The Restructuring Review

Eighth Edition

Editor
Christopher Mallon

Law Business Research

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EDITOR'S PREFACE

I am very pleased to present this eighth edition of *The Restructuring Review*. As with the previous editions, our intention is to help general counsel, government agencies and private practice lawyers understand the conditions prevailing in the global restructuring market in 2015 and 2016, and to highlight some of the more significant legal and commercial developments and trends that have been evident in recent years, and that are expected to be significant in the future.

At the time of writing, a number of factors threaten to disrupt the relatively benign global economic conditions that have prevailed in recent months. The crisis in the eurozone, and in particular the distress suffered by Greece, has once again been leading the news in Europe. The conflicting political imperatives driving the actions of Greece and its eurozone creditor nations appear to gain strength with each new twist of the crisis, to such an extent that a long-term solution satisfactory to all parties that keeps Greece in the eurozone may prove to be a chimera.

Elsewhere in the Orthodox world, the interventions made by Russia in Ukraine have led relations between Russia and NATO to deteriorate to their worst state since the Cold War, with firm sanctions being imposed by many western countries on Russia. The economic uncertainty caused by such tensions provides another challenge to global growth and stability.

The situation in the Middle East continues to be a grave security concern and the human cost of the political turmoil in the region is horrifying. From an economic perspective, however, the dramatic events in Syria, Iraq and elsewhere have had a minimal impact, which perhaps has contributed to the apparent inability of world powers to formulate a means of resolving the conflicts in the region.

Possibly the most important events for global long-term economic prospects are the problems in the Chinese economy that are suggested at the time of writing by, among other symptoms, a dramatic decline in Chinese stock prices. Chinese economic and fiscal indicators are notoriously enigmatic, but if a serious economic crisis does affect China, as is anticipated by many commentators, such a crisis may be significantly exacerbated

by the weaknesses in the Chinese banking system, and the consequences for the global economy could transcend the impact of the problems in the eurozone.

A further factor to note is the continued employment of unorthodox monetary policy by many central banks. There remains considerable uncertainty as to the broader economic effects when quantitative easing is unwound and interest rates return nearer to the long-term average; many commentators expect that when the monetary tide retreats, many businesses that until now have managed to conceal their weaknesses may be left dangerously exposed.

With the above in mind, it seems likely that the global economy is set for a period of further uncertainty in the year to come. As such, this work continues to be relevant and important, in particular as a result of the international nature of many corporate restructurings.

I would like to extend my gratitude to the contributors from some of the world's leading law firms who have given such valuable support and cooperation in the preparation of this work, and to our publishers, without whom this work would not have been possible.

Christopher Mallon
Skadden, Arps, Slate, Meagher & Flom (UK) LLP
London
August 2015

Chapter 26

SWITZERLAND

Thomas Rohde[1]

I OVERVIEW OF RESTRUCTURING AND INSOLVENCY ACTIVITY

After a stable growth of 2 per cent in GDP in 2014, the economic outlook for Switzerland has deteriorated following the decision of the Swiss National Bank on 15 January 2015 to abolish the minimum exchange rate of 1.20 Swiss francs per euro, and the expected GDP growth at constant prices 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 GDP in 2016.[2]

However, 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.[3]

Not only has the GDP growth for 2015 and 2016 been revised downwards following the Swiss National Bank decision; the inflation forecast has also been significantly revised downwards. The Swiss National Bank has revised its inflation forecast downwards to –1 per cent for 2015 and to –0.4 per cent for 2016. Only in 2017 does the Swiss National Bank expect inflation to become positive again at 0.3 per cent. The Swiss National Bank's forecast furthermore assumes that the three-month Libor remains at –0.75 per cent over the entire forecast horizon, and that the Swiss franc weakens.[4]

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1 Thomas Rohde is a partner at Bär & Karrer.

2 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.

3 Ibid.

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

There have been no noteworthy developments 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;[5] however, the losses resulting from bankruptcy proceedings that have been concluded rose sharply from 1,887,793 Swiss francs in 2013 to 3,144,279 Swiss francs in 2014.[6] No official statistics are published with regard to composition proceedings (i.e., Swiss in-court restructuring proceedings). 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).

II GENERAL INTRODUCTION TO THE RESTRUCTURING AND INSOLVENCY LEGAL FRAMEWORK

Restructuring and insolvency proceedings in Switzerland are mainly governed by the Swiss Debt Enforcement and Bankruptcy Law (SDEBA).[7] 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).

The SDEBA provides for two main types of corporate insolvency proceedings:[8]

a 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

b composition proceedings, which are the main Swiss restructuring proceedings and which protect the distressed debtor from its creditors in order to enable such distressed debtor to either attempt to reach a court-approved debt-restructuring agreement with its creditors (such 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.[9]

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

6 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.

7 The SDEBA not only governs insolvency proceedings but the general enforcement of monetary claims in Switzerland.

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

9 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. In addition to these 'general execution proceedings', the SDEBA also provides for 'special execution

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.

Often, however, distressed debtors in Switzerland try to restructure without the involvement of the courts and thus outside of composition proceedings or corporate law moratoria. The techniques usually used in such informal out-of-court restructurings include:

a the re-evaluation of real property or investments to their market value (note that such assets are normally to be booked at their acquisition values and thus might be considerably undervalued in the balance sheet;

b the increase of share capital by emission of additional shares (typically paid in cash);

c the reduction of the share capital (or even complete cancellation of the shares) combined with an immediate increase of the share capital; or

d the sale of certain assets or businesses.

Especially if the distressed debtor is part of a group, intercompany loans granted to the distressed debtor are often subordinated as one element of the restructuring (it being understood that such subordination does not itself lead to a restructuring but only provides the distressed debtor with more time to implement the restructuring). Finally, the distressed debtor can also try to obtain from its creditors partial waivers of their claims (sometimes this is combined with equity participation of such creditors, which are thus structured as debt-equity swaps by way of set-off).

i Insolvency proceedings

Bankruptcy 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.

proceedings', meaning proceedings that lead to 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 as far as is needed for the satisfaction of such creditor's claim; or 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.

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 over-indebtedness.[10]

Upon declaration of bankruptcy by the bankruptcy court, the debtor loses control over its assets, such 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,[11] draws up a respective 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.[12] 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.[13]

Composition proceedings

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

10 If the claims of the debtor's creditors are no longer covered by the debtor's assets on a going-concern basis or on a liquidation-value basis.

11 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.

12 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.

13 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 costs of ordinary proceedings or if the case is a simple one, the main difference between the two proceedings being 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 creditors' meeting 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, creditors' committee, the bankruptcy administration or the bankruptcy court.

proceedings if it is also entitled to request the opening of bankruptcy proceedings. 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 will be reached with creditors, and will transfer the case to the composition court.

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.[14] If such chances exist, the composition court will appoint an administrator (typically, the provisional administrator) and, if circumstances require, also a creditor's 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 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 independent of whether they have individually approved the agreement.[15] 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 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.[16]

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 agreement), such composition agreement can either take the form of an 'ordinary composition agreement' or of 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

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

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

16 According to the SDEBA, a debtor or a creditor may even propose a composition agreement during bankruptcy proceedings. In such 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 such agreement, the bankruptcy administration requests the bankruptcy court to revoke the bankruptcy proceedings. This procedure is, however, rather seldom used.

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.[17] 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 case, the composition proceedings do not result in the dissolution of the debtor, but this is rather 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 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.

Failing execution of a composition agreement or a restructuring, or in the event of the revocation of the debt moratorium by the composition court, 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 a debtor has to file for bankruptcy due to over-indebtedness, the bankruptcy court may stay the opening of the bankruptcy proceedings upon request of the debtor (or a creditor), in cases where there is a prospect of an out-of-court restructuring of the debtor. In the event 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; it may, for example, appoint an administrator and define such administrator's competences, and decide on the duration of the stay. The stay is usually not rendered public; note, however, that such stay does not have the same protective effects as the debt moratorium in the composition proceedings. In the event the debtor and its creditors cannot agree on an out-of court restructuring, the court will open bankruptcy proceedings.

ii Selected topics

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

17 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.

form part of the bankruptcy estate. In the event that certain assets of the bankrupt debtor have been pledged as collateral in order 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 following effect on the rights of secured creditors.

In the event that 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.[18] The preferential rights of the secured creditor being reserved, such secured creditor is, however, satisfied in priority out of the proceeds of the realisation of the collateral.[19] 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 right *in rem* of the secured creditor. In the event that the obligation secured by a mortgage is not yet due,[20] the mortgage remains in place and the claim secured by such 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 (in the case of moveables or real estate) or assigned (in the case of claims) to the secured creditor by way of security in order to secure the debtor's obligations,[21] such assets do not form part of the bankruptcy estate.[22] The secured creditor thus has no obligation to hand over such collateral to the bankruptcy administration, but rather can realise the

18 The opening of bankruptcy proceedings having as a consequence that 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, however, not only hand in the collateral, but also file his or her secured claim in the bankruptcy proceedings.

19 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.

20 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 due to the opening of bankruptcy proceedings.

21 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 him or herself to exercise his or her propriety rights only in compliance with the purpose of such security and to retransfer or reassign title to such asset after his or her claim has been paid in full.

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

collateral itself according to the relevant provisions of the security agreement entered into between the bankrupt debtor and the secured creditor (such 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, 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 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 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.[23]

Duties of directors of companies in financial difficulties

Based on the duty of the board of directors to safeguard the interests of the company and to act always in its best interests, the board has the duty to ensure the continuity of the company as a going concern and thus to take the necessary steps to ensure its continuing existence by implementing any necessary restructuring measures in the event of a situation of distress.

If, according to the stand-alone statutory balance sheet of the company, the net assets do not fully cover half of the company capital and the legal reserves, the board must immediately call a shareholders' meeting. At this meeting, the board must disclose to the shareholders the reasons causing the financial distress and the company's future prospects, and to propose restructuring measures on which the shareholders can decide. Furthermore, if there is substantiated concern that the company's net assets do not cover the equity (over-indebtedness), an interim balance sheet must be prepared and submitted to the auditors for examination.[24] If the interim balance sheet shows that the claims of

23 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 to realise 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).

24 Note that such concern can especially be given in cases of insufficient liquidity. If a company does not have sufficient liquidity, it typically does not present a going concern any more, and the assets have to be valued in the balance sheet on a liquidation basis (and no longer on a going concern basis), which usually leads to an over-indebtedness of the company. Thus, the board must in particular constantly verify the liquidity situation of the company.

the company's creditors are neither covered by its assets on a going-concern basis nor on a liquidation-value basis, the board must notify the judge (i.e., immediately file for bankruptcy). According to Swiss case law, the board may only refrain from notifying the judge in such a situation if it takes measures to reorganise the company and its balance sheet, if it seems reasonable to believe that such reorganisation can be achieved (i.e., such an outcome is highly likely) within a short time frame, and if the situation of the company's creditors is not worsened by such a delay. Under such circumstances, the notification of the judge can be delayed; should such reorganisation not be achieved within a short time frame, however, the filing should not be delayed further. The board may also refrain from notifying the judge if the creditors of the company subordinate their claims to those of all other company creditors in the amount necessary to cure the over-indebtedness.

In the event that the members of the board of directors violate any of their duties, they are personally liable to the company, to each shareholder and to the company's obligees (e.g., its creditors) for the damage caused by an intentional or negligent violation of such duty.

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 an 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 the case of composition proceedings, during the year prior to the notification of the debt moratorium), are voidable (avoidance of gratuitous transactions).[25] 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 liabilities). The adequacy of the consideration is to be verified based on and in relation to

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

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 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 over-indebted. Such legal acts are the granting of collateral for existing obligations that the debtor was hitherto not bound to secure; the settlement of a (monetary) debt by unusual means of payment; and the payment of an un-matured debt (avoidance due to over-indebtedness). 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 over-indebtedness.

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:

a the act of the debtor must have caused damage so that the creditor's rights to enforcement are affected;[26]

b the debtor must have acted with the intent to cause damage;[27]

c the counterparty knew or should have known of the debtor's intent to cause damage;[28] and

d 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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26 The case law of the Swiss Federal Supreme Court indicates that this requirement is met if the act of the debtor caused an 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 act did not adversely affect the other creditors (or even benefitted the other creditors), later decisions indicate that this is not the case.

27 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 preference or disadvantage as a possible consequence of its act.

28 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 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 a debtor has received a consideration from the beneficiary in connection with the (voided) transaction, the debtor's estate must also return such consideration to the beneficiary.

III RECENT LEGAL DEVELOPMENTS

The most significant recent legal development in Swiss insolvency law remains the partial modification of the SDEBA that entered into force on 1 January 2014. This partial modification was triggered by the insolvency of Swissair, the main Swiss airline (and SAirGroup, to which it belonged) in 2001. Many claimed that with a more restructuring-friendly corporate rescue process in the SDEBA, it might have been possible to save Swissair, and so the composition proceedings provided for in the SDEBA were therefore analysed and partially modified in order to facilitate a restructuring of financially distressed companies in the context of composition proceedings. The most important modifications are as follows.

Composition proceedings, which protect distressed debtors from their creditors in order to enable such debtors to attempt to reach court-approved composition agreements with their creditors, can now also be used by distressed debtors exclusively as a protection measure to restructure outside court-approved composition agreements. The modified SDEBA explicitly states that the composition proceedings do not necessarily need to aim for the conclusion of a composition agreement and that the debt moratorium may be lifted if the debtor has been able to successfully restructure without conclusion of a composition agreement. Furthermore, the composition proceedings now always start with a provisional debt moratorium of up to four months, such provisional debt moratorium being granted unless there are clearly no chances to restructure, which makes the first stage of the composition proceedings more easily accessible for distressed debtors. In addition, the composition court can, under certain circumstances, abstain from publishing the granting of the provisional debt moratorium (such publication normally being counterproductive), and the protection granted to the distressed debtor under the (provisional and definitive) debt moratorium has been improved. Finally, distressed debtors now have the right to terminate long-term agreements during the debt moratorium if a restructuring cannot be achieved without such measure and the administrator agrees to it.[29] All these changes to composition proceedings aim to make such proceedings more attractive to distressed debtors.[30]

29 Such termination triggers a compensation obligation towards the counterparty, the respective claim of the counterparty, however, being subject to the composition agreement, if any.

30 It is also notable that, according to the modified SDEBA, the composition court may only approve an ordinary composition agreement if the equity holders of the distressed debtor make an adequate contribution to the restructuring of such distressed debtor.

Further modifications introduced to facilitate restructurings include:

a the exemption of sales made during a debt moratorium from clawback actions (thus providing the acquirer with the necessary security it did not previously have, a fact that was sometimes reflected in a somewhat reduced purchase price); and

b in the context of a transfer of a business by way of an asset sale, the abolition of the automatic transfer of all employees related to such business to the acquirer of the business, in the event such asset sale is implemented in the context of composition proceedings, effectively allowing the acquirer to 'cherry pick'.

In addition, the joint and several liability of the acquirer of such business for the claims of transferred employees predating the transfer has also been abolished in the context of composition proceedings.

Finally, the rules regarding voidable actions have been partially modified – apart from the exemption of sales made during composition proceedings from clawback actions – to reverse the burden of proof in certain instances; 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 case, the modified SDEBA contains the legal presumption that – in the context of avoidance of gratuitous transactions – the consideration received by the debtor from such related party was not adequate, and that – in the context of avoidance for intent – the debtor's intent was recognisable to such related party.

IV SIGNIFICANT TRANSACTIONS, KEY DEVELOPMENTS AND MOST ACTIVE INDUSTRIES

In 2014, there were no new landmark bankruptcy cases or restructuring cases that we are aware of, whether in terms of value or in terms of innovations with regard to restructuring techniques. In addition, the existing landmark bankruptcy and restructuring cases (which have been mentioned in the earlier editions of this Review, including those relating to the Swissair/SAir Group, to the Petroplus group, to the Erb group, to the former Swissmetal Industries AG and to the Swiss Lehman Brothers entity) have continued in the normal course. In 2015, there have been no new notable bankruptcy cases or restructuring cases of which we are aware, except for 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 bond into equity (the restructuring was implemented in May 2015).

In terms of distressed industries, no official statistics are available in Switzerland that indicate which industries would have to be singled out as specifically distressed. However, according to a private study, the building industry and the hotel and restaurant industry suffered the most bankruptcies in 2014. In this context, it should be noted that bankruptcies in the hotel and restaurant industry concern not only small or medium-sized establishments in Switzerland, but also first class hotels, such as the Intercontinental in Davos, whose operating company was declared bankrupt in June 2014, and the Waldhaus in Flims, whose owner, the Waldhaus Flims Mountain Resort AG, had to file for bankruptcy at the beginning of April 2015.

V INTERNATIONAL

Council Regulation (EC) No. 1346/2000 of 29 May 2000 does not apply to insolvency proceedings in Switzerland; neither has Switzerland adopted legislation based on the UNCITRAL Model Law on Cross-Border Insolvency, the recognition of foreign bankruptcy decrees or foreign arrangements, with creditors being 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:

a the foreign decree is issued at the debtor's domicile;
b the decree is enforceable in the country in which it was issued;
c there are no grounds for non-recognition pursuant to Article 27 of PILA;[31] and
d 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.

If a foreign bankruptcy decree is recognised, such recognition 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 that are located in Switzerland. The recognition of a foreign bankruptcy decree thus has the same effect as a Swiss bankruptcy decree, with a few 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, but only creditors with claims that are 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 there is a surplus (i.e., the claims of all creditors that can participate in the Swiss proceedings can be fully satisfied), such 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 recognised, the balance is distributed to the unsecured third-class creditors domiciled in Switzerland.[32]

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

32 Note that special rules, however, exist in the Swiss Banking Act with regard to the recognition of foreign bankruptcy decrees and insolvency measures regarding financial institutions, giving the Swiss Financial Market Supervisory Authority, 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 essence, 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 if:

a their bankruptcy decree is recognised by the competent Swiss court (which will sometimes not be possible due to the fact that their country does not grant reciprocity); and

b 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 such rules.

VI FUTURE DEVELOPMENTS

In 2012 – while the partial modification of the SDEBA that entered into force on 1 January 2014 was still being discussed in the Parliament – both chambers of the Parliament mandated the Federal Council to draft a bill for new comprehensive restructuring proceedings to be introduced in the 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 a consultation procedure on the revision of the 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 the Swiss corporate law, and addressed these mandates by proposing certain changes to the existing law. However, the proposed changes will not really lead to new comprehensive restructuring proceedings in the Swiss corporate law, but will rather concentrate on introducing more precise (and also some new) duties to act for the boards of Swiss corporations if a corporation shows certain symptoms that indicate an upcoming possible insolvency (symptoms relating to, *inter alia*, the liquidity of the company or its net equity position). The proposed changes thus aim at inducing boards to react earlier in cases of an impending insolvency. Furthermore, the Federal Council proposes removing the possibility of the 'corporate law moratorium' from the 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.

It remains to be seen whether and in which form the proposed changes of the Federal Council will be passed by the Parliament. However, as these changes are part of a more general revision of the Swiss corporate law, it will certainly take several years before such changes become law.

Appendix 1

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Thomas Rohde is a partner at Bär & Karrer and heads the firm's reorganisation and insolvency practice. He focuses on corporate restructurings and reorganisations as well as the representation of creditors in Swiss insolvency proceedings. Furthermore, he regularly advises clients on all types of M&A transactions (with a particular emphasis on real estate transactions) as well as on general corporate and commercial matters. Mr Rohde graduated from the University of Basel in 1997 and was admitted to the Basel Bar in 2000. He obtained a master of laws (LLM) from the University of Chicago in 2004. He has been practising law since 2001 and became a partner at Bär & Karrer in 2010.

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