PRAGER DREIFUSS

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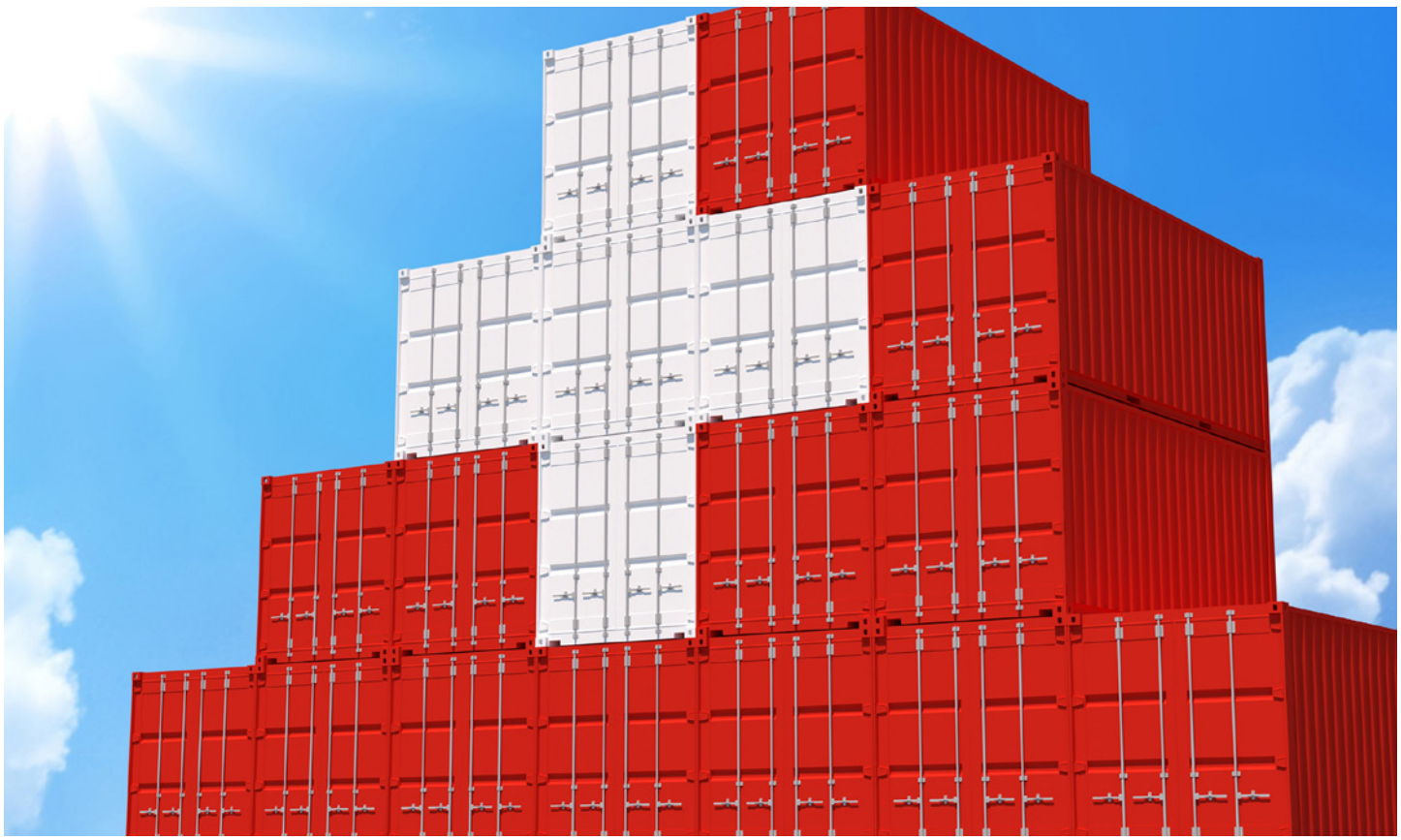
TALKINGPOINT Q&A REPRINT February 2024

Restructuring and distressed M&A – a Swiss perspective

FW discusses restructuring and distressed M&A from a Swiss perspective with Daniel Hayek and Mark Meili at Prager Dreifuss Ltd.



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THE PANELLISTS

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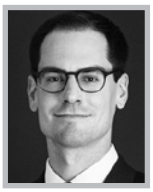
Daniel Hayek is chairman of the management committee and head of the insolvency and restructuring team, as well as the corporate and M&A team, at Prager Dreifuss. Mr Hayek has been a partner with Prager Dreifuss since 2001. His practice focuses on all aspects of insolvency and restructuring matters, including representing creditors in bankruptcy-related litigation, registering or purchasing claims or in enforcing disputed claims before courts. His longstanding expertise includes M&A, corporate finance, takeovers, banking and finance, and corporate matters in restructuring situations.



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Mark Meili joined Prager Dreifuss in 2013 and became a partner in January 2024. He advises companies in company and contract law matters, focusing on distressed and finance transactions.

FW: To what extent have you seen a rise in restructuring efforts in Switzerland? How would you describe the general health of companies in the current market?

Hayek: When the financial support measures taken by the Swiss Federal Council to support businesses suffering from the effect of the coronavirus (COVID-19) pandemic came to an end in 2022, the number of bankruptcies sharply increased by 22 percent compared to 2021. Higher interest rates, rising inflation, the wars in Ukraine and Gaza and the global banking crisis caused the number of bankruptcies to rise further in 2023. We expect the number of failing companies to continue to grow in the coming months. While the increase mainly relates to small and medium-sized enterprises (SMEs), we have also seen some larger companies like Signa Group requiring restructuring efforts. A successful restructuring of banking giant Credit Suisse took place in March 2023 when it merged into UBS. The Swiss federation actively supported the merger to strengthen financial market stability. Despite the challenging macroeconomic factors, most companies in Switzerland remain confident in their own abilities and have trust in Switzerland as a successful business location.

FW: For companies that are underperforming or in financial distress, how challenging is it to restructure under Swiss law? What options are available?

Meili: The revised Swiss Debt Enforcement and Bankruptcy Law (DEBA), which entered into force on 1 January 2014, has the primary objective of promoting the restructuring of companies over liquidation. Judicial composition proceedings begin with a provisional composition moratorium to assess the prospects of restructuring. If such prospects exist, the composition court will grant a definitive composition moratorium. The debtor's daily business will run under the supervision of a court-appointed composition administrator. There are two principal types of judicial composition agreements. The first is a dividend agreement and the second is an agreement with assignment of the assets to the creditors. Both types of judicial composition agreements require approval by a majority of the creditors and the composition court. Such an agreement will have a binding effect on all the debtor's creditors. Companies can also seek out-of-court composition agreements based on private transactions, which the debtor concludes with each creditor individually.

FW: How would you characterise the current level of financing available to distressed companies? What funding sources are supporting restructuring efforts?

Hayek: Traditional lenders like banks have become increasingly careful and more reluctant to grant loans because of the increased default risks of struggling companies and the global banking crisis. Businesses are therefore looking for alternative and less conservative lenders, such as hedge funds, distressed funds, pension funds, insurance companies and family offices. Shareholders are also likely to put up money if they believe in the long-term success of the business. The Credit Suisse merger with UBS could have a negative impact on investor confidence in the financing market, as a large amount of Credit Suisse's notes were completely wiped out and its shareholders suffered substantial losses. Legal proceedings are ongoing in this regard. In relation to the financial difficulties of Signa Group, hedge funds were reportedly considering providing

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>
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> Prager Dreifuss Ltd

significant funding, however the group's financing requirements were quite high and the transparency was probably insufficient.

FW: To what extent have procedural changes in Swiss bankruptcy law improved bankruptcy-related scenarios for companies and creditors?

Meili: On 1 January 2023, the revised Swiss company law entered into force. The revised law compels the board to initiate restructuring measures not only in the case of a capital loss or overindebtedness, but also earlier in the event of insufficient liquidity. This also means that the board must now increasingly monitor the company's solvency, which means it must draw up a liquidity plan. If the company is in danger of becoming insolvent and can no longer meet its liabilities when they fall due, the board must take appropriate steps to strengthen the company's solvency. Compared to the previous framework, the board of directors has additional obligations to act if the company is in financial distress. It remains to be seen whether the new framework will support restructuring efforts in a more targeted manner and prevent insolvency proceedings to a larger extent.

FW: Reflecting on the last 12 months or so, have you seen an uptick in distressed M&A in Switzerland? What advantages are there to acquiring a company in distress?

Hayek: In 2020, many companies postponed planned deals due to the prevailing uncertainties in connection with COVID-19. Investor confidence returned in 2021 and M&A activity in Switzerland reached an all-time high in 2022. However, in the second half of 2022 and in the first half of 2023, M&A activity declined due to global recession fears and rising interest rates. We have not yet seen a wave of distressed M&A deals. Except for the merger between UBS and Credit Suisse, we are also not aware of any recent substantial transactions in Switzerland where troubled targets were fully purchased. As seen in the UBS and Credit Suisse merger, distressed deals offer the opportunity to acquire assets at attractive prices with the potential for significant upside and a stronger market position. Distressed assets can also be used to expand in other areas or as collateral in financing transactions.

FW: What are some of the key aspects to consider when acquiring distressed entities or assets?

Meili: A distressed acquisition can be structured as a share purchase or asset purchase. Share deals are usually less attractive, because all known and unknown liabilities will transfer to the buyer. In an asset deal, the acquirer can cherry-pick the desired assets. However, a transfer of selected liabilities needs to be carefully analysed, as this could favour certain creditors over others, which could give rise to liability claims. To avoid the risk of contestation in the event of bankruptcy, it is advisable to include creditors in the transaction prior to insolvency or judicial composition proceedings. In judicial composition proceedings, court approval is required for an asset deal which protects it from being challenged in bankruptcy proceedings. Finally, tax consequences need to be considered. While it may be possible to offset gains with losses, certain actions may trigger tax consequences, for example the contribution of new money.

FW: To what extent can we expect more restructuring activity in Switzerland in the months ahead? How do you envisage the distressed M&A market evolving?

Hayek: Because of the challenging macroeconomic factors, we expect that many companies will require restructuring efforts in the coming months. This should also create distressed acquisition opportunities and the chance to buy assets at reasonable prices. Alternative investment funds, particularly hedge funds, are always looking to invest in distressed companies in Switzerland, and therefore we also expect to see more distressed deals in the coming months. ■

> BECAUSE OF THE CHALLENGING MACROECONOMIC FACTORS, WE EXPECT THAT MANY COMPANIES WILL REQUIRE RESTRUCTURING EFFORTS IN THE COMING MONTHS.
>
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