



## Insolvency Law Newsletter Switzerland

# Foreign Insolvency Administrator not Competent to Take Legal Action in Switzerland after Recognition of the Foreign Insolvency Decree in Switzerland

### Facts

On March 19, 2002, X GmbH & Co. KG, Frankfurt, was put in insolvency in accordance with German law and an insolvency administrator was put in place. Shortly thereafter, Y AG, a Swiss company, was put in bankruptcy by the competent Swiss court.

The German insolvency administrator filed a claim against Y AG in the amount of CHF 639'936.

On August 17, 2007, the competent Swiss court recognized the German insolvency decree over X GmbH & Co. KG for the entire territory of Switzerland and opened an ancillary insolvency proceeding in relation to the assets of X GmbH & Co. KG located in Switzerland in accordance with Art. 166 et seq. Swiss Private International Law Act ("SPILA").

The Swiss insolvency administrator of Y AG rejected the claim filed by the German insolvency administrator and, alternatively contested, the German insolvency administrator's legal authority. The German insolvency administrator contested the rejection and filed an appeal, which was rejected by both cantonal authorities.

### Decision of the Federal Supreme Court

In its decision rendered on September 23, 2008, the Federal Supreme Court reasoned that the question to be answered in the case brought before them was not whether or not a foreign insolvency administrator may file a claim in a Swiss insolvency proceeding. This question was already clarified by the Federal Supreme Court in its decision 134 III 366, where the Federal Supreme Court held that a foreign insolvency administrator may not engage in any debt collection activities on the Swiss territory or bring a legal action for enforcing a claim, prior to having sought

recognition of the foreign insolvency decree in Switzerland.

In the case at hand, the German insolvency proceeding has already been recognized in Switzerland. The question that needed to be determined by the Federal Supreme Court was whether the foreign insolvency administrator was competent to act on the Swiss territory.

According to Swiss law, insolvency over an entity outside of Switzerland does not automatically extend to the assets of the foreign entity located on Swiss territory. Only upon recognition of the foreign insolvency decree in accordance with Art. 166 et seq. SPILA, will ancillary insolvency proceedings be commenced by the competent Swiss insolvency administration. The Federal Supreme Court argued that upon recognition, it is exclusively upon the Swiss insolvency administration to exercise all rights in respect of the assets located in Switzerland and that upon such recognition, the foreign insolvency administrator has no further authority in relation to such assets.

### Comment

The decision rendered by the Federal Supreme Court is a consequence of the general principle that the hands of a foreign governmental authority are not permitted to reach into the Swiss territory. This principle applies, absent a specific treaty, to all actions of a foreign government, governmental agency or judiciary.

The principle of territoriality does, according to Swiss law, however, not restrict a Swiss insolvency administrator to reach for assets outside the Swiss territory. This issue will have to be answered by the foreign jurisdiction, where the assets are located.



In today's globalized economy, the principle of territoriality in insolvency law matters, as understood by Swiss law, appears to be a relict from Stone Age and does not foster an efficient administration in international insolvency law matters in the interest of all creditors. Rather, it tends to complicate matters and increase administrative costs to the detriment of all the creditors.

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