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Asset recovery: Can foreign receivers access Swiss assets?

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Switzerland has a reputation for high-quality banking – holding significant foreign assets and offering a fairly pro-enforcement regime. However, gaps between the different legal cultures means recovering Swiss assets to satisfy foreign judgments from common law jurisdictions may be difficult . Here, we investigate possible solutions.

Supreme Court Case 5A_999/2022 dated 20 February 2024

In this recent case, the Swiss Federal Supreme Court addressed the recognition of two New York orders appointing a receiver under Rule 66 of the Federal Rules of Civil Procedure for the benefit of two judgment creditors.

The purpose of this appointment was to recover claims totalling USD 135 million under civil judgments from New York and Florida. The receiver was granted extensive powers over all assets directly or indirectly belonging to the debtor, including the authority to locate and take immediate possession of domestic and foreign bank accounts and to start proceedings to secure and collect them.

Given the existence of Swiss bank accounts belonging to the debtor, the receiver sought recognition of his appointment in Switzerland.

No recognition of receiver's powers in Switzerland

In Switzerland, foreign decisions in civil matters originating from outside the European Union or EFTA member states are recognised under the Swiss Private International Law Act ("**PILA**," unofficial English version available online at: https://www.fedlex.admin.ch/eli/cc/1988/1776_1776_1776/en). This provides a differentiated framework for ordinary civil matters, which are governed by Article 25 et seq. PILA, and bankruptcy matters, which fall under Article 166 et seq. PILA. The latter regime is more onerous on the applicant.

From a Swiss perspective, foreign decisions on the collection of monetary debts do not pertain to civil matters but to public law and are thus not eligible for recognition under the regime applicable to civil judgments (Supreme Court Decision 129 III 683, par. 5.2; Supreme Court Decision 5A_483/2010 dated 8 February 2011, par. 3.2).

In this case, Swiss courts considered that the New York orders did not pertain to civil matters, as the receiver's mission was to collect funds belonging to the debtor to satisfy the two judgment creditors. Its object was thus to advance debt collection efforts, not to adjudicate a civil claim.

The court then noted that the orders did not qualify as a bankruptcy decision either, because they did not provide for the equal treatment of all creditors but instead advanced the exclusive interests of the two judgment creditors, thus lacking the inherently collective feature required under Swiss bankruptcy recognition standards.

As a result, Swiss courts ruled that the orders appointing the receiver could not be recognised in Switzerland, and the receiver's powers derived from the

orders could not be exercised on Swiss territory.

This result should extend to all foreign receivers appointed for the benefit of selected creditors.

Swiss "blocking statute" and risk of criminal prosecution

Although the Supreme Court did not address this question, the lower court held that – had the receiver attempted, without being recognised, to instruct the Swiss bank to release the debtor' funds to him – this conduct could have been characterised as a crime under Article 271(1) of the Swiss Criminal Code. This criminalises sovereign activities carried out on behalf of or in the interest of a foreign state on Swiss territory without lawful authority. Violations of this provision may lead to prosecution, with the prior approval of the Swiss government, and potentially to imprisonment for up to three years.

Because of this provision, foreign receivers whose powers cannot be recognised in Switzerland should refrain from acting on Swiss territory.

Potential alternative solutions

Since foreign receivers such as those appointed under Rule 66 of the United States Federal Rules of Civil Procedure cannot (i) be recognised in Switzerland, and (ii) directly act on Swiss territory, the following alternative options could be considered to try and recover assets located in Switzerland:

- **Obtaining a bankruptcy judgment and passport it in Switzerland**: The receiver or creditors could push the debtor into bankruptcy abroad, the related judgment being recognisable in Switzerland if it was rendered at the debtor's domicile/seat or centre of main interests. If there are no Swiss privileged or secured creditors, and if foreign bankruptcy proceedings do not discriminate against ordinary Swiss creditors, the foreign liquidator can apply for a waiver of local bankruptcy and, once granted, act on Swiss territory to repatriate assets.
- **Enforcing the judgments on the merits**: The creditors themselves, not the receiver, could seek recognition and enforcement of the judgments on the merits in Switzerland, typically as an incidental matter within ex parte proceedings for the attachment of Swiss assets pending their collection.
- **Filing a criminal complaint in Switzerland**: If the Swiss assets were procured by and/or are predicated on a severe fraud, the creditors may manage to have criminal investigations opened in Switzerland. As private claimants, the creditors could ask for the return of the Swiss assets in satisfaction of the foreign civil judgments on the merits, typically after they have been confiscated by Swiss criminal authorities or courts.

Other solutions may exist, including out-of-court endeavours and associated compromises that may be reached if the creditors know how to action the right levers.

Conclusion

This case illustrates the challenges posed by international asset recovery matters where gaps between legal systems – notably between common law and civil law regimes – may sometimes hinder creditors' recovery attempts. Despite these hurdles, solutions are often available by identifying and availing oneself of the relevant local relief. Since a "one-size fits all" method does not exist, creditors and receivers should seek advice early on to identify the most suitable course of action at the place where the assets lie and, if necessary, adjust their strategy in their home jurisdiction accordingly.