreign proceeding associated with the bankruptcy, the amount that he received shall be imputed, after deduction of the costs incurred, as a payment received in the Swiss proceeding.

4. Distribution

a. Recognition of the foreign schedule of creditors

Art. 173

1. After distribution to all creditors as set forth under Article 172, paragraph 1, the remaining balance shall be remitted to the foreign trustee in bankruptcy or to those creditors who are entitled thereto under the foreign law.

2. The surplus may not be made available until the foreign schedule of creditors has been recognised.

3. The Swiss court with jurisdiction to recognise the foreign bankruptcy decree shall also have jurisdiction to recognise the foreign schedule of creditors. In particular, it shall examine whether the creditors domiciled in Switzerland have been equitably included in the foreign schedule of creditors. The creditors concerned shall be granted a hearing.

b. Non-recognition of the foreign schedule of creditors

Art. 174

1. If the foreign schedule of creditors cannot be recognised, any surplus shall be distributed among the Swiss-domiciled creditors of the third class as set forth in Article 219 paragraph 4 DEBA.

2. The same shall apply if the schedule of creditors is not filed for recognition within the time period fixed by the judge.

5. Waiver of conducting an ancillary bankruptcy proceeding

Art. 174a

1. Upon request of the foreign trustee in bankruptcy, conducting an ancillary bankruptcy proceeding may be waived if no claims under Article 172 paragraph 1 have been submitted.

2. If Swiss-domiciled creditors have submitted other claims than the ones mentioned in Article 172 paragraph 1, the court may wave conducting an ancillary bankruptcy proceeding provided that the claims of these creditors are equitably considered in the foreign proceeding. The creditors concerned shall be granted a hearing.

3. The court may subject the waiver to conditions and requirements.

4. If conducting an ancillary bankruptcy proceeding is waived, the foreign trustee in bankruptcy may with due regard to Swiss law exercise all powers that it can exercise under the law of the State where the bankruptcy proceedings were opened; in particular, it may transfer assets abroad and file lawsuits. These powers do not include the carrying out of authoritative actions, the use of coercive means or the right to resolve disputes.

III^{bis}. Coordination

Art. 174b

Regarding proceedings which are factually connected, the involved authorities and institutions may coordinate their actions among themselves and with respect to foreign authorities and institutions.

III^{ter}. Recognition of foreign rulings concerning avoidance claims and similar rulings

Art. 174c

Foreign rulings concerning avoidance claims and other actions harmful to creditors which are closely connected with a bankruptcy decree recognised in Switzerland, are recognised under Articles 25 to 27 if they were entered in the State of origin of the bankruptcy decree or are recognised in that State and the defendant did not have its domicile in Switzerland.

IV. Recognition of foreign composition and similar proceedings

Art. 175

A composition or a similar proceeding in a foreign jurisdiction shall be recognised in Switzerland. Articles 166 to 170 and 174a to 174c shall be applicable by analogy. The creditors domiciled in Switzerland shall be granted a hearing.

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