DANIEL STAEHELIN
Attorney at Law, Partner,
Kellerhals Carrard, Switzerland

LUKAS BOPP
Attorney at Law, Partner,
Kellerhals Carrard, Switzerland

“

THE NEW PROVISIONS WILL CREATE NEW AND MORE PRECISE DUTIES FOR BOARD MEMBERS OF SWISS COMPANIES

”

Switzerland: Current projects and new laws

In Switzerland, there are currently two new insolvency-related legislation projects in the pipeline. One project intends to amend the current international insolvency law of Switzerland and to facilitate the recognition of foreign insolvency proceedings. The other aims to incentivise the implementation of reorganisation measures in companies at an early stage in order to avoid insolvency.

Already enacted at the beginning of 2017 is a new legislation that provides an international jurisdiction for the freezing of assets belonging to an inheritance estate.

Revision of the Swiss International Insolvency Law

On 7 September 2017, a hearing in relation to an intended revision of the Swiss international insolvency law took place before the Swiss Parliament's upper chamber's legal commission. Participants included – in addition to two other experts – INSOL Europe members Vincent Jeanneret, Karl Wüthrich and Daniel Staehelin. Based on the experts' comments the commission agreed to accept the proposal in general and move ahead with the legislation project.

Key points of the revision, as has already been reported earlier in Eurofenix by Rodrigo Rodriguez of the Federal Office of Justice, are the omission of the ominous reciprocity as a condition for recognition and the extension of the indirect jurisdiction from the statutory seat to the Centre of Main Interest (COMI). In addition, assets located in Switzerland can be turned over to the foreign insolvency administrator without opening ancillary proceedings in Switzerland, in cases were neither privileged creditors domiciled in Switzerland, nor creditors with a pledge located in Switzerland exist. At last, foreign judgements on voidance claims will be recognised in Switzerland provided the respondent was not domiciled in Switzerland.

Reorganisation of companies before insolvency

This new law on pre-insolvency reorganisation will formally be contained in the company section of the Swiss Code of Obligation and will complement the 2014 already enacted amended provisions on reorganisation in the Swiss Bankruptcy Code. The new provisions will create new and more precise duties for board members of Swiss companies to ensure that necessary measures to avoid insolvency are initiated as early as possible and that the focus of board members on liquidity and capital cover of a company is sharpened.

The new law provides that if there are reasonable grounds to suspect that the company may be unable to pay its debts when they become due within the next six months, the board is required to draw up a liquidity plan and to adjudicate the economical state of the company.

The liquidity plan must identify the current liquidity and the expected income and expenses. If the liquidity plan indicates that the company might become unable to pay its debts when they become due the board must implement additional measures to ensure the company's ability to meet its financial obligations or to file for the opening of a debt moratorium in accordance with the provisions of the Bankruptcy Code. Although the monitoring of the finances and the cash flow of a company on a constant basis already belonged, under the current law, to the core obligations of the board of a company, there was no such explicit course of actions to be undertaken.

Besides impending illiquidity, loss of capital will remain a triggering factor for reorganisations measures. Under the current law, the threshold for initiating such measures is the indication in the last annual balance sheet that one-half of the share capital and the legal reserve

are no longer covered by sufficient assets. Under the new law, this threshold will be raised to two-thirds and the measures to be undertaken by the board are more clearly addressed. The board has to implement measures to remove the capital loss and asses the economic situation of the company. If the company does not have a statutory auditor, the balance sheet must be audited before presenting in to the general assembly.

These new provisions should more adequately commit the board of directors to closely monitor the development of the financial situation of a company and initiate in good time the necessary steps to either avoid insolvency or, at least, to initiate the proceedings at a point in time where there is still a chance for recovery.

New law on international jurisdiction for the freezing of assets belonging to an inherited estate

One of the most controversial topics in international debt enforcement law is the international jurisdiction for the freezing of assets with joint

ownership. When the last Shah of Persia died in an Egyptian military hospital in 1980, a creditor of one of his heirs tried to freeze the late Shah's villa in St. Moritz (Switzerland). The Federal Supreme Court of Switzerland justifiably refused this in a last-instance ruling, since not the villa, but only the quota of the yet undivided inheritance constituted a sizable asset of the respective heir. In domestic cases such a quota is considered to be located at the descendant's last domicile. Nonetheless, the Federal Supreme Court of Switzerland later decided in several questionable decisions that Switzerland has no jurisdiction for the freezing of assets against foreign heirs despite the descendant's last domicile being in Switzerland. Now, the Swiss legislator has become active and enacted on 1 January 2017 a new law according to which assets belonging to an undivided inheritance may be frozen in Switzerland if the descendant's last domicile is located in Switzerland but it is not relevant whether the other assets of the descendent are actually located in Switzerland. ■

Ireland:
Court of Appeal clarification of issue of discretion in examinership applications

The Court of Appeal has allowed an appeal by the Edward Holdings group of companies against a decision of O'Connor J in the High Court refusing to appoint an examiner to four of the seven group companies in respect of which an examiner was sought to be appointed.[1] The group, which is controlled by Gerry Barrett, owns, amongst other assets, the Meyrick and G hotels in Galway.

The Court of Appeal rejected all of the findings which underpinned the decision of the High Court to refuse to appoint the examiner, including non-disclosure and abuse of process findings. The central issue for consideration by the Court of Appeal was the argument by the secured creditor that a settlement agreement between the group and the secured creditor in January 2017 was inconsistent with the concept of the group of companies seeking to have an examiner appointed to the relevant companies and that this should cause the court to exercise its discretion to refuse the application to appoint the examiner.

In the Court of Appeal, Finlay Geoghegan J and Hogan J, in separate judgments, with which Peart J agreed, both concluded that the existence of the settlement agreement was not a sufficient basis upon which to exercise their discretion to refuse the application. Hogan J explained the position as follows.

"*The fact … that an application for examinership would be inconsistent with the performance of the obligations imposed on a company under the terms of a settlement agreement cannot in itself – and I stress these words – be a dispositive consideration for a court determining whether to appoint an examiner … precisely because the entire examinership system is premised on the assumption that pre-existing commercial contracts (of whatever kind) will be overridden, varied, negated and dishonoured in the wider public interest of rescuing an otherwise potentially viable company*".

This constitutes a useful clarification of this issue particularly in light of a recent decision of the High Court which suggested otherwise (*Re JJ Red Holdings Ltd*), with which Hogan J expressly disagreed. ■

Footnote

1 Examinership is the Irish legal mechanism for the rescue or reconstruction of an ailing but potentially viable company.

"THE COURT OF APPEAL REJECTED ALL OF THE FINDINGS WHICH UNDERPINNED THE DECISION OF THE HIGH COURT"

TONY O'GRADY
Partner, Matheson, Ireland

KEVIN GAHAN
Senior Associate, Matheson, Ireland