

SWITZERLAND

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Debt enforcement and bankruptcy changes

Restrictions on access to debt enforcement register

The Swiss Debt Enforcement and Bankruptcy Act (DEBA) allows the initiation of debt enforcement proceedings before a court becomes involved. A creditor can request the competent debt enforcement office (normally at the domicile of the debtor) to issue a payment order to the debtor. The office serves that payment order without verifying the existence and enforceability of the purported claim; however, the debtor may declare its objection, within 10 days, to the debt enforcement office. If the debtor objects to the payment order, the creditor will first have to obtain a favourable court decree before continuing with the enforcement proceedings. If, on the other hand, the debtor does not object to the payment order, the creditor may directly continue with enforcement proceedings, which will ultimately lead to the seizure of assets in the case of individuals or bankruptcy where legal entities are involved (generally speaking).

Given the debt enforcement office does not assess the purported claims before issuing a payment order, the order is served even where no claim exists or exists only in a lower amount.

Each debt enforcement office keeps a debt enforcement register for its district (Register). The Register lists all payment orders served to debtors located in the district, objections raised by debtors, and further enforcement steps taken. Anyone who establishes a legitimate interest in obtaining information on a specific person has the right to receive the Register records on that person for the previous five years. The intended execution of a contract creates a sufficient interest to receive information on the prospective counterparty. The Register is thus an important source of

creditworthiness assessments. In practice, before entering into binding agreements it is customary for landlords, employers, banks, and so on, to request a Register excerpt from a prospective counterparty. An unjustified payment order – which shows in the Register – can thus have a substantial adverse impact on the ability of an individual or entity to do business.

In order to mitigate the negative effects of unjustified payment orders, the DEBA will be amended, effective January 1 2019, such that three months after receipt of a payment order, an objecting debtor may request the debt enforcement office not to disclose the payment order. The office then sets a 20-day deadline to the creditor to prove that it has initiated a judicial action to continue with enforcement proceedings. If the creditor fails to provide such evidence within 20 days, the payment order will no longer be visible. However, if the creditor later provides evidence of initiation, or if debt enforcement proceedings are continued following court approval, third parties (with a legitimate interest) will once again have the right to see the payment order.

Some critics believe that while so far the Register may in some cases have shown unjustified enforcement efforts of creditors, going forward there will be an unpredictable element as to which information will be shown in the Register, depending on the stage of the enforcement proceedings.

Easier recognition of foreign bankruptcy proceedings in Switzerland

Under the prevailing Swiss Act on Private International Law (PILA), the recognition of foreign bankruptcies requires, *inter alia*, that the bankruptcy be opened at the legal seat of the debtor and that the requesting foreign state reciprocally recognises bankruptcies opened in Switzerland. These requirements can lead to unsatisfactory situations where foreign bankruptcies may not be recognised because they have been opened at the debtor's centre of main interest (instead of at the location of its legal seat) or because the reciprocity condition was not met; or recognition was delayed because reciprocity could only be proved with substantial effort.

Under the prevailing law, once foreign bankruptcy proceedings have been recognised in Switzerland, auxiliary Swiss bankruptcy proceedings must take place,

encompassing the debtor's assets located in Switzerland. The aim of these proceedings is to safeguard pledges and privileged creditors (for example employees, or certain social security claims) in Switzerland. Such auxiliary proceedings, however, make little sense, if no such pledges or privileged creditors exist.

As of January 1 2019, the PILA will be amended to correct these shortcomings. Going forward, foreign bankruptcies will be recognised, whether they are opened at the debtor's legal seat or at the location of the debtor's centre of main interest. The reciprocity requirement will be abolished entirely. Auxiliary Swiss bankruptcy proceedings may be dispensed with if no pledges exist and no privileged creditors file claims. In such a case, the foreign bankruptcy trustee may to a large extent directly administer the debtor's Swiss assets, including repatriating them. Foreign trustees may not exercise sovereign powers on Swiss territory, however.

Together with the described changes to the DEBA and PILA, related and more technical amendments to existing debt enforcement provisions will enter into force on January 1 2019.

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