

UIA Winter Seminar 2009
Rescue of Companies: M&A, Insolvency and Litigation Aspects
and the International Contest

Continuing Pending Litigation
in Case of Insolvency

A Swiss Law Perspective

Dr. Peter Straub / Dr. Michael Cartier

Walder Wyss & Partners AG
Seefeldstrasse 123
P.O. Box 1236
CH-8034 Zurich
Phone +41 44 498 98 98
Fax +41 44 498 98 99
reception@wwp.ch
www.wwp.ch



TABLE OF CONTENTS

- I. INTRODUCTION 3
- II. OVERVIEW: WHAT HAPPENS TO PENDING PROCEEDINGS IN THE EVENT OF INSOLVENCY? 3
 - A. In a Nutshell 3
 - B. First Stage: Suspension of Pending Proceedings 4
 - C. Second Stage: Decision by the Meeting of Creditors on Pursuit of Claim 6
 - a) Who decides on the pursuit of pending proceedings? 6
 - b) What decision can the meeting of creditors take? 6
 - D. Third Stage: Suspension is revoked and Schedule of Claims amended 7
- III. EFFECTS OF INSOLVENCY ON PENDING PROCEEDINGS IN DETAIL 8
 - A. Pending Litigation Proceedings 8
 - B. Pending Administrative Proceedings 8
 - C. Pending Arbitral Proceedings 8
 - D. Foreign Proceedings and Bankruptcy 9
 - a) Foreign vs. Domestic Bankruptcy: What effect do they have? 10
 - b) Foreign vs. Domestic Proceedings: How are they affected? 10
 - E. Banking Insolvency - Special Rules 10
- IV. PRO MEMORIA: SPECIAL INSOLVENCY PROCEEDINGS ARISING AFTER THE DECLARATION OF BANKRUPTCY 12
 - A. Action to contest the Schedule of Claims 12
 - a) Action aimed at including one's own claim in the Schedule of Claims 12
 - b) Action aimed at throwing out another creditor's claim from the Schedule of Claims 12
 - B. Third Party Claims and Claims of the Bankruptcy estate 13
 - a) Third Party Claims 13
 - b) Claims of the Bankruptcy estate 13
 - C. Avoidance/Clawback Actions 13
- V. COUNSELS' CORNER 14
 - a) Extinction of the Power of Attorney - Mandate 14
 - b) Conflict of Interests between Debtor and Bankruptcy estate 15
 - c) Legal Fees 15
- VI. SUMMARY 15

I. INTRODUCTION

In the past, Switzerland was rocked by the insolvency of Swissair, the so-called "flying bank". This led to the largest insolvency and composition proceedings in Swiss history. Today, it is banks and financial institutions finding themselves in the spotlight.¹

Several actions against various banks have been announced or are pending. The spectrum ranges from private clients seeking compensation for losses suffered to banks seeking to have loans repaid as liquidity dries up. Only just recently the Swiss Financial Market Authority declared a Swiss subsidiary of Lehman Brothers bankrupt. Under these auspices pending litigation and insolvency will invariably clash.

Yet, this is in itself not a recent issue. In fact the Federal Statute on Debt Enforcement and Bankruptcy ("DEBS"), which governs insolvency proceedings in Switzerland, contains specific provisions governing pending litigation in case of insolvency. However, only recently in Swissair proceedings has the Swiss Federal Supreme Court decided on important issues of cross-border insolvency and treatment of foreign proceedings.

II. OVERVIEW: WHAT HAPPENS TO PENDING PROCEEDINGS IN THE EVENT OF INSOLVENCY?

A. In a Nutshell

In a nutshell, the Federal Statute on Debt Enforcement and Bankruptcy deals with pending litigation in the case of insolvency as follows:

- a) it provides for a temporary suspension of certain proceedings upon the declaration of bankruptcy. This allows the bankruptcy administrator and the meeting of creditors to review the pending proceedings;
- b) thereafter, the bankruptcy estate may choose to pursue proceedings in its own name or to assign the right to pursue the proceedings to individual creditors;
- c) finally, the bankruptcy estate can accept pending claims lodged against the debtor. These claims are then registered as claims in the insolvency.

The following paragraphs show the various stages in more detail:

¹ Dr. Michael Cartier, associate with Walder Wyss & Partner AG contributed to this paper, while Ms. Caterina Mattle, junior associate with Walder Wyss & Partner AG, assisted in the research.

B. First Stage: Suspension of Pending Proceedings

In an initial stage, the Federal Statute on Debt Enforcement and Bankruptcy leads to a suspension of certain pending proceedings for a limited amount of time in order to allow the bankruptcy administrator and in particular the creditors of the debtor to make a decision on how to deal with the pending proceedings. Art. 207 DEBS states:

Article 207 **E. Stay of Civil Court Actions and Administrative Proceedings**

¹ *With the exception of urgent matters, civil court actions to which the debtor is a party and which affect the composition of the bankruptcy estate are stayed. In ordinary bankruptcy proceedings they can be resumed at the earliest 10 days after the second meeting of creditors. In summary bankruptcy proceedings at the earliest 20 days after the Schedule of Claims is made available for inspection.*

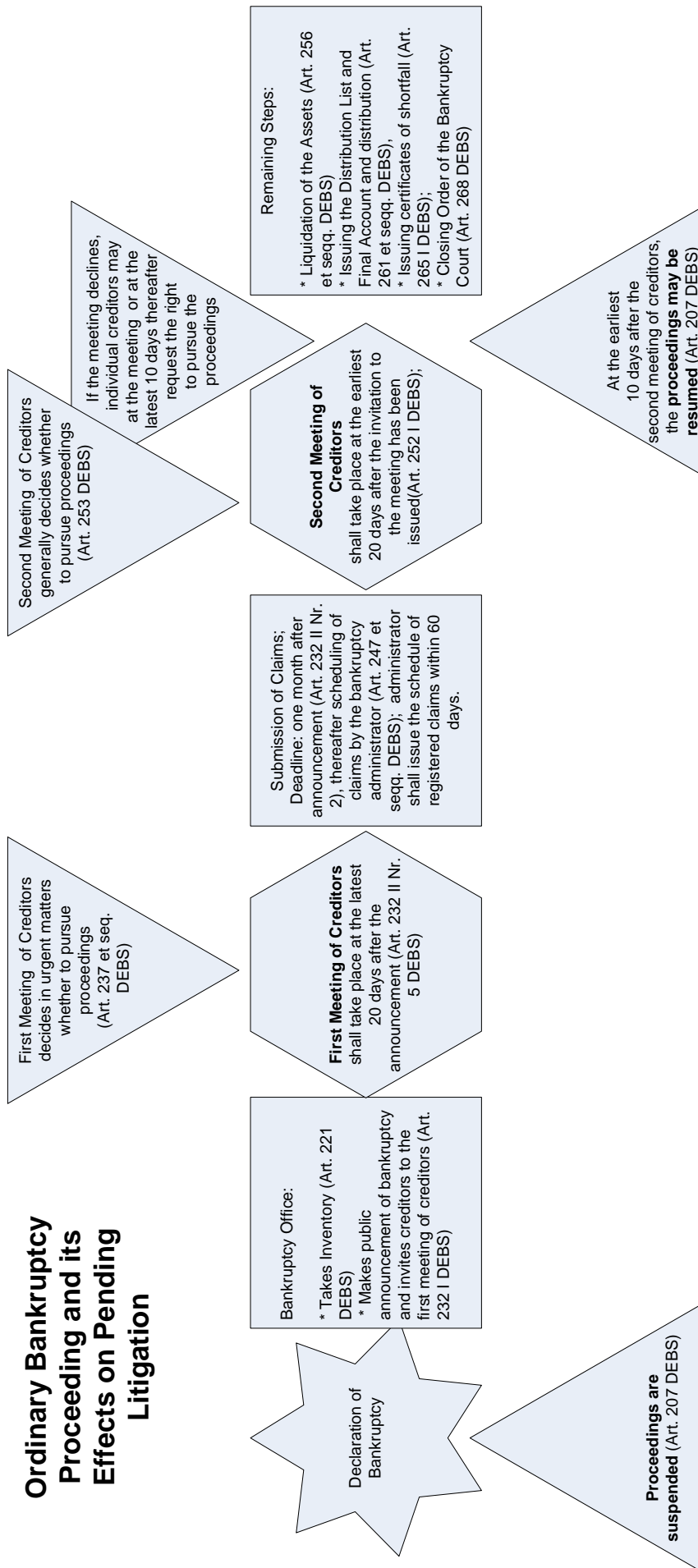
² *Under the same conditions administrative proceedings may be stayed.*

³ *During the stay, limitation periods and deadlines leading to the forfeiture of rights do not run.*

⁴ *This article does not apply to actions for compensation for libel or bodily harm or to family law matters.²*

The following diagram gives an overview of how long the suspension lasts in an ordinary bankruptcy proceeding, and which entities involved in the bankruptcy make decisions with respect to pending litigation.

² English translation by Dr. Stephen V. Berti, "Swiss Debt Enforcement and Bankruptcy Law - English translation of the Amended Federal Statute on Debt Enforcement and Bankruptcy (SchKG), Zurich 1997). Official French, German and Italian versions are available on the site of the Federal Administration [<http://www.admin.ch/ch/d/sr/sr.html>].



C. Second Stage: Decision by the Meeting of Creditors on Pursuit of Claim

Swiss insolvency proceedings are largely a creditor-driven. The main competence lies with the so-called "Meeting of Creditors", in which the creditors of the insolvent debtor meet and decide on all issues affecting the bankruptcy estate, including whether to pursue pending proceedings affecting the bankruptcy estate.

a) Who decides on the pursuit of pending proceedings?

In exceptionally urgent pending proceedings, the bankruptcy office will be required to pursue cases (subject to later approval) even before the first meeting of creditors has had the chance to convene. Where an urgent decision is needed, but sufficient time exists to convene the first meeting of creditors (simple urgency), then already the first meeting of creditors may decide on pursuing proceedings. This may be the case in summary or accelerated proceedings, which are not automatically suspended under Art. 207 DEBS.

In all other, i.e. non-urgent cases, the second meeting of creditors. The second meeting of creditors had the widest competence to decide on the pursuit of pending proceedings. The second meeting is afforded this competence on the reasoning that the bankruptcy administrator will by then have identified further creditors affected by the bankruptcy. In other words the second meeting of creditors will represent a larger part of the creditors representing a larger amount of the debt.

b) What decision can the meeting of creditors take?

The meeting of creditors decides whether in the case of "active proceedings" (Aktivprozesse) in which the debtor is claimant, it wishes the bankruptcy estate to continue the proceedings with the inherent procedural risks and associated costs. If the meeting of creditors decides to pursue the proceedings, the court costs and legal fees are considered direct costs of the bankruptcy estate. These will then be paid prior to any assets being distributed among the creditors. This is also the reason why the meeting of creditors needs to decide on this matter since the disbursement of court costs and legal fees reduces the assets available for distribution among the creditors.

In the case of passive proceedings (Passivprozesse), the second meeting of creditors can either to accept the claim lodged against the debtor or continue defending against the claim. The bankruptcy estate or better yet the creditors bear a twofold risk: the court costs and legal fees associated with defending an action, which will be disbursed first. Additionally, an award against the debtor will be entered into the Schedule of Claims as a further claim against the bankruptcy estate.

If the second meeting of creditors decides to pursue or to defend the claims, the bankruptcy estate takes up the pending proceedings in its own name and on its own account deriving its rights from those of the debtor.

If the second meeting of creditors declines to pursue or defend against specific claims, an individual or group of creditors of the debtor can request that they be assigned the right to pursue or defend the claims. In other words, the bankruptcy estate transfers the financial risk of the proceedings to the creditors; while the creditors who bear the risk are compensated by taking a first cut from any received or defended assets. Any surplus falls back to the bankruptcy estate.

Finally, if neither the bankruptcy estate nor a creditor decides to pursue a claim, such claim is deemed retracted. This will lead to the claim being written, with all the ensuing cost consequences for the bankruptcy estate. However, these costs will be deemed to be ordinary claims in the bankruptcy and are included accordingly in the Schedule of Claims. If neither the bankruptcy estate nor a creditor decides to defend against a claim, such claim will be deemed accepted. This will lead to the claim being entered into Schedule of Claims.

D. Third Stage: Suspension is revoked and Schedule of Claims amended

If the proceedings are continued, they are entered into the Schedule of Claims *pro memoria*. Depending on the outcome of the proceedings the claim is then either struck from or definitively entered into the Schedule of Claims.

Art. 63 Ordinance of the Federal Supreme Court on the Administration of the Bankruptcy Offices states:

Article 63 ***h. Claims subject to pending proceedings***

¹ *Contested claims, which at the time of the declaration of bankruptcy, are to be entered into the Schedule of Claims merely pro memoria without a decision of the bankruptcy administration.*

² *If the proceedings are neither pursued by the bankruptcy estate nor by individual creditors in accordance with Article 260 DEBS, the claim is deemed recognized and the creditors no longer have the right, to challenge their allocation [in the Schedule of Claims] according to Article 250 DEBS.*

³ *If, however, the proceedings are pursued depending on the outcome of the proceedings the claim is either struck from or definitively entered into the Schedule of Claims, which again cannot be challenged by the creditors.*

One important aspect of claims being recognized by the bankruptcy estate or a proceeding ultimately lost by the bankruptcy estate is that the corresponding claims are entered

into Schedule of Claims and may no longer be challenged by any of the creditors by means of an action to contest the Schedule of Claims.

III. EFFECTS OF INSOLVENCY ON PENDING PROCEEDINGS IN DETAIL

A. Pending Litigation Proceedings

Art. 207 DEBS does not provide for a blanket suspension of all civil court actions. On the contrary there are specific limitations. Civil court actions are only suspended if the following conditions apply:

- the debtor must be a party to the proceedings (claimant, respondent, *litis denunciante*, etc.);
- the court actions must affect or have the potential to affect the composition of the bankruptcy estate (lead to additional assets or lead to higher debts);
- the court actions are pending before a Swiss civil court (see below for international implications).

There is no automatic suspension, in the case of urgent proceedings (in essence accelerated and summary proceedings as well as other ordinary proceeding which brook no delay). Also, there is no suspension in the case of personal and non-transferable actions, i.e. actions for compensation for libel or bodily harm or proceedings related to family law matters.

B. Pending Administrative Proceedings

Art. 207 II DEBS provides that also administrative proceedings "may" be suspended. This is an important difference. While civil court proceedings are suspended *ex lege*, administrative proceedings are only suspended if the competent authority or judge issues a suspension order.

C. Pending Arbitral Proceedings

According to Art. 207 DEBS civil actions (*Zivilprozesse*) are suspended. One may be inclined to interpret this broadly as to encompass arbitral proceedings, however, Federal Statute on Debt Enforcement and Bankruptcy is to a large degree administrative law and procedural law, which is generally not directly applicable to arbitral proceedings.

The question whether arbitral proceedings are to be suspended needs to be answered by looking to the procedural rules applicable to the arbitration in question. In Switzerland domestic arbitration is governed by the Cantonal Concordat on Arbitration (CCA). For

international arbitration, the Chapter 12 of the Federal Statute on Private International Law applies.

The Cantonal Concordat on Arbitration which applies to domestic arbitration, itself contains no provision for the suspension of proceedings. However, the parties can agree on the applicable procedural rules or in the absence of such agreement, the arbitral tribunal can determine the conduct of the proceedings (Art. 24 I CCA). If both the parties and the arbitral tribunal fail to determine the applicable procedural rules, the Federal Statute on Federal Civil Proceedings (BZP) applies analogously by default (Art. 24 II CCA). Furthermore, Art. 6 BZP states that the judge (arbitrator) can suspend the proceedings for reasons of practicability but also that the proceedings are suspended automatically in the specific cases prescribed by law. This could bring Art. 207 DEBS to bear on domestic arbitral proceedings, which could require an arbitral tribunal to suspend its proceedings.

Chapter 12 PILS which applies to international arbitration, also lacks any specific provisions on suspending proceedings. Furthermore, it does not provide for any default procedural law. Hence, if the parties have not agreed on specific procedural rules, it remains for the arbitral tribunal to determine the conduct of the proceedings (Art. 182 II PILS). Accordingly, the arbitral tribunal has the competence to suspend its own proceedings. Additionally, legal doctrine in Switzerland accepts that Art. 207 DEBS does not constitute part of the Swiss public policy and consequently would not apply directly to arbitral proceedings.³

Since the insolvency of a party brings with it a multitude of issues (security for costs, validity of the powers of attorney, authorized representative, etc.) and also the possibility that the bankruptcy estate might retract or acknowledge claims, it nevertheless makes sense for an arbitral tribunal to exercise its discretion and suspend the proceedings until there is more clarity. Only where arbitral proceedings are near completion and no further submission required from the parties would a suspension makes little sense.

D. Foreign Proceedings and Bankruptcy

The Federal Statute on Debt Enforcement and Bankruptcy hails back to 1889 and while there have been ongoing revisions, it is fair to say that the concept of the Swiss insolvency law remains territorial in nature. Only limited international aspects of bankruptcy are dealt with in the Federal Statute on Private International Law. This gives rise to various issues:

³ ASA Bull. 1996, p. 427 et seq.; SJZ 93 (1997) p. 28.

a) Foreign vs. Domestic Bankruptcy: What effect do they have?

Because of the territorial nature of Art. 207 DEBS, a foreign bankruptcy (unless it is recognized in Switzerland) does not lead to the suspension of Swiss proceedings. Of course this does not hinder a Swiss state court to suspend the proceedings due to a foreign bankruptcy under the applicable Cantonal procedural law for important reasons. However, this is not automatic.

Furthermore, Art. 207 DEBS applies only to domestic proceedings. A foreign judge is not bound to the rules of Art. 207 DEBS. Of course the *lex fori* of the foreign court may provide for a suspension of proceedings for important reasons.

b) Foreign vs. Domestic Proceedings: How are they affected?

The territorial nature of Art. 207 DEBS is further evidenced by the fact that the bankruptcy of a Swiss-domiciled company will generally not lead to the suspension of a foreign proceedings. It is the foreign law which determines what, if any effect it wishes to afford a bankruptcy declared in Switzerland.

The Swiss Federal Supreme Court has reiterated the point that Art. 207 DEBS does not apply to foreign pending proceedings and accordingly the bankruptcy administration is not required to register such claims *pro memoria* in the schedule of creditors in 2004 (AOM AIR LIBERTÉ)⁴ and again in 2007 and 2008 (ZEPHIR)⁵.

Accordingly, a creditor who has a pending claim before a foreign court will still be required to register his claim with the bankruptcy administration. If the bankruptcy administration declines to accept his claim and enter it into the schedule of claims, he must file an action against the bankruptcy estate for inclusion into the schedule of claims. In other words, while a creditor may continue the proceedings abroad, he will nonetheless be advised to institute proceedings in Switzerland in order to be certain to participate in the liquidation of the debtor's assets in Switzerland.

E. Banking Insolvency - Special Rules

The collapse of Lehman Brothers has also had its effects on Switzerland. In particular a Swiss subsidiary of Lehman Brother has been declared bankrupt by the Swiss Financial

⁴ Decision of the Federal Supreme Court (DFC) of 12 November 2004, 7B.124/2004, consideration 3.2.3.

⁵ DFC of 30 September 2008, 5A_20/2008, consideration 3.3.4.; DFC of 23 April 2007, 7B.226/2006, consideration 4.3.3.

Market Supervisory Authority (FINMA) with effect 22 December 2008 (published 7 January 2008).⁶

Art. 33 et seqq. of the Federal Statute on Banks and Savings Banks refers to bankruptcy provisions of the Federal Statute on Debt Enforcement and Bankruptcy in the event of a bank bankruptcy, with certain additional bank-specific provisions.

Proceedings pending against a bank would thus also be suspended in application of Art. 207 DEBS. A bank-specific provision for the suspension of pending proceedings may be found in Art. 20 of the Ordinance of the Swiss Financial Market Supervisory Authority (FINMA) on Banking Bankruptcy:

Article 20 **Pursuing pending proceedings**

¹ The Bankruptcy Liquidator reviews the claims of the bankruptcy estate, which at the time of the declaration of bankruptcy are already object of proceedings (civil proceedings or administrative proceedings) and makes an application to FINMA on the pursuit of these proceedings.

² If FINMA declines the pursuit of the proceedings, the Bankruptcy Liquidator gives the creditors the opportunity to request the right to conduct the proceedings in line with Article 260 para. 1 and 2 DEBS. He sets them an appropriate deadline.

In place of the meeting of creditors, it is the Swiss Financial Market Supervisory Authority which decides whether or not the bankruptcy liquidator may pursue pending proceedings. In the absence of any formal "second meeting of creditors" in a banking bankruptcy, pending proceedings would most likely have to be suspended at least until 20 days after the Schedule of Claims is published (corresponding to the rules provided for a summary bankruptcy procedure) and not 10 days after the second meeting of creditors (corresponding to the rules provided for an ordinary bankruptcy procedure).

For the sake of completeness, it should be noted that the EC Directive 2001/24/EC on the Reorganisation and Winding-up of Credit Institutions, does not apply to Switzerland. However, Art. 37f and Art. 37g of the Federal Statute on Banks and Savings Banks provide for the coordination with foreign bankruptcy proceedings and the recognition of foreign bankruptcy declarations and measures.

⁶ The public announcement of the bankruptcy of Lehman Brothers Finance AG can be found on the website of FINMA with further particulars [<http://www.finma.ch/e/sanktionen/insolvenzen/Pages/insolvenzen.aspx>]

IV. PRO MEMORIA: SPECIAL INSOLVENCY PROCEEDINGS ARISING AFTER THE DECLARATION OF BANKRUPTCY

While the title of the presentation is "*Continuing Pending Litigation in the case of Insolvency*" it should not be forgotten that there are several insolvency-specific proceedings which may be triggered by the bankruptcy or affect pending proceedings.

A. Action to contest the Schedule of Claims

The Federal Statute on Debt Enforcement and Bankruptcy provides for proceedings to ensure that a creditor is correctly entered into the Schedule of Claims and to have falsely entered claim struck from the Schedule of Claims. Depending on the purpose one may distinguish two types of action to contest the Schedule of Claims:

a) Action aimed at including one's own claim in the Schedule of Claims

Creditors whose claims have been rejected by the bankruptcy administrator and not been entered into the Schedule of Claims or entered in wrong class of creditors can file an action against the bankruptcy estate to contest the Schedule of Claims (Art. 250 I DEBS). Such action is aimed at having the claim correctly entered into the Schedule of Claims. This is a pre-requisite in order to participate in the distribution of assets.

A creditor who has a claim pending before a foreign court may be forced to file such an action, if the bankruptcy administrator does not deem his to be sufficiently founded. In order to safeguard his entitlement to part of the bankruptcy estate, the creditor will be forced to institute such an action in parallel to or in place of the foreign proceedings.

b) Action aimed at throwing out another creditor's claim from the Schedule of Claims

Creditors who deem that the claims of another creditor have been wrongly included into the Schedule of Claims (Art. 250 II DEBS) can file an action against such creditor. Such action is aimed at throwing out the other creditor's claim from the Schedule of Claims.

If the contested claim was the result of a pending proceeding which neither the bankruptcy estate nor an individual creditor sought to continue, such pending claim has been deemed accepted and no longer subject to judicial review (Art. 63 II of the Ordinance of the Federal Supreme Court on the Administration of the Bankruptcy Offices).

In summary, if a creditor wishes to contest the claim of another party that is subject to a pending proceeding, he must request the right to pursue the pending proceedings and cannot later file an action to throw out the other creditor's claim.

B. Third Party Claims and Claims of the Bankruptcy estate

The Federal Statute on Debt Enforcement and Bankruptcy provides for proceedings to determine if assets (chattel or real estate) residing with or registered to a third party actually belong to the bankruptcy estate or if assets residing with or registered to the bankruptcy estate actually belong to a third party (Art. 242 DEBS).

a) Third Party Claims

Where a third party claims to have a better right to the chattel or real estate residing with or registered to the bankruptcy estate and the bankruptcy estate deems this claim to be baseless, the bankruptcy estate sets a deadline of 20 days within which the third party can file a claim to have the chattel or real estate handed over (Art. 242 II DEBS).

The Federal Statute on Debt Enforcement and Bankruptcy does not state what happens if there is already a pending proceeding on the entitlement to chattel or real estate. While the action to enforce a third party claim is deemed an insolvency action having only effect on the current bankruptcy, it is possible that pending proceedings before a Swiss court, will be continued in the guise of a third party claim for the sake of procedural economy.

If, however, a proceeding is pending before a foreign court, the third party will most likely need to initiate a third party claim with the court at the seat of the bankruptcy estate to avoid his property being liquidated and later distributed by the bankruptcy administrator.

b) Claims of the Bankruptcy estate

Where the bankruptcy estate deems it has a better right to the chattel or real estate residing with or registered to a third party, the bankruptcy estate can only attain these assets by means of filing an ordinary claim either for vindication of chattel or correction of the real estate registry. The action by the bankruptcy estate is an ordinary court action and has effects beyond the immediate bankruptcy.

Again, the Federal Statute on Debt Enforcement and Bankruptcy does not state what happens if there is already a pending proceeding on the entitlement to specific chattel or real estate. However, since vindication and/or correction or real estate registry actions are ordinary claims, the bankruptcy estate will possibly be required to pursue the already pending proceedings whether they are before a Swiss or foreign court.

C. Avoidance/Clawback Actions

Last but not least, bankruptcy proceedings can often lead to avoidance or clawback actions where the bankruptcy administrator or individual creditors seek to have assets or monies returned to the bankruptcy estate, which were either:

- donated to a third party up until a year before the bankruptcy (avoidance of gifts and donations, Art. 286 DEBS)
- paid or given as security for a non-due debt, for obligations which did not previously have to be secured, or as an unusual form of payment up until a year before the bankruptcy if the debtor was over-indebted (avoidance due to insolvency, Art. 287 DEBS)
- paid or given up until 5 years before the bankruptcy for the intent of harming creditors or unduly favouring individual creditors (avoidance due to intent, Art. 288 DEBS)

Avoidance actions do not have any direct implications for pending proceedings, however, experience in the Swissair cases has shown that avoidance actions have become unavoidable in large insolvency cases.

V. COUNSELS' CORNER

Continuing litigation during insolvency also gives rise to a several practical problems for the counsel involved in the pending proceedings.

a) Extinction of the Power of Attorney - Mandate

According to Art. 35 Swiss Code of Obligations, a power of attorney extinguishes automatically upon bankruptcy being declared on the principal, unless the power of attorney provides that it shall remain valid beyond the bankruptcy.

A standard form power of attorney (e.g. the one provided by the Zurich Bar Association) will often contain wording allowing for the continued validity of the power of attorney:

*In the absence of contrary provisions of procedural law, this power of attorney shall not expire upon the death of the client, upon the client's being declared presumed dead, upon the client's loss of capacity to act, or **upon the client's bankruptcy.***

If the power of attorney lacks similar wording, and the principal is declared bankrupt, the mandated counsel will be acting without authority.

Similarly Art. 405 Swiss Code of Obligations provides that a mandate agreement also ceases upon the bankruptcy of the principle unless otherwise agreed. However, Art. 405 Code of Obligation eases this effect by ensuring that the mandated counsel may still do such necessary acts to safeguard the interests of the principal.

b) Conflict of Interests between Debtor and Bankruptcy estate

If the bankruptcy estate or individual creditors (according to Art. 260 SchKG) decide to pursue a proceeding with the same counsel as the bankrupt debtor, this may give rise to a conflict of interests. The interests of the debtor are not necessarily aligned with those of the bankruptcy estate and even less so with individual creditors.

c) Legal Fees

Last but not least, if counsel to the debtor has failed to seek an advance or a retainer from the bankrupt party in a pending proceeding, he will often have to register any open invoices as ordinary claims with the bankruptcy estate.

If, however, the bankruptcy estate decides to pursue the claims in place of the bankrupt debtor with the same counsel, the accrued fees become debts of the bankruptcy estate (i.e. they are paid before the ordinary creditors receive any proceeds from the liquidation). Finally, counsel can request that the bankruptcy provide security for the future payments before continuing with his work.

A word of warning! If counsel recognizes that his client is slipping into bankruptcy, he may be tempted to require payment of all outstanding invoices. However, counsel should not be surprised if he is confronted with a clawback claim, if little later his client is declared bankrupt.

VI. SUMMARY

Overall, while Swiss insolvency law does provide for a mechanism for dealing with pending litigation in the case of insolvency, this mechanism is very territorial in nature. This has both pros and cons.

A party involved in a foreign (non-Swiss) proceeding against a Swiss party, which has been declared bankrupt, will not only be faced with risk of not being able to enforce an award for lack of sufficient assets. More often than not he will be forced to institute separate proceedings in Switzerland in order to have his claims included in the Schedule of Claims and thus participate in the little assets that remain.

Conversely, by requiring that most necessary proceedings take place in Switzerland, Swiss insolvency law provides a degree of certainty that the bankruptcy procedure can be completed in a reasonable amount of time thereby ensuring that the creditors will eventually receive (at least part of) their money.