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In-Depth: Insolvency (formerly The Insolvency Review) offers an incisive review of the most consequential features of the insolvency laws and procedures in key jurisdictions worldwide. It also examines the practical implications of recent market trends and insolvency case developments.

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Switzerland

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Summary

Introduction

The overall economic challenges in recent years lead to increase in the number of bankruptcies in Switzerland. In contrast, the number of restructuring proceedings has remained relatively low. This large difference is mainly attributable to the fact that traditionally Swiss companies prefer bankruptcy proceedings over restructuring proceedings, often also because they are not aware of the advantages of restructuring proceedings. The dominance of bankruptcy proceedings results in very low dividends for creditors, which could be improved if more companies opted for restructuring proceedings where assets can be realised at higher values. In recent years, various legislative measures have been taken with the aim of reducing the number of bankruptcy proceedings and create incentives for companies to use restructuring procedures instead. This will hopefully lead to an increased usability of restructuring procedures in the near future, resulting in better outcomes and higher dividends for creditors.

Insolvency law, policy and procedure

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.[1] A number of other laws and ordinances further regulate special aspects of restructuring and insolvency proceedings, such as specific provisions relating to the nature of the debtor (e.g., financial institutions).

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

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

1. bankruptcy proceedings pursuant to Article 197 et seq., aimed at the full liquidation of the debtor's assets and the debtor's dissolution by realising the entire estate and distributing the proceeds proportionately to all creditors; and
2. composition proceedings pursuant to Article 293 et seq., aimed at enabling the debtor to reach a restructuring agreement with its creditors.

The DEBA provides for in-court and out-of-court measures supporting the restructuring of a financially distressed debtor. The Swiss Code of Obligations (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 725a, Paragraph 1 thereof.[2]

Policy

The collapse of Switzerland's national airline, Swissair, in 2001 sparked a public debate about the need to amend Swiss insolvency laws. There was wide criticism that the DEBA failed to deal effectively with the restructuring of financially distressed companies and with insolvencies of large group companies, resulting in the vast majority of restructuring processes ending in liquidation rather than in survival of the companies. Subsequently, the DEBA provisions were discussed in Parliament, and the revised DEBA entered into force on 1 January 2014. The primary objective of the revision was to promote the restructuring of companies over liquidation.

Inspired by the US Bankruptcy Code's Chapter 11 procedure, the revised DEBA facilitates companies' access to protection under a moratorium for mere restructuring purposes. The rules governing the moratorium thus create incentives to apply for a provisional moratorium in a timely manner. Companies shall have enough time to adopt restructuring measures without the public being aware of their financial difficulties. Changes in employment law in relation to business takeovers should further facilitate the process. In addition, the provisions on terminating long-term agreements were revised. Since 2014, a debtor can extraordinarily terminate long-term agreements, other than employment agreements, in composition proceedings.[3] Thus, debtors can now free themselves from long-term commitments, which may jeopardise the financial stability of the entire company. However, we have yet to see any increase in restructurings leading to company survivals under the revised DEBA.

Insolvency procedures

Bankruptcy proceedings

Once a debtor is declared bankrupt by the competent court,[4] all the debtor's creditors take part in the bankruptcy proceedings.

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

As a first step, the bankruptcy office prepares an inventory listing all the debtor's assets. If that inventory shows that the proceeds from the assets will cover the costs of bankruptcy proceedings, the bankruptcy office will commence ordinary bankruptcy proceedings. Otherwise, the bankruptcy office will initiate summary proceedings, which generally do not entail creditors' meetings.[5]

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

The first creditors' meeting should be held within 20 days of the public announcement of the bankruptcy proceedings against the debtor. The purpose of this meeting is to decide on organisational issues, such as appointing either the public bankruptcy office or a private

bankruptcy administrator as the administrator of the estate. It further decides on urgent administrative action, such as the continuation of the debtor's business activities.

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

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

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

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

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

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

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

Composition proceedings

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

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

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

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

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

There are two principal types of judicial composition agreements:

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

2. an agreement with assignment of the assets to the creditors pursuant to Article 317 et seq. of the DEBA,[6] whereby the debtor assigns its assets fully or partially to the creditors, and a court-appointed and creditor-elected liquidator realises the assets.[7] As opposed to bankruptcy proceedings, composition proceedings allow for more flexibility in realising the assets. The proceeds of the realisation are distributed among the creditors in proportion to the amounts of their filed claims and in accordance with the hierarchy of claim classes set out by the DEBA. To this end, the appointed administrator prepares a schedule of claims that can be contested by creditors as in bankruptcy proceedings. If all the debtor's assets are assigned to its creditors, the composition agreement leads to the dissolution and liquidation of the debtor.

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

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

Stay of bankruptcy decision and exceptions to notify the court

The board of directors of a company is legally obliged to request the opening of bankruptcy proceedings when the financial statement shows that the 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 725b of the SCO.[8] The court may stay the decision on the opening of bankruptcy proceedings if there are reasonable prospects that the debtor can reach a composition agreement with its creditors.

It is notable that the SCO provides for two exceptions to the board of directors' duty to notify the court of any over-indebtedness: if certain creditors subordinate their claims to those of all other company creditors to the extent of the capital deficit, or if there are reasonable prospects that the over-indebtedness can be remedied within a reasonable period (not more than 90 days), the board is exempt from its obligation to notify the court.

Ancillary insolvency proceedings

Recognition of foreign insolvency proceedings and foreign arrangements with creditors is dealt with in the PILA.[9]

Starting proceedings

Bankruptcy proceedings

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

A creditor may file a request to open proceedings if:

1. it has either fully enforced its claims in debt collection proceedings and remains in possession of a claim against the debtor; or
2. other reasons justify the immediate opening of bankruptcy proceedings against a debtor (i.e., without prior debt collection proceedings), such as fraudulent behaviour or cessation of payments by the debtor.

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

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

Composition proceedings

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

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

Control of insolvency proceedings

Bankruptcy proceedings

As has been stated, a debtor loses the right to disposal of its assets once bankruptcy proceedings have been opened against it. This right is assumed by the bankruptcy administrator, who will be either a state administrator or an elected private administrator. The bankruptcy administrator is legally obliged to preserve and realise the bankruptcy estate. Certain important rights remain with the creditors, such as appointing and confirming the bankruptcy administrator and deciding how to realise the estate's assets. Additionally, the creditors may appoint a creditors' committee at the first creditors' meeting.[10]

Composition proceedings

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

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

Special regimes

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

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

The aforementioned legal provisions in the Ordinance on the Insolvency of Banks and Securities Dealers provide for a completely autonomous restructuring procedure according to the procedure set out in the DEBA. Notably, FINMA has the authority to transfer assets located in Switzerland to a foreign bankruptcy estate when bankruptcy proceedings have 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.[11]

Compared to a creditor's rights in ordinary bankruptcy proceedings, creditors have limited rights in proceedings governed by FINMA. In particular, they have limited rights to appeal the bankruptcy administrator's actions: creditors can only appeal acts relating to the realisation of assets. A creditor intending to appeal any other acts may file a notification to the Federal Banking Commission (FBC). The FBC then decides whether it will examine the appealed act. Furthermore, a creditor's right to inspect the liquidator's files is limited by banking secrecy. This right may further be restricted to specific stages of the proceedings, or it may be limited or refused if opposing interests take precedence. Moreover, any information gathered by way of file inspection may solely be used to preserve the rights of creditors.

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

Cross-border issues

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

When bankruptcy proceedings are opened abroad, these foreign proceedings are recognised in Switzerland on condition that the PILA requirements are met,[12] which are that the foreign bankruptcy must have been declared by the competent court at the seat of the debtor or at the centre of main interests (COMI),[13] the foreign bankruptcy must be enforceable in the issuing country and there are no general grounds for refusal according to the PILA.[14]

Upon meeting these requirements, a foreign insolvency administrator is not entitled to file claims against a Switzerland-domiciled debtor before the Swiss courts. Rather, Swiss authorities conduct separate Swiss proceedings and appoint a local liquidator for the purpose of liquidating the assets (ancillary proceedings).[15] This means that, in effect, a foreign bankruptcy decree triggers Swiss bankruptcy proceedings. However, unlike Swiss bankruptcy proceedings, which include any debtor's assets located abroad, these ancillary proceedings relate only to assets located in Switzerland. Furthermore, not all a debtor's creditors participate in the ancillary proceedings; participation is restricted to creditors with pledge-secured claims, creditors with privileged (first-class and second-class) unsecured claims domiciled in Switzerland and creditors of non-secured and non-privileged claims of a Swiss branch of a foreign insolvent entity.

Once the claims of all creditors have been fully satisfied and a surplus remains, this surplus can be distributed to the foreign insolvency administration or to the entitled bankruptcy creditors directly. This distribution requires the recognition of the foreign schedule of claims by the same Swiss court that recognised the foreign bankruptcy proceedings. The foreign schedule of claims will be recognised when Switzerland-domiciled creditors have been appropriately considered in the schedule of claims. The PILA provides for distribution among Swiss third-class creditors, when the Swiss court does not grant recognition of the foreign schedule of claims.[16]

Additional topics

Clawback actions

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

Only acts committed by the debtor prior to the opening of bankruptcy proceedings can be subject to clawback actions. The bankruptcy administrator or the composition liquidator is entitled to bring forward clawback actions against the contractual party of the debtor, or the debtor itself in the name of the bankruptcy estate, within three years of the opening

of bankruptcy proceedings or within three years of the confirmation of the composition agreement. A creditor may only bring such a claim in its own name after assignment of this right from the bankruptcy estate.

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

1. gifts or gratuitous acts of a debtor, pursuant to Article 286 of the DEBA. Any gifts, gratuitous acts or dispositions by the debtor for which it did not receive adequate compensation are voidable, if they were made up to one year prior to the opening of bankruptcy proceedings or one year prior to the notification of the debt moratorium against the debtor;[17]
2. certain acts by an over-indebted debtor, pursuant to Article 287 of the DEBA. The granting of collateral for existing obligations, to which the debtor was not obligated, the settlement of monetary debt by unusual means and the payment of undue debt is voidable, if carried out by an over-indebted debtor up to one year prior to the opening of bankruptcy proceedings or one year prior to the notification of the debt moratorium against the debtor;[18] and
3. acts by a debtor with the deliberate intent of disadvantaging creditors, pursuant to Article 288 of the DEBA. All acts carried out by a debtor up to five years prior to the initiation of bankruptcy proceedings or five years prior to the notification of the debt moratorium are voidable, if carried out with an intent to harm the debtor's creditors or to favour certain creditors to the detriment of the others, and if that intent was apparent, or should have been apparent, to the contracting party.[19]

Liability claims

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

First, according to the revised Swiss company law that came into force on 1 January 2023, the board of directors now has an explicit duty to monitor the solvency of the company, for example, by adopting a cash flow forecast for the next 12 months. If the company is threatened with insolvency, the board of directors must take measures to ensure its solvency.

Second, if the latest annual balance sheet shows that half of the share capital and the legal reserves are no longer covered (capital loss), the board of directors must take measures to rectify the capital loss, pursuant to Article 725a, Paragraph 1 of the SCO.[21]

Third, an interim balance sheet must be drawn up if there is good cause to suspect over-indebtedness. If the interim balance sheet shows that claims by the company's creditors are not covered, whether the assets are appraised at going concern or liquidation values (over-indebtedness), the board of directors must notify the court, unless certain company creditors subordinated their claims to the extent of the capital deficit or if immediate restructuring measures are available and the over-indebtedness can be remedied within a reasonable period (not more than 90 days). The chances of restructuring

must be tangible (in other words, highly likely) and delaying the notification of the court may not endanger the financial situation of company creditors.[22]

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

Insolvency metrics

Switzerland's gross domestic product (GDP) rose by merely 0.3 per cent in the first quarter of 2024. While the industrial output stagnated, the service sector grew and private consumption increased. The Swiss federal government's expert group on economic forecasts expects GDP to rise by a total of 1.2 per cent in 2024, which is lower than previously projected because global demand from a Swiss perspective is expected to remain below its historical average in the coming quarters. For 2025, the expert group expects economic activity to normalise to a certain extent and GDP to grow by 1.7 per cent.[23]

In June 2024, the Swiss National Bank predicted an inflation rate of 1.3 per cent for 2024. For 2025, the expected rate has been revised downwards from 1.2 per cent to 1.1 per cent. The Swiss National Bank further predicts an inflation rate of 1 per cent for 2026.[24] This prognosis was based on the assumption that the Swiss National Bank base rate will remain unchanged at 1.25 per cent during the entire forecast horizon. In 2024, the Swiss National Bank has decreased the base rate twice from 1.75 per cent to 1.25 per cent because inflationary pressure has fallen compared to previous quarters.

Statistics on insolvency activity are not yet available for 2024. In 2023, 15,447 bankruptcy proceedings were opened, which represents an increase of 2.9 per cent compared to 2022. In particular, the IT, hospitality, transport and logistics sectors saw a sharp increase in company bankruptcies. However, losses resulting from bankruptcy proceedings decreased in 2023 to 2.1 billion Swiss francs, compared to 4.2 billion Swiss francs and 2.4 billion Swiss francs in 2021 and 2022, respectively. The conclusion of a small number of large proceedings was mainly responsible for the high losses in 2021 (and 2020).[25]

Plenary insolvency proceedings

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

Petroplus

The oil refining company Petroplus Holdings (PHAG), which has its headquarters in Zug, Switzerland, was the parent company of the Petroplus group, which operated refineries in several European countries. Petroplus Marketing AG (PMAG) occupied a central position

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

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

In February 2018, two settlements entered into force:

1. between PMAG, the English group company Petroplus Refining and Marketing Ltd (PRML), PRML's Swiss ancillary bankruptcy estate and the PRML liquidators; and
2. between PMAG, the English group company, Petroplus Refining Teesside Ltd (PRTL), PRTL's Swiss ancillary bankruptcy estate, the PRTL liquidators and Deutsche Bank Trust Company Americas as security trustee for Petroplus bond creditors.

The settlements concluded ongoing actions to contest the PMAG schedule of claims instigated by PRML and PRTL, the aim of which was to achieve the admittance of an additional third-class claim of the PRML ancillary bankruptcy estate to the amount of 131 million Swiss francs and to relegate a claim of 23.8 million Swiss francs by the PRTL ancillary bankruptcy estate from subordinated to normal third class. The settlements took into account the risks of all parties involved and permitted a far-reaching validation of PMAG's schedule of claims, which led to the distribution of a further interim payment to third-class creditors of PMAG.

Swissair

The holding company of Swissair, SAirGroup AG, and its subsidiary companies have been in composition proceedings since 2001. The liquidation proceedings advanced during 2016, when the intra-company claims (Flightlease AG, SAirLines AG and Swissair AG) were settled. SAirGroup asserted claims based on directors' liability under corporate law against several corporate bodies of SAirGroup (members of the board, chief executive officer, chief financial officer). The composition liquidator argued, in particular, that these bodies transferred shares in possession of SAirGroup to the subsidiary SAirLines, without receiving adequate compensation for the transactions. The Swiss Federal Supreme Court rejected the claims in 2012, as SAirGroup could not prove over-indebtedness of SAirGroup and SAirLines.[26]

In February 2024, the composition proceedings in relation to SAirGroup AG were concluded. The total bankruptcy dividend amounted to 23.5 per cent.

Lehman Brothers

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

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.

Year in review

On a legislative level, the revised Swiss company law entered into force on 1 January 2023, which aims at promoting restructuring of a distressed company, mainly by introducing certain additional obligations of directors in the context of their duties under Articles 725 et seq. of the SCO. The revised law provides for an early warning system in the event of insufficient liquidity and aims to reduce the number of bankruptcies. However, in 2023, the number of bankruptcies slightly increased compared to 2022. We expect that the revised law may need additional time until it is fully implemented in the business sector and the effects are fully realised to reduce the number of bankruptcies in the medium to long term.

Outlook and conclusions

From 2021 to 2023, the number of bankruptcies in Switzerland increased. During the first couple of months in 2024, the number of bankruptcies decreased, except in the real estate sector where we have seen an increase in the number of bankruptcies. We generally expect that the Swiss economy will stabilise over the coming months, which should also lead to a decrease in corporate bankruptcies.

On a legislative level, two important revisions will enter into force on 1 January 2025 in Switzerland. Stricter measures against abusive bankruptcies will be implemented, which are aimed at preventing debtors from to misusing bankruptcy proceedings to get rid of their financial obligations, such as salary payments or debts, and thus harm other people and companies. In addition, the exclusion of bankruptcy in the enforcement of public-law

claims will be abolished, which will lead to uniform treatment of public-law and private-law claims in enforcement proceedings. This means an aggravation for debtors who are generally subject to bankruptcy, as non-payment of public-law debts can now also lead to bankruptcy.

Endnotes

1 The most recent revision of the DEBA entered into force in January 2023. ^ Back to section

2 Failing to implement these measures promptly may open up the directors to liability suits, in line with Article 754, Paragraph 1 of the SCO. See also 'Additional topics'. ^ Back to section

3 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. ^ Back to section

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

5 The subsequent remarks about Swiss bankruptcy proceedings relate to ordinary bankruptcy proceedings. ^ Back to section

6 Notable examples of composition proceedings with assignment of the assets are SAirGroup AG, Swissair Schweizerische Luftverkehr AG, Petroplus Marketing AG and Unifina Holding. ^ Back to section

7 The liquidation may take several years. This may affect the assets of the estate as negative interests may incur, thereby reducing the creditors' returns. Therefore, settlements have become even more important for creditors. See 'Plenary insolvency proceedings' for an example of such a settlement. ^ Back to section

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

9 See 'Cross-border issues'. ^ Back to section

10 See 'Insolvency procedures'. ^ Back to section

11 See 'Cross-border issues'. ^ Back to section

12 The principle of reciprocity has been deleted by the revision of the Swiss Private International Law (PILA) that came into force on 1 January 2019. ^ Back to section

13 The definition of a COMI in the revised PILA matches the definition in the Insolvency Regulation. ^ Back to section

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

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

16 Swiss law provides for more flexible rules on the recognition of foreign bankruptcy decrees on banks and other financial institutions. ^ Back to section

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 of the DEBA). ^ Back to section

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

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

20 The board of directors' general duty of care and loyalty is described in Article 717 of the SCO. ^ Back to section

21 Restructuring measures may for example be a capital increase, cutting the capital combined with an immediate increase or a rescue merger. ^ Back to section

22 Decision of the Swiss Supreme Court of 2 October 1990, BGE 116 II 533. ^ Back to section

23 See press release by the State Secretariat for Economic Affairs, dated 14 June 2024, Konjunkturprognosen (admin.ch) and the economic forecasts by the Federal Government's Expert Group for summer 2024, dated 17 June 2024, Konjunkturprognose im Wesentlichen beibehalten: 2024 wächst die Schweiz nur unterdurchschnittlich (admin.ch) . ^ Back to section

24 See press release of the Swiss National Bank, dated 20 June 2024, containing a monetary policy assessment, https://www.snb.ch/public/publication/de/www-snb-ch/publications/communication/press-releases-restricted/pre_20240620/0/pre_20240620_d.pdf. ^ Back to section

25 See press release of the Federal Statistical Office dated 9 April 2024 containing figures on insolvency proceedings in 2023, Betreibungen und Konkurse | Bundesamt für Statistik (admin.ch) . ^ Back to section

26 BGer 4A_410/2011. ^ Back to section

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