



## Insolvency Law Newsletter Switzerland

# Foreign Insolvency Authority Lacks Standing to Sue, Unless Ancillary Insolvency Proceedings Are Initiated in Switzerland

### Facts

The Federal Supreme Court has in the decision rendered on March 6, 2008 (BGE 134 III 366) for the first time explicitly decided whether a foreign insolvency administrator is entitled to bring a claim in Switzerland against a Swiss resident debtor for collection of amounts outstanding, without first applying for the recognition of the foreign bankruptcy decree according to art. 166 Federal Code on Private International Law ("CIPL").

In the case at hand, an Italian insolvency authority has assigned the claim according to a composition agreement with assignment of assets to a third party. This third party took action on behalf of the insolvency authority against a Swiss resident debtor located in Geneva without first seeking the recognition of the insolvency proceedings in Switzerland. The Federal Supreme Court denied the foreign insolvency administrator acting through the assignee the right to sue against the Swiss resident debtor for the reasons stated below.

### Decision of the Federal Supreme Court

The Federal Supreme Court held that, absent a specific treaty, which in the present case was not applicable, a foreign insolvency authority may not bring an action in Switzerland for the collection of claims outstanding against a Swiss debtor, unless such insolvency administrator has first applied for the recognition of the foreign bankruptcy decree. According to art. 166 CIPL, a foreign bankruptcy decree shall be recognized in Switzerland (a) if the decree is enforceable in the State where it was entered; (b) if there are no grounds for refusal under

art. 27 CIPL; and (c) if reciprocity is accorded in the jurisdiction seeking the recognition of its insolvency decree.

It is not sufficient to decide on the recognition by means of a preliminary question during the action for the collection of claims outstanding against the Swiss debtor, as no ancillary insolvency proceedings can be initiated thereafter. Hence, a foreign insolvency authority has to initiate a separate proceeding to recognize the foreign bankruptcy decree, if it wants to take actions in Switzerland against a debtor in relation to assets located in Switzerland.

Once the foreign bankruptcy decree is recognized in a separate proceeding in Switzerland, it will have the effects of bankruptcy as set forth under Swiss law, i.e. it will lead to so called ancillary insolvency proceedings, but only with respect to assets, which are actually located in Switzerland (art. 170 CIPL).

Without recognizing the foreign bankruptcy decree, the insolvency authority has only the right to request protective measures according to art. 168 CIPL and the right to take actions according to art. 285 (challenge of fraudulent conveyances) of the Swiss Debt Enforcement and Bankruptcy Law ("DBL") in Switzerland.

### Comment

The decision rendered by the Federal Supreme Court may also have an impact upon the pending insolvency proceedings involving Lehman Brothers in the United States, to the extent that the insolvent



foreign entity has assets in Switzerland or operates through a branch.

In an insolvency of a bank or securities dealer, large powers are given to the Federal Banking Commission. The Federal Banking Commission may order protective measures, a restructuring or liquidation (see art. 25 Federal Banking Law ("FBL")). These powers also apply in respect of a Swiss branch of a foreign bank or securities dealer.

The protective measures include (amongst others) the giving of instructions to such bank or securities dealer, a restriction of the business activity, a payment moratorium or maturity postponement (see art. 26 FBL).

If the Federal Banking Commission orders the liquidation of a bank or securities dealer, the general provisions of Swiss Insolvency Law are applicable, subject to certain modifications, which are primarily of a procedural nature.

Where a bank or securities dealer is subject to insolvency proceedings outside Switzerland, the Federal Banking Commission decides upon the recognition of the foreign insolvency decision (art. 37g FBL). The foreign insolvency authority will have to request acknowledgement of its decision in Switzerland. Such request is to be addressed to the Federal Banking Commission (art. 37g FBL). However, even without a request, may the Federal Banking Commission order protective measures. This is particularly the case, where there is a risk that assets in Switzerland may be collected by the foreign authority.

The recognition of the foreign insolvency decision will lead to ancillary insolvency proceedings in respect of assets located in Switzerland. Contrary to ordinary ancillary bankruptcy proceedings, also privileged creditors domiciled outside Switzerland may file their respective claims with the Swiss authority for inclusion in the creditor's ledger.

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