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Insolvency Switzerland

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In February 2020, the first COVID-19 case in Switzerland was detected. As numbers of infections started to increase drastically, the Swiss Federal Council imposed a partial lockdown with non-essential shops, schools, leisure facilities and restaurants closed. Furthermore, the Swiss Federal Council restricted public and private gatherings as well as border crossings. In late spring 2020, these health measures were gradually eased. Following a rapid increase in COVID-19 cases in autumn and some stricter public health measures, which have failed to achieve the desired effect, a second partial lockdown was imposed in late January 2021. Once again, non-essential shops, leisure facilities and restaurants had to be closed.

Due to the above-mentioned public health measures as well as travel restrictions from other countries, the hotel and travel sectors were affected particularly hard by the pandemic. The pandemic also had a material impact on the retail industry, which was already experiencing financial strain, as consumers pivot to online shopping. However, contrary to expectations, a large increase of bankruptcies and composition proceedings has so far failed to materialize.

In 2020, the number of companies declared bankrupt amounted to 5,144 (not including the 1,858 bankruptcies for organizational reasons). Compared to 6,379 company bankruptcy declarations in 2019, this corresponds to a decrease of nearly 20%. In early 2021, company bankruptcy declarations remain comparatively low.

The low level of bankruptcies is likely linked to the result of the governmental support provided to counteract the negative effects of the public health measures. The Swiss Federal Council has, for instance, extended the entitlement and enabled easier access to short-time work compensation. Furthermore, it has adopted financial measures, such as a COVID-19 government-backed bridge loan program and the possibility to postpone the payment of taxes without the obligation to pay interest. In addition, financial aid was not only provided by the federal government but also, to different degrees and limited to specific sectors, on regional level by the cantons and some major cities.

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COVID-19 related reliefs were also granted, regarding the risk of being declared bankrupt by a court due to a respective filing. For instance, the strict filing obligation of the board of directors to the court in case of (balance sheet) over-indebtedness has been, under certain circumstances, suspended. In addition, sector-specific emergency measures, such as the stay of debt enforcement for the travel industry, were enacted.

Most of the insolvency regime reliefs have meanwhile expired. On the other hand some of the other governmental measures still remain in place (e.g. the short-time work compensation measures as well as the rule that bridge loans up to CHF500,000 per company will not be considered as borrowed capital for the calculation of over-indebtedness until 31 March 2022). As a result, some in-court insolvency proceedings are likely to have just been postponed. Its economic impact is, however, difficult to predict. We assume that some increase in formal insolvency proceedings is likely once the state aid falls away.

Notwithstanding the COVID-19 ordinances, Swiss law provides various tools to restructure and reorganize a company. Even in the case when the legal entity will cease to exist, there are several possibilities to save the business, or at least viable parts of it, by transfer to a new entity (for instance within the framework of composition proceedings).

Due to its openly worded content, Swiss law adapts quickly to changed requirements and circumstances. Further, Swiss bankruptcy and restructuring law has various acquirer-friendly provisions. The transfer of business to a new entity may be achieved already before insolvency proceedings are initiated. No court needs to be involved. However, a transfer during insolvency proceedings has the advantage of the acquiring company not being held liable for the employee claims of the transferor company. Furthermore, the acquiring company may pick and choose which employees shall be transferred.

In June 2020, the Swiss parliament approved a general corporate law reform, amending numerous provisions of the Swiss Code of Obligations. An important part of this reform relates to insolvency rules. The aim is to induce the board of directors to take countermeasures at an early stage in case of financial distress. Further, the reform recognizes the importance of illiquidity as a risk that likely leads to bankruptcy. In addition to the currently prevailing capital-related factors, the new provisions also focus on the company’s liquidity.

Contrary to the laws of other countries, illiquidity did not, up to now, trigger the board’s duty to notify the court, as long as the company is not over-indebted. The current law just states that the board needs to ensure appropriate financial planning. The reform thus introduces a duty of the board to take appropriate action in the event of imminent illiquidity. This includes the requirement to file for a debt restructuring moratorium if other restructuring measures may not resolve an imminent illiquidity of the company.

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While the entry into force of the entire corporate law reform is not expected until 2023, some provisions have already come into force. This is for instance the case pertaining to the total duration of the provisional debt restructuring moratorium. According to the new provision, the court may grant a moratorium up to eight (instead of four) months. The moratorium might be approved as silent (non-public). However, even before the COVID-19 pandemic started, there are very few composition agreements throughout Switzerland (one of the most known cases is the former Swiss airline Swissair and its top holding SAirGroup). When evaluating options for a distressed company, the broad toolkit of debt restructuring should be taken into account. In particular, the possibility to conclude a composition agreement by the majority of creditors and approval of the court might be of interest. Such agreements become binding on all creditors and allow for a full recovery of the company. Likewise, the possibility to sell the business, or part of it, in the course of a debt restructuring moratorium with court approval might be attractive. The approval provides transaction security and hence reduces the board's liability in this respect.