# Does the Recast Insolvency Regulation violate the ordre public of Switzerland?

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*Abstract:*

Switzerland is located in the middle of Europe but remains a third state to the European Union. An insolvency proceeding opened in a European Member State and involving goods and/or creditors located in Switzerland is therefore a proceeding involving assets and/or liabilities associated to a third State. As a consequence, European administrators need to comply with Swiss law to obtain recognition of the bankruptcy decree and cooperation of the Swiss authorities (A.). The Recast Insolvency Regulation contains rules designed for European matters, for goods and creditors located within the European Union. Using these rules to involve goods located in Switzerland, while reserving Chapter IV to creditors domiciled in Member States, may induce a discrimination of the creditors domiciled in Switzerland. Such an unequal treatment may be considered as a violation of the formal and of the substantive *ordre public* of Switzerland (B.).

**Key words:** Switzerland. Ancillary bankruptcy proceeding. Universality. *Schmid*. *Nortel*. Foreign creditor. Recognition. Unequal treatment of creditors. Public policy. Lodging of claim

## *A. The Federal Act on private international law of December 18th, 1987, Chapter 11. Bankruptcy and composition, revised on March 16th, 2018*

Switzerland is neither a member of the European Union, nor of the European Economic Area. Concerning private international law matters, Switzerland is part of the Lugano Convention, which is not applicable on insolvency matters (Art. 1 para. 2 lit. b Lugano Convention), but there is no such parallel convention for such matters. As a consequence, the recognition of foreign bankruptcy decrees by Swiss courts relies on Chapter

11 of the Federal Act on Private International Law (PILA) from 18.12.1987[1]. These rules have been revised on 16.03.2018 with effect from 01.01.2019.

Chapter 11 is based on the principle of territoriality with legal assistance. Key is the recognition of the foreign bankruptcy decree by a Swiss court, which is mandatory. No preliminary recognition is possible. Recognition will be granted, if the requirements of article 166 PILA are fulfilled: the decision is enforceable in the State where it has been issued, recognition will not induce any violation of the Swiss formal or substantive *ordre public*, and indirect competence is verified. Indeed, only decisions issued in the debtor's State of domicile, or in the State of the centre of the debtor's main interests, provided the debtor was not domiciled in Switzerland when the foreign proceedings were opened, may be recognized.

Recognition, in principle, induces the opening of an auxiliary bankruptcy proceeding with a civil servant as administrator, and governed by Swiss law. Foreign administrators have no powers on Swiss territory in the frame of an auxiliary bankruptcy proceeding. The auxiliary estate of this proceeding serves for claims secured by assets located in Switzerland, privileged claims of creditors domiciled in Switzerland, and for claims arising from liabilities of the debtor's branch in Switzerland. Any surplus shall be remitted to the foreign bankruptcy estate if the foreign schedule of claims is recognized by the Swiss court, which will check in particular if the creditors domiciled in Switzerland have been included fairly in the foreign schedule of claims. In case of non-recognition, the surplus is distributed among those creditors.

The revision of Chapter 11 of 16.03.2018 gave to the court the possibility to renunciate to the opening of an auxiliary proceeding in Switzerland. There are however two conditions to such a renunciation. Firstly, no privileged or secured claims have been filed. Secondly, the other creditors domiciled in Switzerland are treated appropriately in the foreign proceeding. If the court renunciates to the auxiliary bankruptcy proceeding, the foreign administrator may dispose over the assets of the debtor located in Switzerland, but only like a private person acting according to Swiss private law[2]. The performance of sovereign acts, the use of coercive measures or the right to settle disputes are forbidden.

1 Chapter 11 PILA is applicable to all insolvency matters, except in cases where The Federal Law on Banks and Savings Banks of November 8th, 1934, is applicable, and in cases where conventional rules are applicable.

2 Kleider/Staehelin, AJP/PJA 2021, 361 (361f.).

### *B. Universality of the main insolvency proceedings of Regulation 2015/848, in matters concerning Switzerland*

An insolvency proceeding relying on the principle of universalism shall encompass all the assets of the debtor and all of his creditors, no matter where they are located. According to recital 23 of the Recast EIR, main insolvency proceedings have a universal scope[3]. Worldwide universality will however remain a goal, if recognition is not granted abroad by the foreign authorities. Within the European Union, recognition relies on Chapter II of the Recast EIR. Universality could therefore be limited to European Member States for practical reasons, where the European judicial area allows judgments to cross borders more easily. All of this aside, both assets and liabilities concerned by the European rules must have an identical scope, either European or worldwide, but identical. If only the assets located in Switzerland benefit from the European rules, but not the creditors domiciled there, practitioners may have troubles obtaining recognition in Switzerland.

#### I. Universality, concerning assets located in Switzerland

The universal scope of the main insolvency proceedings shall encompass ‘all the debtor's assets’, except for assets involved in secondary insolvency proceedings (recital 23 EIR). Does it mean that assets located in third countries are included?

The *Virgós/Schmit* Report seemed to encourage this interpretation[4]. The problem is, neither Regulation 1346/2000 nor its recast Regulation contain provisions clearly dealing with third States matters. Consequently, when the Court of Justice of the European Union got asked in such cases about Regulation 1346/2000, it gave a shaky answer. Decision *Schmid v Hertel* let believe that the Insolvency Regulation was applicable to third States matters. However, only provisions that did not expressly prescribe a cross-border element involving at least two Member States were concerned[5]. The

3 Concerning Regulation 1346/2000, recital 12.
4 Virgós /Schmit, p. 15, para. 19 and p. 51, para. 73.
5 ECJ, 16.01.2014 – case C-328/12, ECLI:EU:C:2014:6 para. 20–29 – R. Schmid v L. Hertel.

*Nortel* decision then gave a very confusing solution[6]. One may believe, based on this decision, that assets located in third States belonged to the main insolvency proceeding[7]. The *Nortel* case is particularly intriguing, as it concerned Art. 2 (g) EIR, a provision clearly restricted to European matters. By doing this, the Court crossed the line drawn in the *Schmid* decision and used a *contra legem* interpretation[8]. The method is questionable, and it seems like national courts do not follow this path. The German Supreme Court indeed applied its ordinary private international law, and not the Insolvency Regulation, to assets located in Switzerland, in a decision rendered after the *Nortel* decision[9].

Even though it is doubtful, some authors believe the *Schmid*- and the *Nortel* decisions to be relevant to interpret the Recast Insolvency Regulation[10]. If this were true, and with the abovementioned interpretation of the *Nortel* decision, Regulation 2015/848 would be applicable to third states matters.

Involving theoretically the assets located in third States in the main insolvency proceeding is one thing, reaching them for real is another one. In order to do this, local law needs to be complied with. Decisions of the Court of Justice of the European Union have no mandatory effects in third States. Concerning Switzerland, Chapter 11 of the PILA will be applied. The Lugano Convention will be of no help, as 'bankruptcy, proceedings relating to the winding-up of insolvent companies or other legal persons, judicial arrangements, compositions and analogous proceedings' are expressly kept outside its scope (Art. 1 para. 2 lit. b Lugano Convention). Of course, Art. 19 Recast EIR is only applicable within the European territory, and the Lugano Convention cannot simply replace the Brussels Regulation in matters concerning Switzerland, in order to obtain the recognition and enforceability of judgments concerning the proceeding, like its course and closure (Art. 32 (1) Recast EIR).

6 ECJ, 11.06.2015 – case C-649/13, ECLI:EU:C:2015:384 para. 53–54 – Comité d'entreprise de Nortel Networks SA v Cosme Rogeau.
7 Bork/van Zwieten/Dammann, Art. 47 mn. 47.20; Menjucq, Rev. proc. coll. juillet 2015, comm. 91; Mankowski/Müller/Schmidt/Schmidt, EuInsVO 2017 Art. 2 mn. 26.
8 Henry, Rev. Sociétés 2015, 549 (549f.); Henry, BJE 1er juillet 2015, 209 (209f.).
9 Bundesgerichtshof, 20.07.2017 – IX ZB 63/16.
10 For a list of arguments justifying that Regulation 2015/848 is restricted to European matters: Kleider, para. 81–86; Kleider, Rev. proc. coll janvier 2020, étude 6.

## II. Universality, concerning liabilities claimed by creditors domiciled in Switzerland

According to the Insolvency Recast Regulation, 'foreign creditors' are only European creditors, as Art. 2 (g) defines them as creditors having their habitual residence, domicile or registered office in another Member State than the State of the opening of the proceeding. Therefore, creditors with their habitual residence, domicile, or registered office in Switzerland cannot benefit from the rules contained in Chapter IV.

Foreign creditors always suffer from a certain unequal treatment, due to geographic distance and language barriers. Chapter IV shall re-establish more equality, but only for creditors domiciled in the European Union. Creditors domiciled in third States are subject to the national rules of each Member State. One may call this an unequal treatment, even a real discrimination[11]. The problem doesn't come from the application of two different sets of rules, one for the European liabilities claimed in the proceeding, and another one for the non-European liabilities. This is not unusual. The problem comes from the interpretation given by the Court of Justice. Universality is a coin with two sides, necessarily of same size, that are assets and liabilities. Since the *Nortel* decision, assets located in Switzerland may be encompassed in the main proceeding, but creditors not. This means, that one side has become universal worldwide, while the other one remained territorial, within the borders of the Union.

From a European point of view, the situation is fully acceptable, because the principle of non-discrimination is made for European matters. For practitioners, the third State's point of view will however be a lot more important, because their goal is to recover the assets lying there. And some third countries control if creditors have received an equal treatment, in order to accept to cooperate. This is the case of Switzerland. Discriminations of creditors based on the location of their residence or based on their nationality are incompatible with the Swiss public policy[12], and will be sanctioned by a denial of recognition of the foreign schedule of debts, according to Art. 173 PILA. The 2018 recast of Chapter 11 of the PILA did not change this logic: the conduct of an ancillary bankruptcy proceeding remains the rule and, if the court decides to waive the procedure on ancillary bankruptcy, it will nonetheless verify if the foreign proceeding takes

11 About this, Kleider, para. 308–319.
12 Swiss Federal Supreme Court, 06.10.1999, 126 III 101, para. 3. b.

adequately account of the claims of the creditors domiciled in Switzerland who rose other claims than those referred to in Art. 172(1) PILA.

The Swiss judges will decide if recognizing the foreign decision is incompatible with the Swiss public policy, but only manifest incompatibilities will be considered. Creditors are treated unequally, based on the location of their residence in Europe or in Switzerland. This will hurt the Swiss *ordre public*[13]. The question is then to see, if there is a manifest incompatibility. In practice, recognition shall be allowed if the creditors domiciled in Switzerland benefited from certain rights, taking their difficulties as foreign creditors in the proceeding into account. Creditors located in Switzerland must be informed of the opening of an insolvency proceeding, and mistakes occurring during the lodging of the claims must be rectifiable[14].

Looking at Chapter IV of the Recast Insolvency Regulation, foreign creditors benefit from one major advantage: they may lodge their claims in the official language of the institutions of the Union of their choice, using a standard claims form. This makes a real difference with national laws, that often require the lodging of the claim to be done in the local official language. Swiss law requires this too, but from all foreign creditors. Such an unequal treatment, based on the location of the residence of the creditor in the Europe Union or in Switzerland, will hurt the Swiss public policy. It may not be enough to be manifestly incompatible with the Swiss public policy and induce a denial of recognition.

It will be up to the Swiss judges to analyse in each case if creditors domiciled in Switzerland have in fact been treated fairly enough compared to creditors domiciled in Europe, or if the unequal treatment of creditors shall be sanctioned.

If the Recast Insolvency Regulation were to be applicable to third states matters, the use of the standard forms could easily be generalized. In the Swiss case, access to the standard claims' forms and particularly to those in German, French and Italian would be of great use. Concerning countries using another official language than the ones from the Union, the standard form in English would already be an advantage.

13 Kleider, 343.
14 Staehelin, p. 167; Braconi, p. 110–111, Fn. 250, 257, 258; Kleider, para. 348–350.

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