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THE  
INTERNATIONAL  
INSOLVENCY  
REVIEW

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THIRD EDITION

EDITOR  
DONALD S BERNSTEIN

LAW BUSINESS RESEARCH

# THE INTERNATIONAL INSOLVENCY REVIEW

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Third Edition

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# EDITOR'S PREFACE

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This third edition of *The International Insolvency Review* once again offers an in-depth review of market conditions and insolvency case developments in key countries around the world. As always, a debt of gratitude is owed to the outstanding professionals in geographically diverse locales who have contributed to this book. Their contributions reflect diverse viewpoints and approaches, which in turn reflect the diversity of their respective national commercial cultures and laws.

The preface to the 2014 edition of this book touched upon the challenges faced by large multinational enterprises attempting to restructure under these diverse and potentially conflicting insolvency regimes. These challenges are particularly acute in large corporate insolvencies, because neither UNCITRAL's Model Law on Cross-Border Insolvency nor other enactments, such as the European Union's Regulation on Insolvency,<sup>1</sup> provide the tools necessary for consolidated administration of insolvencies involving multiple legal entities in a corporate group, with operations, assets and stakeholders under different corporate umbrellas in different jurisdictions.<sup>2</sup> Insolvent corporate groups are therefore obliged to cobble together consensual restructurings with local stakeholders in key jurisdictions, or to initiate separate plenary insolvency proceedings for individual companies under multiple local insolvency regimes (as illustrated in the cases of *Nortel*

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1 Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings, 2000 O.J. (L 160) 1, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2000:160:0001:0018:en:PDF>.

2 On 20 May 2015, the European Parliament and Council published the Recast Regulation on Insolvency 2015/848 (the 'Recast Regulation'), which will apply to insolvency proceedings initiated after 26 June 2017. The Recast Regulation contains a provision for voluntary, non-binding group coordination proceedings in the EU. The practical impact of this new tool remains to be seen.

and *Lehman Brothers*, among others), with added costs, dispersed control, legal conflicts and inconsistent judgments.

As discussed in last year's edition, the search for a legislative or treaty-based solution to this problem is ongoing, but any such solutions would necessarily involve some degree of relinquishment of national sovereignty and a ceding of local jurisdiction and control that may be difficult for local interests to accept, especially without substantial convergence in national insolvency laws. Given the lack of statutory tools, for some time it has been common in cross-border cases to implement insolvency protocols designed to address potential procedural, and in some cases substantive, conflicts. These agreements may be limited to providing a general framework for cross-border cooperation and coordination, or they may also include specific procedures for deferral, claims resolution, communication between the courts or other particular needs of an individual case.<sup>3</sup> Since the time of the *Maxwell Communications* case, cross-border protocols have enjoyed widespread support from insolvency practitioners and organisations, including from the American Law Institute, the International Insolvency Institute and INSOL Europe.<sup>4</sup>

However, while cross-border protocols are often valuable tools in multinational corporate group insolvencies, they are inherently limited in important ways. Absent supranational legal regimes, courts can only adjudicate disputes under the laws of their own countries, and parties can only be bound to the extent that the writ of the local court can be enforced against them. Fundamentally, cross-border protocols cannot expand the sovereignty or jurisdiction of the court presiding over an insolvency proceeding, superimpose a single governing substantive law or extend the reach of enforcement of local law against foreign parties. This is especially true if multiple plenary insolvency proceedings have been instituted under divergent national legal regimes with respect to members of a corporate group. Cross-border protocols are not a replacement for the enactment of supervening multi-jurisdictional solutions that bring all of the proceedings under a single controlling legal umbrella.

Some observers believe that the deficiencies in the protocol approach to cross-border insolvencies go beyond their inherent limitations. Questions have been raised about whether the effort to overcome these deficiencies leads to aberrational results, as the parties and the courts try to live up to the cooperative spirit of such protocols. In one such critique, former US bankruptcy court Judge James M Peck, who oversaw a number of cases employing cross-border protocols, most notably the *Lehman Brothers* case, recently addressed this issue in the context of the ongoing fight over distributions in

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3 See UNCITRAL Practice Guide on Cross-Border Insolvency Cooperation, New York 2010, available at [www.uncitral.org/pdf/english/texts/insolven/Practice\\_Guide\\_Ebook\\_eng.pdf](http://www.uncitral.org/pdf/english/texts/insolven/Practice_Guide_Ebook_eng.pdf).

4 See Final Supplemental Order Appointing Examiner and Approving Agreement Between Examiner and Joint Administrators, *In re Maxwell Comm. Corp.*, Case No. 91-15741 (Bankr. S.D.N.Y. 15 January 1992); see also Guidelines Applicable to Court-to-Court Communications in Cross-Border Cases, published by the American Law Institute (16 May 2000) and adopted by the International Insolvency Institute (10 June 2001); European Communication and Cooperation Guidelines for Cross-Border Insolvency, prepared by INSOL Europe's Academic Wing (2007).

the *Nortel Networks* insolvency cases.<sup>5</sup> As discussed in greater detail in the United States chapter of this review, various Nortel entities initiated plenary insolvency proceedings in the US, UK and Canada. After the sale of substantially all of Nortel's assets, the question remained of how to allocate the resulting US\$7.3 billion fund among creditors of the various estates. The parties implemented a cross-border protocol that was designed to promote consistent determinations of legal issues in the various proceedings.<sup>6</sup> After years of legal manoeuvring, the US and Canadian courts did indeed reach consistent decisions, following a trial 'held in two cross-border courtrooms linked by remarkable and effective technology,' on the methodology for distributing the fund to creditors.<sup>7</sup> However, despite the legal wrangling that has so far cost the Nortel and its creditors over US\$1 billion in legal fees, as Judge Peck notes, US bondholders have questioned the legitimacy of the rulings under US law, and appeals have been filed.<sup>8</sup> As Judge Peck explains, even the most accomplished commercial judges may have a 'propensity to seek pragmatic resolutions in good faith that may solve the problem presented but that may deviate from a merits based determination'.<sup>9</sup> While judges in multi-jurisdiction insolvency cases should be praised for trying to fit a single irregular peg into both a square and a round hole, it is certainly worth asking whether the integrity of a court's process can be compromised in the struggle to do so.

Judge Peck argues that courts should not overly strive to enhance consistency in decision making across jurisdictions, as 'judges who are performing their jobs faithfully within their home court system are doing all that is required of them.'<sup>10</sup> If parties fear inconsistent outcomes, they may be more willing to enter into binding arbitration or find other means of settling their differences as, Judge Peck suggests, they did in the *Lehman Brothers* case.<sup>11</sup>

While it runs against the grain, after all the efforts of the past 25 years to promote cooperation and coordination in international insolvencies, to suggest that judicial cooperation can sometimes work at cross-purposes with efficient administration of cross-border insolvencies, there is no denying that the likelihood of speedy, clear and accurate (even if inconsistent) substantive adjudication drives settlements in large complex cases. In cross-border cases, striving for judicial decisions that are hard to challenge, even if inconsistent, may be a straighter path to a practical outcome than striving to attain wholly symmetrical results.

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5 James M. Peck, *A Cross Border Judicial Dilemma – Conflict and Consistency in Insolvency Cases that Span the Globe*, Banking & Financial Services Law Association, Brisbane, Australia (4 September 2015).

6 *Id.*

7 *In re Nortel Networks, Inc.*, 532 B.R. 494 (Bankr. D. Del. 2015).

8 James M. Peck, *A Cross Border Judicial Dilemma – Conflict and Consistency in Insolvency Cases that Span the Globe*, *supra* note 4.

9 *Id.*

10 *Id.*

11 *Id.*

Of course, the need for judges to make such pragmatic choices would be reduced if there were clear legal enactments providing for the alignment of insolvency outcomes across jurisdictional lines.

I once again want to thank each of the contributors to this book for their efforts to make *The International Insolvency Review* a valuable resource. As each of our authors, both old and new, knows, this book is a significant undertaking because of our effort to provide truly current coverage of important commercial insolvency developments around the world. My hope is that this year's volume once again will help all of us reflect on the larger picture, keeping our eye on likely, as well as necessary developments on the near and, alas, distant horizon.

**Donald S Bernstein**

Davis Polk & Wardwell LLP

New York

October 2015

## Chapter 31

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# SWITZERLAND

*Thomas Rohde*<sup>1</sup>

### I INSOLVENCY LAW, POLICY AND PROCEDURE

#### i Statutory framework and substantive law

Insolvency proceedings in Switzerland are mainly governed by the Swiss Debt Enforcement and Bankruptcy Law (SDEBA), which governs not only insolvency proceedings, but also the general enforcement of monetary claims in Switzerland. A number of laws and ordinances other than the SDEBA, however, contain additional provisions on insolvency, either providing special rules with regard to certain types of insolvent debtors (e.g., financial institutions, collective investment schemes or insurance companies) or with regard to specific aspects of an insolvency (e.g., the fate of employees in an insolvency or the directors' duties in the event of insolvency). As for the recognition of foreign bankruptcy decrees or foreign arrangements with creditors, such recognition is governed by the Swiss Federal Act on Private International Law.<sup>2</sup>

The SDEBA provides for two main types of corporate insolvency proceedings:<sup>3</sup> bankruptcy proceedings, which lead to the dissolution of the debtor and the objective of which is the liquidation of the debtor's estate and the proportionate satisfaction of the debtor's creditors through the distribution of the proceeds; and composition proceedings, which are the main Swiss restructuring proceedings and which protect the distressed debtor from its creditors to enable the distressed debtor to attempt either to reach a court-approved debt-restructuring agreement with its creditors (such as a

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1 Thomas Rohde is a partner at Bär & Karrer AG.

2 Note that the Council Regulation (EC) No. 1346/2000 of 29 May 2000 does not apply to insolvency proceedings in Switzerland, nor has Switzerland adopted legislation based on the United Nations Commission on International Trade Law Model Law on Cross-Border Insolvency.

3 This chapter only describes insolvency proceedings applicable to corporate debtors.



debt-restructuring agreement either providing for a true restructuring of the debtor or for the realisation of the debtor's assets outside bankruptcy proceedings and thus for the liquidation of the debtor) or to restructure outside a court-approved debt-restructuring agreement. In bankruptcy proceedings as well as composition proceedings, all creditors of the debtor participate in the proceedings, which involve the entire estate of the debtor.<sup>4</sup> In addition to the composition proceedings provided for by the SDEBA, the Swiss Code of Obligations provides for a second type of restructuring proceedings, the 'corporate law moratorium', the objective of which is to serve as a moratorium allowing the debtor to implement an out-of court restructuring. This procedure is, however, seldom used.

## ii Policy

With composition proceedings, the SDEBA has for a long time provided a procedure designed to allow distressed corporate debtors to restructure.

Notwithstanding the availability of this procedure in the SDEBA, distressed debtors in Switzerland try nonetheless to restructure without the involvement of the courts and thus outside composition proceedings. If, however, composition proceedings are commenced, they typically end with the liquidation of the distressed debtor and not with its restructuring and survival. Swiss composition proceedings therefore have a reputation for not being overly effective. However, while it is certainly true that composition proceedings contained (and still contain) elements that are not restructuring-friendly, one of the main reasons that most composition proceedings end with a liquidation and not with a restructuring of the distressed debtor is that distressed debtors wait too long before starting such proceedings and when they finally enter into them it is mostly with the aim of a liquidation outside bankruptcy proceedings and not with the aim of a restructuring.

When in 2001 Swissair, the main Swiss airline (and the SAirGroup, to which it belonged), could not be saved from insolvency, many claimed that with a more restructuring-friendly corporate rescue process in the SDEBA, it might have been possible to save Swissair. The composition proceedings contained in the SDEBA have since been analysed and partially modified to facilitate a restructuring of financially distressed companies in the context of composition proceedings. This partial modification of the SDEBA entered into force on 1 January 2014 and it remains to be seen whether the modified composition proceedings will become more 'popular' with time as a restructuring tool for distressed debtors (and not primarily as a tool for the liquidation of the distressed debtors outside bankruptcy proceedings).

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<sup>4</sup> In addition to these 'general execution proceedings', the SDEBA also provides for 'special execution proceedings', meaning proceedings that lead to (1) the enforcement of an unsecured claim of a creditor against a debtor, which is not subject to bankruptcy, and which merely leads to the seizure and realisation of the debtor's estate to the extent needed for the satisfaction of such a creditor's claim, or (2) the enforcement of a secured claim by a secured creditor, which is done by way of realisation of the collateral. Furthermore, the SDEBA provides for special proceedings in the event of the enforcement of bills of exchange and cheques. These special execution proceedings are not covered in this chapter.

iii Insolvency procedures

*Bankruptcy proceedings*

Bankruptcy proceedings are the general insolvency proceedings of Swiss insolvency law. They lead to the dissolution of the debtor and have as their objective the liquidation of the debtor's estate and the proportionate satisfaction of the debtor's creditors through the distribution of the proceeds from such a liquidation.

Upon declaration of bankruptcy by the competent court, the debtor loses control over its assets, with control being assumed by the bankruptcy administration, and its business operations usually come to a standstill. In essence, the bankruptcy administration, which is either the official public bankruptcy office or a private bankruptcy administration elected by the creditors, does everything necessary for the maintenance and realisation of the bankruptcy estate. In particular, it draws up the inventory of the assets belonging to the bankruptcy estate, summons the creditors to file their claims, verifies and decides on the admittance of such claims and the class to which they will be allocated,<sup>5</sup> draws up a schedule of claims, realises the assets by way of public auction or private sale, and distributes the proceeds to the creditors according to the allocated class.<sup>6</sup> After the distribution, the bankruptcy administration submits its final report to the bankruptcy court, which declares the bankruptcy proceedings closed and the debtor is deleted from the commercial register.

Note that the SDEBA provides for two different types of bankruptcy proceedings: ordinary proceedings and summary proceedings. The bankruptcy court adopts summary proceedings if the proceeds of the assets are unlikely to cover the expected costs of ordinary proceedings or if the case is a simple one.<sup>7</sup> The main difference between the two proceedings is that in ordinary proceedings there are creditors' meetings and the creditors may also appoint a creditors' committee. In summary proceedings, however, there are neither creditors' meetings (only in exceptional cases can a creditor's meeting

---

5 The SDEBA provides for three different classes of claims. First-class claims are, *inter alia*, certain claims of employees of the bankrupt debtor. Second-class claims are mainly claims by social security, health and unemployment insurance institutions for employer contributions. Third-class claims are basically all other claims against the debtor.

6 First of all, secured creditors are to be satisfied out of the proceeds from the realisation of their collateral. After this, creditors having claims against the bankruptcy estate itself (i.e., claims that have come into existence with the consent of the bankruptcy administration) are to be satisfied. Finally, creditors with unsecured claims are to be satisfied out of the remaining proceeds of the liquidation of the estate according to the class their claim has been allocated to. Creditors of an inferior class only participate in the distribution if all creditors of the superior class (or classes) have been entirely satisfied. If the proceeds are insufficient to satisfy all creditors of the same class, the available amount will be distributed among them in proportion to the amount of their respective claims.

7 If the proceeds of the assets are unlikely to cover even the expected costs of summary proceedings, the bankruptcy court declares the bankruptcy proceedings closed (i.e., no bankruptcy proceedings will be conducted), unless a creditor advances the expected costs of the summary proceedings.

be convened by the bankruptcy administration) nor a creditors' committee. The SDEBA sets out in detail which decisions have to be taken by the creditors' meeting, the creditors' committee, the bankruptcy administration or the bankruptcy court.

The SDEBA provides that the bankruptcy proceedings should be completed within one year after the declaration of bankruptcy; however, that period may be extended by the authority supervising the bankruptcy administration. While smaller bankruptcies can be completed within months, more complex ones may last for several years.

### *Composition proceedings*

Composition proceedings are the main Swiss restructuring proceedings. They protect the distressed debtor from its creditors to enable such a distressed debtor to attempt either to reach a court-approved debt restructuring agreement with its creditors or to restructure outside a court-approved debt restructuring agreement.

In essence, the composition court will grant the debtor a provisional debt moratorium of up to four months and will usually appoint a provisional administrator to verify the chances of a restructuring or a composition agreement.<sup>8</sup> If such chances exist, the composition court will appoint an administrator (typically, the provisional administrator) and, if circumstances require, also a creditors' committee, and grant a definitive debt moratorium of up to 24 months, during which time the debtor must either successfully restructure or agree on a composition agreement with its creditors. Such an agreement requires the approval by a certain majority of the creditors as well as court approval and is binding on all creditors of the debtor, independently of whether they have individually approved the agreement.<sup>9</sup> The (provisional as well as the definitive) debt moratorium has the effect that no debt enforcement action against the debtor may be initiated or pursued during such a moratorium; furthermore, although the debtor remains 'in charge' (i.e., continues to manage its affairs), it is subject to supervision as regards the conduct of its day-to-day business through the court-appointed administrator and may only dispose of certain assets with the approval of the composition court (or the creditors' committee). The administrator not only supervises the debtor's activities but, in particular, tries to achieve a composition agreement (unless a restructuring outside a court-approved debt-restructuring agreement can be achieved). To this end, the administrator draws up an inventory of the debtor's assets, summons the creditors to file their claims and, in the event that a composition agreement is envisaged, negotiates a composition agreement with the debtor and the creditors.

If the composition proceedings are used by the distressed debtor to attempt to reach a composition agreement (i.e., a court-approved debt-restructuring agreement) with its creditors (and not to restructure outside such an agreement), such a composition agreement can either take the form of an 'ordinary composition agreement' or of

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8 The provisional debt moratorium is normally rendered public, but the composition court can under certain circumstances abstain from rendering the provisional moratorium public.

9 Composition agreements are, however, not binding (1) on secured creditors with respect to their claims up to the amount covered by the realisation of the collateral, and (2) with regard to claims that have come into existence with the consent of the administrator.

a 'composition agreement with assignment of assets'. In the case of an ordinary composition agreement, the debtor and its creditors either agree on a specific payment plan, thereby giving the debtor more time to pay its debts in full, or they agree that the creditors waive part of their claims. The ordinary composition agreement thus results in a restructuring of the debtor's debts, thereby allowing the debtor to avoid liquidation and to continue its business.<sup>10</sup> The composition agreement with assignment of assets, on the other hand, usually leads to the liquidation of the debtor's business and the dissolution of the debtor; the debtor and the creditors agree that the debtor assign all its assets to the creditors for realisation by a liquidator elected by the creditors and supervised by a creditors' committee in satisfaction of the creditors' claims. Theoretically, the debtor and its creditors may also agree that only part of the debtor's assets be assigned. In such cases, the composition proceedings do not result in the dissolution of the debtor, but this is seldom the case. The part of the creditors' claims that cannot be satisfied from the proceeds of the realisation of the assigned assets are normally waived. The realisation of the assets by the liquidator in composition proceedings is similar to that in bankruptcy proceedings but with more flexibility. The distribution of the proceeds follows the same rules as in bankruptcy. Such a composition agreement may also lead to a rescue of part of the debtor's business in the event that the debtor's business is partly or entirely sold to a third party.

Should the creditors not approve the composition agreement or should it already have become apparent during the debt moratorium that there are no prospects of a restructuring or of the creditors approving a composition agreement, bankruptcy proceedings against the debtor will be opened.

### *Corporate law moratorium*

As mentioned above, the Swiss Code of Obligations provides for an additional corporate rescue process, the 'corporate law moratorium'. In the event that a debtor has to file for bankruptcy because of overindebtedness, the bankruptcy court may stay the opening of the bankruptcy proceedings upon the request of the debtor (or a creditor) if there is a prospect of an out-of-court restructuring of the debtor. In the event that the court decrees such a stay, it will take the appropriate measures to preserve the debtor's assets. The court has broad discretion as how to structure such a stay and as to its duration; it may, for example, appoint an administrator and define such an administrator's areas of competence, and decide on the duration of the stay. The stay is usually not rendered public; note, however, that such a stay does not have the same protective effects as the debt moratorium in the composition proceedings. In the event that the debtor and its creditors cannot agree on an out-of court restructuring, the court will open bankruptcy proceedings.

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10 Note, however, that the composition court may only approve an ordinary composition agreement if the equity holders of the distressed debtor make an adequate contribution to its restructuring.

### *Ancillary proceedings*

In addition to the above-mentioned proceedings, the Swiss Federal Act on Private International Law provides for special Swiss ancillary proceedings in the event of a recognition of a foreign bankruptcy decree or a foreign arrangement with creditors in Switzerland (see Section I.vii, *infra*).

#### iv Starting proceedings

Bankruptcy proceedings are opened by the bankruptcy court either upon the request of a creditor or of the debtor itself. A creditor may request the opening of bankruptcy proceedings if it has gone through the ordinary Swiss debt-collection proceedings (which are also governed by the SDEBA) and its claim has not been settled by the debtor. In certain cases, however, a creditor may request the opening of bankruptcy proceedings without prior debt-collection proceedings, particularly if the debtor has ceased its payments or committed (or tried to commit) acts of fraudulent conveyance. The debtor itself may request the opening of bankruptcy proceedings if it declares itself insolvent. The debtor's board of directors (or its statutory auditors) even has the duty to request the opening of bankruptcy proceedings in the event of overindebtedness (i.e., if the claims of the debtor's creditors are no longer covered by the debtor's assets on a going-concern basis nor on a liquidation-value basis). Finally, and as mentioned above, bankruptcy proceedings are opened by the composition court *ex officio* under certain circumstances in the context of composition proceedings (e.g., in the event that the creditors do not approve the composition agreement or if it becomes apparent during the debt moratorium that there are no longer prospects of a restructuring or of the creditors approving a composition agreement).

Composition proceedings are usually opened by the composition court upon request of the debtor itself; however, a creditor may also request the opening of composition proceedings if it is also entitled to request the opening of bankruptcy proceedings.<sup>11</sup> Finally, even the bankruptcy court may stay judgment on the opening of bankruptcy proceedings of its own motion if it appears that a composition agreement could be reached with creditors, and will transfer the case to the composition court.

As for the corporate law moratorium, and as mentioned above, in the event a debtor has to file for bankruptcy because of overindebtedness, the bankruptcy court may stay the opening of the bankruptcy proceedings upon request of the debtor (or a creditor), if there is a prospect of an out-of-court restructuring of the debtor.

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11 According to the SDEBA, a debtor or a creditor may even propose a composition agreement during bankruptcy proceedings. In such a case, the bankruptcy administration has to assess the proposal for the attention of the creditors' meeting, which will have to decide on such a composition agreement. If the creditors' meeting accepts the proposed composition agreement and the composition court confirms the agreement, the bankruptcy administration requests the bankruptcy court to revoke the bankruptcy proceedings. This procedure is, however, rather seldom used.

v **Control of insolvency proceedings**

*Control over the debtor's assets during the proceedings*

In bankruptcy proceedings, the debtor loses control over its assets upon declaration of bankruptcy by the competent court and the bankruptcy administration assumes full control of the assets; business operations usually come to a halt.

In composition proceedings, the debtor continues to manage its affairs during the debt moratorium but is, however, subject to supervision as regards the conduct of its day-to-day business through a court-appointed administrator.<sup>12</sup> In addition, the debtor is prohibited from divesting, encumbering or pledging assets that are connected to its business, to give guarantees or to make gifts without the authorisation of the composition court (or the creditor's committee). Finally, the composition court may even direct that certain other acts shall require the approval of the administrator to be valid or even direct the administrator to take over the management of the business from the debtor.<sup>13</sup>

In the event of a corporate law moratorium, the debtor generally remains in control over its assets during such a moratorium. The court may, however, appoint an administrator whose areas of competence have to be defined by the court, and restrict the debtor's capacity to dispose of its assets.

*Governance rights during the proceedings*

In a bankruptcy, the bankruptcy administration has the task of doing everything necessary for the maintenance and realisation of the bankruptcy estate.<sup>14</sup> Along with the bankruptcy administration, the debtor's creditors have certain governance rights in the context of bankruptcy proceedings, in particular in ordinary bankruptcy proceedings. Creditors exercise such governance rights through creditors' meetings and through a creditors' committee; a creditors' committee is, however, optional.<sup>15</sup> A first creditors'

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12 Note that during the provisional moratorium, the composition court may abstain from appointing a provisional administrator.

13 If an ordinary composition agreement is concluded, the debtor regains full control over its assets. However, the composition agreement (or the composition court) may provide for the appointment of an administrator until the composition agreement has been fully performed, and give the administrator certain supervisory, management or liquidation powers with regard to the implementation and safeguarding of the performance of the composition agreement. In the event, and upon confirmation, of a composition agreement with assignment of assets, the debtor loses control over (usually) all its assets, and control is assumed by the liquidator.

14 Among others, and as mentioned above, the bankruptcy administration draws up an inventory of the assets belonging to the bankruptcy estate; summons the creditors to file their claims; verifies and decides about the admittance of such claims and which class they will be allocated to, and draws up a schedule of the respective claims; convenes the creditors' meetings; realises the assets by way of public auction or private sale; and distributes the proceeds to the creditors according to their allocated class.

15 In summary bankruptcy proceedings, no creditor's committee is appointed and normally no creditors' meetings are convened, thus the creditors have rather limited governance rights in such summary bankruptcy proceedings.

meeting is to be held within 20 days after the call to the creditors to file their claims has been published. The first creditors' meeting resolves on urgent matters, appoints the bankruptcy administration (official, public bankruptcy office or a private bankruptcy administration) and a creditors' committee. After the schedule of claims has been made available for inspection, the bankruptcy administration invites the creditors to a second creditors' meeting. The second creditors' meeting decides whether to confirm the bankruptcy administration in office and makes all other arrangements, without restrictions, for the continuation of the proceedings.<sup>16</sup>

In the event of a debt moratorium, the court appoints an administrator.<sup>17</sup> As mentioned above, the administrator not only supervises the debtor's activities, but also draws up an inventory of all the debtor's assets, summons the creditors to file their claims and, in the event that a composition agreement is envisaged, negotiates the composition agreement with the debtor and the creditors, and convenes and chairs a creditors' meeting for discussing the draft composition agreement. The creditors have few governance rights during such a debt moratorium: They decide upon the composition agreement (if an agreement is envisaged) and if a composition agreement with assignment of assets is proposed to the creditors, the creditors designate the liquidator as well as a creditors' committee to oversee the performance of such an agreement. In addition, and if the circumstances require, the composition court can appoint a creditors' committee for the duration of the debt moratorium, which supervises the administrator but has very few and limited governance rights.<sup>18</sup>

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16 In particular, the second creditors' meeting is competent to decide how the assets are realised (public auction or private sale). As for the creditors' committee, such a committee mainly has competence for the following areas: (1) supervision of the bankruptcy administration; (2) authorisation of the debtor to continue to run its business; (3) approval of accounts, authorisation of the continuation of court proceedings and conclusion of settlements and arbitration agreements; (4) objection to claims in the bankruptcy that the administration has admitted; and (5) ordering payment on account to be made to the creditors during the proceedings.

17 As mentioned above, the composition court may, however, abstain from appointing a provisional administrator for the duration of the provisional moratorium.

18 As mentioned above, in the case of an ordinary composition agreement, an administrator can be appointed until the composition agreement has been fully performed, to supervise, manage or liquidate the assets with a view to implementing and safeguarding the performance of the composition agreement. No specific creditors' governance rights exist, however, in the context of the performance of an ordinary composition agreement. In the case of a composition agreement with assignment of assets, a liquidator and a creditors' committee are nominated by the creditors' meeting. The liquidators are supervised and controlled by the creditors' committee. The specific areas of competence of such a creditors' committee and of the liquidators are defined in the composition agreement. The creditors exercise their governance rights through the creditors' committee designated by the creditors' meeting. The creditors' committee supervises and controls the liquidator.

Finally, in the context of a corporate law moratorium, there exist no special creditors' governance rights. Under certain circumstances they may even not be notified of the ongoing moratorium.

#### vi Special regimes

As mentioned above, special rules instead of the general rules set out in the SDEBA apply in cases of insolvency of certain types of debtors, in particular in cases of insolvency of financial institutions, collective investment schemes or insurance companies.

The most important of these special insolvency regimes in Swiss law is certainly the special insolvency regime set out in the Swiss Federal Banking Act (the Banking Act) and the Ordinance of the Swiss Financial Market Supervisory Authority on the Insolvency of Banks and Securities Dealers (the Banking Insolvency Ordinance), and which applies to banks, security dealers and central mortgage bond institutions. One of the most notable differences between the general insolvency regime set out in the SDEBA and the insolvency regime for financial institutions is that it is not the ordinary bankruptcy offices that are competent but the Swiss Financial Market Supervisory Authority (FINMA). Furthermore, in the case of a bankruptcy of a bank, second-class claims are not only claims by social security, health and unemployment insurance institutions for employer contributions, but also claims of depositors against the bankrupt bank of up to 100,000 Swiss francs. Finally, while the bankruptcy proceedings in cases of bankruptcy of financial institutions are similar to the ordinary bankruptcy proceedings set out in the SDEBA, the restructuring proceedings set out in the SDEBA and the Code of Obligations (i.e., the composition proceedings and the corporate law moratorium) are not applicable to financial institutions; a separate restructuring regime is set out in the Banking Act and in the Banking Insolvency Ordinance, which is specifically tailored to the needs of financial institutions and which has been completely overhauled after the financial crisis, and implements to a large extent the recommendations issued by the Basel Committee on Banking Supervision and the Financial Stability Board.

While Swiss insolvency law contains special insolvency regimes for certain debtors, Swiss insolvency law does not provide for a special regime in the event of an insolvency of a corporate group: Swiss insolvency law generally does not take into account whether the insolvent debtor is part of a group or not but instead treats each (insolvent) entity separately; it provides neither for a formal coordination of such insolvency cases (e.g., by having a single bankruptcy office being competent in the case of an insolvency of several group companies), nor for a material coordination of such insolvency cases (e.g., by consolidating the assets or liabilities of the insolvent group companies). However, the partial modification of the SDEBA, which entered into force on 1 January 2014, introduced a new provision whereby, in cases of related bankruptcies or composition proceedings, the competent authorities shall coordinate as much as possible their acts. Furthermore, under the new provision the competent bankruptcy and composition courts concerned may declare one single court as competent. Swiss insolvency law has



thus taken one first step in the direction of formal coordination in cases of insolvency of a corporate group.<sup>19</sup>

### vii Cross-border issues

The recognition of foreign bankruptcy decrees or foreign arrangements with creditors is governed by the Swiss Federal Act on Private International Law (PILA).

A foreign bankruptcy decree is recognised in Switzerland upon the application of the foreign bankruptcy administrator or a creditor if the following cumulative conditions are met: (1) the foreign decree is issued at the debtor's domicile; (2) the decree is enforceable in the country in which it was issued; (3) there are no grounds for non-recognition pursuant to Article 27 of PILA;<sup>20</sup> and (4) reciprocity is granted by the country in which the decree was issued. The recognition of a foreign composition agreement or similar proceedings by a competent foreign authority follows the same principles.

Recognition of a foreign bankruptcy decree does not, however, result in the foreign bankruptcy administrator being able to include the assets of the debtor located in Switzerland in the foreign bankruptcy proceedings, or to conduct the foreign bankruptcy proceedings on Swiss territory; separate local (Swiss) bankruptcy proceedings are conducted by the Swiss authorities, exclusively relating to the debtor's assets located in Switzerland. The recognition of a foreign bankruptcy decree thus has the same effect as a Swiss bankruptcy decree, with the following main differences.

The assets are restricted to those located in Switzerland, so only these assets are realised and distributed in the context of the Swiss proceedings. Furthermore, not all creditors of the debtor can participate in the Swiss proceedings, only creditors with claims secured by a pledge of collateral located in Switzerland, and unsecured creditors domiciled in Switzerland with privileged (first-class and second-class) claims. In the event that there is a surplus (i.e., the claims of all creditors that can participate in the Swiss proceedings can be fully satisfied), such a surplus is remitted to the foreign bankruptcy estate, but only if the foreign schedule of claims has been recognised by the Swiss court, which will happen if the claims of creditors domiciled in Switzerland were appropriately considered in the foreign schedule of claims. If the foreign schedule of claims is not

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19 Furthermore, the rules regarding voidable actions have also been partially modified as of 1 January 2014 to reverse the burden of proof in cases of intra-group transactions carried out before the insolvency: while, normally, the bankruptcy administration (or the liquidator) has to prove that all conditions for an avoidance action are fulfilled, the modified SDEBA contains a legal presumption leading to a reversal of the burden of proof should the dispositions carried out by a debtor favour related parties (e.g., group companies). In such cases, the modified SDEBA contains the legal presumption that – in the context of avoidance of gratuitous transactions – the consideration received by the debtor from such a related party was not adequate, and that – in the context of avoidance for intent – the debtor's intent was recognisable to such a related party.

20 The decree must be compatible with Swiss public policy and must have been issued in accordance with certain basic procedural principles.

recognised, the balance is distributed to the unsecured third-class creditors domiciled in Switzerland.<sup>21</sup>

Foreign bankruptcy administrators that have to recover assets of a bankrupt debtor located in Switzerland thus face a rather challenging task: they cannot themselves act in Switzerland (if they do, they could even face criminal charges) and can recover assets through the Swiss authorities only (1) if their bankruptcy decree is recognised by the competent Swiss court (which will sometimes not be possible because of the fact that their country does not grant reciprocity), and (2) as far as there is a surplus left after all creditors with claims that are secured by a pledge of collateral located in Switzerland and all privileged creditors domiciled in Switzerland have been satisfied. In addition, the latest decisions of the Swiss Federal Supreme Court have made it clear that the rules of the PILA set out above apply to every case in which a foreign insolvency administrator is trying to recover assets in Switzerland and thus leaves no room for any bypassing of these rules.

There exists, however, one important exception to the above rules: while the above rules generally also apply in the context of an insolvency of a foreign bank or other financial institution, the Banking Act provides that the FINMA may – in the context of an insolvency of a foreign bank or other financial institution – transfer the assets of such an insolvent foreign institution to the foreign administrator without local Swiss bankruptcy proceedings being conducted.

#### **viii Selected additional topics**

In addition to the formal and material rules applying to the bankruptcy and composition proceedings, which have been set out in more detail above, two additional selected topics shall be briefly outlined, as they are typically of interest in most Swiss bankruptcy or restructuring cases: the treatment of collateral in Swiss insolvency proceedings and the possibility of clawback actions under Swiss law.

#### *Collateral*

The objective of bankruptcy proceedings is the liquidation of the debtor's estate and the proportionate satisfaction of the debtor's creditors through the distribution of proceeds. All assets owned by the debtor at the time of the opening of bankruptcy proceedings form part of the bankruptcy estate. In the event that certain assets of the bankrupt debtor have been pledged as collateral to secure its obligations, such assets also form part of the bankruptcy estate, notwithstanding the reservation of the preferential rights for the secured creditors. The opening of bankruptcy proceedings thus has the effect on the rights of secured creditors as follows.

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21 Note, however, that special rules exist in the Swiss Banking Act with regard to recognition of foreign bankruptcy decrees and insolvency measures regarding financial institutions, giving FINMA, which is competent in the context of insolvency proceedings of financial institutions in Switzerland, much more flexibility (as well as a duty to coordinate with the foreign insolvency officials).

In the event the collateral consists of moveable goods, the creditor has the obligation to hand over such collateral to the bankruptcy administration, which will liquidate such assets.<sup>22</sup> The preferential rights of the secured creditor being reserved, such a secured creditor is, however, satisfied in priority out of the proceeds of the realisation of the collateral.<sup>23</sup> In the event that the collateral consists of real estate of the debtor (i.e., the creditor's rights are secured by way of a mortgage on the debtor's real estate), the opening of bankruptcy proceedings has, in general, no effect on such a right *in rem* of the secured creditor. In the event that the obligation secured by a mortgage is not yet due,<sup>24</sup> the mortgage remains in place and the claim secured by such a mortgage is assigned to the acquirer of the real estate in the context of the realisation of the real estate. In the event that an obligation secured by a mortgage is due, the real estate will be realised by the bankruptcy administration and the secured creditor will be satisfied in priority out of the proceeds. In the event that the collateral is a claim or another right that has been pledged in favour of the secured creditors, basically the same rules apply as those applicable in the case of a pledge of moveable goods.

If, however, assets of the bankrupt debtor have not been pledged but transferred or assigned to the secured creditor by way of security to secure the debtor's obligations,<sup>25</sup> such assets do not form part of the bankruptcy estate.<sup>26</sup> The secured creditor thus has no obligation to hand over such collateral to the bankruptcy administration but rather can realise the collateral itself according to the relevant provisions of the security agreement entered into between the bankrupt debtor and the secured creditor (such a security agreement typically providing for the right of the secured creditor to realise such assets through private sale).

Unlike bankruptcy proceedings, composition proceedings do not necessarily lead to the dissolution of the debtor or the liquidation of its estate. As a consequence,

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22 As a consequence of the opening of bankruptcy proceedings all obligations of the bankrupt debtor become due (with the exception of those that are secured by a mortgage on the bankrupt debtor's real estate); the secured creditor will, therefore, not only hand in the collateral, but also file its secured claim in the bankruptcy proceedings.

23 The realisation of the collateral by the secured creditor through a private sale is therefore not admissible and any agreement between the pledgor and the pledgee providing for such a right of private sale of the pledgee is only valid outside bankruptcy proceedings.

24 Unlike any other obligations of the bankrupt debtor, obligations of the bankrupt debtor that are secured by a mortgage on its real estate do not become due and payable because of the opening of bankruptcy proceedings.

25 In the case of a transfer or assignment of an asset by way of security, the debtor transfers title to the asset to the creditor, who commits itself to exercise its proprietary rights only in compliance with the purpose of such a security and to retransfer or reassign title to such an asset after its claim has been paid in full.

26 Assigned claims that only come into existence after the opening of the bankruptcy proceedings, however, form part of the bankruptcy estate. Such a situation may, for example, arise if the bankrupt debtor has assigned by way of security all existing as well as future receivables to its creditors.

the main effect of the opening of composition proceedings is that the creditors are not allowed to initiate or pursue any debt enforcement action against the distressed debtor – including the realisation of the collateral – during the debt moratorium, except for enforcement proceedings for the realisation of collateral for claims secured by a mortgage of real estate. The realisation of the real estate, however, is also excluded during the debt moratorium. In the event that the distressed debtor and its creditors enter into an ordinary composition agreement and the composition agreement is approved by the composition court (the debt moratorium thus being terminated), such an agreement is not binding on the secured creditors with respect to their claims up to the amount covered by the realisation of the collateral. Secured creditors are therefore free again to enforce their claims (if such claims are due) and realise the collateral by way of enforcement proceedings against the distressed debtor after the composition agreement has been approved by the court. The same applies to secured creditors in the case of a composition agreement with assignment of assets.<sup>27</sup>

### *Clawback actions*

According to the SDEBA, certain actions carried out by the debtor before the opening of bankruptcy proceedings and that disadvantage its creditors (or favour certain of its creditors to the disadvantage of others), may be voidable under certain circumstances. In the context of composition proceedings, such actions are only voidable upon confirmation by the composition court of a composition agreement with assignment of assets but not during the debt moratorium or upon conclusion of an ordinary composition agreement.

Avoidance actions may be brought in the event of bankruptcy proceedings by the bankruptcy administration in the name and on account of the bankruptcy estate, or – under certain circumstances – by a creditor in its own name and at its own risk. In the event of a composition agreement with assignment of assets, avoidance actions may be brought by the liquidator in the name and on account of the estate, or also – under certain circumstances – by a creditor in its own name and at its own risk.

All gifts and gratuitous transactions, as well as all dispositions made by the debtor without receiving adequate consideration during the year prior to the opening of bankruptcy proceedings (or, in case of composition proceedings, during the year prior to the notification of the debt moratorium), are voidable (avoidance of gratuitous transactions).<sup>28</sup> Although not explicitly mentioned in the SDEBA, only those dispositions of the debtor that result in direct or indirect damage to the debtor's creditors are voidable (e.g., by way of a reduction of the debtor's assets or by way of an increase in the debtor's

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27 In particular, the creditors secured by a pledge over moveable goods have no obligation to hand in their collateral to the liquidator but have the possibility of realising such collateral by way of enforcement proceedings (or by way of private sale in the event that this has been provided for in the pledge agreement).

28 In the event of fire sales, there exists thus a certain risk that the bankruptcy administration might challenge such a sale if the seller is declared bankrupt shortly after such a transaction by arguing that the seller has sold its assets at a too low a price because of the specific situation in which the sale has taken place (i.e., liquidity problems of the seller paired with time pressure).

liabilities). The adequacy of the consideration is to be verified based on and in relation to the market value of the debtor's disposition. With respect to dispositions carried out by a debtor in favour of related parties (e.g., group companies), the SDEBA contains a legal presumption that the consideration received by the debtor from such a related party will not have been adequate (which leads to a reversal of the burden of proof).

Furthermore, certain legal acts are voidable if carried out by the debtor during the year prior to the opening of bankruptcy proceedings (or, in the case of composition proceedings, during the year prior to the notification of the debt moratorium) and if the debtor at that time was already overindebted. Such legal acts are (1) the granting of collateral for existing obligations that the debtor was hitherto not bound to secure, (2) the settlement of a (monetary) debt by unusual means of payment, and (3) the payment of an unmaturing debt (avoidance due to overindebtedness). Avoidance is, however, precluded in the event that the recipient proves that it was unaware and could not have been aware of the debtor's overindebtedness.

Finally, any acts that have been carried out by the debtor during the five years prior to the opening of bankruptcy proceedings (or, in the case of composition proceedings, during the five years prior to the notification of the debt moratorium) are voidable that have the purpose, apparent to the other party, of disadvantaging its creditors or preferring certain of its creditors to the detriment of others (avoidance for intent). For an act to be voidable according to this provision, the following four requirements must be met: (1) the act of the debtor must have caused damage so that the creditor's rights to enforcement are affected;<sup>29</sup> (2) the debtor must have acted with the intent to cause damage;<sup>30</sup> (3) the counterparty knew or should have known of the debtor's intent to cause damage;<sup>31</sup> and (4) the act must have been carried out in the five years prior to the opening of bankruptcy proceedings (or, in the case of composition proceedings, during the five years prior to the notification of the debt moratorium).

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29 The case law of the Swiss Federal Supreme Court indicates that this requirement is met if the act of the debtor caused actual damage to the debtor's creditors (either by reducing the assets available for distribution among the creditors or by reducing the quota of a specific creditor in the distribution) or if the act otherwise adversely affects the position of the debtor's creditors in the relevant insolvency proceeding. Whether the mere preference of certain creditors over other creditors of the debtor would suffice is not entirely clear. While the Swiss Federal Supreme Court indicated in a decision rendered in 2008 that a mere preference of certain creditors was sufficient, even if such an act did not adversely affect the other creditors (or even benefitted the other creditors), later decisions indicate that this is not the case.

30 According to the case law of the Swiss Federal Supreme Court, it is, however, not necessary that the debtor has directly aimed at such damage, but it is sufficient if the debtor could and must have recognised that its act would cause such damage. It is thus sufficient, if the debtor merely accepts such a preference or disadvantage as a possible consequence of its act.

31 With respect to dispositions carried out by a debtor in favour of related parties (e.g., group companies), the SDEBA contains a legal presumption that the debtor's intent was recognisable to such a related party (which leads to a reversal of the burden of proof).

Avoidance actions become time-barred two years after the date of confirmation of the composition agreement with assignment of assets or, in the case of bankruptcy proceedings, two years after the opening of such proceedings. If the court admits the avoidance action, recipients who have received assets of the debtor through the transaction in question are bound to return them to the debtor's estate. In the event that a debtor has received a consideration from the beneficiary in connection with the (voided) transaction, the debtor's estate must also return the consideration to the beneficiary.

## II INSOLVENCY METRICS

After a stable growth of 2 per cent in GDP in 2014, the economic outlook for Switzerland has deteriorated after the Swiss National Bank's decision taken on 15 January 2015 to abolish the minimum exchange rate of 1.2 Swiss francs per euro. The GDP growth of constant prices expected for 2015 and 2016 has been significantly revised downwards, with growth of 0.8 per cent expected in 2015 and 1.6 per cent in 2016. Furthermore, unemployment has risen again since February and the average unemployment rate is expected to rise to 3.3 per cent in 2015 and to 3.5 per cent in 2016.<sup>32</sup>

The Swiss federal government's expert group on economic forecasts currently still expects the Swiss economy to adapt to the new exchange rate environment without falling into severe recession, but points out that this assessment implies a robust economic domestic demand and a continuous recovery of the world economy.<sup>33</sup>

Not only has the GDP growth expected for 2015 and 2016 been revised downwards as mentioned above, but the inflation forecast has also been significantly revised downwards. For 2015, the Swiss National Bank has revised its inflation forecast downwards to -1 per cent and for 2016 to -0.4 per cent. Only in 2017 does the Swiss National Bank expect inflation to become positive again at 0.3 per cent. The forecast of the Swiss National Bank furthermore assumes that the three-month LIBOR will remain at -0.75 per cent over the entire forecast horizon, and that the Swiss franc will weaken.<sup>34</sup>

There was no striking development in the past year in restructuring and insolvency activity compared with 2013. According to the Federal Statistical Office, 11,853 bankruptcy proceedings were opened in Switzerland in 2014, which represents a decrease of 5 per cent compared with 2013.<sup>35</sup> However, the losses resulting from bankruptcy proceedings that have been concluded rose sharply from 1,887,793 Swiss

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32 Press release of the State Secretariat for Economic Affairs dated 16 June 2015 containing the economic forecasts from the Swiss Federal Government's expert group.

33 Press release of the State Secretariat for Economic Affairs dated 16 June 2015 containing the economic forecasts from the Swiss Federal Government's expert group.

34 Press release of the Swiss National Bank dated 18 June 2015 and containing its monetary policy assessment.

35 In addition 1,715 companies have been put into bankruptcy proceedings due to organisational deficiencies (and not due to insolvency).

francs in 2013 to 3,144,279 Swiss francs in 2014.<sup>36</sup> With regard to composition proceedings, no official statistics are published. Based, however, on the available data, it seems that 36 provisional debt moratoria (compared with 25 in 2013) and 23 debt moratoria (compared with 37 in 2013) have been granted to businesses registered with a commercial register in Switzerland and 24 composition agreements have been confirmed (compared with 34 in 2013).

### III PLENARY INSOLVENCY PROCEEDINGS

In 2014, there were no new landmark bankruptcy cases or restructuring cases that we are aware of, either in terms of value or in terms of new or novel issues raised. Also, the existing landmark bankruptcy and restructuring cases which have been mentioned in the earlier editions of this Review have continued in the normal course, the most notable ones being:

- a* The insolvency case of SAirGroup, the holding company of Swissair, the former main Swiss airline, which has been pending since 2001 and in which a composition agreement with assignment of assets was agreed in 2003 (further insolvency proceedings are also pending against certain other SAirGroup group companies). It is to be assumed that the liquidation proceedings will last several further years.
- b* The insolvency case of the Petroplus group, an oil refiner headquartered in Switzerland, which has been pending since 2012 and where bankruptcy proceedings were opened against its holding company, Petroplus Holding SA (which are still pending) and where composition agreements with assignment of assets were agreed upon with regard to certain of its (Swiss) subsidiaries in 2013 (i.e., Petroplus Marketing SA and Petroplus Refining Cressier SA).
- c* The insolvency case of Lehman Brothers Finance SA (the Swiss Lehman Brothers entity), which has been declared bankrupt in 2008 and whose bankruptcy proceedings are expected to last several further years.

In 2015, there have also been no new notable bankruptcy cases or restructuring cases so far that we are aware of, except for of the restructuring of Cytos Biotechnology AG, a Swiss biopharmaceutical company listed on the SIX Swiss Exchange, which has been restructured by way of a conversion of its outstanding convertible bonds into equity (the restructuring was implemented in May 2015). Furthermore, the Swiss hotel industry faces some problems, evidenced by high-profile cases like the Hotel Intercontinental in Davos, whose operating company was declared bankrupt at the beginning of June 2014; or the Hotel Waldhaus in Flims, whose owner, the Waldhaus Flims Mountain Resort AG, had to file for bankruptcy at the beginning of April 2015.

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<sup>36</sup> Statistic published by the Federal Statistical Office and available at [www.bfs.admin.ch/bfs/portal/de/index/themen/06/02/blank/key/02/betreibungen.html](http://www.bfs.admin.ch/bfs/portal/de/index/themen/06/02/blank/key/02/betreibungen.html).

#### **IV ANCILLARY INSOLVENCY PROCEEDINGS**

With regard to ancillary insolvency proceedings, no official statistics are published. Based, however, on the available data, it seems that very few foreign insolvency decrees are recognised in Switzerland every year and that no significant ancillary insolvency proceedings for foreign-registered companies have been initiated in Switzerland during the past few years.

#### **V TRENDS**

In 2012 – while the partial modification of the SDEBA that entered into force on 1 January 2014 was still being discussed in the Swiss parliament – both chambers of the Swiss parliament mandated the Federal Council to draft a bill for new comprehensive restructuring proceedings to be introduced in Swiss corporate law, which would allow and facilitate the restructuring of a distressed company before composition proceedings are opened.

In November 2014, the Federal Council launched the consultation procedure on a revision of Swiss corporate law. In its preliminary draft of the revised Swiss corporate law, the Federal Council also took into account the mandates it had received regarding the introduction of a new comprehensive restructuring proceeding in Swiss corporate law and addressed these mandates by proposing certain changes to existing law. However, the proposed changes do not really lead to new comprehensive restructuring proceedings in the Swiss corporate law, but instead concentrate on introducing more precise (and also some new) duties to act for the board of Swiss corporations if a corporation shows certain symptoms which indicate an upcoming possible insolvency (such symptoms relating, for example, to the liquidity of the company or its net equity position). The proposed changes thus aim to induce the board to react earlier in case of an impending insolvency. Furthermore, the Federal Council proposes to delete the possibility of the ‘corporate law moratorium’ in Swiss corporate law, and to slightly adjust the composition proceedings in order to offer the advantages of the ‘corporate law moratorium’ in the context of the composition proceedings.



## Appendix 1

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