

The background of the entire page is a close-up, vertical stack of various coins. The coins are of different colors, including silver, gold, and copper, and feature various designs and inscriptions. The lighting creates highlights and shadows, giving the stack a three-dimensional appearance.

THE STRATEGIC **VIEW**

Expert perspectives on international law

Corporate Restructuring 2016

Legal analysis, forecasts and opinion by
leading legal experts in key jurisdictions

THE STRATEGIC VIEW

Corporate Restructuring 2016

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SWITZERLAND

Thomas Rohde and Till Spillmann analyse significant reforms of the insolvency law governing Switzerland's restructuring market.

1. What trends, in terms of activity levels, affected industries or investor focus, have you seen in the restructuring and insolvency market in your jurisdiction over the last 12 months?

The last 12 months have been heavily impacted by the Swiss National Bank's decision to discontinue the minimum exchange rate of CHF 1.20 per euro. The discontinuation triggered a sharp appreciation of the Swiss franc. Its impact hit parts of the Swiss economy relatively hard, in particular tourism, industry, manufacturing and consumer goods and retail, and, more generally, the export industry to the extent they have their cost base predominantly in Switzerland. In general, the decision has worsened the economic situation of many companies

as most of them have not been able to pass on price increase to their customers. Furthermore, a number of ongoing legislative projects such as the Swiss Corporate Tax Reform III and popular initiatives have a negative impact on the general market sentiment in Switzerland.

Against this background, a number of companies have decided to implement or accelerate restructuring measures, including by way of raising equity capital and/or restructuring debt.

2. What is the market view on prospects for the coming year?

The market environment will continue to be challenging for Swiss companies for as long as the Swiss

“ [T]he Swiss domestic lending market is mainly driven by banks while senior/junior structures are less often seen ”

franc remains at its current level. As a countermeasure, many companies have implemented cost cutting programmes and restructuring measure – some of which seem to be relatively successful. Nevertheless, some sectors will face very difficult times, in particular the retail sector and tourism.

3. What are the key tools available in your jurisdiction to achieve a corporate restructuring – are they primarily formal, court-driven processes, or are informal out-of-court restructurings possible? Do you feel that the tools you have available are effective in terms of providing speedy, fair and predictable outcomes?

The main formal corporate restructuring proceedings available in Switzerland are the composition proceedings provided for by the Swiss Debt Enforcement and Bankruptcy Law (SDEBA). The composition proceedings protect the distressed debtor from its creditors to give it an opportunity to either reach a court-approved debt-restructuring agreement with its creditors (providing for a true restructuring of the debtor or for the realisation of the debtor's assets outside bankruptcy proceedings) or to restructure outside a court-approved debt-restructuring agreement.

Composition proceedings are opened by the composition court, usually upon request of the debtor itself. 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. 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 the moratorium, the debtor must either successfully restructure or agree on a composition agreement with its creditors. Such agreement requires approval from a certain majority of the creditors and by the court and is binding on all creditors of the debtor, regardless of whether they have individually approved the agreement. For secured creditors, composition

agreements are not binding with respect to their claims up to the amount covered by the realisation of the collateral, and to claims that have come into existence with the consent of the administrator. During the (provisional as well as the definitive) debt moratorium, no debt enforcement action against the debtor may be initiated or pursued. Furthermore, although the debtor remains 'in charge', it is subject to supervision by the court-appointed administrator as regards the conduct of its day-to-day business and may only dispose of certain assets with the approval of the composition court (or the creditors' committee).

A composition agreement (i.e. a court-approved debt-restructuring agreement) may either take the form of an 'ordinary composition agreement' or of a 'composition agreement with assignment of assets'. In an ordinary composition agreement, the creditors either agree on a specific payment plan – giving the debtor more time to pay its debts in full – or on waiving part of their claims. The ordinary composition agreement thus results in a restructuring of the debtor's debts allowing the debtor to avoid liquidation and to continue its business. 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 assigns 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. The realisation of the assets by the liquidator in composition proceedings is similar to that in bankruptcy proceedings but provides more flexibility. The distribution of the proceeds follows the same rules as in bankruptcy. If the debtor's business is sold – in parts or as a whole – the composition agreement may lead to the rescue of part of the debtor's business. If the execution of the composition agreement or the restructuring fails, or if the composition court revokes the debt moratorium, bankruptcy proceedings against the debtor will be opened.

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'. Its objective is to serve as a moratorium allowing the debtor to implement an out-of-court restructuring: in the event a debtor has to file for bankruptcy due to over-indebtedness, the bankruptcy court may suspend the opening of the bankruptcy proceedings upon request of the debtor (or a creditor) if an out-of-court restructuring of the debtor seems possible. In the event the court decrees such a suspension, it will take the appropriate measures to preserve the debtor's assets. The court has broad discretion: it may, for example, appoint an administrator and define its competences, and decide on the duration of the moratorium. The moratorium is usually not made public. It 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. This type of restructuring proceedings is rarely used and the Federal Council has recently proposed to delete the possibility of such 'corporate law moratorium' in the Swiss corporate law.

Since most composition proceedings end with the liquidation of the debtor – by assignment of its assets – rather than with its restructuring, distressed debtors in Switzerland often attempt to restructure without the involvement of the courts. The techniques usually used in such out-of-court restructurings include the re-evaluation of real property or investments to their market value (such assets are normally to be booked at their acquisition values and thus might be considerably undervalued), the increase of share capital by emission of additional shares (typically paid in cash), the reduction of the share capital (or even complete cancellation of the shares) combined with an immediate increase of the share capital, or 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 (although the subordination itself does not lead to a restructuring but only provides the distressed debtor with more time to implement restructuring measures). Finally, the distressed debtor may also try to obtain a partial waiver of claims from its creditors (sometimes against equity participation, i.e. a debt-equity swap by way of set-off).

The composition proceedings of the SDEBA were made more restructuring-friendly with its revision as per 1 January 2014. The regulatory overhaul had been triggered by the insolvency of Swissair, Switzerland's main airline, in 2001, as many claimed that it might have been possible to save Swissair with a more restructuring-friendly corporate rescue process in the SDEBA. Since its revision, the composition proceedings certainly provide a viable alternative to a restructuring without the involvement of the courts.

- 4. In terms of intercreditor dynamics, where does the balance of power lie as between shareholders and creditors, and as between senior lenders and junior/mezzanine lenders? In particular, how do valuation disputes between different stakeholders tend to play out?

The balance between shareholders and creditors is often determined on the basis of the specific circumstances. Generally, in restructuring scenarios the power shifts relatively quickly from shareholders to the creditors. Shareholders must accept restructuring plans agreed among lenders or the company is sent into bankruptcy or composition proceedings.

Furthermore, the Swiss domestic lending market is mainly driven by banks while senior/junior structures are less often seen. Credit documentation for second lien facilities or other junior debt for Swiss borrowers that wish to access the European or the US lending market is often governed by non-Swiss law, and the respective trends of the jurisdiction according to which the documentation is governed are more relevant than Swiss particularities.

- 5. Have there been any changes in the capital structures of companies based in your jurisdiction over recent years caused by the retreat of banks from loan origination? In particular, have you found that capital structures now increasingly comprise debt governed by different laws (such as New York law governed high yield bonds)? If so, how do you expect these changes to impact on restructurings in the future?

In the recent past, we have seen more often that companies also access the bond markets, be it in Switzerland or abroad, to refinance bank debt. But the domestic bank debt market in Switzerland has proven to be relatively resilient and also remains the predominant way to raise debt for Swiss companies. For larger and complex financing structures debtors regularly access the European and US debt market, whereas for high yield bonds New York law is the natural choice.

- 6. Is there significant activity on the part of distressed debt funds in your jurisdiction? How successful have they been in entering the market, and how much has market practice (or law) evolved in response? If funds have not successfully entered the market, can you identify reasons why?

Generally, distressed debt funds do not play an important role in Switzerland but are seen from time-to-time in connection with large corporate restructurings.

- 7. Are there any unusual features of your insolvency or restructuring law that an external investor should be aware of (such as equitable subordination, or substantive consolidation)?

An unusual feature of Swiss insolvency law and practice is the risk that the courts may apply the concept of equitable subordination to shareholder loans under certain circumstances.

According to the concept, shareholder loans may be qualified as a subordinated loan in bankruptcy proceedings if they were granted at a time when an independent third party would not have granted it anymore and only the injection of new equity would have had a restructuring effect. Lower courts and bankruptcy officials have frequently applied the

concept, treating such shareholder loans as equity or as subordinated to all other debt. Although the Swiss Federal Supreme Court (in a decision issued in 2006) ruled that shareholder loans given under the described circumstances may not be re-qualified into equity if the borrower enters bankruptcy, the Court left open whether such a shareholder loan could be qualified as a subordinated loan in bankruptcy proceedings. Thus, an external investor should be aware that – depending on the circumstances under which they are granted – shareholder loans granted to Swiss companies may be treated as subordinated to all other debt in case of the bankruptcy.

8. Are there any proposals for reform of the legal framework that governs insolvency and restructurings in your jurisdiction?

The most significant reforms of the Swiss insolvency and restructuring law that have occurred recently are:

- the overhaul of the restructuring regulations for banks (mainly by way of the revision of the restructuring provisions in the Swiss Banking Act which came into force on 1 September 2011 and the replacement of the old Bank Bankruptcy Ordinance with the new Banking Insolvency Ordinance by the Swiss Financial Market Supervisory Authority FINMA on 1 November 2012); and
- the partial modification of the composition proceedings in the SDEBA, which entered into force as per 1 January 2014 and aimed to facilitate the restructuring of financially distressed companies in the context of composition proceedings.

In addition to these reforms, the following two reforms are currently proposed:

- In 2012, both chambers of the Swiss 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 the consultation procedure on a 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 Swiss corporate law and addressed these mandates by proposing certain changes to the existing law. However, the proposed changes do not lead to new comprehensive restructuring proceedings in Swiss corporate law, but rather focus on introducing more precise (and also some new) duties to act for the board of Swiss corporations if certain symptoms indicate a possible insolvency. The proposed changes thus aim at inducing the board to react earlier in case of impending insolvency. Furthermore, the Federal Council proposed to abandon the ‘corporate law moratorium’ and to delete the respective sections in Swiss corporate law.
- In October 2015, the Federal Council launched the consultation procedure on a revision of the Swiss International private law with regard to the recognition of foreign bankruptcy decrees and of foreign composition agreements (or similar proceedings by a competent foreign authority) in Switzerland. The proposed revision aims to facilitate the recognition of such foreign decrees and agreements and also includes certain changes regarding the effects of such recognition. ➔



9. If it was up to you, what changes would you make?

Currently, the SDEBA does not substantially facilitate the conditions which must be met for a composition agreement to be approved by the court. For example, the SDEBA does not provide for the possibility to split unsecured,

non-privileged creditors into separate 'classes' (or groups) which may be treated differently in the composition agreement or for the possibility of a real cram-down. The introduction of such provisions (which exist in other jurisdictions) into the SDEBA would increase chances to successfully use composition proceedings for a restructuring rather than a liquidation.



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