Insolvency and Restructuring
Switzerland

Continuing with our focus on the issues surrounding insolvency and restructuring, *Lawyer Monthly* speaks to Daniel Hayek, a member of the management committee of Prager Dreifuss Ltd. Prager Dreifuss is an integrated law firm in Switzerland with a strong international focus, some 40 lawyers, and offices in Zurich, Berne and Brussels.

Please introduce yourself, your role and your firm.

As the head of Prager Dreifuss' "Corporate and M&A" team I am specialized in mergers and acquisitions (mainly strategic buyers), corporate finance, banking, restructuring and bankruptcy proceedings as well as general corporate matters. My team and I advise business clients in all types of domestic and cross-border transactions and we represent creditors, some of which are banks, hedge funds or other financial institutions, in insolvency and restructuring proceedings. In these fields I also represent clients in court and before arbitrational tribunals.

Our firm is committed to understand the client's business and our services are individually tailored to and focused on our client's needs. Our many years of experience enable us to cut through complexity and select the right strategy for our clients. We have a lean and efficient structure, strong and diverse teams specialised in all major areas of commercial law, active ties to authorities, Swiss universities and academia and long standing working relationships with leading counsels in all major jurisdictions.

The restructuring and insolvency market has evolved radically over the last few years. How have you seen the market change recently in your jurisdiction?

Switzerland was shaken by the insolvency of its national airline Swissair in 2001, which led to the largest insolvency proceedings in Swiss history. Consequently, litigation concerning aircraft lease agreements became a major issue. Recently, due to the financial crisis banks and financial institutions find themselves in the public eye. Numerous syndicated loans and over-the-counter derivatives contracts lapsed due to early termination provisions because of the insolvency of their counterparty or parent companies that originally provided guarantees to their affiliates. As a consequence of the meltdown in 2008, bankruptcy litigation in Switzerland became more finance-based. A notable trend throughout most recent bankruptcy proceedings is the increased use of preference claims by bankruptcy administrators. Considerable amounts that debtors paid out shortly before they became bankrupt have successfully been claimed back by bankruptcy administrators by means of clawback actions. The various directors' liabilities claims that also have been initiated by the bankruptcy administrators have enjoyed lesser degrees of success.

What do you think are the advantages and disadvantages of a restructuring programme as opposed to insolvency?

In both proceedings, be it a restructuring or an insolvency, creditors are faced with the threat that they have to renounce a certain part of their claim. However, a characteristic difference is that within a private restructuring programme all creditors, and not only the majority like for example within a debt restructuring moratorium, must agree on such proceedings. Once consent regarding the private restructuring is reached, a further advantage is that the parties can proceed faster and do not need to adhere to directions imposed by a bankruptcy administrator but only to the conditions they negotiated. A board of directors must be aware though, that in order to avoid directors' liability claims

they need to proceed with private restructuring measures within six weeks after the balance sheet shows negative equity. Also, if an agreement to restructure is not reached after all, it is still possible to file either for a debt restructuring moratorium or insolvency. It must then be considered that the value of a company's assets will in most cases be higher when valued on a going concern rather than when applying liquidation values.

What legal challenges and complexities arise when dealing with insolvency and restructuring in your jurisdiction? How can you assist clients in navigating/solving these challenges and complexities?

Switzerland, as one of the major financial hubs worldwide, is home to many internationally operating companies and their subsidiaries. The increased difficulties experienced by corporations when seeking financing in the wake of the financial crisis has led to quite some of these firms facing financial difficulties that have resulted, if not in insolvency, in restructuring processes. Today's interdependences within corporate groups, for example by means of the granting of guarantees from the parent company to an affiliate or through the distribution of intercompany-loans, such insolvency or restructuring proceedings inevitably lead to highly complex cross-border cases demanding smooth cooperation and coordination between law firms as well as with bankruptcy administrators from all the different jurisdictions.

From a legal point of view, the coming-into-effect of the new unified Swiss Code of Civil Procedure (CCP) in January 2011 may in itself present a challenge. The new procedural laws have a significant impact on bankruptcy proceedings. Since only a few court decisions regarding bankruptcy litigation cases have been decided under the new CCP, there remains uncertainty on the interpretation of various new provisions. Actions to contest the schedule of claims for example are no longer dealt with in the special accelerated proceedings, but the ordinary procedural rules for commercial litigation apply. To institute litigation, a plaintiff must now file a full statement of claim within the brief non-extendable deadline of 20 days after the schedule of claims was published and can no longer only submit a first summary brief as required under most of the previous cantonal procedural laws. While this short deadline seems appropriate in small bankruptcy litigation cases, it poses serious challenges when it comes to complex cross-border litigation. Parties can limit their risks by starting to prepare litigation in good time before the schedule of claims is expected and by seeking the dialogue with the bankruptcy administrators in order to understand what position they tend to take regarding the admittance of a certain claim.

Another complexity that must be taken into account is that with regard to the amounts of distribution unsecured third class creditors might be confronted with uncertainties. They might be confronted with estimates on expected third class dividends, given by bankruptcy administrators, that can easily range to a maximum that constitutes the quadruple of the lowest estimate. This complicates the litigation risk assessment of the parties, in particular since the amount in dispute forms the basis for the levying of security for court and party fees.

What must be kept in mind furthermore is that in July 2013 the two chambers of the Swiss Parliament have decided to amend certain rules within the Federal Statute on Debt Enforcement and Bankruptcy. If no referendum against these planned amendments is initiated by October 2013, they will enter into force, very likely already in January 2014. In that case, some considerable changes will come about such as a reversal of the burden of proof if a preference claim is initiated due to a donation the debtor has made or because of a legal act the debtor has contracted shortly before he fell into bankruptcy: It is intended that close third parties, such as related companies, that allegedly profited from the contested action will need to substantiate that they have not received any advantages.

Can you talk about any recent cases you have been involved in?

We have recently been involved in large insolvency cases such as the already mentioned insolvency proceedings of Swissair. Within this case the litigation was and still is primarily concerned with aircraft leasing agreements and directors liability claims. Other bankruptcy cases we have worked on are the ones of Petroplus and Lehman Brothers. Litigation that I have been involved in was based on agreements to finance or hedge assets of the debtor. Amongst others, we have been involved in claims to contest the schedule of claims amounting to sums of several hundred million dollars due to terminated aircraft leasing contracts, terminated and failed syndicated loans and over-the-counter derivatives contracts based on ISDA Master Agreements. **LM**

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