Asset Recovery and Insolvency: How to Unlock the Doors of the Swiss Vault?

Switzerland is a complex jurisdiction for foreign insolvency practitioners. A strict blocking statute and the banking secrecy make it difficult to obtain information and to secure assets prior to the recognition of the foreign insolvency decree.

The country is also a civil law jurisdiction where pre-trial disclosure orders are not available. It is well known by international asset recovery specialists that Swiss criminal proceedings offer an alternative and efficient tool that enables the disclosure of banking information and the freezing of assets. Another advantage is often overlooked: in the context of insolvency, they can also be used at the earliest stage of fraud-related cases without IPs being at risk of infringing the Swiss blocking statute.

Embedded in Article 271 para. 1 of the Swiss Criminal Code, the Swiss Blocking Statute provides that any person:

- who carries out activities on behalf of a foreign State on Swiss territory;
- without lawful authority; and
- where such activities are the responsibility of a public authority or public official.

shall be liable to a custodial sentence not exceeding three years or to a monetary penalty, or, in serious cases, to a custodial sentence of not less than one year.

Foreign insolvency office holders qualify as persons who carry out activities on behalf of a foreign State as they are appointed by a court in order to conduct a non-voluntary liquidation process. They thus have to be vested with lawful authority by seeking recognition of the foreign insolvency decree before Swiss courts. Since 2019, a new cross-border insolvency act applies in the country, which is deemed compatible with the UNCITRAL Model Law. In particular, the requirement of reciprocity has been abolished.

Recognition is granted within 2 or 3 weeks. At the earliest stage of large-scale fraud cases, this is however not satisfying as urgent measures must be taken for the preservation of both evidence and assets.

Insolvency practitioners usually take steps in foreign jurisdictions which have similar judicial systems. US liquidators will choose common law jurisdictions first, whereas European insolvency office holders prefer litigating within the EU borders, even in non-harmonized matters. Switzerland is considered at a later stage, for instance when a Swiss element is identified during foreign proceedings.

This is surprising since Switzerland still manages more than 25% of the world's foreign assets and has thousands of service providers such as trustees and wealth managers. This is to say that the jurisdiction remains an asset recovery hub and should always be seriously considered in the implementation of global litigation strategies at the very beginning of each case which present links with the jurisdiction.

In the context of contentious insolvency in particular, it is possible to obtain from the Swiss law enforcement authorities broad freezing and disclosure orders **prior to the recognition** of the foreign insolvency measures by granting legal standing in criminal proceedings to the bankrupt/insolvent entity itself.

Swiss criminal proceedings are very specific compared to those of common law jurisdictions, as plaintiffs who obtain the status of “party to the proceeding”, can play an active role in the investigations and ultimately be compensated with the assets seized by the law enforcement

authorities. The absence of secrecy of the investigation and the right to consult the file with no restriction (usually) also enable plaintiffs to use criminal evidence in any other domestic or foreign proceedings, including arbitration. Last but not least, banking secrecy does not apply in criminal proceedings (as well as in insolvency proceedings), subject to the protection of the rights of third parties.

This is the reason why it is often said that Swiss criminal proceedings are an asset recovery tool. Once criminal investigations have begun – often following the filing of a criminal complaint, the plaintiff can secure assets and obtain evidence, in particular those produced by Swiss financial institutions.

When the victim of the fraud is an insolvent entity, the later may have legal standing in criminal proceedings as a person directly affected by the offence.

"Civil fraud" of common law can often qualify as Swiss criminal offences. For instance, breach of fiduciary duties, deceit or conspiracy may be transposed into Swiss criminal offences of mismanagement, embezzlement or fraud (or a mix of them).

Interestingly, the victim of a predicate offence committed abroad (should it simply qualify as civil fraud in the country where it was perpetrated) is deemed to be directly affected by the laundering of the proceeds of the fraud in or through Switzerland, which means that the victim can participate in money laundering criminal proceedings, obtain banking evidence and freeze Swiss assets.

The criminal plaintiff may, cumulatively or alternatively:

- request the prosecution and conviction of the person criminally responsible for the offence by filing a criminal complaint (**criminal action**); and/or
- bring civil claims derived from the offence by joining the criminal proceedings (**civil action**).

Until deletion from company registry, the bankrupt entity has standing in the proceedings in relation to criminal offences committed at its expense. The foreign insolvency decree does not need to be recognized before the debtor files a criminal complaint in Switzerland as long as it acts on Swiss territory through its duly authorized bodies pursuant to the company laws of its place of incorporation.

Once admitted as criminal plaintiff, the debtor may request the law enforcement authorities to freeze any assets located in Switzerland (and abroad), as well as to issue disclosure orders against third parties holding assets or relevant information. In other words, criminal proceedings can be used by insolvency practitioners to obtain urgent measures before they seek recognition before civil courts, without being at risk of breaching the Swiss Blocking Statute.

If the foreign debtor can be admitted as criminal plaintiff by requesting the opening of criminal investigations, it is unclear whether or not it has standing to exercise the civil action prior to the recognition of the foreign office holder and, one step further, whether this would infringe the Swiss Blocking Statute. The prudent and pragmatic approach will be to refrain from bringing any civil claims before recognition of the foreign insolvency decree.

In any case, a foreign insolvent debtor will not infringe the Swiss blocking statute as long as:

- its representatives (insolvency practitioners or not) act in the criminal proceedings in their capacity as executive body pursuant to the company law of its place of incorporation, and not in their capacity as court-appointed insolvency office holders; and
- it does not bring civil claims in the criminal proceedings before recognition.

With its triple lock of banking secrecy, blocking statute and non-availability of pre-trial collection of evidence, Switzerland is seen as a difficult jurisdiction, in particular by insolvency practitioners from common law jurisdictions. Criminal proceedings are the main key to unlock the doors of the Swiss vault. Besides the public interest in punishing crime, they are not that far from Anglo-Saxon civil fraud legal actions.

Furthermore, a trend in favour of international cooperation can be observed in the country, even from civil courts. It is particularly true in contentious insolvency cases, where courts have recognized the **prevailing public interest** of the recovery of Swiss assets in favour of foreign insolvency practitioners and worldwide creditors over Swiss private interests. We can thus wonder whether this improvement of the position of foreign insolvency office holders opens new avenues for asset tracing and recovery in Switzerland.