THE RESTRUCTURING REVIEW

FIFTEENTH EDITION

Editor
Peter K Newman

THE LAWREVIEWS

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PREFACE

I am very pleased to present this 15th edition of *The Restructuring Review*. Our intention is to help general counsel, government agencies and private practice lawyers, as well as other professionals, investors and market participants, to understand the prevailing conditions in the global restructuring market in 2021 and the first half of 2022. This edition seeks to highlight some of the most significant legal and commercial developments and trends during this period.

Two common themes pervade the contributions to this edition by leading practitioners from jurisdictions around the globe. First, the historic economic downturn experienced around the world in 2020 due to the covid-19 pandemic was met with significant state intervention, which cushioned some of the immediate impact of the pandemic. Indeed, many jurisdictions witnessed a bounceback during 2021 as the world eased out of the covid-19 pandemic. Widespread access to covid-19 vaccines allowed many countries to ease or lift entirely the lockdowns and travel restrictions that had been imposed in 2020. The opening of economies and continuation of government support measures allowed for rapid growth during this time. But the upward trajectory seems to have been short-lived, as a number of geopolitical and other factors have already started to slow growth and bring uncertainty to the next phase of post-pandemic life. The second theme is the continued development of restructuring tools to ameliorate and resolve insolvency and financial distress, with numerous jurisdictions introducing additional legislative reforms to facilitate restructurings or even beginning to 'road-test' tools introduced in recent years.

Following the initial onset of the pandemic in 2020, many jurisdictions witnessed only limited restructuring and insolvency activity throughout 2021. Temporary support measures implemented by governments to provide financial support and breathing space for companies to recover from the pandemic were successful in this regard. These measures seem to have offset (at least temporarily) much of the damage wrought by the pandemic for businesses, although most government support programmes have ended or are in the process of being phased out, and economies around the globe now face other challenges to economic recovery. These challenges include massive disruptions in global supply chains and historic levels of inflation in many jurisdictions. In addition, the war in Ukraine, which commenced with the Russian invasion in February 2022 and continues at the time of writing, has ushered in soaring energy costs, has exacerbated supply chain issues, and has been met with punishing economic sanctions from the EU, UK and US. An increased focus on environmental, social and governance concerns and metrics is also leading to changes in the corporate and investment landscape – changes to which businesses must adapt. Although 2021 was a record-breaking year for mergers and acquisitions deals activity, this began to slow in the first half of 2022. Companies are facing uncertain times on many fronts.

Although levels of insolvency and restructuring activity have remained suppressed, many jurisdictions have in recent years put in place new or updated laws, rules and practices relating to business restructuring and insolvency, both in reaction to the covid-19 pandemic but also as part of a broader trend of reform. As you will see in the coming chapters, many of these new laws have already been tested over the past year and have helped businesses to restructure in an exceptionally challenging period. This continued development means that corporate debtors and their advisers will have increasingly robust toolkits to deal with financial distress and insolvency arising in the turbulent post-pandemic environment.

I hope that this edition of *The Restructuring Review* will continueedia to serve as a useful guide at a crucial moment in the evolution of restructuring and insolvency law and practice internationally. I would like to extend my gratitude to all the contributors for the support and cooperation they have provided in the preparation of this work, and to our publishers, without whom it would not have been possible.

Peter K Newman
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London
July 2022

Chapter 20

SWITZERLAND

Daniel Hayek and Mark Meili[1]

I OVERVIEW OF RESTRUCTURING AND INSOLVENCY ACTIVITY

The Swiss federal government's Expert Group expects Switzerland's GDP to rise by 2.8 per cent in 2022.[2] In 2021, Switzerland's GDP had risen by 3.7 per cent and thereby more than recovered the 2.9 per cent loss in 2020 due to the covid-19 pandemic. Until the outbreak of covid-19, the Swiss labour market benefited from a favourable economic environment, with unemployment gradually declining since mid-2016. However, with the outbreak of covid-19, unemployment rates started to rise with a peak in February 2021 at 3.7 per cent. In April 2022, the unemployment rate was at 2.3 per cent, having significantly decreased from the high rates in spring 2021. The Expert Group is predicting an average unemployment rate of 2.1 per cent for this year.[3]

As a result of a higher oil price and higher prices for goods affected by supply bottlenecks, the Swiss National Bank (SNB) has revised its inflation forecast upwards and anticipates an inflation rate of 2.1 per cent for 2022. For both 2023 and 2024, the SNB predicts inflation of 0.9 per cent.[4]

In Switzerland, no official statistics are published with regard to composition proceedings (i.e., formal restructuring proceedings). With regard to bankruptcy proceedings, in 2021, 14,081 bankruptcy proceedings were opened, which is an increase of 9 per cent compared with 2020. The increase can be attributed to the covid-19 pandemic and the end of the financial measures taken by the Swiss government to support businesses affected by covid-19. Losses resulting from bankruptcy proceedings decreased in 2021 to 4.2 billion Swiss francs, compared with 8.2 billion Swiss francs in 2020.[5] It should be noted that the conclusion of one large proceeding (Erb Group) accounted for total losses of 6.5 billion Swiss francs in 2020.

1 Daniel Hayek is a partner and Mark Meili is a counsel at Prager Dreifuss AG.
2 Press release of the State Secretariat for Economic Affairs (SECO) dated 14 March 2022.
3 Press release of the SECO dated 14 March 2022 containing the economic forecasts by the federal government's Expert Group of spring 2022; press release of the SECO dated 6 May 2022 'The labour market situation in April 2022'.
4 Press release of the Swiss National Bank dated 24 March 2022 containing a monetary policy assessment.
5 Press release of the Federal Statistical Office dated 4 April 2022 containing figures on insolvency proceedings in the year 2021.

II GENERAL INTRODUCTION TO THE RESTRUCTURING AND INSOLVENCY LEGAL FRAMEWORK

Switzerland does not have a comprehensive law on insolvency and restructuring procedures. Although insolvency matters are mainly governed by the Swiss Debt Enforcement and Bankruptcy Law (DEBL), formal restructuring procedures are provided for in both the DEBL and the Swiss Code of Obligations (CO), with the latter also containing provisions on informal restructuring methods.[6]

i Informal restructuring techniques

Normally, a company in financial difficulties will first try to improve its situation through informal restructuring, avoiding the involvement of courts unless inevitable. Operational restructuring measures may include changes in management or the disposal of underperforming businesses. Other informal restructuring techniques are provided for by company law. The CO allows for the revaluation of immovable property and participations at their real value (as compared with the purchase value at which they are usually evaluated) if half of the company's equity and its legal reserves are no longer covered by its assets. Further, a company can gain capital through issuing new shares for consideration and thereby improving its debt-to-equity ratio. Another measure often used is the reduction, possibly to zero, of the share capital, followed by an immediate share capital increase.

Some creditors may have a special interest in the distressed company's survival, for instance as shareholders of that company or if they are part of the same group of companies, and in one way or another contribute to its restructuring. This could be through the granting of a bridge loan until the company secures permanent financing or through waiving part or all of their claims. A creditor may also agree to subordinate instead of waving their claims. This is a technique that is used often as Article 725 II of the CO allows postponement of the notification of a judge in cases of over-indebtedness if claims in the amount of the capital deficit are subordinated to all other liabilities (i.e., generally subordinated). Although a subordination agreement itself does not constitute restructuring measures, as the financial situation of the company remains unchanged, it increases the chances for a distressed company to recover financially, as it allows for more time for it to adopt restructuring measures.

ii Formal procedures

The two main types of formal restructuring and insolvency proceedings provided for in the DEBL are bankruptcy and composition proceedings.[7] Unlike bankruptcy, composition proceedings do not necessarily lead to the dissolution of the company. In addition, the CO provides for a corporate law moratorium.

Bankruptcy proceedings

A company is placed into bankruptcy by the competent court upon request of either a creditor or the debtor itself. In addition, bankruptcy proceedings can be opened over a company *ex officio* (e.g., because of serious organisational deficiencies). A creditor may file a

6 A number of laws and ordinances other than the DEBL contain additional provisions on insolvency, providing special insolvency regimes for certain types of debtors, namely financial institutions, collective investment schemes or insurance companies.

7 This chapter will only describe insolvency proceedings applicable to companies.

request for bankruptcy if its claim has not been settled by the debtor although it was upheld in debt collection proceedings. Further, a creditor may request the court to open bankruptcy proceedings without prior debt collection proceedings if other reasons justify the immediate opening of bankruptcy proceedings, such as fraudulent behaviour or cessation of payments by the debtor. Finally, the debtor itself can request the opening of bankruptcy proceedings by declaring its insolvency – the board of directors even has a legal obligation to do so if the balance sheet shows that the company is over-indebted.

The DEBL provides for two types of bankruptcy proceedings. Summary proceedings are commenced if the proceeds from the assets are unlikely to cover the costs of the bankruptcy proceedings or if the case is of a simple nature. They generally do not entail creditors' meetings or a creditors' committee. In all other cases, ordinary proceedings apply.

Once a debtor is declared bankrupt by the competent court, it loses the right to dispose of its assets, despite remaining the beneficial owner of its estate. The right is transferred to the bankruptcy estate, which is represented exclusively by the bankruptcy administration. The objective of the bankruptcy proceedings is the full liquidation of the debtor's estate, including all assets and liabilities, to satisfy all creditors in proportion to their claims against the debtor. All creditors participate in the bankruptcy proceedings, which means that all debt enforcement proceedings initiated before the declaration of bankruptcy come to an end and that no new debt enforcement proceedings against the debtor can be initiated by creditors on an individual basis. The bankruptcy administration publishes a notice inviting creditors to the first creditors' meeting and summoning them to file their claims and debts within one month and to hand over any collateral.

The first creditors' meeting is entrusted with appointing either the public bankruptcy office or a private bankruptcy administrator as well as electing a creditors' committee, which is generally in charge of supervising the bankruptcy administration. It further decides on administrative actions, such as the continuation of the debtor's business activities. The bankruptcy administrator decides on the filed claims in the schedule of claims, which can be contested by the creditors before the competent court. The second creditors' meeting is convened to decide on matters such as the continuation of claims against third parties and the realisation of the debtor's assets (by way of public auction, private sale or assignment to a creditor).

The proceeds are used to satisfy the creditors' claims in accordance with their rank.[8] Secured creditors are satisfied before all other claims out of the proceeds from the sale of the collateral. Unsecured creditors are divided into three classes. The first class of claims mainly consists of claims arising from employment relationships with the debtor accrued within six months prior to the opening of the bankruptcy proceedings. The second class encompasses claims from social security, health and unemployment institutions. The third class comprises all other unsecured and unsubordinated claims accrued before the opening of the bankruptcy proceedings. Dividend distributions are made according to the creditors' ranking. The creditors in a lower class will be satisfied only if and to the extent that the creditors of the higher-ranking class have been satisfied in full. If the insolvency estate does not have enough funds to cover all claims in one class, the proceeds are distributed to the creditors of that class on a pro rata basis according to the claim amounts.

8 Note that estate claims that consist of claims arising out of transactions entered into after the opening of insolvency proceedings as well as the costs of conducting the proceedings are satisfied with priority before any distributions are made to other creditors.

After distribution of the bankruptcy estate among the creditors, the bankruptcy administration submits its final report to the bankruptcy court, which declares the proceedings closed if it finds that the bankruptcy proceedings have been fully completed.

Composition proceedings

Composition proceedings aim to protect a debtor from bankruptcy proceedings and alleviate financial distress. They are usually initiated by the debtor itself by supplying the court with financial statements and a restructuring plan.[9] Composition proceedings may also be requested in ongoing bankruptcy proceedings by the debtor and a creditor. If a successful conclusion of a composition agreement seems possible, the bankruptcy court may even transfer the matter to the composition court *ex officio*.

The composition court will grant a provisional debt moratorium, pursuant to Article 293a et seq. of the DEBL, and order measures to preserve the debtor's assets and appoint an administrator to assess the chances of restructuring and reaching a composition agreement with the creditors. If a successful restructuring or reaching a composition agreement seem likely, the composition court grants a definitive debt moratorium of up to 24 months, pursuant to Article 294 et seq. of the DEBL. In the opposite case, bankruptcy proceedings will be opened *ex officio*. During the (provisional or definitive) debt moratorium, the debtor is protected from further financial distress insofar as no debt enforcement proceedings can be commenced against the debtor. Unlike in bankruptcy proceedings, the debtor may continue running its business, although under the supervision of a court-appointed administrator. The latter may be required to approve certain transactions, such as the termination of contracts whose continuation would jeopardise the successful restructuring of the debtor.[10] The disposal of fixed assets may require the approval of the composition judge or the creditors' committee.

The court-appointed administrator also supports the debtor in trying to reach a composition agreement with the creditors, who are summoned to file their claims just like in bankruptcy proceedings. There are two types of judicial composition agreements. The ordinary composition agreement pursuant to Article 314 et seq. of the DEBL allows for the restructuring of the debtor through either a moratorium agreement providing for full payment of creditors' claims at a later stage or a dividend agreement, whereby the claims are partially waived. In a composition agreement with assignment of assets pursuant to Article 317 et seq. of the DEBL, the debtor assigns its assets to the creditors for realisation by a liquidator, who then satisfies the creditors' claims out of the proceeds. Although an assignment of only parts of the assets is possible, the agreement will usually assign all assets and thus lead to the liquidation of the debtor company. From this point on, the proceedings do not aim at restructuring the company but at achieving the highest possible recovery rate for creditors. Despite being similar to bankruptcy proceedings, composition proceedings allow for more flexibility in the realisation of assets,[11] which is why they may be given preference over bankruptcy if parts of the company can be sold without loss of value. In fact, almost all of the largest insolvency cases in recent years have been settled through composition proceedings.[12]

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9 Creditors entitled to request the opening of bankruptcy proceedings can also request composition proceedings under the same conditions.

10 Article 297a DEBL.

11 See Article 256, Paragraph 3 DEBL and Article 322 DEBL.

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

A composition agreement requires approval by a majority of the creditors and the composition court.[13] Once approved, the composition agreement will be binding on any creditor whose claims either arose before the moratorium or have since come into existence without approval by the administrator. The agreement is not binding on secured creditors to the extent that their claims are covered by the collateral. If the composition agreement is rejected, the composition court will open bankruptcy proceedings *ex officio*.

Composition proceedings may also result in an extrajudicial composition agreement. In addition, they may end without the need to reach any composition agreement at all if the debtor can be restructured successfully during the moratorium.

Corporate law moratorium

The corporate law moratorium is provided for in Article 725a of the CO, which aims to enable a distressed debtor to restructure. As is explained below in more detail, the board of directors of a company is legally obliged to file for bankruptcy if the company is over-indebted. Upon application of the board of directors or a creditor, the court may grant a stay of bankruptcy proceedings. A stay is granted if there is a prospect of financial restructuring, which will usually be the case if a realistic restructuring plan has been submitted to the court by the board of directors. In such cases, the court will render measures to preserve the debtor's assets. In particular, the court may appoint an administrator and define their duties. Since publication of the corporate law moratorium will usually have a negative effect on a company's business relationships and hence its restructuring efforts, the law allows for the non-publication of the stay of bankruptcy proceedings, unless it is necessary to protect third parties. The effects of the corporate law moratorium are not as far-reaching as those of a debt moratorium in composition proceedings. Although creditors' requests for opening of bankruptcy proceedings or for liquidation of the debtor's assets may not be granted during the moratorium, creditors can still commence debt enforcement proceedings against the debtor.

iii Selected topics

Taking and enforcement of securities

There are several forms of security over assets in Switzerland. The most common ones are pledges, including both regular pledges and 'irregular pledges', which are not regulated by law. Although a regular pledge does not entail a transfer of ownership but rather the mere possession of the collateral, the secured creditor under an irregular pledge becomes not only the possessor but also the legal owner of the collateral, which consists of money, claims or other chattels. Upon satisfaction of their claim, the owner has an obligation to return the collateral to the debtor in the same amount and quality. Often, the collateral is also transferred (if it is a non-fungible movable asset or real estate) or assigned (if it is a claim) by way of security. The impact of insolvency on such security rights depends on the type of security arrangement and the type of assets serving as collateral.

Pledged assets form part of the bankruptcy estate unless the collateral is owned not by the debtor but by a third party. If movable assets (as well as claims or other rights) have been pledged, the secured creditor is not allowed to sell the collateral privately but has to hand it over to the bankruptcy administration for liquidation with the other assets. The

13 The composition court will give approval only under certain conditions, namely if the debtor's offer is reasonable compared with its financial capacities and the privileged creditors' claims are fully covered.

DEBL still guarantees the secured creditors' right to preferential satisfaction, as the proceeds from the sale of the pledged assets will be used to satisfy the secured creditors in priority of all other creditors.[14] Should the proceeds from the sale of the collateral not be sufficient to fully discharge the secured claim, the remaining amount ranks as an unsecured and unprivileged claim.

If real estate has been pledged, the effect of the opening of bankruptcy proceedings on such security depends on the maturity of the secured debt. Unlike all other claims, claims secured by real estate do not automatically fall due with the opening of bankruptcy proceedings.[15] If the secured debt is due, the real estate will be realised by the bankruptcy administration and the proceeds will be used to satisfy the secured creditors. If the secured debt is not due, the real estate will also be realised by the bankruptcy administrator. The secured creditor will, however, not be satisfied. Instead, the debts will be transferred to the acquirer of the real estate and the pledge will remain in place.

If the security arrangement includes a transfer of ownership under an irregular pledge or if the claims have been assigned or other assets transferred by way of security, such assets do not form part of the bankruptcy estate. The secured creditor is not required to hand the collateral over to the bankruptcy administrator and can, if permitted by the security agreement, liquidate the collateral privately.

In composition proceedings, there is no obligation for creditors with a pledge on movable assets to hand in the collateral to the liquidator. During the moratorium, secured creditors are generally not allowed to commence or continue enforcement proceedings unless the collateral consists of real estate. The liquidation of real estate is also excluded during the moratorium.[16] If the proceedings result in a composition agreement, the agreement will not be binding on secured creditors to the extent of the claim covered by the collateral. After the moratorium is lifted, secured creditors can choose between commencing enforcement proceedings and liquidating the collateral privately, in accordance with the pledge agreement.

Duties of directors of companies in financial difficulties

Under Swiss corporate law, the board of directors has a general duty to safeguard the interests of the company, which includes the responsibility to ensure that the company remains financially sound and to take the appropriate measures to restructure the company should it be in financial difficulties. Further, depending on the balance sheet situation of the company, the law requires the board of directors to take specific measures. The types of measures to be taken by the board of directors depend on the level of losses the company has incurred. A distinction is made between a situation of (1) loss of capital (half of the company's equity is no longer covered by its assets) and (2) over-indebtedness or negative equity (the liabilities of the company exceed its assets).

If there is a loss of capital, the board of directors must immediately summon a shareholders' meeting to inform shareholders about the financial state of the company and suggest restructuring measures for them to decide on.[17] If there is a substantiated concern that the company might be over-indebted, the board of directors needs to have an interim balance sheet prepared and submitted to the auditors. If the interim balance sheet confirms

14 Article 219, Paragraph 1 DEBL.
15 Article 208, Paragraph 1 DEBL.
16 Article 297, Paragraph 1 DEBL.
17 Article 725 II CO.

that the liabilities of the company are not covered on either a going concern or a liquidation scenario basis, the board of directors must notify the judge, a duty that the board cannot delegate.[18] Such a notification will usually lead to the opening of bankruptcy proceedings. Notification can be avoided only if some creditors of the company agree to subordinate their claims behind those of all other creditors to an extent sufficient to compensate the negative equity[19] as described above. Further, the Swiss Federal Supreme Court has held that the board of directors may abstain from notifying the court if immediate restructuring measures are available. The chances of restructuring must be tangible, and delaying the notification of the court may not endanger the financial situation of company creditors.[20]

Taking timely action as described is a key component of the directors' duty to perform their tasks with due care. If they fail to do so, they risk becoming personally liable under Article 754 of the CO to anyone suffering losses (i.e., the company, shareholders and creditors), if an intentional or negligent breach of their duty of due care can be established. The relevant damage consists of the increase in the company's losses occurring between the point in time at which the board learnt about the situation of over-indebtedness (and failed to notify the bankruptcy judge) and the date on which the company is declared bankrupt. In a series of decisions,[21] the Swiss Federal Court held that subordinated debts should be included in the calculation of the damage caused to a company in a director's liability claim, as subordination does not constitute a waiver and thus does not diminish the company's damage. This approach increases the liability exposure of directors who try to keep the company 'alive' by using the possibility of subordination rather than immediately filing for bankruptcy. The decisions have thus been subject to criticism, with arguments that company law encourages subordination as a last attempt to save the company[22] and that the use of this instrument should not negatively affect directors if the company subsequently has to file for bankruptcy.

Clawback actions

To ensure that all creditors are treated equally, the DEBL provides for a number of clawback actions. Assets that the debtor has disposed of before becoming insolvent can be returned to the insolvency estate under certain conditions. Transactions entered into by the debtor may be challenged if the transaction was disadvantageous for the creditors. Only those transactions for which the debtor did not receive appropriate consideration are voidable and only upon the condition that the insolvency estate's assets are not sufficient to cover all claims. The contestability of such transactions is limited in two respects. On the one hand, they must have been concluded in a determined period of time prior to the opening of bankruptcy proceedings or the approval of a composition agreement with assignment of assets (suspect period). The length of the suspect period depends on the nature of the transaction challenged. On the other hand, the DEBL exhaustively enumerates the revocable pre-insolvency transactions.

18 Article 716a I CO.

19 Article 725 II CO.

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

21 Decision of the Swiss Federal Supreme Court of 9 June 2011, BGer 4A_91/2011 and of 2 September 2010, BGer 4A_277/2010.

22 Article 725, Paragraph 2 SCO.

Gifts and other transactions free of charge or made without adequate consideration that were entered into by the debtor within the year prior to the opening of bankruptcy proceedings or the grant of a moratorium in the case of a composition agreement with assignment of assets are voidable.[23] The adequacy of the consideration is assessed objectively – the parties' intentions or their good faith are irrelevant. It is further irrelevant whether the parties were aware of the discrepancy between performance and consideration. The burden of proof for the inadequacy of the consideration generally lies with the party challenging, with an important exception: if the transaction favoured a related party, which includes companies belonging to the same group, the latter bears the burden of proof.

Certain legal acts by which some creditors are favoured over others are voidable if they were made when the debtor was already over-indebted (i.e., the liabilities exceeded the assets). Such acts must have been carried out within a suspect period of one year.[24] They include the granting of security for obligations that did not have to be secured, the payment of claims by unusual means or the payment of debts before they were due. If the counterparty can prove that it was not, and did not need to be, aware of the state of over-indebtedness of the debtor, the relevant transaction cannot be voided.

Finally, the law provides for the general revocability of any act performed with the intention of the debtor of generally harming their creditors or favouring certain creditors to the detriment of the others.[25] In contrast to the other grounds for voidability, the suspect period of time is five years. Article 288 of the DEBL accounts for its wide application by establishing strict requirements, making it hard for claimants to prevail on these grounds, as not only does the intent of the debtor need to be proven but also that such intent was recognisable for the recipient. If the latter is a related party, the burden of proof is reversed (i.e., the recipient will have to prove that the intent of the debtor was not recognisable for them).

A clawback action may be brought by the bankruptcy administration, a composition liquidator or a creditor within three years of the opening of bankruptcy proceedings or the court approval of the composition agreement with assignment of assets. If successful, the recipient must return the assets to the insolvency estate or, should this not be possible, compensate the estate in cash. In turn, the recipient can claim back their own performance given in consideration of the revoked assets.

III RECENT LEGAL DEVELOPMENTS

Since its partial revision, which entered into force on 1 January 2014, the DEBL has not undergone any significant modification. The 2014 revision was adopted as a reaction to the insolvency of Switzerland's national airline Swissair, which exposed the shortcomings of Switzerland's restructuring scheme. Its primary objective was to promote restructuring over liquidation in the context of composition proceedings through various amendments, which have been discussed in earlier editions of *The Merger Control Review*.

23 Article 286 DEBL; *Schenkungsanfechtung*.
24 Article 287 DEBL; *Überschuldungsanfechtung*.
25 Article 288 DEBL; *Absichtsanfechtung*.

IV SIGNIFICANT TRANSACTIONS, KEY DEVELOPMENTS AND MOST ACTIVE INDUSTRIES

There are no official statistics in Switzerland on distressed industries. A private study found that in 2021 most bankruptcies were opened over businesses in the craft and hospitality industry. No new landmark (bankruptcy or restructuring) proceedings have been opened in the last 12 months of which we are aware. The most high-profile cases, which are still ongoing, include the Swissair insolvency proceedings (i.e., Flightlease AG, SAirLines AG and Swissair AG); the liquidation of the Petroplus group, which operated oil refineries in several European countries (including the liquidation of its holding company, Petroplus Holding AG, and the main operating company, Petroplus Marketing AG, both domiciled in Zug); the insolvency proceedings of companies of the Banque Privée Espírito Santo SA; and the bankruptcy proceedings of the Swiss Lehman Brothers entity.[26]

V INTERNATIONAL

As Council Regulation (EC) No. 2015/848 of 20 May 2015 does not apply to Swiss insolvency proceedings and Switzerland has not adopted the UNCITRAL Model Law on Cross-Border Insolvency, the recognition and enforcement of foreign insolvency proceedings are dealt with in the Swiss Private International Law Act (PILA).[27] On 1 January 2019, the revision of the PILA with regard to the recognition of international bankruptcy decrees and foreign composition agreements came into force. The revised PILA is an important step towards the harmonisation of international insolvency law and will facilitate the recognition of foreign insolvency decrees in Switzerland. The revision aimed to modernise and facilitate the costly and burdensome proceedings for recognition of such foreign decrees and agreements and also included certain changes regarding the effects of such recognition. Further, the revision aimed at avoiding unnecessary ancillary proceedings in cases in which there are no Swiss-domiciled secured or privileged creditors.

A foreign insolvency administrator has no power to act in Switzerland. As a consequence, the administrator cannot directly recover assets located in Switzerland because it does not have standing in Swiss proceedings and is not allowed to file a claim in the insolvency proceedings of a Swiss debtor of the foreign estate (the latter being a usual scenario whereby an international group of companies becomes insolvent). To safeguard the rights of the estate, the foreign insolvency administrator must undergo a rather burdensome process, which starts with an application for recognition of the foreign insolvency decree in Switzerland. To be recognised in Switzerland, the foreign bankruptcy decision must meet the requirements set out in Article 166 of the PILA:

a the decision must have been rendered by the competent court at the seat of the debtor or at the 'centre of main interests';

b the decree is enforceable in the issuing country; and

c the recognition of the decree is not incompatible with Swiss public policy pursuant to Article 27 of the PILA.

26 A detailed description of the status of these insolvency proceedings is contained in the Switzerland chapter of *The Insolvency Review* (Eighth Edition).

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

The same requirements apply to the recognition of a foreign composition agreement or similar proceedings.[28] Even if the foreign insolvency decree is recognised, the foreign administrator is not entitled to act directly in Switzerland but may request the opening of separate Swiss bankruptcy proceedings and the appointment of a local liquidator. The purpose of such ancillary proceedings is the liquidation of those assets that are located in Switzerland, thereby avoiding Swiss creditors being disadvantaged. In a first step, only secured creditors and privileged creditors domiciled in Switzerland can participate. If said creditors are fully satisfied, any surplus is remitted to the foreign insolvency estate or the foreign creditor, but only upon recognition of the foreign schedule of claims in Switzerland. Recognition will be granted if creditors domiciled in Switzerland have been appropriately considered in the foreign schedule of claims. Otherwise, the surplus will be distributed to Swiss-domiciled third-class creditors.

However, if there are no privileged or secured creditors or creditors of a Swiss branch, and if the claims of unprivileged 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 upon a request made by the foreign bankruptcy administration. The foreign administrator may take certain actions in Switzerland. In particular, it may transfer assets abroad and conduct legal proceedings.

VI FUTURE DEVELOPMENTS

For some years, a revision of Swiss company law has been under way that aims to promote restructuring of a distressed company, mainly by introducing certain additional obligations of directors in the context of their duties under Article 725 et seq. of the CO. The proposal introduces an early warning system in the event of insufficient liquidity, according to which the board of directors would be required to take measures, such as adopting a cash flow forecast for the next 12 months. Furthermore, the corporate law moratorium will be deleted. The Federal Council adopted the related dispatch at its meeting on 23 November 2016, but the revision will not come into force before 2023.

28 See, for example, a recent decision by the High Court in London ([2021] EWHC 775 (Ch)) dated 30 March 2021, in which the High Court decided that a restructuring plan pursuant to Part 26A of the United Kingdom Companies Act 2006 fell under the bankruptcy exclusion of the Lugano Convention (and would therefore have to be recognised according to the rules of the PILA in Switzerland).

Appendix 1

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Daniel Hayek is chair of the management committee and head of the insolvency and restructuring team and the corporate and M&A team of Prager Dreifuss, one of Switzerland's leading firms for commercial law. Daniel has been a partner with Prager Dreifuss Ltd since 2001. His practice focuses on all aspects of insolvency and restructuring matters, including representing creditors in bankruptcy-related litigation, registering and purchasing claims, and enforcing disputed claims before courts. His long-standing expertise includes mergers and acquisitions, corporate finance, takeovers, banking and finance, and corporate matters also in restructuring situations. Daniel's recent practice comprises, among other things, representation of the trustee and the security agent of the bondholders regarding their claims against one of Europe's largest independent oil refiners, the Swiss-based Petroplus group; enforcing a large claim based on derivatives in a litigation against the bankrupt estate of the Swiss Lehman entity; and advising the trustee of the Kodak pension plan on the acquisition of assets and restructuring.

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