Insolvency & Restructuring

Daniel Hayek, Partner at Prager Dreifuss

For what is arguably the financial capital of the world, Switzerland is renowned for its jurisdiction's financial benefits, but this doesn't mean businesses encounter less risk.

Here, Daniel Hayek, Partner at Prager Dreifuss, gives Lawyer Monthly an update on the Swiss insolvency & restructuring landscape, revealing the most recent matters the firm has been involved with, progress in legislation surrounding foreign bankruptcy decrees, and what in his opinion is still to be introduced to Swiss legislation in this regard.

Has the insolvency and restructuring sector evolved significantly since we last spoke three years back?

There have been various developments in the insolvency & restructuring sector over the past years.

On the one hand, several amendments to the Federal Statute on Debt Enforcement and Bankruptcy entered into force on the 1st January 2014. They were enacted to encourage restructuring rather than liquidation of a company in distress by facilitating the application and approval of a moratorium on debt restructuring. Other incentives for restructuring include changes to employment law in relation to the takeover of businesses and more debtor-friendly rules on dealing with long-term contracts allowing a company in distress to free itself from long-term commitments that obstruct its financial recovery.

On the other hand, new case law of the Federal Supreme Court has clarified the situation with regard to the recognition of foreign bankruptcy decrees. Under Swiss law, liquidators of foreign estates must apply for recognition of the foreign bankruptcy decree and the opening of ancillary bankruptcy proceedings in Switzerland before claims can be filed or any action taken in Switzerland. Once the application has been approved, the local bankruptcy office can file claims on behalf of the ancillary bankruptcy estate.

One of the requirements for recognition is that the foreign jurisdiction grants reciprocity. Previously, it had been unclear whether the Netherlands granted reciprocity. A judgment rendered by the Federal Supreme Court within the Petroplus liquidation has now laid down what qualifies as reciprocity, thus clarifying the legal situation and enabling recognition of bankruptcy decrees from the Netherlands.

> *"From a legal perspective a major challenge in a recent insolvency has been settling a key legal issue not yet decided by case law"*

What are the most recent legal matters you have been involved with and what have been the professional challenges therein?

Recently we have been involved in the insolvencies of Petroplus, Lehman Brothers and Swissair.

From an economic perspective, the current negative interest rate environment poses a major challenge in such large insolvencies. Since distributions on claims tend to be made rather towards the end than the beginning of a liquidation, creditors are naturally interested in the swift conclusion of insolvency proceedings. Currently, assets collected by the liquidator during the course of the insolvency proceedings and deposited with a bank are charged with negative interest. Liquidators are obliged to deposit collected assets with a designated bank and therefore cannot circumvent negative interest rates. This situation puts lawyers and liquidators under even more pressure to accelerate insolvency proceedings. One of the Petroplus liquidators challenged the negative interest rates in court, but the Federal Supreme Court recently ruled that there is no statutory obligation to apply a positive interest rate on mandatory deposit accounts. Thus, an insolvency lawyer needs to be very pro-active and anticipate creditors' expectations in order to be able to act in his client's best interest.

From a legal perspective a major challenge in a recent insolvency has been settling a key legal issue not yet decided by case law. For example, the question of subordination of intercompany loan agreements in favour of the bondholders in the Petroplus liquidation where we negotiated a settlement agreement involving not only the insolvent Swiss entity, but also the holding company and various foreign subsidiaries. As representatives of the Indenture Trustee and the Security Agent of bondholders we ensured that claims of our clients in the amount of CHF 1.9 billion, as well as claims of group companies amounting to several hundred million francs, were accepted. Successful conclusion of the settlement required a team effort and close cooperation between the liquidators and lawyers involved. Acceptance of the deal also depended heavily on clients' and bondholders' confidence in the negotiated solution which they approved after execution.

Are there any current changes to Swiss legislation in the insolvency sphere?

The Swiss Federal Council is planning to amend the provisions of the Federal Act on Private Law in order to facilitate the recognition of foreign bankruptcy decrees. It has been recognised that the current procedure to have foreign bankruptcy decrees recognised and ancillary bankruptcy proceedings opened in Switzerland is burdensome and costly. Examples like the recent ruling of the Federal Supreme Court on the recognition of Dutch bankruptcy decrees are a testimony to the obstacles foreign liquidators currently face. The planned amendments will have a great impact on any future cross-border insolvencies involving corporate groups and we are monitoring these developments closely.

Is there any further legislation you believe necessary to be introduced in Switzerland at this point in time?

In the aftermath of the financial crisis, insolvency litigation in Switzerland has become more finance based. While there exist specialised commercial courts to deal with finance based litigation, almost all insolvency related litigation is dealt with by the court for debt enforcement and insolvency actions on a mandatory basis. Where insolvency litigation is heavily finance based, for example because the underlying contracts are based on ISDA Master Agreements, the debt enforcement and insolvency court may not dispose of the same level of expertise as the commercial court.

Further, in certain parts of Switzerland the debt enforcement and insolvency court will be composed of a single judge. In complex cross-border insolvencies where the legal issues relate to foreign law and require expert opinions the court might be stretched for resources. As a consequence, cases take longer to be adjudicated than they should, a very frustrating situation for the client and all parties involved in the insolvency proceedings. In such cases it would be beneficial if the parties were able to choose the court where they want to bring their action rather than ascribing mandatory jurisdiction to the debt enforcement and insolvency court. This would ensure that the competent court disposes of the appropriate level of expertise and personal resources to deal with the case in an efficient and timely manner.

As a thought leader, what key considerations would you advise potential future insolvency & restructuring lawyers to always raise with their clients?

Where lawyers advise the board of a company it is important to advise on statutory obligations when the company is in distress. Otherwise, board members can be held personally liable if the company becomes insolvent at a later stage. Here, events of default under a revolving credit facility in particular, can prove to be fatal for the company and its directors. Where the company's liabilities exceed the assets and lenders demand payment, or refuse to agree on an enforcement standstill period, the board has to notify the debt enforcement and insolvency court within four to six weeks. If the board fails to do so and the company later becomes insolvent, the directors may be liable towards the company, its shareholders and the company's creditors.

In complex cross-border insolvency cases lawyers might also be advising foreign liquidators of affiliated or subsidiary companies. In such cases insolvency lawyers need to advise the foreign liquidator on the particularities of the lawyers' domestic insolvency regime. For example, many foreign liquidators are not aware that they need to apply for recognition of the foreign bankruptcy decree and for the opening of ancillary bankruptcy proceedings in Switzerland.

Finally, where a lawyer is representing a creditor vis-à-vis an insolvent company, he needs to ensure that the client's claim is properly substantiated within the required timeframe, as otherwise the claim will be rejected. Especially where the underlying legal issues are governed by foreign law, the lawyer needs to ensure that his client obtains legal advice on the respective foreign law as soon as possible. **LM**

About Daniel Hayek

As member of the management committee and head of the Insolvency & Restructuring and the Corporate and M&A teams of Prager Dreifuss, Daniel regularly represents creditors in insolvency proceedings, whether in registering or in enforcing disputed claims vis-à-vis liquidators and before courts. Further, as head of the Corporate and M&A team he specialises in mergers and acquisitions, corporate finance, and takeovers as well banking and finance.

Prager Dreifuss is an integrated partnership with some 40 lawyers and one of Switzerland's leading commercial law firms. We provide a comprehensive as well as in depth service in an efficient and lean way. We do not only advise but offer solutions that are tailored to each individual client. In insolvency and restructuring matters we also draw on our in-house specialists in related areas such as tax, finance or litigation. Our active ties to authorities and leading counsels in major jurisdictions complement our service.

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