The Swiss Blocking Statute: Using criminal proceedings as interim relief

Antonia Mottironi explains how foreign insolvency practitioners can use criminal proceedings as interim relief in fraud-related cases

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In Switzerland, a strict blocking statute and the well-known banking secrecy make it difficult for the foreign insolvency office holder to seek information on the debtor's assets from third parties (such as banks) prior to the recognition of the foreign insolvency decree.

Criminal proceedings, however, offer a precious tool to obtain urgent freezing and disclosure orders at the earliest stage of fraud-related cases.

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What does the Swiss Blocking Statute entail for foreign IPs?

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

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

Foreign insolvency office holders qualify as persons who carry out activities on behalf of a foreign State, as they are appointed by a foreign court in order to conduct a non-voluntary liquidation process pursuant to insolvency laws. Thus, they have to be vested with lawful authority by seeking the recognition of the foreign insolvency decree before the Swiss civil courts, pursuant to Articles 174ff. of the Swiss Private

International Law Act. As Switzerland is not an EU country, the EU rules do not apply. However, 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.

Where no privileged or secured claims exist, authorization to act directly in Switzerland and to have the Swiss assets remitted may be granted. Otherwise, a Swiss ancillary liquidator is appointed in order to liquidate the Swiss assets. Foreign insolvency office holders may then act directly after being assigned with the rights of the Swiss ancillary estate. Recognition is usually 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.

Using criminal proceedings as interim relief in contentious insolvency cases

In spite of this strict blocking statute and a cumbersome regime of ancillary bankruptcy, Swiss law also provides for an efficient

means to obtain broad freezing and disclosure orders **prior to the recognition** of the foreign bankruptcy by granting legal standing in criminal proceedings to the bankrupt entity itself.

Swiss criminal proceedings are very specific compared to those of common law jurisdictions, notably because of the absence of secrecy of the investigation. In particular, plaintiffs have the status of "party to the proceedings" and, as such, are granted rights, *inter alia*, to:

- play an active role in the proceedings, from the right to participate in the investigation to the right to be compensated for the damage from which they have suffered;
- consult the file and, generally, 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, as, once criminal investigations have begun (often following the filing of a criminal complaint), the plaintiff can secure Swiss (through domestic criminal proceedings) and foreign (through international criminal assistance requests) assets and obtain evidence, including those produced by Swiss financial institutions.

In the context of contentious insolvency, **the foreign bankrupt entity** may have legal standing in criminal proceedings as a person directly affected by a "fraud", which usually includes "civil fraud" in common law. It is worth mentioning that victims of an offence committed abroad (e.g. mismanagement, deceit, embezzlement) are deemed to be directly affected by the laundering of its proceeds in or through Switzerland, which means that they can participate in money laundering criminal proceedings.

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 removal from the 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.

This entails that the representative appointed after the insolvency decree is issued must be recorded as the executive body of the debtor in the company registry of its place of incorporation. Depending on the jurisdiction and the type of insolvency measure ordered, the authorised body of an insolvent entity may be the insolvency office holder, but vested with authority to act pursuant to company law.

Once admitted as a criminal plaintiff, the debtor may request the law enforcement authorities to freeze any asset 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 IPs to obtain urgent measures before they seek recognition before civil courts, without being at risk of breaching the Swiss Blocking Statute.

Is the Swiss Blocking Statute a pitfall or a mirage?

If the foreign debtor can be admitted as a 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, a step further, whether this would infringe the Swiss Blocking Statute.

The prudent and pragmatic approach would be to refrain from bringing any civil claims before recognition of the foreign insolvency decree. The filing of a civil action indeed aims at the remittance of Swiss assets for the ultimate benefit of a foreign insolvent estate. It is therefore likely that bringing civil claims on behalf of the debtor prior to recognition would be deemed as a circumvention of the obligation made to IPs to obtain lawful authority to act on Swiss territory.

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

- its representatives (IPs 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.

Summary

Switzerland is a complex jurisdiction for IPs. The country remains however the main offshore banking centre in the world, with more than one-quarter, or USD 2.3 trillion, of the world's foreign assets under management. The use of criminal proceedings as a powerful and efficient tool for asset tracing and recovery should never be overlooked. They should instead always be seriously considered in the implementation of global asset recovery and litigation strategies at the very beginning of each case that present obvious links with the jurisdiction. ■

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Welcome from the Editors

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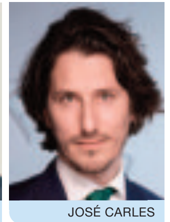
JOSÉ CARLES

INSOL Europe has continued to flourish this Spring. Our Council met in Malahide, Ireland in March (p. 10) to focus on the future of this organization —that we all feel like a big family— for the next few years. In this context, we would like to remind you through this Editorial that any ideas any of you may have will always make INSOL Europe to continue to blossom and be fruitful... so do not hesitate to share them!

As you will see in this issue, just as an example, one of INSOL Europe's projects you could be involved in includes collaboration with the European Bank for Restructuring and Development (**p. 30**).

This issue includes news and reports from many European countries. It covers how foreign insolvency practitioners may use criminal proceedings to obtain urgent freezing and disclosure orders in Switzerland (**p. 20**) and how the proposal harmonising certain aspects of insolvency law would affect Poland (**p. 22**) and France (**p. 24**). Other facts and trends addressed include personal insolvencies in the UK (**p. 35**), statistics on insolvency and restructuring procedures in Germany (**p. 38**), effects of sanctions on the payment of creditors in Ukraine (**p. 39**), legislative changes and implementation of the EU Directive on Preventive Restructuring Frameworks in Italy (**p. 40**) as well as the rescue process for micro and small companies in Ireland (**p. 41**).

Our Spring 2023 edition also analyses the effects on insolvency of the Russian invasion of Ukraine and the introduction of martial law in Ukraine as well as the procedure for the implementation and monitoring of the effectiveness of the state sanctions policy, which include asset blocking of those included in the sanctions lists (**p. 16** and **p. 39**). As we said in our Editorial in last year's Spring issue citing Pablo Neruda, despite many flowers having been cut in Ukraine in this past year, they have not been able to stop the country's Spring. Nonetheless, we have been hoping to celebrate the end of this military aggression and the beginning of a new period of peace and recovery for already too long and we send all our support to our colleagues in Ukraine.

Technology continues to affect our professions in many ways. In this respect, this number includes an update on the steady digitalization of insolvency procedures in Lithuania from the Ministry of Finance of the Republic of Lithuania (**p. 8**). Our IT&DA column (**p. 14**) comments on decisions included in our online worldwide digital assets case register and compares the treatment of cryptoassets under insolvency scenarios in the cases of Bitgrail (Italy) and Celsius (US). This number also includes brainstorming views and advances on the insolvency of digital services providers (including cloud computing services in Luxembourg) and the role of customers as stakeholders (**p. 18**).

And as not everything is about Europe, in our US column you will also find the reasons why '*you gotta love Chapter 11*' and the latest trends from the US. On the other hand, the impact of the EU Directive on Preventive Restructuring Frameworks on insolvency legislation has gone beyond the EU and has reached also North Macedonia (EU candidate), which is currently in the process of passing a new restructuring and insolvency law that reflects the Directive on Restructuring and Insolvency (**p. 32**).

We are looking forward to the next INSOL Europe event that Spring will bring us together: the Eastern European Countries' Committee Conference in Vilnius, Lithuania (18-19 May)! Besides, the beginning of the Summer will bring AIJA and INSOL Europe's Young Member Group together in joint conference in Seville, Spain (29 June-1 July). ***See you there!***

José

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