BANKRUPTCY & RESTRUCTURING

CorporateLiveWire

EXPERT GUIDE 2022

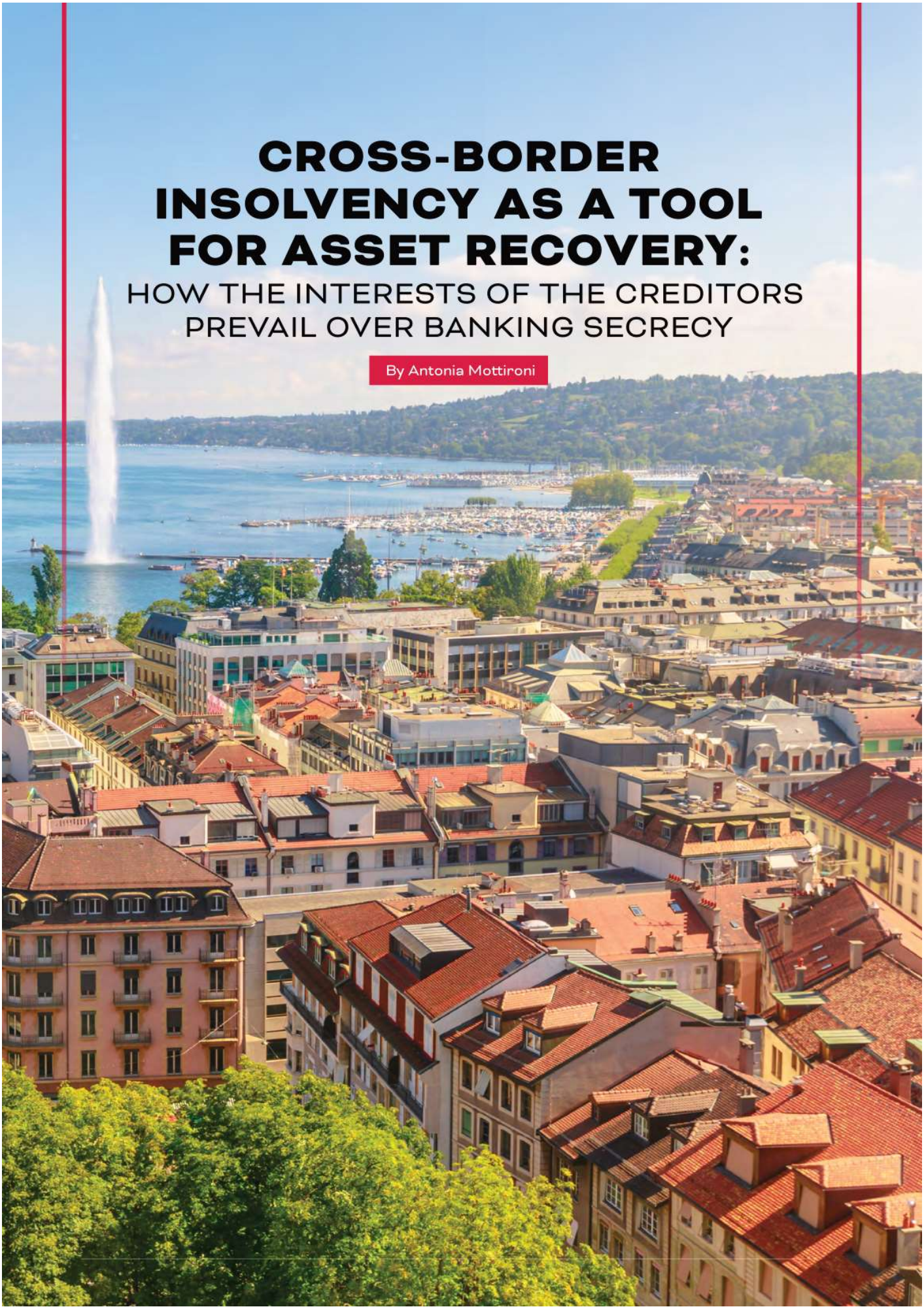
www.corporatelivewire.com

APPLEBY | LUNDGRENS | Quantuma | Grant Thornton

CROSS-BORDER INSOLVENCY AS A TOOL FOR ASSET RECOVERY:

HOW THE INTERESTS OF THE CREDITORS PREVAIL OVER BANKING SECRECY

By Antonia Mottironi



RECENT TRENDS CAN BE OBSERVED IN CIVIL COURTS IN FAVOUR OF LIFTING BANKING SECRECY EVEN WHERE THE PREVAILING INTEREST IS NOT THE PROSECUTION OF A CRIME, BUT (IN PARTICULAR) INSOLVENCY.

Switzerland is the main offshore banking centre in the world, with more than 25%, or US$2.3 trillion, of the world's foreign assets under management. The country has more recently become the world's number one commodity trading and trade finance hub. Its global market share is estimated at 35% for oil, 60% for metals and 50% for sugar and cereals respectively. Shipping through Swiss companies represents 22% of global movements of commodities.

Switzerland has been well-known for decades to be restrictive with regard to the exchange of information with foreign jurisdictions. Claimants, creditors and insolvency office holders involved in fraud-related cases or in commercial matters face with banking secrecy, the unavailability of pre-trial disclosure of evidence and the so-called "Swiss Blocking Statute". As a result, they frequently have to resort to instituting criminal proceedings in order to obtain disclosure and freezing orders from Swiss law enforcement authorities, where banking secrecy does not apply. This practice is efficient but also questionable, as the use of criminal proceedings should be kept for what they are meant to be: a last resort.

Recent trends can be observed in civil courts in favour of lifting banking secrecy even where the prevailing interest is not the prosecution of a crime, but (in particular) insolvency. The situation has also recently improved with the adoption of a new cross-border insolvency regime, in force since January 2019, which aims at simplifying the recognition of foreign insolvencies and the work of foreign officeholders, by enabling them to act directly on Swiss territory without the appointment of an ancillary liquidator. The most recent federal case law has also improved the position of insolvency office holders in the collection of pre-trial evidence in support of civil claims against Swiss banks.

Duty of Swiss banks to disclose internal information in insolvency, even to their prejudice

Little use has been made of Swiss insolvency proceedings so far for the purpose of collecting evidence from Swiss banks.

By statute, insolvency trustees can seek the support of Swiss bankruptcy offices in order to obtain information from Swiss banks:

- concerning the debtor's assets that they hold; or
- against whom this debtor has existing or potential claims.

Insolvency practitioners have overlooked this second alternative for decades, with the latest case law dating back to 1941. The scope of the duty of banks to provide information to insolvency trustees was understood to be limited to their duty of accountability on the assets of the debtor as their client. This practice excluded the collection of internal information.

In a landmark decision of June 2020 regarding an application based on this second option (5A_126/2020), the Swiss Supreme Court ruled that in the context of insolvency, there is a public interest in the disclosure of internal information of the bank that may enable Swiss and foreign insolvency office holders to identify claims, to assess their amounts and to collect all supporting evidence for the purpose of bringing a legal action against the bank itself. In other words, the scope of the duty to inform insolvency office holders is much broader than their contractual duty of accountability.

This is almost to say that pre-trial collection of banking internal information as evidence in favour of insolvency office holders is now available in Switzerland, which is justified by the prevailing interest of all and worldwide creditors over banking secrecy.

This leading case was extensively commented in light of the legal provisions on the duty of accountability. Surprisingly, the key issue of such prevailing interest was overlooked. This shows that in spite of a clear trend in favour of international collaboration coming from Swiss courts and the lawmaker, a culture of privacy still exists outside of courtrooms, which is henceforth worth challenging.

What's next?

Apart from its obvious attraction to chase assets, Switzerland can now be seen as an appropriate jurisdiction to collect information from all stakeholders in the market (banks, commercial counterparties, debtors, family offices, HNWI's service providers).

Switzerland being a civil law jurisdiction, criminal proceedings undoubtedly remains a powerful asset tracing tool to get access to banking information in case of fraud and money laundering. They enable in particular the compensation of victims and criminal settlements between the law enforcement authorities, the plaintiffs and the accused.

However, times where Switzerland was considered as a haven for dirty money is over, while remaining a private banking hub and a competitive and innovative market in many international transactions.

With this in mind, identifying the relevant interests at stake and the appropriate civil paths available appears as an efficient and more balanced approach to seek banking information for the upcoming decades.

Antonia Mottironi specialises in international asset recovery, notably in connection with business crime, and has extensive experience in international disputes involving common law jurisdictions and/or foreign arbitral tribunals.

Her practice is based on a close relationship of trust and proximity with her clients.

She always ensures transparent communication with them in terms of the risks and opportunities related to the proceedings that they conduct together.

Ardentěr — Law
strategy across borders

For more information please contact:
+41 22 722 05 40 | amottironi@ardenterlaw.ch


Insolvency