THE INSOLVENCY REVIEW

NINTH EDITION

Editor
Donald S Bernstein

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Donald S Bernstein

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PREFACE

As with prior editions of *The Insolvency Review*, this ninth edition includes in-depth information regarding current market conditions and insolvency case developments in a number of countries. Because of the ongoing covid-19 pandemic, we owe more than the usual debt of gratitude to the outstanding professionals around the globe who annually dedicate their time and talents to this book. Their contributions reflect the diversity of their respective national commercial cultures and laws, and, for the past two years, the disparate impact of covid-19 around the world.

I had hoped that by this time we would have greater visibility into the impact of the pandemic on national economies, but while we know more today than we did last year and have vaccines that seem to be effective against the viral variants to date, countries have faced repeated setbacks due to the evolution of the virus, limited access to vaccines in some places and resistance to vaccination and mitigation measures in others. As a result, the adverse impact of the pandemic on the health and livelihoods of so many around the world continues.

This adverse impact has of course been blunted by fiscal stimulus, payment moratoria and the temporary suspension of director liability for ongoing trading in a number of countries, and insolvency activity in many countries has consequently been lower than expected. However, as time goes on the financial stresses temporarily suppressed by economic relief measures continue to build, and concern grows over what will happen when relief measures expire. This has led to repeated extensions of relief measures in a number of countries despite the recognition that these measures cannot remain in place forever.

It seems senseless for there to be mass evictions of residential and business tenants and the failure of numerous businesses – especially small and medium-sized businesses that were viable before the pandemic – when temporary relief measures expire. The question is whether there is a way to mitigate the longer term economic impact of the pandemic so tenants and businesses can survive the crisis and be restored to financial health, thereby preserving their income-generating capacity and jobs. Some have suggested that solutions like permanent relief from pandemic-related rent arrears and the creation of 'emergency restructuring entities' to facilitate business restructurings and channel public and private funds to viable businesses should be considered.

The economic costs of the pandemic will have to be borne by consumers, investors, employees or taxpayers. The policy question is whether these costs can be minimised and made more sufferable by creating mechanisms that spread their absorption in a more orderly and equitable way.

As I do each year, I want to thank the contributors to this book for their efforts to make *The Insolvency Review* a valuable resource. As each of our authors knows, this book is a challenging undertaking every year, and is particularly so during the pandemic. We have far

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less visibility into what is really going on in the global economy and where things are headed. Nevertheless, my hope is that this year's volume will help all of us, authors and readers alike, reflect on the larger picture, keep our eye on likely, as well as necessary, developments and point to better ways to address the adverse financial impact of the current crisis.

Donald S Bernstein
Davis Polk & Wardwell LLP
New York, USA
September 2021

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Chapter 19

SWITZERLAND

Daniel Hayek and Mark Meili[1]

I INSOLVENCY LAW, POLICY AND PROCEDURE

i Statutory framework and substantive law

Swiss restructuring and insolvency proceedings are mainly governed by the Swiss Debt Enforcement and Bankruptcy Law (DEBA), which entered into force in 1892.[2] A number of other laws and ordinances further regulate special aspects of restructuring and insolvency proceedings, such as specific provisions relating to the nature of the debtor (e.g., financial institutions).

The recognition of foreign restructuring and insolvency proceedings is governed by the Swiss Private International Law (PILA), which entered into force in 1989.

The DEBA provides for two main types of insolvency proceedings against corporate debtors:

a bankruptcy proceedings pursuant to Article 197 et seq., aimed at the full liquidation of the debtor's assets and the debtor's dissolution by realising the entire estate and distributing the proceeds proportionately to all creditors; and

b composition proceedings pursuant to Article 293 et seq., aimed at enabling the debtor to reach a restructuring agreement with its creditors.

The Swiss Code of Obligations (SCO), which entered into force in 1912, provides for in-court and out-of-court measures supporting the restructuring of a financially distressed debtor, for example, by way of the corporate law moratorium for over-indebted companies pursuant to Article 725a of the SCO. Further, the SCO requires immediate implementation of restructuring measures, when a company's financial statement shows that half of the share capital and statutory reserves are no longer covered by the company's assets, pursuant to Article 725, Paragraph 1 thereof.[3]

ii Policy

The collapse of Switzerland's national airline, Swissair, in 2001 sparked a public debate about the need to amend Swiss insolvency laws. There was wide criticism that the DEBA failed to deal effectively with the restructuring of financially distressed companies and

1 Daniel Hayek is a partner and Mark Meili is a counsel at Prager Dreifuss AG.

2 The most recent revision of the Swiss Debt Enforcement and Bankruptcy Law [DEBA] entered into force in January 2014.

3 Failing to implement these measures promptly may open up the directors to liability suits, in line with Article 754, Paragraph 1 of the Swiss Code of Obligations [SCO]. See also Section I.viii.

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with insolvencies of large group companies, resulting in the vast majority of restructuring processes ending in liquidation rather than in survival of the companies. Subsequently, the DEBA provisions were discussed in Parliament, and the revised DEBA entered into force on 1 January 2014. The primary objective of the revision was to promote the restructuring of companies over liquidation.

Inspired by the US Bankruptcy Code's Chapter 11 procedure, the revised DEBA facilitates companies' access to protection under a moratorium for mere restructuring purposes. The rules governing the moratorium thus create incentives to apply for a provisional moratorium in a timely manner. Companies shall have enough time to adopt restructuring measures without the public being aware of their financial difficulties. Changes in employment law in relation to business takeovers should further facilitate the process. In addition, the provisions on terminating long-term agreements were revised. Since 2014, a debtor can extraordinarily terminate long-term agreements, other than employment agreements, in composition proceedings.[4] Thus, debtors can now free themselves from long-term commitments, which may jeopardise the financial stability of the entire company. However, we have yet to see any increase in restructurings leading to company survivals under the revised DEBA.

iii Insolvency procedures

Bankruptcy proceedings

Once a debtor is declared bankrupt by the competent court,[5] all the debtor's creditors take part in the bankruptcy proceedings.

The aim of the proceedings is to satisfy all the creditors in proportion to their claims against the debtor. This requires the full liquidation of the debtor's estate, including all assets and liabilities. During the bankruptcy proceedings, the debtor remains the beneficial owner of its estate until the estate is realised. However, the debtor loses the right to dispose over its assets. This right is transferred to the bankruptcy estate, which exercises it through the bankruptcy administration.

As a first step, the bankruptcy office prepares an inventory listing all the debtor's assets. If that inventory shows that the proceeds from the assets will cover the costs of bankruptcy proceedings, the bankruptcy office will commence ordinary bankruptcy proceedings. Otherwise, the bankruptcy office will initiate summary proceedings, which generally do not entail creditors' meetings.[6]

Subsequently, the bankruptcy office publicly announces the opening of bankruptcy proceedings against the debtor and summons the creditors to file their claims within one month, whereby the filing deadline is extended for foreign creditors.

The first creditors' meeting should be held within 20 days of the public announcement of the bankruptcy proceedings against the debtor. The purpose of this meeting is to decide

4 The right to termination by the debtor exists only during the moratorium and only if refraining from terminating the long-term agreement would make the restructuring aim impossible and the liquidator has consented to the termination.

5 In Switzerland, insolvencies are handled by insolvency courts, which are a special section at the district court in most cantons. Therefore, district court judges, in certain cantons single judges, may have to deal with complex finance-based insolvency litigation without having the same level of expertise as commercial courts.

6 The subsequent remarks about Swiss bankruptcy proceedings relate to ordinary bankruptcy proceedings.

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on organisational issues, such as appointing either the public bankruptcy office or a private bankruptcy administrator as the administrator of the estate. It further decides on urgent administrative action, such as the continuation of the debtor's business activities.

The first creditors' meeting may elect a creditors' committee, which, among other things, is generally in charge of supervising the bankruptcy administrator, deciding on the continuation of business operations, and authorising the continuation of court proceedings and the conclusion of settlement agreements. The meeting requires a quorum of at least 25 per cent of the known creditors, or at least 50 per cent of the creditors if there are four or fewer known creditors. Decisions in the first creditors' meetings are reached by an absolute majority of the represented votes.

The bankruptcy administrator administers the bankruptcy estate's assets and decides on the admission of filed bankruptcy claims in the schedule of claims, as well as the extent and the class in which the claims are admitted. The schedule of claims is open for inspection at the bankruptcy office and can be contested before the competent court by way of a statement of claim within 20 days. Creditors may contest either that their claims were rejected, that their claims were not admitted in the filed amount or that their claims rank in the wrong class of claims. A distinct feature of Swiss insolvency proceedings is that a creditor may also contest the admittance (regarding admitted amount or class of claim) of another creditor's claim, which – if successful – results in a negative declaratory judgment. If this negative collocation suit action is successful, the amount by which the defendant's share of the bankruptcy estate is reduced is used to satisfy the claimant's full claim, including legal fees. Any surplus is distributed among the creditors according to the rectified schedule of claims.

The second creditors' meeting is entrusted with passing further resolutions, in particular, a decision about the realisation of the debtor's assets. The bankruptcy administrator will realise the assets by way of public auction, private sale or assignment of claims to a creditor.

The proceeds resulting from the realisation of the debtor's estate are then used to satisfy the bankruptcy claims. Distribution of the proceeds to the creditors follows the principle of equal treatment. However, certain creditor claims are privileged and are satisfied prior to other claims.

Claims by pledgees are satisfied before the three other classes of claim under the DEBA. If the proceeds exceed the claims of the pledgees, the surplus is used to cover claims that are not asset-backed. These unsecured claims are divided into three creditor classes. The creditors in a subsequent class will only be satisfied if and to the extent the creditors of the previous class have received full coverage of their claims. If the proceeds from the realised assets do not fully suffice to cover all claims in one class, the proceeds are distributed to the creditors on a pro rata basis according to the amounts of the claims (the bankruptcy dividends). The first class of creditors mainly comprises claims arising from employment relationships with the debtor, accrued within the six months prior to the opening of the bankruptcy proceedings. The second class of claims encompasses claims from social security, health and unemployment institutions. All other types of claims against the debtor accrued before the opening of the bankruptcy proceedings fall into the third creditor class.

After the distribution of the bankruptcy estate among the creditors, the bankruptcy administration files a concluding report to the bankruptcy court. If the court finds the bankruptcy proceedings to have been fully completed, it declares the proceedings closed.

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Bankruptcy proceedings necessarily lead to the dissolution of a bankrupt corporation. During the proceedings, 'in liquidation' is added to the company name in the register of commerce. Upon conclusion of the bankruptcy proceedings, the company is deleted from the register of commerce, whereby it ceases to exist legally.

Composition proceedings

The main aims of composition proceedings are to protect a debtor from bankruptcy proceedings and to alleviate financial distress. At the end of the composition proceedings, the debtor should reach a composition agreement with its creditors, which either provides for a genuine restructuring of the debtor (*Prozentvergleich, Dividendenvergleich*) or for the (partial) realisation of the debtor's assets outside of bankruptcy proceedings (*Nachlassvertrag mit Vermögensabtretung, Liquidationsvergleich*). Both types of composition agreements can be achieved either with the assistance of a court or extrajudicially.

Out-of-court composition agreements are based on private transactions, which the debtor concludes with each creditor individually, whereas judicial composition agreements are the result of proceedings regulated by law, by which the debtor can settle its debts with the approval of a majority of its creditors with judicial assistance. Such an agreement then has a binding effect on all the debtor's creditors.

Composition proceedings begin with a provisional composition moratorium, pursuant to Article 293a et seq. of the DEBA, of up to four months, granted by the composition judge upon request of the debtor, a creditor or upon transfer from a bankruptcy court to which the debtor or a creditor submitted a proposal for a composition agreement. The composition court appoints a composition administrator to assess the prospects of restructuring or approval of the composition agreement. If such prospects exist, the composition court will grant a definitive composition moratorium of an additional four to six months, pursuant to Article 294 et seq. of the DEBA. In particularly complex cases, the moratorium may be extended to up to 24 months. In the absence of any prospect of a restructuring or approval of the composition agreement, the composition court will open bankruptcy proceedings *ex officio*.

Upon granting of the definitive composition moratorium, the court appoints a composition administrator (known as a Sachwalter). In contrast to bankruptcy proceedings, the right to disposal of the debtor's assets remains – with some limitations – with the debtor. The debtor's daily business runs under the supervision of a court-appointed composition administrator. The composition court will also appoint a creditors' committee when necessary. The disposal of certain assets by the debtor may require the approval of the composition judge or the creditors' committee.

The provisional and the definitive composition moratoriums protect the debtor from further financial distress, insofar as no enforcement proceedings may be initiated or continued during the moratoriums.

There are two principal types of judicial composition agreements:

a a dividend agreement pursuant to Article 314 et seq. of the DEBA, the aim of which is payment of a certain percentile of the claims and a waiver of the residual amounts. This allows the debtor to eventually resume its business operations and regain the right to fully dispose of its assets; and

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b an agreement with assignment of the assets to the creditors pursuant to Article 317 et seq. of the DEBA,[7] whereby the debtor assigns its assets fully or partially to the creditors, and a court-appointed and creditor-elected liquidator realises the assets.[8] As opposed to bankruptcy proceedings, composition proceedings allow for more flexibility in realising the assets. The proceeds of the realisation are distributed among the creditors in proportion to the amounts of their filed claims and in accordance with the hierarchy of claim classes set out by the DEBA. To this end, the appointed administrator prepares a schedule of claims that can be contested by creditors as in bankruptcy proceedings. If all the debtor's assets are assigned to its creditors, the composition agreement leads to the dissolution and liquidation of the debtor.

Both types of judicial composition agreements require approval by a majority of the creditors and the composition court.

The revised DEBA is focused on facilitating access to restructuring procedures by, inter alia, granting more time for moratoriums (four months, which can be extended by another four months, so a total of eight months, instead of two months previously) and allowing a distressed company to sell parts of its business to generate funds, subject to the approval of the composition judge or the creditors' committee.

Corporate law moratorium

A corporate law moratorium is an additional measure provided for in Article 725a of the SCO, the aim of which is to enable a distressed debtor to restructure.

The board of directors of a company is legally obliged to request the opening of bankruptcy proceedings when the financial statement shows that creditor's claims are no longer covered by the debtor's assets, neither on a going-concern nor on a liquidation-value basis and the corporation is, therefore, over-indebted, pursuant to Article 725, Paragraph 2 of the SCO.[9] The court may stay the opening of bankruptcy proceedings if restructuring is a possibility and may order measures to preserve the company's assets. To this end, the court can appoint an administrative receiver and define his or her duties. A corporate law moratorium is only published publicly, which is necessary to protect third-party interests.

It is notable that the SCO provides for an exception to the board of directors' duty to notify the court of any over-indebtedness: if certain creditors subordinate their claims to those of all other company creditors to the extent of the capital deficit, the board is exempt from its obligation to notify the court.[10]

7 Notable examples of composition proceedings with assignment of the assets are SAirGroup AG, Swissair Schweizerische Luftverkehr AG,Petroplus Marketing AG and Unifina Holding.

8 The liquidation may take several years. This may affect the assets of the estate as negative interests may incur, thereby reducing the creditors' returns. Therefore, settlements have become even more important for creditors. See Section III for an example of such a settlement.

9 Members of the board may be held liable if they fail to act accordingly, under Article 754, Paragraph 1 of the SCO.

10 It should also be noted that covid-19 credits provided for by the Swiss Federal Council as liquidity measures of less than 0.5 million Swiss francs are not to be taken into account as debt for the calculation of over-indebtedness up to 31 March 2022. This exception does not apply to covid-19 credits over 0.5 million Swiss francs.

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Ancillary insolvency proceedings

Recognition of foreign insolvency proceedings and foreign arrangements with creditors are dealt with in the PILA.[11]

iv Starting proceedings

Bankruptcy proceedings

The right to request the opening of bankruptcy proceedings is available to several parties, while the right to officially open bankruptcy proceedings is reserved for the bankruptcy court.

A creditor may file a request to open proceedings if:

a it has either fully enforced its claims in debt collection proceedings and remains in possession of a claim against the debtor; or

b other reasons justify the immediate opening of bankruptcy proceedings against a debtor (i.e., without prior debt collection proceedings), such as fraudulent behaviour or cessation of payments by the debtor.

A debtor has the right to request the opening of bankruptcy proceedings if it is insolvent and there are no prospects of reaching a private settlement of debts. A board of directors is legally obliged to request the opening of bankruptcy proceedings against an over-indebted company.

Last, bankruptcy proceedings can also be opened *ex officio* by courts, for example, in cases of organisational deficiencies of companies. In the event that a composition agreement cannot be agreed by creditors, the composition court will open the bankruptcy proceedings.

Composition proceedings

Composition proceedings are often initiated by a debtor by supplying the court with financial statements, profit and loss statements and a provisional restructuring plan. Composition proceedings can temporarily protect the debtor from further debt enforcement proceedings being initiated against it and can enable it to restructure its business. Certain creditors may also request composition proceedings.

Both the debtor and the creditors may always request composition proceedings in ongoing bankruptcy proceedings and even the bankruptcy court may stay ongoing bankruptcy proceedings if there are sufficient indications of a successful conclusion of a composition agreement.

Corporate law moratorium

The bankruptcy court may stay bankruptcy proceedings against an over-indebted corporation upon request of the board of directors or of a creditor, when there is the likelihood of a successful restructuring.

v Control of insolvency proceedings

Bankruptcy proceedings

As has been stated, a debtor loses the right to disposal of its assets once bankruptcy proceedings have been opened against it. This right is assumed by the bankruptcy administrator, who will be either a state administrator or an elected private administrator. The bankruptcy administrator

11 See Section I.vii.

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is legally obliged to preserve and realise the bankruptcy estate. Certain important rights remain with the creditors, such as appointing and confirming the bankruptcy administrator and deciding how to realise the estate's assets. Additionally, the creditors may appoint a creditors' committee at the first creditors' meeting.[12]

Composition proceedings

The composition court will appoint a provisional composition administrator for the provisional composition moratorium period and a definitive composition administrator, once the definitive composition moratorium has been granted. The administrator is entrusted with several tasks by the DEBA, including overseeing the debtor's day-to-day business and drafting a composition agreement. The composition court can appoint a creditors' committee, which supervises the administrator. The right to dispose of the debtor's assets and conduct day-to-day business generally remains with the debtor.

Creditors have few controlling rights in composition proceedings. Their main right is the approval of the composition agreement by double majority. In composition proceedings with assignment of assets, the creditors can also determine the liquidators, and the number and the members of the creditors' committee.

Corporate law moratorium

A court may stay bankruptcy proceedings against an over-indebted company, in the event of prospects of restructuring, pursuant to Article 725a of the SCO. The court will take measures to preserve a debtor's assets while the right to dispose of assets remains with the debtor. The SCO gives the court much discretion on how to achieve this. It may appoint an administrative receiver and deprive the board of directors of its power of disposal or make the board's resolutions conditional on the consent of the administrative receiver.

Creditors have no specific rights in a corporate law moratorium; they may not even be aware of an ongoing moratorium, as public notification is not always necessary.

vi Special regimes

Swiss law provides for special bankruptcy and restructuring rules for specific debtors. The most notable special regime deals with the insolvency of banks, security dealers and mortgage bond institutions.

The regime is governed by the Swiss Federal Banking Act of 1934 and the Ordinance of the Swiss Financial Market Supervisory Authority on the Insolvency of Banks and Securities Dealers of 2012. The competent authorities for managing the proceedings are not state courts, but the Financial Market Supervisory Authority (FINMA). The privileged second-class claims are further expanded to bank deposits with the bankrupt bank in the maximum amount of 100,000 Swiss francs, as opposed to including only social security claims in ordinary bankruptcy proceedings.

The aforementioned legal provisions in the Ordinance on the Insolvency of Banks and Securities Dealers provide for a completely autonomous restructuring procedure according to the procedure set out in the DEBA. Notably, FINMA has the authority to transfer assets located in Switzerland to a foreign bankruptcy estate when bankruptcy proceedings have

12 See Section I.iii.

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been opened against a foreign bank or other financial institution, without opening Swiss ancillary proceedings. This stands in contrast to the ordinary treatment of foreign bankruptcy proceedings in Switzerland, which are further outlined below.[13]

Compared to a creditor's rights in ordinary bankruptcy proceedings, creditors have limited rights in proceedings governed by FINMA. In particular, they have limited rights to appeal the bankruptcy administrator's actions: creditors can only appeal acts relating to the realisation of assets. A creditor intending to appeal any other acts may file a notification to the Federal Banking Commission (FBC). The FBC then decides whether or not it will examine the appealed act. Further, a creditor's right to inspect the liquidator's files are limited by banking secrecy. This right may further be restricted to specific stages of the proceedings, or it may be limited or refused if opposing interests take precedence. Further, any information gathered by way of file inspection may solely be used to preserve the rights of creditors.

There are no provisions in Swiss law that specifically govern insolvent group companies.

vii Cross-border issues

The recognition of foreign insolvency proceedings in Switzerland is regulated by PILA, as the Council Regulation (EC) No. 2015/848 of 20 May 2015 (the Insolvency Regulation) does not apply to proceedings in Switzerland, and Switzerland has not adopted legislation based on the UNCITRAL Model Law on Cross-Border Insolvency.

When bankruptcy proceedings are opened abroad, these foreign proceedings are recognised in Switzerland on condition that the PILA requirements are met,[14] which are that the foreign bankruptcy must have been declared by the competent court at the seat of the debtor or at the centre of main interests (COMI),[15] the foreign bankruptcy must be enforceable in the issuing country, and there are no general grounds for refusal according to the PILA.[16]

Upon meeting these requirements, a foreign insolvency administrator is not entitled to file claims against a Switzerland-domiciled debtor before the Swiss courts. Rather, Swiss authorities conduct separate Swiss proceedings and appoint a local liquidator for the purpose of liquidating the assets (ancillary proceedings, known as a Minikonkurs).[17] This means that, in effect, a foreign bankruptcy decree triggers Swiss bankruptcy proceedings. However, unlike Swiss bankruptcy proceedings, which include any debtor's assets located abroad, these ancillary proceedings relate only to assets located in Switzerland. Further, not all a debtor's creditors participate in the ancillary proceedings; participation is restricted to creditors with

13 See Section I.vii.

14 The principle of reciprocity has been deleted by the revision of the Swiss Private International Law [PILA] that came into force on 1 January 2019.

15 The definition of a centre of main interests [COMI] in the revised PILA matches the definition in Regulation (EU) No. 2015/848 (the Insolvency Regulation).

16 Foreign bankruptcy decrees that are in apparent breach of Swiss public policy or that are not in accordance with basic Swiss procedural principles will not be recognised according to Article 27 of PILA.

17 If there are no privileged or secured creditors or creditors of a Swiss branch, and if the claims of non-privileged and unsecured creditors in Switzerland are adequately taken into account in foreign proceedings and these creditors were granted their right to be heard, Swiss courts can waive ancillary proceedings in favour of a foreign insolvency trustee upon a request by the foreign bankruptcy administration.

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pledge-secured claims, creditors with privileged (first-class and second-class) unsecured claims domiciled in Switzerland and creditors of non-secured and non-privileged claims of a Swiss branch of a foreign insolvent entity.

Once the claims of all creditors have been fully satisfied and a surplus remains, this surplus can be distributed to the foreign insolvency administration or to the entitled bankruptcy creditors directly. This distribution requires the recognition of the foreign schedule of claims by the same Swiss court that recognised the foreign bankruptcy proceedings. The foreign schedule of claims will be recognised when Switzerland-domiciled creditors have been appropriately considered in the schedule of claims. The PILA provides for distribution among Swiss third-class creditors, when the Swiss court does not grant recognition of the foreign schedule of claims.[18]

viii Additional topics

Clawback actions

The success of insolvency proceedings largely depends on the value of assets that can be brought into the estate, and if the estate can be adequately secured. There is always a risk of the debtor diminishing its assets. The DEBA deals with this risk extensively and provides for legal remedies either to secure the estate or to repatriate assets belonging to the estate, for example by way of clawback actions.

Only acts committed by the debtor prior to the opening of bankruptcy proceedings can be subject to clawback actions. The bankruptcy administrator or the composition liquidator is entitled to bring forward clawback actions against the contractual party of the debtor, or the debtor itself in the name of the bankruptcy estate, within three years of the opening of bankruptcy proceedings or within three years of the confirmation of the composition agreement. A creditor may only bring such a claim in its own name after assignment of this right from the bankruptcy estate.

The DEBA provides for three types of clawback actions, in relation to:

a gifts or gratuitous acts of a debtor, pursuant to Article 286 of the DEBA. Any gifts, gratuitous acts or dispositions by the debtor for which it did not receive adequate compensation are voidable, if they were made up to one year prior to the opening of bankruptcy proceedings or one year prior to the notification of the debt moratorium against the debtor;[19]

b certain acts by an over-indebted debtor, pursuant to Article 287 of the DEBA. The granting of collateral for existing obligations, to which the debtor was not obligated, the settlement of monetary debt by unusual means and the payment of undue debt is voidable, if carried out by an over-indebted debtor up to one year prior to the opening of bankruptcy proceedings or one year prior to the notification of the debt moratorium against the debtor;[20] and

c acts by a debtor with the deliberate intent of disadvantaging creditors, pursuant to Article 288 of the DEBA. All acts carried out by a debtor up to five years prior to the

18 Swiss law provides for more flexible rules on the recognition of foreign bankruptcy decrees on banks and other financial institutions.

19 The burden of proof that there is no disproportion between performance and consideration lies with the related party of a debtor or the group company (Article 286, Paragraph 3 of the DEBA).

20 Actions are not possible if the beneficiary can prove that it did not know the debtor was over-indebted and was not required to have such knowledge.

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initiation of bankruptcy proceedings or five years prior to the notification of the debt moratorium are voidable, if carried out with an intent to harm the debtor's creditors or to favour certain creditors to the detriment of the others, and if that intent was apparent, or should have been apparent, to the contracting party.[21]

Liability claims

The SCO holds that a board of directors has a duty to safeguard the interests of the company in good faith;[22] specifically, the SCO lists two duties that will ensure the continuity of a company in a difficult financial situation.

First, if the latest annual balance sheet shows that half of the share capital and the legal reserves are no longer covered (capital loss),[23] the board of directors must convene a general meeting without delay and propose financial restructuring measures, pursuant to Article 725, Paragraph 1 of the SCO.

Second, an interim balance sheet must be drawn up if there is good cause to suspect over-indebtedness. If the interim balance sheet shows that claims by the company's creditors are not covered, whether the assets are appraised at going concern or liquidation values (over-indebtedness), the board of directors must notify the court, unless certain company creditors subordinated their claims to the extent of the capital deficit. Further, the Swiss Supreme Court has stated that the board of directors may abstain from notifying the court, if immediate restructuring measures are available.[24] The chances of restructuring must be tangible (in other words, highly likely) and delaying the notification of the court may not endanger the financial situation of company creditors.[25]

If members of the board of directors fail to comply with any of these legal obligations, they may become personally liable to the company, the creditors or the shareholders, where an intentional or negligent breach of duty led to a financial damage of any of these parties.

II INSOLVENCY METRICS

Switzerland's gross domestic product (GDP) decreased by 0.5 per cent in the first quarter of 2021. This is mainly attributable to the coronavirus. However, because of the increased loosening of covid-19 measures, the Swiss federal government's expert group on economic forecasts expects GDP to rise by a total of 3.6 per cent in 2021. For 2022, the expert group expects the Swiss economy to continue to recover and GDP to grow by 3.3 per cent, mainly because international trade is likely to pick up speed.[26]

21 The burden of proof generally lies with the plaintiff. However, the burden of proof is reversed when the beneficiary is a related party or a group company, which must then prove that it was not in a position to recognise the debtor's intent to harm (Article 288, Paragraph 2 of the DEBA).

22 The board of directors' general duty of care and loyalty is described in Article 717 of the SCO.

23 Restructuring measures may for example be a capital increase, cutting the capital combined with an immediate increase (Kapitalschnitt) or a rescue merger.

24 Contrary to restructuring measures in connection with a capital loss, restructuring measures in connection with over-indebtedness must be available immediately, as the board of directors must notify the court within a short time frame.

25 Decision of the Swiss Supreme Court of 2 October 1990, BGE 116 II 533.

26 See press release by the State Secretariat for Economic Affairs, dated 15 June 2021, and the economic forecasts by the Federal Government's Expert Group for summer 2021, dated 15 June 2020.

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In March 2021, the Swiss National Bank predicted an inflation rate of 0.2 per cent for 2021. For 2022, the expected rate has been revised upwards from 0.2 per cent to 0.4 per cent. The Swiss National Bank further predicts an inflation rate of 0.5 per cent for 2023.[27] This prognosis is based on the assumption that the three-month LIBOR will remain unchanged at minus 0.75 per cent during the entire forecast horizon.

Statistics on insolvency activity are not yet available for 2021. In 2020, 12,912 bankruptcy proceedings were opened, which represents a substantial decrease of 7.2 per cent compared to 2019. This can be attributed to the financial measures taken by the Swiss government to support business affected by covid-19. However, losses resulting from bankruptcy proceedings reached an all-time high in 2020 with 8.2 billion Swiss francs, compared to 2.3 billion Swiss francs in 2019. It needs to be noted that the conclusion of one large proceeding (Erb group) was accountable for total losses of 6.5 billion Swiss francs.[28]

III PLENARY INSOLVENCY PROCEEDINGS

In the past 12 months, no new landmark bankruptcy or restructuring cases have been opened to our knowledge. However, ongoing cases that have been discussed in this Review in previous editions have proceeded. The following are the most high-profile bankruptcy and restructuring cases.

i Petroplus

The oil refining company Petroplus Holdings (PHAG), which has its headquarters in Zug, Switzerland, was the parent company of the Petroplus group, which operated refineries in several European countries. Petroplus Marketing AG (PMAG) occupied a central position within the Petroplus group as it was responsible for acquiring the required crude oil and having it processed by the refineries, to eventually sell the products directly or through local marketing companies. Insolvency proceedings were commenced in late January 2012 with regard to numerous Petroplus group companies, including PHAG and PMAG, following a failure to secure a revolving credit facility (RCF) of up to US$2 billion. PMAG requested composition proceedings with assignment of assets while PHAG entered into bankruptcy proceedings. Since the lenders under the RCF were satisfied in full, the bondholders became the most important group of the Petroplus entity asserting claims based on bonds of approximately US$1.75 billion against the issuer and guarantors. They further asserted claims based on an assigned security against PMAG. The PMAG liquidators dismissed these claims, contesting the validity of relative subordination in favour of the bondholders.

The issue of relative subordination against PMAG was settled with the security agent of the bondholders and several Petroplus group entities involved. This settlement became effective in March 2016, shortly after the global settlement between the RCF banks and Petroplus group companies became effective. The RCF global settlement provided for the payment of US$211 million from the RCF banks' security agent to PMAG.

In February 2018, two settlements entered into force: (1) between PMAG, the English group company Petroplus Refining and Marketing Ltd (PRML), PRML's Swiss ancillary

27 See press release of the Swiss National Bank, dated 25 March 2021, containing a monetary policy assessment.

28 See press release of the Federal Statistical Office dated 7 April 2021 containing figures on insolvency proceedings in 2020.

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bankruptcy estate and the PRML liquidators; and (2) between PMAG, the English group company, Petroplus Refining Teesside Ltd (PRTL), PRTL's Swiss ancillary bankruptcy estate, the PRTL liquidators and Deutsche Bank Trust Company Americas as security trustee for Petroplus bond creditors. The settlements concluded ongoing actions to contest the PMAG schedule of claims instigated by PRML and PRTL, the aim of which was to achieve the admittance of an additional third-class claim of the PRML ancillary bankruptcy estate to the amount of 131 million Swiss francs and to relegate a claim of 23.8 million Swiss francs by the PRTL ancillary bankruptcy estate from subordinated to normal-third class. The settlements took into account the risks of all parties involved and permitted a far-reaching validation of PMAG's schedule of claims, which led to the distribution of a further interim payment to third-class creditors of PMAG.

ii Swissair

The holding company of Swissair, SAirGroup AG, and its subsidiary companies have been in composition proceedings since 2001. The liquidation proceedings advanced during 2016, when the intra-company claims (Flightlease AG, SAirLines AG and Swissair AG) were settled and a property belonging to SAirGroup was sold, generating 72 million Swiss francs for the bankruptcy estate. By settling the intra-group claims, only one action to contest the schedule of claims of SAirGroup remains pending. This action of 2,358,783,548.45 Swiss francs by the Belgian airline Sabena in liquidation against SAirGroup is currently pending before the second instance court. SAirGroup further asserted claims based on directors' liability under corporate law against several corporate bodies of SAirGroup (members of the board, chief executive officer, chief financial officer). The composition liquidator argued, in particular, that these bodies transferred shares in possession of SAirGroup to the subsidiary SAirLines, without receiving adequate compensation for the transactions.

The Swiss Federal Supreme Court rejected the claims in 2012, as SAirGroup could not prove over-indebtedness of SAirGroup and SAirLines.[29] Further directors' liability claims of the group companies remain pending before several Swiss courts. Six advance payments on bankruptcy dividends have been made and the expected bankruptcy dividend amounts to 23 per cent, according to the liquidator.

iii Lehman Brothers

Lehman Brothers Finance SA, the Swiss Lehman Brothers entity, was declared bankrupt in 2008. The bankruptcy proceeding is governed by the special regime for insolvent banks as outlined in Section I.vi. Twelve dividend payments, with a total dividend of more than 61 per cent for third-class creditors, have been paid out to creditors as of 30 June 2019.

IV ANCILLARY INSOLVENCY PROCEEDINGS

Official statistics on ancillary insolvency proceedings in Switzerland are not published. To our knowledge, within the past few years, several foreign insolvency administrators of Petroplus group companies requested Swiss ancillary bankruptcy proceedings to be opened, including

29 BGer 4A_410/2011.

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Petroplus International BV in liquidation and Petroplus Finance 2 Ltd in liquidation. Swiss ancillary proceedings allow the foreign group companies to assert and enforce their claims against the Swiss Petroplus companies.

V TRENDS

The positive trend of a decreasing number of bankruptcies came to an end in March 2021, when the number of bankruptcies started to slightly increase again. Bankruptcy proceedings were mainly opened in sectors that were indirectly affected by the covid-19 measures, for example, passenger transport services and laundries. Overall, the number of bankruptcies is still lower compared to the average number of bankruptcies during previous economic crises.

The rather moderate increase in bankruptcies can mainly be attributed to the liquidity support scheme established by the Swiss Federal Council to support businesses affected by covid-19. As the pandemic subsides, the economic recovery is likely to pick up speed, which should also have a positive impact on the number of bankruptcies. However, because many companies have accumulated a lot of debt over the past year and structural changes have begun in some sectors, we generally expect an increase in corporate bankruptcies in the coming months.

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Appendix 1

ABOUT THE AUTHORS

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Daniel Hayek is a partner and chairman of the management committee and head of the insolvency and restructuring and banking and finance teams of Prager Dreifuss. He has extensive experience in representing creditors in bankruptcy proceedings, whether in registering claims or in enforcing disputed claims regarding bankruptcy administrators, as well as before the courts. He also specialises in banking and finance, and corporate matters.

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Mark Meili is a counsel who is a member of Prager Dreifuss' corporate and M&A and dispute resolution teams. He mainly advises companies regarding commercial and corporate law matters. His main areas of practice include M&A; corporate finance; and contract, corporate and commercial law matters.

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