

Briefing December 2018

Changes to Swiss debt enforcement and bankruptcy law effective January 2019

On 1 January 2019, certain changes to Swiss debt enforcement and bankruptcy law will enter into force. The revised law aims to offer better protection for debtors against unjustified debt enforcement steps and to facilitate the recognition of foreign bankruptcy proceedings.

Restriction on disclosure in debt enforcement register

The Swiss Debt Enforcement and Bankruptcy Act (DEBA) allows the initiation of debt enforcement proceedings prior to a court's involvement: A creditor may request the debt enforcement office located at the domicile of the debtor to issue a payment order to the debtor, which the office will do without verifying the existence and enforceability of the purported claim. The debtor may then declare its objection within ten days. In the event of an objection, the creditor will 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, generally speaking, will ultimately lead to the seizure of assets in cases involving individuals, or bankruptcy where legal entities are involved. Given that the debt enforcement office does not assess the purported claims before issuing a payment order, cases may arise where an order is served even though no claim exists or exists only for a lesser amount.

Each debt enforcement office keeps a register which lists payment orders served on debtors located in its district, objections raised by debtors and further enforcement steps taken. Anyone who establishes a

legitimate interest in obtaining information about a specific person has the right to access the information in the register relating to such person for the past five years. The intended execution of a contract creates a sufficient interest to receive information on the prospective counterparty. In practice, before entering into binding agreements, it is customary for landlords etc. to request a register excerpt from a prospective counterparty. The debt enforcement register is therefore an important source for creditworthiness assessments and an unjustified payment order – which appears in the register – can 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, art. 8a of the DEBA will be amended with effect from 1 January 2019: Under the new law, a debtor objecting to a payment order may request that, upon the expiry of three months after service of the payment order, the same is no longer disclosed in the register unless the creditor can show that it initiated judicial steps to continue enforcement proceedings. Upon such a request, the debt enforcement office sets a 20-day deadline for the creditor to provide evidence that it has taken further judicial enforcement steps. If the creditor fails to do so, the respective payment order will no longer be visible in the register (but the creditor's rights are not otherwise curtailed). The payment order will, howev-

er, again appear in the register if: (i) the creditor at a later date provides evidence to the office that it has initiated proceedings or (ii) in any event when debt enforcement proceedings are continued following a court decision.

So far, the debt enforcement register may, in some cases, have shown unjustified enforcement efforts of creditors. However, the situation going forward is that justified enforcement acts will not be visible for a certain time period if a creditor waits more than three months before initiating court proceedings or if it does not make the effort to provide the debt enforcement office with evidence of a judicial action.

Simplified defence against unjustified debt enforcement proceedings

A person who considers debt enforcement proceedings initiated against it to be unjustified, may request the suspension and revocation of such proceedings by a special court action (art. 85a DEBA). So far, however, courts have denied the possibility of such a revocation in certain cases where the debtor had already objected to the payment order – based on the argument that, in such cases, the creditor first needs a favourable court decree before continuing with debt enforcement and hence there is no legitimate interest in taking a separate revocation action.

As of 1 January 2019, an amendment to art. 85a DEBA provides that a debtor may in any case request the revocation of ongoing debt enforcement proceedings based on a special court action, irrespective of whether or not the debtor has raised an objection against the payment order.

Facilitated recognition of foreign bankruptcy proceedings

Under the current 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 recognizes bankruptcies opened in Switzerland. These requirements led to unsatisfactory situations where foreign bankruptcies could not be recognized because they were opened at the debtor's *centre of main interest* (instead of its legal seat) or because the reciprocity condition was not met. In other cases, recognition was delayed as reciprocity could only be proved following substantial effort.

Under the current law, once foreign bankruptcy proceedings have been recognized in Switzerland, auxiliary Swiss bankruptcy proceedings must take place, encompassing the debtor's assets located in Switzerland. Such auxiliary proceedings aim at safeguarding the interests of pledgees holding pledges on assets located in Switzerland and the interests of privileged creditors domiciled in Switzerland (e.g. employees, certain social security claims). The auxiliary proceedings, however, make little sense if no such pledges or privileged creditors exist.

As of 1 January 2019, amendments to the PILA will address these shortcomings: Going forward, foreign bankruptcies opened at the debtor's legal seat or its centre of main interest will be recognized. The reciprocity requirement will be completely abolished. Auxiliary Swiss bankruptcy proceedings may be dispensed with if no Swiss pledges exist and no privileged Swiss creditors file claims. In this case, the foreign bankruptcy trustee may to a large extent directly administer the debtor's Swiss assets, including repatriating them. However, foreign trustees may not exercise sovereign powers on Swiss territory.

Along with the described changes to the DEBA and PILA, some associated and more technical amendments will enter into force on 1 January 2019.

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