

Insolvency outside the Convention

*Dr Alexander Ressos, TEP
Attorney-at-Law (Switzerland), Solicitor (Hong Kong),
Solicitor (England & Wales)*

Bankruptcy, proceedings relating to the winding-up of insolvent companies, judicial arrangements and analogous proceedings are equally excluded from the Convention (Article 1(2)(b)). Within the European Union, cross-border insolvency is governed by Regulation (EU) 2015/848, which does not apply to Switzerland.¹ Between Switzerland and Italy, cross-border insolvency is therefore governed by national law on each side: in Switzerland by Chapter 11 of the PILA (Articles 166 to 175), in Italy by the general rules of private international law and the Code of Business Crisis and Insolvency.

1 The Swiss rules after the revision of 2019

The Swiss rules on the recognition of foreign insolvency proceedings were substantially reformed by the Federal Act of 16 March 2018, in force since 1 January 2019.² Before the reform, Article 166 PILA made recognition conditional on reciprocity, a requirement that obliged applicants to prove that the state of origin would recognize a Swiss bankruptcy in a comparable situation. The Ticino government had pointed out in the consultation that this proof was burdensome and sometimes required expert opinions from foreign institutes.³ The revision abolished reciprocity. It also extended indirect jurisdiction to the state where the debtor has the centre of its main interests (COMI), unless the debtor's seat was in Switzerland. Finally, it made the ancillary Swiss bankruptcy optional when no secured or privileged creditors domiciled in Switzerland need protection (Article 174a PILA).⁴

Under the revised Article 166 PILA, the foreign administrator, the debtor or a creditor may apply for recognition of a foreign bankruptcy decree. The decree is recognized if it is enforceable in the state where it was rendered, if there is no ground for refusal under Article 27 PILA, and if it was rendered in the state of the debtor's domicile or seat or in the state of its

centre of main interests.⁵ Recognition requires assets in the district of the court seised. Its main effect is the opening, under Swiss law, of an ancillary bankruptcy over the Swiss assets, in which secured claims and privileged claims of creditors domiciled in Switzerland are satisfied first. The balance is transferred to the foreign administrator. If the ancillary proceedings are waived, the foreign administrator may exercise the powers conferred on him by the law of the state of origin in Switzerland, although he may not perform acts of public authority, use coercive measures or decide disputes.⁶ Decisions of the foreign insolvency court on avoidance actions can also be recognized if they were rendered in the state of the insolvency and the defendant was not domiciled in Switzerland.

The Ticino courts had anticipated part of the reform. In the insolvency of the Parmalat group, the CEF of the Tribunale d'appello recognized the indirect jurisdiction of the Italian courts over two Parmalat subsidiaries with their statutory seats in the Netherlands, treating Italy as the centre of their main interests in order to avoid a limping situation.⁷ The case showed that Lugano, where several Italian groups held financial subsidiaries and accounts, needed a modern insolvency regime.

2 Notes

1. Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings (recast), OJ L 141, 5 June 2015, p. 19, EUR-Lex, <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:32015R0848>. ↩
2. Lenz & Staehelin, newsflash on the revision of the PILA (international insolvency law), April 2018, https://www.lenzstaehelin.com/fileadmin/user_upload/publications/180405_Newsflash_Revision_IPRG_2018_EN.pdf; amendment note "Amended by No I of the FA of 16 March 2018, in force since 1 Jan. 2019 (AS 2018 3263; BBl 2017 4125)", reproduced at Omnilex, <https://app.omnilex.ai/fr/sources/commentaries/ch-fedlex--291-170>. ↩
3. Consiglio di Stato del Cantone Ticino, response to the federal consultation on the amendment of the PILA (bankruptcy and composition), 20 January 2016, https://www4.ti.ch/fileadmin/POTERI/CdS/procedure_di_consultazione_federale/2016/16_102_DI_Modifica_LDIP_fallimento_e_concordato.pdf. ↩

4. Lenz & Staehelin (above); Patrick Fini, "Il riconoscimento dei decreti fallimentari esteri in Svizzera", Diritto esecutivo, October 2019, 471, <https://author.weblaw.ch/magnoliaAuthor/dam/novita-fiscali/2019/Ottobre/Fini---Il-riconoscimento-dei-decreti-fallimentari-esteri-in-Svizzera.pdf>. ↩
5. Fini (above). ↩
6. Lenz & Staehelin (above); PILA, Art. 174a(4), at [droit-bilingue.ch](https://www.droit-bilingue.ch/de-it/2/29/291-174a-210.html), <https://www.droit-bilingue.ch/de-it/2/29/291-174a-210.html> ("Diese Befugnisse umfassen nicht die Vornahme hoheitlicher Handlungen, die Anwendung von Zwangsmitteln oder das Recht, Streitigkeiten zu entscheiden"); Fini (above). ↩
7. Consiglio di Stato del Cantone Ticino, consultation response of 20 January 2016 (above). ↩

For general information only. This article does not constitute legal or tax advice, does not replace advice on an individual case and creates no lawyer-client relationship. It reflects the legal position as of September 2026.

Online version: helveticaregister.com/lugano-insolvency-outside-the-convention