Preliminary Draft for a Reform of Swiss International Insolvency Law

Marjolaine Jakob, the author of this post, is a researcher at the University of Zurich, Faculty of Law.

In October 2015, the Swiss Federal Department of Justice and Police (Eidgenössisches Justiz- und Polizeidepartement) published a preliminary draft for the reform of the 11th title of the Swiss Private International Law Act (SPILA) on insolvency proceedings and compensation proceedings (Articles 166–175 rev-SPILA) along with an explanatory report. Simultaneously, the consultation procedure (Vernehmlassungsverfahren) was opened, which ended on February 5, 2016. The preliminary draft and the explanatory report are available here.

Summary of the content of the preliminary draft

The preliminary draft aims at improving the existing rules against the background of recent national and international developments in cross-border insolvency law. A complete revision is not intended. The new rules are supposed to facilitate the procedure and the requirements for the recognition of foreign bankruptcies.

Amongst other amendments, the proposal contains the following modifications:

- It is proposed to abandon the requirement of reciprocity, which is currently still a pre-requisite for the recognition of foreign bankruptcies (cf. art. 166 para 1. lit. c SPILA).
- Following international trends, indirect jurisdiction is to be extended. In future, not only bankruptcy orders rendered at the debtor's domicile but also those rendered in the state of the centre of main interests of the debtor (under the condition that the debtor was not resident in Switzerland at the time of the opening of the foreign bankruptcy proceedings) should be recognized (art. 166 para. 1 lit. c nr. 2 rev-SPILA).
- Currently, the recognition of a foreign bankruptcy order necessarily leads to the opening of secondary insolvency proceedings with regard to the debtor's assets located in Switzerland. Claims secured by pledge and privileged claims of creditors domiciled in Switzerland are satisfied in advance. The preliminary draft provides for a rule according to which a a

waiver of secondary insolvency proceedings is possible where there is no need for a protection of claims secured by pledge and domestic creditors (art. 174a para. 1 rev-SPILA). In the event of the court approving the request for a waiver, the foreign bankruptcy administrator is supposed to have all powers that the debtor had before the foreign bankruptcy proceedings were opened. Accordingly, assets located in Switzerland would be at the disposal of the foreign bankruptcy administrator in this case (art. 174a para. 2 rev-SPILA).

- The draft also contains a rule according to which domestic authorities and institutions shall coordinate their actions with foreign authorities and institutions (art. 174b rev-SPILA).
- Furthermore, it is proposed that foreign judgments on avoidance claims and insolvency related claims are to be recognised by Swiss courts subject to certain prerequisites (art. 174c rev-SPILA).

Subsequent legislative process

As a next step, the Swiss Federal Office of Justice will prepare a report on the results of the consultation procedure. Based on this report, the Federal Council (Bundesrat), i.e. the Swiss government, will decide on the further procedure.

The Federal Council has the option to submit a final draft to the Federal Parliament, which may either adhere to the preliminary draft or contain limited or extensive amendments. In either case, the final draft is issued a long with a dispatch (Botschaft). Subsequently, the final draft will be discussed in the Parliament.

The Federal Council might, however, also decide to no longer pursue the revision of the 11th title of SPILA or to instruct the Swiss Federal Office of Justice to undertake further clarifications regarding the revision project.