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Bankruptcy

1 General information

Since the entry into force on 1 July 2004 of new bank insolvency provisions in the Banking Act (BA; SR 952.0), the Swiss Financial Market Supervisory Authority (FINMA) has the powers to initiate bankruptcy proceedings for banks (Art. 33 ff BA), fund management companies and securities firms (Art. 67 of the Financial Institutions Act [FinIA; SR 954.1]), investment companies with variable capital (SICAVs), limited partnerships for collective investment schemes (LPs) and investment companies with fixed capital (SICAFs) (Art. 137 ff of the Collective Investment Schemes Act [CISA; SR 954.31]), insurance companies (Art. 55 ff of the Insurance Supervision Act [ISA; SR 961.01]) and, lastly, financial market infrastructures (Art. 88 of the Financial Markets Infrastructure Act [FinMIA; SR 958.1]).

Until 1 January 2023, these powers also applied in respect of institutions whose authorisation requirement was still being reviewed or that engaged in an activity subject to authorisation without being in possession of the required licence. For all proceedings initiated after this date, authority has reverted to the ordinary bankruptcy court. FINMA's authority, however, remains unchanged for proceedings already underway prior to this date.

This document focuses on banks placed into bankruptcy and sets out some general aspect of the proceedings, purely for information purposes. Bank bankruptcy is primarily governed by Chapter XII of the Banking Act (BA). FINMA may set out the procedure in more detail (Art. 34 para. 3 BA). It has exercised such powers through the FINMA Banking Insolvency Ordinance (BIO-FINMA; SR 952.05), one of whose particular objectives is to specify the bank bankruptcy proceedings (Art. 1 BIO-FINMA).

2 Impact of the initiation of bankruptcy proceedings

If there is no prospect of a successful resolution or in the event of the failure of an attempted resolution, FINMA withdraws the bank's licence, places the bank into bankruptcy and announces this decision publicly (Art. 33 para. 1 BA).

The bankruptcy order has the effect of opening bankruptcy proceedings pursuant to Art. 197 to Art. 220 of the Debt Enforcement and Bankruptcy Act (DEBA; SR 281.1) (Art. 34 para. 1 BA). The initiation of bankruptcy proceedings thus halts the accrual of interest with regard to the bank (Art. 209 para. 1 DEBA). Interest continues to accrue for secured claims, however, until realisation of the security is completed, provided that the proceeds from realisation exceed the amount of the claim and the accrued

interest at the time bankruptcy proceedings are initiated (Art. 209 para. 2 DEBA). The initiation of bankruptcy proceedings also causes all existing debts of the bank to become due, save for those which are secured through real estate of the bankrupted institution (Art. 208 para. 1 DEBA).

FINMA may itself take on the role of the bankruptcy liquidator or may appoint a third party who will act as such under its supervision (Art. 33 para. 2 BA). An assembly of creditors is not automatic and is convened only upon a request being submitted to FINMA by the liquidator (Art. 35 para. 1 letter a DEBA). The same applies to the establishment of a committee of creditors (Art. 35 para. 1 letter b BA), an instrument that is a particularly effective means of both ensuring support for the bankruptcy liquidator and for the representation of the creditors. The committee, as a supervisory body, defends the interests of the creditors as a whole.

The decision to open bankruptcy proceedings is immediately enforceable as it will not suffer, by law, from a suspensive effect in case of an appeal (Art. 37^{quinquies} letter d BA).

3 Communication with creditors

Communication with creditors takes place by means of the public notices published in the Swiss Official Gazette of Commerce (SOGC) and on the FINMA website. With regard to deadlines and the legal consequences associated with a public notice, the date of publication in the SOGC is the deciding factor. Communications are sent directly to creditors whose name and delivery address in Switzerland are known. FINMA may require creditors domiciled or residing abroad to appoint an authorised person for service in Switzerland. For reasons of urgency or to simplify the procedure, direct communications may be dispensed with (Art. 4 BIO-FINMA).

In order to keep them informed of the status of the proceedings, it is standard practice for the liquidator to inform the creditors of a bank that has been placed into bankruptcy at least once a year, by means of a circular.

4 Registration of claims and other rights

The claims recorded in the institution's books are considered to be recognised and no new filing of claims is required (Art. 36 para.1 BA). The other creditors and all persons having claims to assets in the insolvent institution's possession are invited to register within the time period specified in the notice to creditors. They are thus called upon to register their claims or complaints with the bankruptcy liquidator and to furnish appropriate supporting evidence.

When registering their claims, creditors with debts secured by a mortgage or other security interests in real estate must indicate separately the principal, the interest, and the expenses, as well as whether the claim for payment of the principal is due or a redemption notice has been effected, and for which amount and for which date as applicable. The owners of easements created under previous cantonal law without registration in public registers and that have not yet been entered in the land register are called upon to notify the bankruptcy liquidator by the registration date specified and submit any supporting evidence.

(Art. 123 of the Ordinance of the Federal Supreme Court on the Forced Sale of Real Estate [FSREO; SR 281.42]). Where the insolvent institution is a co-owner or condominium (private apartment) owner of a property (private apartment), this notice to effect notification to the bankruptcy liquidator also applies to easements on the property itself (Art. 130a para. 2 *cum* 123 FSREO). Where the bankruptcy liquidator is not notified of such easements, they can no longer be asserted against any good faith purchasers of such encumbered properties unless the Swiss Civil Code also provides for the enforceability of such rights in rem even when they have not been entered in the public land register (Art. 29 FSREO).

By force of the aforementioned powers accorded to FINMA to lay down the details of the bankruptcy proceedings pursuant to Article 34 paras. 2 and 3 BA, bank insolvency proceedings are set out in BIO-FINMA. In accordance with such, the bankruptcy liquidator verifies the filed claims and those to be recognised by law, and, in this context, may make enquiries and ask the creditors to provide additional proof (Art. 26 BIO-FINMA). The bankruptcy liquidator decides whether, to what extent and with what rank claims are recognised and shall draw up the schedule of claims (Art. 27 BIO-FINMA); the bankruptcy liquidator informs every creditor whose claim was not collocated as filed or as registered in a book or land register why the claim was rejected in full or in part (Art. 29 para. 4 BIO-FINMA). The creditors may inspect the schedule of claims for a period of at least 20 days; the bankruptcy liquidator gives public notice of when and how the schedule of claims may be inspected, and in what form (Art. 36 LB *cum* 29 BIO-FINMA). Actions may be taken to contest the schedule of claims in accordance with ordinary bankruptcy law (Art. 250 DEBA *cum* 30 BIO-FINMA).

5 Privileged deposits

Deposits in the name of the depositor, including medium-term notes that are deposited with the bank in the name of the depositor, are assigned to the second class of creditors pursuant to Article 219 DEBA for amounts up to a maximum of CHF 100,000 for each creditor (Art. 37a para. 1 BA) and, as such, are deemed to be privileged. A claim is privileged only once, even where there are several holders (Art. 37a para. 3 BA). Privileged depositors are deemed to be the contracting party entitled under the claim relationship with the bank or the depositor of the medium-term note as they appear in the bank's ledgers at the time the bank's bankruptcy is declared (Art. 42c para. 1 of the Ordinance on Banks and Savings Banks [BO; SR 952.02]).

Privileged deposits are paid out from the insolvent bank's available liquid assets outside of the schedule of claims and excluding any netting (Art. 37b BA). The depositor protection scheme (currently in operation via *esisuisse*) is triggered on a subsidiary basis for privileged deposits only if the institution's available liquid funds do not permit full and immediate payout.

The bankruptcy liquidator must formulate a payout plan based on a list of privileged depositors provided by the bank and will call upon them to communicate the required payment instructions (for example: information on the bank account to be credited). The payout will be carried out once instructions for the payment transfer have been received (Art. 37j BA).

Unlike deposits (privileged or not), assets held in custody (for example: units and shares in collective investment schemes) are the property of clients and, as such, must be segregated from the bankruptcy assets (Art. 37d BA).

6 Reporting and surrendering of assets

The bankruptcy liquidator draws up an inventory of the bankruptcy assets (Art. 16 para. 1 BIO-FINMA). Notably, the assets held in custody that are to be segregated from the bankruptcy assets pursuant to Article 37d of the Banking Act must be recorded in the inventory at their market value at the time the bankruptcy proceedings were opened (Art. 16 para. 3 BIO-FINMA).

The bank's debtors and other persons (including those bound by professional secrecy such as lawyers, banks, etc.) who are in possession of the bank's assets through a pledge or for any other reason whatsoever must report to the bankruptcy liquidator within the deadline specified in the notice to creditors and release the assets to the bankruptcy liquidator. Claims and liabilities for which a right to offset has been asserted must likewise be reported. Any existing pre-emptive rights (such as those stemming from a general lien) lapse in the event of an unjustifiable failure to report or surrender (Art. 17 BIO-FINMA).

Securities and other financial instruments serving as collateral do not fall within this obligation to surrender, provided the legal conditions for the collateral recipient to take responsibility for their realisation are met. However, these assets – together with proof of the right to realise them – must be reported to the bankruptcy liquidator, who shall make a note of them in the inventory. The collateral recipient must agree with the bankruptcy liquidator on the proceeds from the realisation of these assets. Any surplus accrues to the bankruptcy assets (Art. 18 BIO-FINMA).

Subject to Article 30a BA (suspension of the termination of agreements), also excluded from the bank insolvency proceedings are memorandums of understanding concluded in advance pertaining to (i) the netting of accounts receivable, including the agreed-upon method and the value assessment, (ii) discretionary utilisation of collateral in the form of securities or other financial instruments, including cash collateral (but excluding physical cash), whose value is objectively ascertainable, and (iii) the transfer of accounts receivable and accounts payable as well as of collateral in the form of securities or other financial instruments, including cash collateral (but excluding physical cash), whose value is objectively ascertainable (Art. 27 BA).

Any violations of the above-mentioned obligations will be punishable by a fine in accordance with Article 48 of the Financial Market Supervision Act (FINMASA; RS 956.1) and Article 324 paras. 2, 3 and 5 of the Swiss Criminal Code (SCC; RS 311.0) *cum* 34 para. 2 BA.

7 Distribution and completion of proceedings

Once all assets have been realised and all processes relating to the calculation of assets and liabilities have been completed, the bankruptcy liquidator draws up the final distribution list as well as the final accounts and submits these to FINMA for approval. They are made available for inspection for a period of ten days and may thus serve as the basis of an appeal (see section 8 below). Once the distribution list has been approved, the bankruptcy liquidator will pay out to the creditors. Following the distribution, FINMA will take the decisions required to conclude the proceedings and will give public notice that the bankruptcy proceedings have been completed (Art. 37e BA).

8 Creditors' rights to contest

The purpose of bank insolvency proceedings is to protect creditors and depositors of insolvent institutions, which is why they are designed as accelerated proceedings. The restriction of the appeal options available is a counterpart to this principle. Thus, in bankruptcy proceedings, the creditors and owners of a bank may only lodge an appeal against realisation measures and the approval of the distribution plan and final accounts (Art. 37^{ter} BA). Actions to contest the schedule of claims are governed by Article 250 DEBA (Art. 30 BIO-FINMA).

Lastly, appeals against the decision to open bankruptcy proceedings for a bank have no suspensive effect (Art. 37^{quinquies} letter d BA), with the result that the decision is immediately enforceable.