



Recognition of cross-border insolvency measures for banks - the Swiss solution

Can the Swiss legislation be a model for a
multilateral approach?

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Financial Stability Board and Cross-border cooperation

Section 7.5 FSB Key Attributes of Effective
Resolution Regimes for Financial Institutions:

“Jurisdictions should provide for transparent and expedited processes to give effect to foreign resolution measures, either by way of a mutual recognition process or by taking measures under the domestic resolution regime that support and are consistent with the resolution measures taken by the foreign home resolution authority. [...]”

Recognition cases

Internationally operating bank with head office outside and branch in Switzerland

- Recognition of foreign injunctions as well as liquidation and restructuring measures possible

Internationally operating bank with head office in and branch outside Switzerland

- Coordination with foreign insolvency proceedings and receivers

Swiss basic principles of recognition

Why is recognition necessary?

- Foreign insolvency measures are not applicable in Switzerland and must therefore be recognized
- Swiss law provides for the unilateral decision of the competent authority to recognize such measures

Who is entitled to ask for recognition?

- Foreign insolvency authority or
- A foreign creditor

Which authority is competent for the decision?

- FINMA (instead of the regular insolvency courts)
- Reciprocity is not required.

What is covered?

- Assets and branches located in Switzerland

Scope of recognition

Foreign insolvency measures

Includes injunctions as well as recovery and protection measures

Must have been decreed by the responsible foreign authority according to the law (not necessarily a court)

Must be enforceable but not necessarily legally valid and effective

Will not be reviewed by FINMA in substance. However, must be in compliance with „Ordre Public“

Domestic procedures

Option 1

Opening of a domestic liquidation proceeding

- Foreign creditors are included irrespective of their domicile and the nature of their claim

Option 2

No domestic liquidation proceeding under the following conditions:

- Equal treatment of collateralized and privileged claims of Swiss creditors
- Other claims of Swiss creditors are adequately considered

Why can the Swiss solution serve as a model for other countries

- Legal capacity to recognize foreign resolution proceedings
 - Efficient and expeditious proceedings
 - Mitigation of disorderly runs on assets across jurisdictions
 - Protection of the financial system and no discrimination of creditors
 - Enhanced support for foreign proceedings
- Legal certainty on cooperation
 - Predictability
- Model character for a multilateral approach?

Appendix: Art. 37f BA¹

Art. 37f Coordination with Foreign Procedures

¹ Should the bank also be subject to foreclosure procedures abroad, the FINMA is to coordinate the bank's bankruptcy proceedings with the competent bodies there to the maximum extent possible.

² Should a creditor have been partially paid in a procedure abroad related to the bank's bankruptcy, then the creditor's bankruptcy dividend from the Swiss procedure (after deduction of costs incurred by the creditor) will be lessened by the amount already received abroad.

¹ Swiss Federal Law on Banks and Savings Banks of 8 November 1934 (Banking Act, BA; SR 952.0)

Appendix: Art. 37g BA

Art. 37g Recognition of Foreign Injunctions regarding Bankruptcy and Liquidation and Restructuring Measures

¹ 1 It is in the FINMA's discretion to recognize bankruptcy injunctions or insolvency measures pronounced against banks abroad.

² The FINMA may put assets located in Switzerland at the disposal of a foreign bankruptcy estate without any previous domestic legal procedure, if the foreign insolvency proceedings:

- a. treat the claims of creditors domiciled in Switzerland that are collateralized and privileged as per art. 219 SchKG¹³⁸ (Swiss Federal Act on Debt Enforcement and Bankruptcy) equally; and
- b. adequately take into account the other claims of creditors domiciled in Switzerland.

³ It is in the FINMA's discretion to recognize bankruptcy injunctions or insolvency measures pronounced against banks in the country where their headquarters are domiciled..

⁴ Should legal procedures take place domestically for the assets located in Switzerland, third-class creditors and creditors domiciled abroad may also be included in the claims schedule in accordance with art. 219 para. 4 SchKG (Swiss Federal Act on Debt Enforcement and Bankruptcy).

⁵ In all other respects, art. 166-175 of the Federal Law on International Private Law dated 18 December 1987¹³⁹ apply.

Appendix: Art. 10 BIO-FINMA²

Art. 10 Recognition of foreign bankruptcy decrees and measures

¹ Where FINMA recognises a foreign bankruptcy decree or a foreign insolvency measure in accordance with Article 37g BankA, the provisions of this Ordinance apply to the assets located in Switzerland.

² Even if there are no reciprocal rights, FINMA may meet recognition requests where this is in the interests of the creditors affected.

³ It shall determine one insolvency venue in Switzerland and the privileged creditors under Article 37g paragraph 4 BankA.

⁴ It shall give public notice of the recognition and the circle of creditors.

² Ordinance of the Swiss Financial Market Supervisory Authority on the Insolvency of Banks and Securities Dealers of 30 August 2012 (Banking Insolvency Ordinance, BIO-FINMA; SR 952.05)



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