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Forum shopping and filing insolvency proceedings in a global legal world

Insolvency Commission

LONDON 2015 WORKSHOP B

National Report of Switzerland

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1. Proper place for commencement of insolvency proceedings and centre of main interests.

a. In your jurisdiction which is the proper place for commencement of insolvency proceedings? Is the applicable law determined separately than the venue?

In Switzerland the proper place for commencement of insolvency proceedings is determined by the articles 46 ss. of the Debt Enforcement and Bankruptcy Act (DEBA). Depending on the debtor and the specific circumstances, the proper debt prosecution and bankruptcy office is determined as follows:

With regard to natural persons with domicile in Switzerland, proceedings are to be initiated at the place of the debtor's permanent residence (art. 46 para. 1 DEBA). Should the debtor have no fixed abode, proceedings are to be initiated at the debtor's current place of residence (art. 48 DEBA).

With regard to legal entities, registered in the Register of Commerce, proceedings are to be initiated at the entity's seat (art. 46 para. 2 DEBA). Should a legal entity not be registered in the Register of Commerce, proceedings are to be initiated at the entity's seat of administration (art. 46 para. 2 DEBA).

In the event that the debtor is residing abroad and has a liable business establishment in Switzerland, proceedings are to be initiated at the debtor's business establishment (art. 50 para. 1 DEBA).

Debtor's residing abroad may agree on a so called "special domicile" within Switzerland with regard to obligations with as Swiss connection. In this case, the proceedings against the debtor may be initiated at that special domicile (art. 50 para. 2 DEBA).

With regard to claims secured by a pledge, proceedings are to be initiated at the place of the pledged object, unless such object is a movable asset. In this case, the creditor may choose the ordinary place for insolvency proceedings instead.

According to Swiss law, creditors may request a court to order an attachment to be laid on certain assets belonging to the debtor. Such attachment has the effect of a provisional seizure of these assets. In the event of an attachment, proceedings may be initiated at the place where the debtor's attached assets are held (art. 52 DEBA).

b. Is there in your country a notion or definition of the debtor's centre of main interests ("COMI")?

There is no legal notion or definition of the debtor's centre of main interests in Switzerland.

c. Which are the factors relevant to the determination of centre of main interests?

n.a.

d. Is this essential in determining the jurisdiction?

n.a.

e. Are there international or supranational regulations regarding the proper place for commencement of insolvency proceedings and/or the determination of the centre of main interest applicable in your country?

No.

f. Is the debtor's centre of main interests the place where an insolvency proceeding concerning the debtor is likely to commence? Why or why not?

No. Proceedings are most likely initiated at the debtor's seat or habitual residence.

- g. Please discuss the issues of timing and procedure with respect to the determination of centre of main interests, including when or if a judicial determination on this issue is required or made?**

n.a.

2. Movement of the place of registration (or habitual residence) of centre of main interest.

- a. Is it possible for the debtor to move its place of registration (or habitual residence) prior or after the commencement of insolvency proceedings? Will such a move affect the decision as to centre of main interests and the determination about the commencement of the proceedings?**

As the proper place for the commencement of insolvency proceedings is mainly determined by the debtor's seat respectively its habitual residence, a change thereof has to be observed.

However, as soon as the debtor was informed about the imminent and inevitable continuation of the debt prosecution or bankruptcy proceedings, a change of seat or habitual residence does not affect the place of the proceedings anymore.

- b. Is it possible to move a debtor's centre of main interests prior to commencement of insolvency proceedings?**

COMI is not applicable in Switzerland.

- c. Is it possible to move a debtor's centre of main interests between the time of the application for commencement and the actual commencement of those proceedings?**

COMI is not applicable in Switzerland.

- d. If there is evidence of such a move in close proximity to the commencement of the commencement, in determining whether to recognize those proceedings, will the court scrutinize more closely such a move?**

COMI is not applicable in Switzerland.

- e. Is forum shopping allowed under domestic or supranational law which applies in your jurisdiction?**

According to Swiss law, forum shopping in insolvency proceedings is very restricted, as most places for commencement of insolvency proceedings are mandatory. In the event that a foreign adjudication opens an insolvency proceeding over a Swiss company abroad based on COMI, a Swiss court will not be in a position to recognize the decision rendered by the foreign adjudication.

However, in connection with the attachment of objects ("arrest") the creditor is often provided with more than just one possibly competent court. The creditor may choose between the court at the place where the debtor's assets are held and the court at the place where debt prosecution and bankruptcy proceedings would usually have to be initiated against the respective debtor.

- f. What are factors in your country that may influence a debtor to choose one forum over another, e.g. judges, favorable laws, case law precedent, etc.?**

As the DEBA is a Federal Act, the DEBA is applicable within all cantons of Switzerland. However, there are still certain differences in the court procedures; i.e. in respect of judgments ordering the payment of a sum of money, certain jurisdictions foresee a throughout written procedure whereas others provide for oral proceedings. Also, when it comes to the recognition of signed promises by the debtor to pay the sum, certain courts are more liberal than others.

- g. Is it possible for a creditor or other party to force or cause a debtor's insolvency proceedings to be moved (rather than dismissed), as a result of a challenge to the debtor's definition of its centre of main interests?**

n.a.

3. Recognition of foreign proceedings, main and secondary proceedings

- a. Is the recognition of foreign proceedings allowed in your country? What are the requirements? Is the recognition affected by the notion of main interests?**

According to section 166 of the Federal Act on International Private Law ("FAIPL") a foreign bankruptcy order which was rendered at the debtor's domicile shall be recognized in Switzerland at the request of the foreign trustee in bankruptcy or of a creditor of the bankrupt estate provided (i) that the order is enforceable in the state in which it was rendered; (ii) that there is no ground to deny recognition according to section 27 of the FAIPL (no conflict with Swiss policy i.e. ordre public, proper summoning of parties, compliance with minimal requirements of Swiss procedural rules), and (iii) the reciprocity is granted by the state in which the order was rendered. The element of reciprocity often proves to be an obstacle for the recognition of a foreign insolvency order. Reciprocity requires that Switzerland will only recognize a foreign insolvency order if the country where the order originates from would also recognize Swiss insolvency orders. There are still a number of countries, which do not recognize foreign insolvency orders generally and therefore also not bankruptcy orders from Switzerland.

Currently Swiss courts consider that the following countries offer reciprocity to Swiss insolvency proceedings: Belgium, Germany, France, Luxembourg, Italy, Greece, United Kingdom, Canada, the United States and Australia. No reciprocity appears to be recognised in respect of the Netherlands, Portugal, Denmark, Finland, Sweden, Norway, Japan or Liechtenstein.

Indeed the recognition is affected by the notion of main interests. Unless the FAIPL provides otherwise, the recognition of a foreign bankruptcy order shall subject the debtor's property, which is located in Switzerland to the legal consequences of bankruptcy according to Swiss law. The purpose of the recognition of a foreign bankruptcy order is to make sure that certain privileged creditors such as employees are not forced to participate in foreign insolvency proceedings. Furthermore, only privileged creditors are entitled to participate in the secondary proceedings (see Questions 3c). Due to the fact that Swiss courts examine the foreign schedule of claims the purpose of the recognition is also that Swiss creditors without privileged claims who will have to participate in foreign insolvency proceedings have the same outset as the other foreign creditors with similar claims, i.e. that Swiss creditors have been taken into consideration the same way as all the other creditors with similar claims in the main proceedings (see Question 3 c.).

- b. Does your relevant domestic or supranational legislation have the notions of main and secondary proceedings or otherwise distinguish between the concepts?**

Debt enforcement against assets in Switzerland of a legal entity with domicile outside of Switzerland is, in general, possible (i) if the foreign entity has an establishment in Switzerland, by way of debt collection against the Swiss establishment, resulting in the seizure and foreclosure of such assets; (ii) if the foreign entity has a branch office in Switzerland, by way of debt collection against the branch office resulting in a branch bankruptcy; and/or (iii) by way of recognition of foreign bankruptcy order in Switzerland resulting in a secondary proceeding limited to the assets of the foreign debtor located in Switzerland.

Therefore, the FAIPL has the notion of main and secondary proceedings (see iii above; section 166 et. Seq. FAIPL). As stated before unless the FAIPL provides otherwise, the recognition of a foreign order in bankruptcy shall subject the debtor's property, which is located in Switzerland to the legal consequences of bankruptcy according to Swiss law (section 170 para. 1 FAIPL). Therefore, attached assets in Switzerland of a person or legal entity outside of Switzerland fall under the secondary proceedings if the foreign bankruptcy order has been recognized.

Swiss case and statutory law is clear on the aspect that a foreign bankruptcy administrator is not entitled to act in Switzerland. The foreign bankruptcy order has to be first recognized in Switzerland according to the requirements of section 166 FAIPL (see. Question 3 a.) otherwise secondary proceedings under the powers of a Swiss bankruptcy liquidator will not take place. Due to the requirement of reciprocity of recognition of foreign bankruptcy orders cases may occur where recognition of the foreign bankruptcy proceeding is not possible and the assets in Switzerland cannot be taken into account i.e. by the foreign bankruptcy administrator (see also question 4 a.).

c. Does your legislation permit secondary proceedings to be opened to run in parallel with the main proceedings? Are the effects of secondary proceedings limited to the assets located in that State where secondary proceedings are opened?

According to section 172 of the FAIPL a Swiss judgment granting recognition of the foreign bankruptcy order has the same effect as a Swiss bankruptcy order.

The Swiss administrator has to realize the assets in accordance with Swiss bankruptcy law. The assets realized will be used to satisfy (i) claims secured with pledges or mortgages on assets located in Switzerland; and (ii) claims not secured by pledge of creditors with domicile in Switzerland but that are privileged under Swiss law (i.e. claims of employees).

Any surplus will be handed over to the administrator of the foreign main bankruptcy under the condition that the Swiss court has examined the schedule of claims of the foreign bankruptcy proceedings (main proceedings) in order to determine whether creditors residing in Switzerland, but which are not privileged and have not been satisfied in the Swiss proceedings, have been given adequate consideration in the foreign main bankruptcy. The creditors concerned must be heard (section 175 FAIPL). In case the Swiss court does not recognize the foreign schedule of claims, the surplus is to be distributed among the creditors who reside in Switzerland even as regard to unprivileged claims. Therefore, the recognition of a foreign bankruptcy always leads to secondary proceedings.

d. Does your jurisdiction allow a challenge to proceedings being designated as secondary? If so, please explain in greater detail.

If the requirements of the recognition of the foreign bankruptcy order are not met, the foreign insolvency proceedings will not be recognized in Switzerland. Other than that, there is no challenge to the proceedings in Switzerland being designated as secondary. In fact,

Swiss International Private Law is familiar with the notion of main and secondary proceedings. The secondary proceedings in Switzerland are also commonly called “mini-bankruptcy”.

According to sections 166 para. 2 of the FAIPL where the debtor has a branch in Switzerland, proceedings according to section 50 of the DEBL shall be admissible until the foreign schedule of admitted claims has become final. In these cases, secondary proceedings (recognition of a foreign bankruptcy order) and Swiss bankruptcy proceedings (bankruptcy of the Swiss branch) may be run in parallel. The request to open bankruptcy proceedings against a Swiss branch office can no longer be made if the foreign schedule of claims has become final. The bankruptcy of the Swiss branch office takes only assets in Switzerland into account that can be attributed to the operative business of the Swiss branch.

Once the branch bankruptcy has been opened, the assets of the branch office will remain separated and will be liquidated in the branch bankruptcy. Section 172 para. 3 of the FAIPL takes this aspect into account by stating that if a creditor has been partially satisfied in foreign proceedings which are connected with the bankruptcy, the portion thus satisfied must, after deduction of incurred costs, be credited against the bankruptcy dividend due in the Swiss procedure.

If a foreign bankruptcy order respectively the foreign schedule of claims has been recognized before the bankruptcy proceedings regarding the Swiss branch office have been opened, then bankruptcy proceedings regarding the Swiss branch office can no longer be requested.

4. Abuse of process

a. In your jurisdiction, is a court able to take account of abuse of its processes as a ground to decline recognition?

The requirements for the recognition are defined in section 166 of the FAIPL. One of the requirements is that there is no ground to deny recognition according to section 27 of the FAIPL (no conflict with Swiss policy i.e. *ordre public*, proper summoning of parties, compliance with minimal requirements of Swiss procedural rules).

Recognition of a foreign bankruptcy order may be denied on the grounds that it violates Swiss substantive *ordre public* in insolvency matters. A foreign bankruptcy order is not recognizable if a creditor is discriminated in the main proceedings due to his nationality, if the main insolvency is a sham (with the purpose to pull out assets of the Swiss debtor), if the purpose of the main insolvency proceedings is to enforce expropriation measures or in case of simulated main insolvency proceedings. Only the violation of fundamental Swiss substantive *ordre public* will be taken into account.

b. What happens if the applicant falsely claims the center of main interests to be in a particular State?

According to the section 166 FAIPL only a foreign bankruptcy order, which was rendered at **the debtor’s domicile** is to be recognized in Switzerland provided that the order is enforceable in the state in which it was rendered.

For the purposes of the FAIPL, a natural person has his domicile in the State in which he resides with the intention to remain permanently (section 20 FAIPL). According to section 21 of the FAIPL the registered office shall be deemed to be the domicile of companies. The registered office of a company is the place specified in the certificate of incorporation or the deed of partnership. In the absence of such designation, the registered office of the

company shall be the place where it is administered in fact. The place of business of a company shall be in the State in which it has its registered office or a branch.

It is disputed in Switzerland whether with regard to the recognition of a foreign bankruptcy order the domicile of the debtor shall strictly be established according to section 20 and 21 of the FAIPL or whether the term domicile shall be interpreted in a functional manner. This question remains unanswered by the Federal Supreme Court of Switzerland. The majority of scholars pleads for a functional interpretation of the term domicile and advocate that a foreign bankruptcy order from the jurisdiction where the debtor has his actual domicile (and not the registered domicile) shall be recognizable.

With a functional interpretation of the term domicile it would not be necessary to refuse the recognition of a foreign bankruptcy order on the grounds of abuse of rights where debtor (falsely) invokes its statutory domicile.

c. Are those issues governed by international or supranational regulations or only by domestic law?

Switzerland is not a member of the EU and therefore the relevant regulations on insolvency proceedings are not applicable. Furthermore, Switzerland has not enacted the UNCITRAL Model Law on Cross-Border Insolvency. Thus, these issues are governed by domestic law i.e. by the FAIPL.