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Collection of Practical Issues Important to Small Practitioners

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Collection of Practical Issues Important to Small Practitioners – Switzerland

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INSOL International
6-7 Queen Street, London, EC4N 1SP
Tel: +44 (0) 20 7248 3333 Fax: +44 (0) 20 7248 3384

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INSOL International is pleased to present a study on Switzerland under its Small Practice Technical Papers Series focusing on “A Collection of Practical Issues Important to Small Practitioners”. The paper was written by Roger Bischof, INSOL Fellow, Managing Partner, BIRT | www.international-restructuring.com, Switzerland.

INSOL International sincerely thanks Roger Bischof for providing INSOL members with this very informative and practical paper on Switzerland.

September 2020

Collection of Practical Issues Important to Small Practitioners

By Roger Bischof

INSOL Fellow, Managing Partner, BIRT | www.international-restructuring.com

Switzerland is a civil law jurisdiction and federal republic composed of 26 cantons. This paper provides an overview of practical issues important to small practitioners in relation to Switzerland.

There are many issues that small practitioners have to deal with on a daily basis. Management; business planning and financial control; human resources planning and professional development; marketing and communication; information communication and technology; and compliance issues and fees are just a few examples. This paper highlights some of these topics that will be of specific interest to members in other jurisdictions.

1. How to find information about insolvency practitioners in Switzerland

1.1 How are practitioners organised?

Unlike some other jurisdictions, there is no specific recognised professional body which authorises Swiss insolvency practitioners (IPs) to act as such.

Swiss federal law provides for the free market access of IPs. According to Article 27 of the Swiss Federal Code on Debt Enforcement and Bankruptcy (DEBA), any person who possesses the (legal) capacity to act may represent other persons in debt enforcement proceedings. This is also applicable to commercial or professional representation. However, this only applies to enforcement proceedings in front of debt collection offices and bankruptcy offices, and bankruptcy and composition moratorium authorities. Also, this basic rule is limited to summary judicial proceedings (for example, disposal and attachment proceedings) in accordance with Article 68 paragraph 2 *lit c* in conjunction with Article 251 of the Swiss Civil Procedure Code, while representations in other proceedings, and in particular proceedings in front of the Swiss Supreme Court, are reserved for registered lawyers (that is, attorneys entitled to represent clients before the Swiss courts in accordance with the Swiss Federal Law on Lawyers' Free Circulation (also commonly known as the Swiss Attorney Act)).

In practice, the profession of IPs in Switzerland is mainly dominated by lawyers and accountants (*Treuhänder, Fiduciaires; Wirtschaftsprüfer, Expert-comptable*). In addition, various debt collection agencies (*Inkassobüros, cabinets de recouvrement*), legal expenses insurances (*Rechtsschutzversicherungen, assurances de protection juridique*) and legal agents (*Rechtsagenten, agents d'affaires brevetés*) also act as professional representatives of parties in compulsory enforcement proceedings.

IP firms can be all sizes – from small boutique practices to large multinational firms. Due to the country's four different language regions, it is recommended to choose an IP which speaks the local language.

The majority of IPs deal with both corporate and individual insolvency. Some IP firms may specialise in either of the two areas, or in particular industries.

1.2 Associations to contact and what do these associations do

As mentioned above, there is no official recognised professional body that is able to authorise and regulate IPs in Switzerland. Having said this, there are a couple of private associations with other purposes (some of them are cantonal rather than federal associations and not all of them have a website in English), such as:

- Swiss Turnaround Association¹;
- Association for Debt Enforcement and Bankruptcy law (Vereinigung für Schuldbetreibungs- und Konkursrecht (SchKG-Vereinigung), Association pour le droit des poursuites et de la faillite (association LP)²;
- Conference of Debt Enforcement and Bankruptcy officers of Switzerland (Konferenz der Betreibungs- und Konkursbeamten der Schweiz, Conférence des préposés aux poursuites et faillites de Suisse, Conferenza degli ufficiali di esecuzione e fallimenti della Svizzera)³;
- Association of Debt Enforcement and Bankruptcy officers and heads of debt collection division of the tax administration of the canton of Berne (Verband der Betreibungs- und Konkursbeamten sowie der Bereichsleiter Inkasso der Steuerverwaltung des Kantons Bern, Association des préposés aux poursuites et faillites et des chefs de section encaissement de l'intendance des impôts du canton de Bern)⁴;
- Association of administrators of Lucerne (Luzerner Sachwalterverband)⁵; and
- Association of Swiss debt collection fiduciary institutes (*Verband Schweizerischer Inkassotreuhandinstitute (vsi)*).⁶

The Swiss Turnaround Association (see Article 2 of its articles of association) promotes the interdisciplinary field of corporate restructuring and reorganisation both in and outside the context of insolvency and debt moratorium proceedings in Switzerland, and to promote national and international cooperation between the professionals working in this field. The Swiss Turnaround Association organises lectures and events, webinars, and publications. Furthermore, it aims to improve the economic and legal framework for corporate restructuring and reorganisation and advocates for international harmonisation of restructuring and reorganisation law. The Swiss Turnaround Association is open to various professionals with a connection to turnarounds and in particular, to restructuring advisers; bankers and investors; restructuring lawyers; certified public accountants and tax experts focusing on restructuring and insolvency; persons who act as administrators or bankruptcy trustees; judges and clerks serving in insolvency or composition courts; and professors and academics researching legal or business topics related to corporate restructuring and reorganisation (see Article 3 of its articles of association).

The Association for Debt Enforcement and Bankruptcy law promotes legal education and practice in the field of debt enforcement and bankruptcy law throughout Switzerland. It is the official addressee for the Swiss Federal Administration's consultation procedures. It organises an annual event and every two years it awards a prize for the best scientific work in the field of Swiss debt enforcement and bankruptcy law. The Association for Debt Enforcement and Bankruptcy law is also open to a broad range of professionals whose activities deal with such matters (see the website that is only available in German and French).

The Conference of Debt Enforcement and Bankruptcy officers of Switzerland aims to promote the uniform management and administration of the debt enforcement and bankruptcy offices in Switzerland. It publishes the journal *Gazette for Debt Enforcement and*

¹ <https://www.swiss-turnaround.ch>

² <http://www.schkg-vereinigung.ch>

³ <https://www.betreibung-konkurs.ch>

⁴ <https://www.schkg-be.ch>

⁵ <http://www.sachwalterverband.ch>

⁶ <https://inkassoverband.ch>

Bankruptcy and it fosters the professional education and training of its members. It consists of local associations of debt enforcement and bankruptcy officials, such as the Association of Debt Enforcement and Bankruptcy officers and heads of the debt collection division of the tax administration of the canton of Berne.

The Association of administrators of Lucerne is a cantonal association whose members act as court appointed administrators in bankruptcy and composition proceedings. In some of the other cantons, the courts may keep lists of such court appointed administrators.

The Association of Swiss debt collection fiduciary institutes fosters the debt collection system and related areas of law.

All of the above associations regularly promote and train the profession and as such have their individual training and development programs and events.

1.3 Obtaining information about an insolvency practitioner or a solution

There is no official list of (registered) IPs in Switzerland. A good starting point may be to reach out to one of the associations mentioned in paragraph 1.2 above. As in many other jurisdictions, IPs often receive their case work from a network of contacts, usually lawyers, accountants or financiers, who refer businesses and individuals to them for advice.

Information on the insolvency procedures, including template forms in German, French and Italian can be found on the above website of the Conference of Debt Enforcement and Bankruptcy officers of Switzerland, and the following website of the Federal Department of Justice.⁷ Moreover, primarily for individual insolvency, addresses of so-called debt counselling centres (*Schuldenberatungsstellen*) can be found on <http://www.schulden.ch>. Regarding corporate insolvency, the best approach generally is to also have a meeting with the IP to discuss the various options available to the director, debtor or creditor.

1.4 Lists of (qualified / certified) IPs

As mentioned in paragraph 1.3 above, there is no "official" list of (registered) IPs in Switzerland. However, a directory of members and contacts can be obtained through the relevant sector associations or the debt counselling centres.

2. Cross-border issues important to small practitioners

2.1 Information about available insolvency laws that apply to cross-border cases

In Switzerland there are six main sources of law regarding cross-border insolvency:

- Chapter 11 of the Swiss Federal Code on Private International Law (CPIL);
- Swiss Federal Code on Debt Enforcement and Bankruptcy (DEBA)⁸;
- Financial sector insolvency regulations;
- Swiss Code of Obligations (CO);
- Swiss Civil Code (CC); and

⁷ <https://www.bj.admin.ch/bj/de/home/wirtschaft/schkg.html>

⁸ See also the temporary regulations concerning COVID-19: Ordinance concerning insolvency law measures to combat the corona crisis (COVID-19 Insolvency law Ordinance) and Ordinance on the legal standstill in accordance with Article 62 DEBA concerning the travel industry.

- Swiss Criminal Code (CCrim).

2.1.1 Chapter 11 of the Swiss Federal Code on Private International Law (CPIL)

Since Switzerland is not a member state of the European Union, the European Regulation on Insolvency Proceedings Recast (2015/848) (European Insolvency Regulation) is not applicable here. Switzerland has also not adopted the United Nations Commission on International Trade Law (UNCITRAL)'s Model Law on Cross-Border Insolvency (Model Law). However, Switzerland has recently implemented its own cross-border insolvency regime which is based on the key elements of the Model Law.

On 1 January 2019, the revised law on cross-border insolvency – Chapter 11 of the Swiss Federal Code on Private International Law (CPIL) – entered into force in Switzerland⁹.

Chapter 11 of the CPIL deals with the recognition of foreign bankruptcy proceedings and composition agreements in Switzerland, as well as the international cooperation between the various domestic and foreign courts and other competent authorities in such matters.

When a debtor domiciled outside Switzerland becomes insolvent or financially distressed, a foreign insolvency judgment is generally without legal effect in Switzerland unless, and until, it has been formally recognised by a competent Swiss court. Absent such a recognition, creditors may still initiate enforcement measures against the assets of the debtor in Switzerland.

The recognition of foreign insolvency proceedings is not automatic. It requires an application to a local court to gain recognition and relief.

However, there are no reciprocity provisions in the CPIL and consequently, Swiss courts can recognise eligible foreign insolvency proceedings even if the foreign jurisdiction would not recognise proceedings commenced in Switzerland.

An enforceable foreign insolvency order is recognised in Switzerland upon application of the foreign trustee in bankruptcy; the debtor; or one of the creditors if it was issued in the state of domicile of the debtor, or in the state of the debtor's main interest (provided that the debtor did not have its domicile in Switzerland when the foreign proceedings were opened). The latter *caveat* is supposed to protect the justified expectations of Swiss creditors and the debtor.

The debtor's centre of main interest (COMI) is not defined in the CPIL. According to the message of the Swiss Federal Council, which refers to Article 3 paragraph 1 of the European Insolvency Regulation and the respective European case law (European Court of Justice (ECJ), C-341/04 (*Eurofood/Parmalat*); ECJ, C-396/09 (*Interedil*)), the COMI is understood as the place where the debtor conducts the administration of its interests on a regular basis, and which is ascertainable by third parties (message dated May 24, 2017, of the Swiss Federal Council concerning the revision of the Federal Code on Private International Law (Chapter 11: Bankruptcy and Composition Agreements), 4136). In other words, there is a rebuttable presumption that companies have their COMI in the place where their registered office is located. Unlike the European Insolvency Regulation, however, the revised CPIL and the corresponding message do not explicitly state that this presumption shall only apply if the registered office has not been moved within a certain period prior to the request for the opening of insolvency proceedings.

Unlike the former law, the revised CPIL provides that the opening of ancillary insolvency proceedings in Switzerland will no longer be mandatory in relation to the recognition of main

⁹ *INSOL International, New Cross-border Insolvency and Restructuring Law in Switzerland*, November 2018, Technical Series Issue No. 41

proceedings that were opened with respect to a debtor located outside of Switzerland. The Swiss court can decide not to open such ancillary proceedings if the statutory requirements are met. If conducting an ancillary bankruptcy proceeding is waived, the foreign IP may with due regard to Swiss law exercise all powers that it can exercise under the law of the state where the bankruptcy proceedings were opened; in particular, it may transfer assets abroad and file lawsuits. These powers do not include the carrying out of authoritative actions, the use of coercive means or the right to resolve disputes.

Regarding proceedings which are factually connected, the CPIL explicitly stipulates that the involved authorities and institutions may coordinate their actions among themselves and with respect to foreign authorities and institutions.

2.1.2 Swiss Federal Code on Debt Enforcement and Bankruptcy (DEBA)

Swiss formal restructuring and insolvency proceedings are mainly governed by the Swiss Federal Code on Debt Enforcement and Bankruptcy (DEBA).

DEBA regulates debt enforcement regarding claims in money (Article 89 *et seq* of the DEBA), including the enforcement of collaterals (Article 151 *et seq* of the DEBA) against individuals and legal entities. The enforcement of non-monetary obligations is governed by the Swiss Civil Procedure Code.

In relation to bankruptcy proceedings, Article 159 *et seq* of the DEBA provide for the liquidation of the debtor's estate and the distribution of the proceeds to its creditors.

In relation to composition proceedings, Article 293 *et seq* of the DEBA provide for the debtor to reach a restructuring agreement with its creditors. In accordance with these provisions, a debtor in financial distress can request a (provisional) moratorium and initiate composition proceedings by submitting a restructuring plan to the competent composition court.

2.1.3 Specific financial sector insolvency regulations

Special insolvency provisions apply to financial institutions. These are stipulated in the relevant sector legislation, being Article 28 *et seq* of the Banking Act; the Financial Market Supervisory Authority (FINMA) Banking Insolvency Ordinance; Article 51 *et seq* of the Swiss Insurance Supervision Act; FINMA Insurance Insolvency Ordinance; Article 36a of the Stock Exchange and Securities Trading Act; Article 88 *et seq* of the Financial Market Infrastructure Act; and Article 137 *et seq* of the Federal Act on Collective Investments.

2.1.4 Swiss Code of Obligations (CO)

The Swiss Code of Obligations (CO) provides for certain out-of-court restructuring measures regarding financially distressed debtors (Article 725 and 725a of the CO (in conjunction with Article 820 of the CO); and Article 732a of the CO)). Furthermore, it deals with director's liability claims (Article 754 of the CO (in conjunction with Article 827 of the CO)) as well as voluntary / solvent liquidations of companies (Article 736 of the CO (in conjunction with Article 826 of the CO)).

2.1.5 Swiss Civil Code (CC)

The Swiss Civil Code (CC) also provides for certain out-of-court restructuring measures regarding financially distressed foundations (Article 84a of the CC).

2.1.6 Swiss Criminal Code (CCrim)

Articles 158 and 163 *et seq* of the Swiss Criminal Code (CCrim) deal with criminal acts in relation to insolvency such as mismanagement, fraudulent bankruptcy and the disposition of

seized assets.

2.2 Enforcing claims in Switzerland, the procedure to follow and getting advice

Pursuant to Article 46 *et seq* of the Swiss Federal Code on Debt Enforcement and Bankruptcy (DEBA), subject to limited exceptions, the debt collection proceedings have to be initiated where the debtor has its domicile, that is, the debt collection request must be filed with the competent debt collection office where the debtor is domiciled.

The creditor must indicate his name and domicile as well as any authorised representative, if any, in the debt collection request to be submitted to the competent debt collection office. A foreign creditor must also choose and indicate a Swiss domicile. In the event of a lack of designation, it is assumed that this domicile is located at the premises of the debt collection office. In other words, the debt collection office will not send any communication and notification to the creditor abroad.

As a general rule, if the bankruptcy proceedings have been commenced against the debtor (Article 159 *et seq* of the DEBA), the creditors must submit their claims or entitlements together with evidence to the bankruptcy office within one month of the announcement of the creditors' call (Article 232 paragraph 2 number 2 of the DEBA). However, foreign creditors may be granted an extended deadline for the submissions of claims (Article 33 paragraph 2 of the DEBA).

Claims from foreign creditors will in general be treated in the same way as claims from creditors in Switzerland. However, Article 170 *et seq* of the Swiss Federal Code on Private International Law (CPIL) stipulate specific rules regarding concurrent foreign proceedings.

Apart from straightforward cases, it is generally recommended to seek advice from a Swiss IP when enforcing claims in Switzerland, since several formal requirements must be met in order to validly launch enforcement proceedings against a debtor domiciled in Switzerland.

For further information regarding the enforcement of foreign judgments, see the discussion in paragraph 6.3 below.

2.3 Key criteria to consider when tracing and recovering assets

If searching for an individual or company subject to debt collection or insolvency proceedings, the creditors or counterparties of an agreement may request an extract of the debt collection and bankruptcy register concerning the debtor. This register can be consulted by anyone showing a *prima facie* legitimate interest.¹⁰

Beyond that, the ability to trace assets in Switzerland is dependent on the nature of the asset.

Ownership of real property in Switzerland can be found by a search of the cantonal Land Registry. For example, the canton of Zurich.¹¹ Without having to prove any specific interest, any person can request information or an extract from the Land Registry regarding the name of the property and the description of the land; the name and identification of the owner; the form of ownership; the date of acquisition as well as the charges, mortgages and easements on the property (Article 26 paragraph 1 of the Land Registry Ordinance).

Ownership of motor vehicles is more difficult to establish, but if the registration mark is known then the registered keeper (not the owner) of a motor vehicle can be traced on the relevant

¹⁰ <https://www.easygov.swiss/easygov/#/en/landing/debt-enforcement-register-extract>

¹¹ <https://www.notariate.zh.ch/deu/grundbuch/auszugsbestellung>

websites of the cantons.¹²

The shareholders of limited liability companies (LLCs) can be traced through the Central Business Name Index.¹³ The shareholders of stock corporations are not published in the Commercial Registry and consequently not accessible through this link.

Intellectual property rights registered in the trademark, patent and design register can be traced by the intellectual property rights database of the Swiss Federal Institute of Intellectual Property.¹⁴

The Swiss aircraft registry contains the records of all Swiss-registered aircraft and provides detailed information regarding the aircraft and its owner and keeper.¹⁵

In addition, there is an unofficial testament register that records wills and other testamentary dispositions. However, the said register is not exhaustive and merely contains information which has been voluntarily provided.

For other types of assets there are some good investigators within IP practices that can assist in tracing assets.

Social media (for example, Facebook, LinkedIn, Instagram and Twitter) can be quite useful in helping to identify and locate individuals and assets.

When it comes to tracing assets that individuals wish to hide, earlier in 2020 Switzerland had still been ranked in the top three jurisdictions on the Financial Secrecy Index,¹⁶ meaning tracing can be quite difficult.

Once ownership of an asset has been established, domestic law (that is, the DEBA) can be used to obtain the seizure of the asset.

2.4 Rights and / or powers of foreign insolvency officers to act directly without any enforcement proceeding

A foreign insolvency officer will not be automatically recognised and will be required to apply for recognition pursuant to the rules outlined in paragraph 2.1.1 above. A foreign insolvency officer can apply to the Swiss courts for recognition of the foreign proceeding in which the officer is appointed.

In principle, the recognition of the order as a foreign insolvency decision would trigger the opening of Swiss bankruptcy proceedings in relation to the debtor's assets located in Switzerland. However, if no secured or preferred creditors file claims in the Swiss bankruptcy, the court may, on application, renounce to open bankruptcy proceedings over these assets. Pursuant to Article 174a paragraph 4 of the Swiss Federal Code on Private International Law (CPIL), the advantage of this would be that the foreign insolvency officer could in Switzerland act under express statutory authority to exercise all remedies that are available to the foreign officer under the law of the state where the insolvency proceedings were opened (except the use of compulsory measures). For instance, the powers of the foreign insolvency officer do not include the carrying out of authoritative actions, the use of coercive means or the right to resolve disputes. The corresponding message of the Swiss Federal Council (discussed in paragraph 2.1.1 above) refers to Article 21 paragraph 3 of the European Insolvency Regulation and explicitly states that subpoenas, for example, constitute

¹² <https://stva.zh.ch/internet/sicherheitsdirektion/stva/de/StVAfz/FZindex/FZeindex.html> / <https://www.eautoindex.ch>

¹³ <https://www.zefix.ch>

¹⁴ <https://www.swissreg.ch>

¹⁵ <https://app02.bazl.admin.ch/web/bazl/en/#/lfr/search>

¹⁶ <https://fsi.taxjustice.net/en/>

prohibited authoritative actions or coercive means.

Despite the fact that the foreign insolvency officer may under certain conditions and circumstances be able to exercise its powers directly, it is advisable to appoint a Swiss IP to deal with the matter in Switzerland in order to work towards a common goal.

2.5 State aid supported proceedings that foreign IPs may use

There are no State aid supported proceedings in Switzerland.

3. Marketing of small practices

3.1 Marketing strategies that are used by the practitioners

The traditional sources of work for IPs are assignments referred by other lawyers, accountants, and financial institutions.

With smaller firms, most referrals come from fellow accountancy and legal professionals whilst for larger firms of IPs, banks and other financial institutions are a major source of work. In addition to this, smaller IP practices will find it beneficial to network with larger firms as conflicts in taking insolvency appointments may arise for the larger firms. However, smaller IP practices may find themselves precluded from working on larger cases where a funder wishes to use a certain (larger) firm on its 'panel' to perform a piece of work.

The creditors in insolvency proceedings hold a significant influence over who deals with each insolvency and are a large source of work. Creditors are however often widely spread and not coordinated.

Marketing strategies are similar to the sale of other legal services (that is, brochures, newsletters, publication of papers, etcetera).

General advertising and advertorials in appropriate newspapers, journals (for example, sheets for debt collection and bankruptcy¹⁷ or Swiss magazine for civil proceedings and enforcement law¹⁸) and websites are used to promote brand awareness of the IP and show the skills available within the firm. Subject to the statutory limitations (see Article 12 *lit d* of the Swiss Attorney Act and the Federal law against unfair competition), more specific adverts and other forms of direct marketing may be used by IPs and their agents to attract work. Seeking to market a business by offering a commission to a work introducer is, however, strictly forbidden.

As most referrals come from fellow accountancy and legal professionals, networking is essential. Hence, IPs attend networking events organised by their firm, other professionals, those in the financial arena and other networking groups.

3.2 Raising and managing the cost of marketing

The cost of marketing is a business expense and as such it must be paid out of fees earned from insolvency assignments.

Many IPs will employ software to monitor the sources of their income and seek to manage their annual marketing spend accordingly.

¹⁷ <https://stutz-medien.ch/blschk>

¹⁸ <https://www.dike.ch/about-ZZZ>

3.3 Effective marketing tools

From experience it appears that the success of any marketing strategy comes from getting the right “mix” (including general advertising, internet, social media, brochures, newsletters, networking events, webinars, publication of papers etcetera) at the right time within the right network.

4. Financing options for small businesses

4.1 Specific financial options for smaller businesses

There are always viable options for smaller, profitable businesses to obtain financing. The finance may be accompanied by a personal guarantee, especially where the business is not as profitable as others.

In recent years access to finance from all sources has become more dependent on a borrower’s ability to repay borrowing as opposed to the value of the security behind the borrowing. Security is very often required, whether it be from the borrower or from management.

5. Remuneration of IPs

5.1 Available models to determine fees

In Switzerland, IPs’ fees are agreed by creditors on one of three bases, by reference to:

- hourly rates;
- a fixed fee; or
- a percentage of realisations.

However, regarding contingent fees, lawyers must abide by Article 12 *lit e* of the Swiss Attorney Act according to which they may not – before the end of a litigation – enter into an agreement with the client to share in the profits of the lawsuit as a surrogate of the fee. Lawyers may not undertake to waive the fee in the event of an unfavourable conclusion of the proceedings either.

In other words, there are very tight restrictions on contingency fees or similar arrangements. Contingency fees as such (*pactum de quota litis*) are prohibited. As regards a *pactum de palmario*, a lawyer is required to collect a fee that fully covers all his costs, plus a modest profit, irrespective of whether his client prevails. In the event of success, the total fee should not exceed double the amount of the minimum permissible fee. Furthermore, a lawyer is required to ask for successive payments as the matter proceeds and may not finance the litigation by working on credit.

The Fee Ordinance to the Federal Code on Debt Enforcement and Bankruptcy regulates the fees and compensation of the IPs who, in application of the law, carry out acts of enforcement and composition proceedings.

The fees of the IP are paid in accordance with the priority laid down in the Swiss Federal Code on Debt Enforcement and Bankruptcy (DEBA), which is after certain expenses and charges properly incurred, but prior to distributions to creditors.

In solvent liquidations, the IPs’ fees are determined by the shareholders.

6. Litigation and funding litigation

6.1 Funding causes of actions - best funders

In 2004, the Swiss Federal Supreme Court held that litigation funding by third-party funders is permissible in Switzerland if the funder acts independent of the client's lawyer (BGE 131 I 223, confirmed in BGer 2C_814/2014). Hence, litigation funding by a third-party funder is an accepted practice in Switzerland and is becoming increasingly popular these days.

A search of the internet will reveal that there are a number of insolvency litigation funders active in the Swiss market. Consequently, there is quite some competition in the Swiss market for litigation funding. While there are some domestic players, there is also plenty of activity by internationally active providers. Generally, a third-party funder would assume all costs of the litigation, including reasonable lawyer fees of the opposing party. In the case of a successful outcome, the funder takes a percentage and recovers the costs. The specific arrangements are, of course, subject to negotiation.

Nevertheless, the market in Switzerland is relatively small; there are no 'best funders' and it is generally advisable to approach a broker to explore the majority of the market.

6.2 Alternatives to litigation

In recent years there has been an increasing effort to encourage parties to engage in alternative dispute resolution (ADR). ADR has become a well-established term covering both arbitration and mediation and ADR is heavily encouraged by the courts. A number of IPs are registered mediators. A search of the internet will reveal those qualified as mediators. A mediator does not need to be qualified in insolvency to be appointed in an insolvency mediator.

Swiss courts have mandatory jurisdiction over other matters that involve economic interests, in particular declarations of bankruptcy; debt collection proceedings; (including the setting aside of a debtor's objection to a summons to pay (*mainlevée de l'opposition*; *Rechtsöffnung*; *rigetto dell'opposizione*)); and the issuance of attachment orders (*séquestre*; arrest; *sequestro*). These disputes cannot be subject to arbitration.

6.3 Enforcing judgments - local and foreign

A local judgment creditor may enforce a judgment or order for the payment of money by one or more of the following methods:

- submitting a debt collection request with the debt collection office;
- instigating bankruptcy or composition proceedings; and / or
- initiate attachment proceedings (*Arrest*, *Séquestre*).

There are a number of tools available to obtain recognition of a foreign judgment and these include:

- the Lugano Convention;
- bilateral treaties between Switzerland and various European states on the recognition and enforcement of judgments and arbitral awards;
- the New York Convention on the recognition and enforcement of foreign arbitral awards;

- recognition of an insolvency order in accordance with Chapter 11 of the Swiss Federal Code on Private International Law (CPIL); and
- enforcement in accordance with Article 25 *et seq* of the CPIL.

Switzerland entered into multiple conventions (for example, the Lugano Convention and the New York Convention) and bilateral treaties with other European states (for example, Austria, Italy, Spain, Czech Republic, Slovakia, Sweden, Belgium and Liechtenstein) regarding the recognition and enforcement of foreign judgments and arbitral awards.

In the absence of an applicable international treaty, the CPIL will apply in relation to the conditions of recognition and enforcement of foreign judgments.

Judgments that concern the course of bankruptcy proceedings and composition proceedings approved by a foreign court can be recognised under the conditions highlighted in paragraph 2.1.1. above.

According to Article 25 *et seq* of the CPIL, other foreign judgments are recognisable in Switzerland provided that:

- a. the foreign judiciary and administrative authorities who rendered the decision had jurisdiction;
- b. the decision is final or cannot be subject to any ordinary appeal; and
- c. there is no ground for denial of recognition as set out in Article 27 of the CPIL.

Pursuant to Article 27 of the CPIL, recognition of a foreign judgment is denied if it is contrary to Swiss public policy or if a party establishes that:

- a. it did not receive proper notice, under either the law of its domicile or that of its habitual residence, unless such party proceeded on the merits without reservation;
- b. the foreign judgment was rendered in breach of fundamental principles of the Swiss concept of procedural law, including the fact that the said party did not have an opportunity to present its defence; or
- c. a dispute between the same parties, with the same subject matter, is the subject of pending proceedings in Switzerland or has already been judged in Switzerland; or that it was judged previously in a third state, provided that the latter decision fulfils the conditions for its recognition.

As already mentioned in paragraph 2.1.2 above, with regard to the enforcement of (domestic or foreign) judgments, pecuniary debt is subject to the Swiss Federal Code on Debt Enforcement and Bankruptcy (DEBA), while specific performances are subject to Article 335 *et seq* of the Swiss Civil Procedure Code.

7. Licensing and regulation of IPs

7.1 Regulation of IPs

There are no specific regulations concerning IPs in Switzerland. The responsibility for monitoring IPs lies with the relevant cantonal Supervisory Commissions for Attorneys-at-Law.¹⁹ Accountants are generally overseen by EXPERTsuisse, the specialist association for

¹⁹ <https://www.gerichte-zh.ch/organisation/obergericht/kommissionen/aufsichtskommission-ueber-rechtsanwaelte.html>

auditing, taxes and fiduciary experts²⁰, as well the Federal Audit Oversight Authority (FAOA).²¹ In other words, there are no particular governmental oversight bodies for IPs and the task is conducted by the respective supervisory authorities of each profession.

In addition, the private associations mentioned in paragraph 1.2 above maintain standards within their membership and they regularly conduct relevant training.

7.2 Who can become an IP or which professionals regularly work as IPs?

Generally anyone can become an IP in Switzerland since there are no specific licenses, certifications or qualifications. The majority of IPs are lawyers. Others have an accountancy background or have trained 'on the job'.

7.3 Type of work that is carried out by IPs

The following tasks and / or roles are generally carried out or fulfilled by Swiss IPs:

- debt collection;
- monitoring, administration and liquidation of insolvent debtors;
- trustee in bankruptcy;
- administrator (*Sachwalter, Commissaire*);
- recognition of foreign insolvency decrees and representation of foreign bankruptcy trustees and receivers;
- special administration of the estate of a bankrupt company;
- representation of creditors during moratorium, composition and bankruptcy proceedings; including the preparation, filing and enforcement of creditor claims;
- bankruptcy-related litigation, such as actions to contest schedules of claims and clawback actions;
- monitoring and administration of a company under moratorium or in composition proceedings;
- freezing orders and other provisional measures;
- enforcement of foreign judgments and arbitral awards; and
- liquidator in both solvent and insolvent liquidations (voluntary liquidation and compulsory liquidation).

IPs are also consulted on informal out-of-court restructuring procedures as the skills used in formal procedures are directly transferable.

7.4 Appointment of an IP

In most cases the debtor or company is referred to a specific IP either by their lawyer,

²⁰ <https://www.expertsuisse.ch>

²¹ <https://www.rab-asr.ch>

accountant, or financier. Depending on the process involved, IPs are usually appointed as follows:

Proceeding	Initial appointment by	Who is appointed
Bankruptcy	Creditors' meeting	Bankruptcy trustee (<i>Konkursverwaltung, administration de la faillite</i>)
Composition	Court	Administrator (<i>Sachwalter, Commissaire</i>)
Composition with assignment of assets to the creditors	Creditors' meeting	Liquidator (<i>Liquidator, Liquidateur</i>)
Liquidation – voluntary	Shareholders	Liquidator (<i>Liquidator, Liquidateur</i>)

8. Compliance issues

8.1 Tax requirements relevant to smaller practices

IPs usually practice either as sole traders, in partnership, as limited liability companies (LLCs) or as stock corporations. As such, they are subject to the common tax requirements of each type of legal entity, and required to submit profit tax returns and accounts on an annual basis. Those with a turnover of more than CHF 100'000 per annum must register for, and charge VAT.

8.2 Money laundering and financial crime

IPs must comply with the money laundering regulations of Switzerland and must not only verify the identity of their clients, directors and debtors, but also report any suspicions of money laundering to the appropriate authorities. Regulation of money laundering in Switzerland is based on two pillars. Firstly, the Federal Act on Combating Money Laundering and Terrorist Financing and the corresponding Anti-Money Laundering Ordinance require IPs to comply with due diligence and disclosure requirements. Secondly, money laundering constitutes a criminal offence in accordance with Article 305*bis* of the Swiss Criminal Code (CCrim).

8.3 The right to access information

The Bankruptcy Office publishes the bankruptcy notice in the Official Gazette and invites creditors to come forward and assert their claims within one month of the notice. In ordinary bankruptcy proceedings, creditors' meetings are convened at which creditors can closely monitor and examine the course of the bankruptcy proceedings.

Where there is a creditors' committee, members of the committee are entitled to access slightly more information than a general creditor. No creditor has a right to inspect the IP's working paper files.

8.4 Corporate governance

As mentioned above, IPs can use any number of business entities to trade and the governance structure will apply as appropriate. Some IPs will be employees and not owners or controllers of the business entity and therefore have no control or oversight of governance.

Irrespective of the position or level of control of IPs over any business, IPs should ensure that they are mindful of governance and influence it as much as possible, as any appointment of an IP is in his / her personal capacity. It is the IP's responsibility to ensure that their cases are handled within the parameters of the laws and regulations under which

the insolvency operates. It is, however, harder for IPs to influence governance where they are not the owner or controller of the business within which they operate.

8.5 Regulatory authorities

The regulation of IPs is discussed in paragraphs 1 and 7 above.

8.6 Disciplinary matters and the complaints systems in operation

Pursuant to Article 17 *et seq* of the Swiss Federal Code on Debt Enforcement and Bankruptcy (DEBA), and with the exception of cases in which the law stipulates that legal action may be taken in court, in ongoing proceedings any order issued by a debt enforcement or bankruptcy office; a bankruptcy trustee; or a composition administrator or liquidator; may be appealed to the supervisory authority in the case of a violation of the law or inadequacy.

In addition, parties may file disciplinary complaints against IPs with the supervisory authorities of the relevant profession (for example, the bar commission).

9. Best practices

9.1 Client money rules

There must be a clear separation of client money and firm money. Funds for each appointment must be kept separately – either in a separate bank account, or separate sub account with a bank that operates a global client account and is able to provide the required undertaking regarding the separation of funds.

9.2 IT security

IPs are no different to many businesses and must operate a sensible IT policy including unique passwords; strict controls over external access to systems; restrictions on internet access; segregation of duties; multiple / daily backups; disaster recovery plans; and encryption of portable devices.

9.3 Licensing requirements

As explained in paragraph 7.2 above, IPs do not need to be authorised to act as such by any Swiss governmental authorities. The use of the term “Licensed Insolvency Practitioner” is not protected in law and anyone can call themselves this, although they may be liable for false advertising or negligence in cases of dishonesty or taking appointments without possessing the necessary skill set. Anyone seeking a properly qualified IP should therefore verify the prospective IPs background and credentials.

9.4 Insider dealing

It is a criminal offence to become involved in insider dealing. Such bad practice will be sanctioned in accordance with the Swiss Financial Market Infrastructure Act.

9.5 Codes of Ethics

There is no specific insolvency code of ethics for IPs in Switzerland. However, the IPs are required to comply with the applicable ethics codes of the relevant professions, such as the Rules of Professional Conduct for lawyers and accountants.

9.6 Time management for IPs

IPs must ensure that they make the most effective use of their resources and that cases are dealt with by the most appropriate grade of staff. It is particularly important to ensure that remuneration is charged based on time properly spent as it will be subject to the review of the meeting of creditors.



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INSOL International™

6-7 Queen Street, London, EC4N 1SP
Tel: +44 (0)20 7248 3333 Fax: +44 (0)20 7248 3384

www.insol.org