Chapter XX

SWITZERLAND

Daniel Hayek and Laura Oegerli[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 according 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. DEBA, 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. DEBA, aimed at enabling the debtor to reach a restructuring agreement with its creditors.

The Swiss Code of Obligations (SCO) entered into force in 1912 and 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 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 SCO.[3]

ii Policy

The collapse of Switzerland's national airline Swissair in 2001 sparked a public debate over the need to amend Swiss insolvency laws. It was widely criticised that the DEBA failed to deal effectively with the restructuring of financially distressed companies and with insolvencies

1 Daniel Hayek is a partner and a member of the management committee and Laura Oegerli is a junior associate at Prager Dreifuss AG.

2 The latest DEBA revision entered into force in January 2014.

3 Failing to implement such measures promptly may open up the directors to liability suits according to Article 754, paragraph 1 SCO, see Section I.viii.

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 take 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, the 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, a turnaround from restructurings increasingly leading to company survivals under the revised DEBA remains to be seen.

iii Insolvency procedures

Bankruptcy proceedings

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

The aim of the proceedings is to satisfy all of 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.

In a first step, the bankruptcy office prepares an inventory listing all of the debtor's assets. Where the inventory reveals 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 creditor's 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 creditor's meeting is to be held within 20 days of the public announcement of the bankruptcy proceedings against the debtor. It decides on organisational issues, such

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 in most cantons a special section at the district court. 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 below remarks on Swiss bankruptcy proceedings relate to ordinary bankruptcy proceedings.

as appointing either the public bankruptcy office or a private bankruptcy administrator as the administrator of the estate. It further decides on urgent administrative actions, for example, on the continuation of the debtor's business activities. The first creditor's meeting may elect a creditor's committee. Among other things, the creditor's committee is generally in charge of supervising the bankruptcy administrator, deciding on the continuation of business operations as well as authorising the continuation of court proceedings and the conclusion of settlement agreements. The meeting has a quorum with at least 25 per cent of the known creditors being present or at least 50 per cent of the creditors being present where there are four or fewer known creditors. Decisions in the first creditor's meetings are taken by 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 by way of a statement of claim within 20 days before the competent court. 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 judgement. 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 creditor's meeting is entrusted with further reaching competences than the first creditor's meeting, in particular, the decision on the realisation of the debtor's assets. The bankruptcy administrator realises 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. The 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 of pledgees are satisfied before all other three claim classes under the DEBA. Where 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 bankruptcy court finds the bankruptcy proceedings to have been fully completed, it declares the bankruptcy proceedings closed.

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 seizes to legally exist.

Composition proceedings

Composition proceedings aim at protecting a debtor from bankruptcy proceedings and alleviating 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 of these types of composition agreements can be achieved either by assistance of a court or extrajudicially.

Out-of-court composition agreements are based on private transactions, which the debtor concludes with each creditor individually. By way of contrast, 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 towards all of the debtor's creditors.

Composition proceedings begin with the *provisorische Nachlassstundung*, a provisional composition moratorium, pursuant to Article 293a et seq. DEBA, a period of up to four months granted by the composition judge upon request of the debtor, a creditor or upon transfer from a bankruptcy court where 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 (*definitive Nachlassstundung*) of an additional four to six months, pursuant to Article 294 et seq. DEBA. In particularly complex cases, the moratorium may be extended to up to 24 months. In the absence of such prospects, the composition court will open bankruptcy proceedings *ex officio*.

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

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

There are two principal types of judicial composition agreements:

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

b the agreement with assignment of the assets to the creditors pursuant to Article 317 et seq. 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 proportionally to their filed claim amounts 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. In case of assignment of all of the debtor's assets 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 longer moratorium time periods (four instead of previously two months) and allowing a distressed company to sell parts of its business to generate funds with the approval of the composition judge or the creditor's committee.

Corporate law moratorium

The corporate law moratorium is an additional measure provided for in the SCO in Article 725a SCO, which aims at enabling 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 SCO.[9] The court may stay the opening of the bankruptcy proceedings if there are prospects of restructuring 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, where publication is necessary to protect third-party interests.

It is notable that the SCO provides for an exception to the board of director's duty to notify the court in case of over-indebtedness: where 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.

Ancillary insolvency proceedings

Recognition of foreign insolvency proceedings and foreign arrangements with creditors are dealt with in the PILA.[10]

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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 creditor's returns. Therefore, settlements have become even more important for creditors. See an example of such a settlement in Section III.

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

10 See Section I.vii.

iv Starting proceedings

Bankruptcy proceedings

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

A creditor may file such a request 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.

The debtor itself 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. The board of directors is legally obliged to request the opening of bankruptcy proceedings against the over-indebted company.

Lastly, 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 upon by creditors, the composition court will itself open the bankruptcy proceedings.

Composition proceedings

Composition proceedings are often initiated by the debtor itself 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 for 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 prospects of a successful restructuring exist.

v Control of insolvency proceedings

Bankruptcy proceedings

As stated above, the debtor loses the right to dispose over its assets once bankruptcy proceedings have been opened against it. This right is assumed by the bankruptcy administrator, namely either a state administrator or an elected private administrator. The bankruptcy administration is legally obliged to preserve and realise the bankruptcy estate. Certain important rights

remain with the creditors, such as appointing and confirming the bankruptcy administration and deciding on how to realise the estate's assets. Additionally, the creditors may appoint a creditor's committee at the first creditor's meeting.[11]

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 daily business and drafting a composition agreement. The composition court can appoint a creditor's committee, which supervises the administrator. The right to dispose of the debtor's assets and conduct daily 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 further determine the liquidators as well as the number and the members of the creditor's 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 SCO. The court will take measures to preserve the 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) itself. 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 Insolvency of Banks and Securities Dealers provide for a completely autonomous restructuring procedure *vis-à-vis* 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

11 See Section I.iii.

have 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.[12]

Compared to 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 related 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 on whether it will examine the appealed act or not. Further, the creditors' rights to inspect the liquidator's files are limited by the banking secrecy. This right may further be restricted to specific stages of the proceedings, or it may be limited or refused where opposing interests take precedence. Further, any information gathered by way of file inspection may solely be used to preserve these creditors' rights.

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 does not apply to insolvency proceedings in Switzerland and Switzerland has not adopted legislation based on the UNCITRAL Model Law on Cross-Border Insolvency.

Where bankruptcy proceedings were opened abroad, these foreign proceedings are recognised in Switzerland on condition that the PILA requirements are met. These requirements are: the foreign bankruptcy must have been declared by the competent court at the seat of the debtor and must be enforceable in the issuing country, there are no general grounds for refusal according to the PILA[13] and the foreign state conversely recognises Swiss bankruptcy proceedings (principle of reciprocity).[14]

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

Once the claims of said creditors are fully satisfied and a surplus remains, this surplus can be distributed to the foreign insolvency administration or to the entitled bankruptcy

12 See Section I.vii.

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

14 The principle of reciprocity was further defined by the Swiss Supreme Court in the ruling BGE 141 III 222 of March 2015, stating that the term 'reciprocity' shall be interpreted broadly, not strictly, namely reciprocity is given where the foreign country recognises the effects of bankruptcies abroad in a similar – not a strictly identical – way. Consequently, the Supreme Court ruled that the Netherlands grant reciprocity in the meaning of Article 166 paragraph 1. lit. c PILA.

creditors directly. This distribution requires the recognition of the foreign schedule of claims by the same Swiss court, which 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 recognition of the foreign schedule of claims is not granted by the Swiss court.[15]

A revised version of the PILA aimed at remedying costly and burdensome recognition proceedings of foreign insolvency proceedings is expected to enter into force shortly.[16]

viii Selected additional topics

Clawback actions

The success of insolvency proceedings largely depends on the amount 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 are 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 two years of opening of the bankruptcy proceedings or within two years of the confirmation of the composition agreement respectively. 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, namely in relation to:

a gifts or gratuitous acts of the debtor, pursuant to Article 286 DEBA. Any gifts, gratuitous acts or dispositions by the debtor for which it did not receive adequate compensation are voidable, if they were made within one year prior to the commencement of bankruptcy proceedings or one year prior to the notification of the debt moratorium against said debtor;[17]

b certain acts by an over-indebted debtor, pursuant to Article 287 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 within one year prior to the opening of bankruptcy proceedings or one year prior to the notification of the debt moratorium against such debtor;[18] and

c acts by a debtor with the intent of disadvantaging creditors, pursuant to Article 288 DEBA (*Absichtsanfechtung*). All acts carried out by a debtor within five years prior to the initiation of bankruptcy proceedings or five years prior to the notification of the

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

16 Cf. Section V.

17 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 DEBA).

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

debt moratorium are voidable, if carried out with the intent to harm its creditors or to favour certain creditors to the detriment of the remaining creditors and if such intent was apparent or should have been apparent to the contracting party.[19]

Liability claims

The SCO holds that the board of directors has the duty to safeguard the interests of the company in good faith.[20] Specifically, the SCO lists two duties of the board of directors to ensure the continuity of a company in a difficult financial situation.

First, the board of directors must convene a general meeting without delay and propose financial restructuring measures, where the last annual balance sheet shows that half of the share capital and the legal reserves are no longer covered (capital loss),[21] pursuant to Article 725, paragraph 1 SCO.

Second, an interim balance sheet must be drawn up where there is good cause to suspect over-indebtedness. If the interim balance sheet shows that claims of 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, pursuant to Article 725, paragraph 2 SCO. Further, the Swiss Supreme Court stated that the board of directors may abstain from notifying the court, where immediate restructuring measures are available.[22] The chances of restructuring must be tangible (meaning highly likely) and delaying the notification of the court may not endanger the financial situation of company creditors.[23]

Where 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

SSwitzerland's GDP growth amounted to 0.6 per cent in the first quarter of 2018. This growth is mainly attributable to growth in trade and business-related services. Thus, quarterly growth is noticeably above average for the second quarter in a row. The Swiss federal government's expert group on economic forecasts expects a GDP growth of 2.4 per cent for 2018 and a

19 The burden of proof generally lies with the plaintiff. However, the burden of proof is reversed where 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 DEBA).

20 The SCO describes the board of director's general duty of care and loyalty in Article 717.

21 Such restructuring measures may for example be a capital increase, cutting the capital combined with an immediate increase (*Kapitalschnitt*) or a rescue merger.

22 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 director must notify the court within a short time frame.

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

growth of 2.0 per cent for 2019. The expert group mainly puts forward a rise in demand for Swiss products owing to the robust global and favourable exchange rate trends as a reason for the continuing GDP growth.[24]

The Swiss National Bank predicts an inflation rate of 0.6 per cent for 2018. For 2018, the expected rate has been revised downwards from 1.1 per cent to 0.9 per cent. The Swiss National Bank further predicts an inflation rate of 1.9 per cent for 2020. This prognosis is based on the assumption that the three-month LIBOR will remain unchanged at -0.75 per cent during the entire forecast horizon.[25]

Statistics on insolvency activity are not yet available for 2018. In 2017, 13,257 bankruptcy proceedings were opened, which equals a decrease of 2.6 per cent since 2016. This is the highest number of commenced bankruptcy proceedings since 2008. Nonetheless, the losses resulting from concluding bankruptcy proceedings have declined in 2017 by 33.5 per cent since 2015, equalling in losses of approx. 1.7 billion Swiss francs in 2017.[26] The strength of the Swiss franc has specifically hit the retail sector and the tourism industry. Companies in these structures have recently had to undergo more restructurings in order to cut down on their costs and secure a profitable continuation of their businesses. Further, the oil price has remained at a historic low and put the commodity sector under financial stress for some time. This has affected both companies engaging in exploration and companies higher up in the production chain. However, most of the commodities traders such as Glencore, who were viewed to be endangered at the beginning of 2016, were able to successfully restore their balance sheets.

III PLENARY INSOLVENCY PROCEEDINGS

In the past 12 months, no new landmark bankruptcy or restructuring cases were opened of which we are aware. However, ongoing cases, which have been portrayed in this Review in previous editions, have proceeded. The most high-profile bankruptcy and restructuring cases being:

a The oil refining company Petroplus Holdings (PHAG) headquartered 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 in order to eventually sell the products directly or through local marketing companies. Insolvency proceedings were commenced with regard to numerous Petroplus group companies in late January 2012, including PHAG and PMAG, after failing to secure up to a US$2 billion revolving credit facility line (RCF). 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

24 Press release of the State Secretariat for Economic Affairs dated 31 May 2018 and the economic forecasts by the Federal Government's Expert Group - summer 2018 dated 19 June 2018, also for the figures stated in the below paragraph.

25 Press release of the Swiss National Bank, dated 15 March 2018 containing a monetary policy assessment.

26 Press release of the Federal Statistical Office, dated 29 March 2018 containing figures on insolvency proceedings in the year 2017.

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 between (1) PMAG, the English group company Petroplus Refining & Marketing Ltd. (PRML), PRML's Swiss ancillary bankruptcy estate and the PRML liquidators and between (2) 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 entered into force. The settlements concluded ongoing actions to contest the PMAG schedule of claims instigated by PRML and PRTL, which were aimed at achieving the admittance of an additional third-class claim amount of the PRML ancillary bankruptcy estate of CHF 131 million and to relegate a 23.8 million Swiss francs claim of the PRTL ancillary bankruptcy estate from the subordinated claims to the normal-third class claims. 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.

b The holding company of Swissair, SAirGroup AG, and its subsidiary companies have been in composition proceedings since 2001. The liquidation proceedings have further advanced in 2016, as the intra-company claims (Flightlease AG, SAirLines AG and Swissair AG) have been 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 of 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 director's liability under corporate law against several corporate bodies of SAirGroup (members of the board, CEO, CFO). 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. In 2012, the Swiss Federal Supreme Court rejected the claims, as SAirGroup could not prove over-indebtedness of SAirGroup and SAirLines.[27] Further director's liability claims of the group companies remain pending before several Swiss courts. Five advance payments on bankruptcy dividends have been made and the expected bankruptcy dividend amounts to 23 per cent according to the liquidator.

c 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 above. Currently, only two objections against the schedule of claims of Lehman Brothers Finance SA are still pending before the competent Swiss courts. Twelve dividend payments, with a total dividend of over 61 per cent for third class creditors, have been paid out to creditors by by 30 June 2018.

27 BGer 4A_410/2011.

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 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

Under the current version of the PILA, the procedure for obtaining recognition of foreign insolvency proceedings is burdensome and cost-intensive, *inter alia*, owing to the reciprocity requirement, the fact that the recognition of foreign proceedings automatically leads to Swiss ancillary proceedings and the fact that assets of a foreign debtor in Switzerland are only distributed to the foreign bankruptcy estate after all secured and privileged claims of Swiss-domiciled creditors have been satisfied.[28]

In an attempt to remedy these issues, in particular to avoid unnecessary ancillary proceedings in cases where there are no secured or privileged creditors in Switzerland, the Swiss Federal Council adopted the dispatch on a revision of the PILA with regard to the recognition of international bankruptcy decrees and foreign composition agreements on 24 May 2017.

The new PILA includes five important amendments:

a. the reciprocity requirement will be deleted, thus considerably facilitating the recognition of foreign bankruptcy decrees as additional costs triggered by required legal opinions of foreign counsel on the reciprocal nature of a certain jurisdiction become unnecessary;

b. insolvency decrees shall be recognised if issued by the competent authorities at the 'centre of main interests' (COMI);[29]

c. 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 the request made by the foreign bankruptcy administration;

d. Swiss authorities can cooperate with foreign bankruptcy authorities on related matters; and

e. creditors of non-secured and non-privileged claims of a Swiss branch of a foreign insolvent entity can be listed in the schedule of claims in the ancillary bankruptcy.

The revised provisions of the PILA were subject to an optional referendum, of which the deadline expired on 5 July 2018. The Swiss Federal Council is now expected to determine the date of entry into force of the revised PILA shortly; the date is likely to be set to late 2018 or early 2019.

28 See Section I.vii for further details.

29 The definition of a COMI in the revised PILA matches the EU Insolvency Regulation's (EU 2015/848) definition of COMI.

DANIEL HAYEK

Prager Dreifuss AG

Daniel Hayek is a member 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 vis-à-vis bankruptcy administrators, also before courts. He also specialises in banking and finance as well as corporate matters.

LAURA OEGERLI

Prager Dreifuss AG

Laura Oegerli is a junior associate at Prager Dreifuss' Zurich office. Her main practice areas are corporate and M&A and dispute resolution. She focuses mainly on contract and corporate law matters as well as insolvency law and acts for national as well as international companies.

PRAGER DREIFUSS AG

Mühlebachstrasse 6
8008 Zürich
Switzerland
Tel: +41 44 254 55 55
Fax: +41 44 254 55 99
www.prager-dreifuss.com