Restructuring and insolvency in Switzerland: overview

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Restructuring and insolvency in Switzerland: overview

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A Q&A guide to restructuring and insolvency law in Switzerland.

The Q&A gives a high level overview of the most common forms of security granted over immovable and movable property; creditors' and shareholders' ranking on a company's insolvency; mechanisms to secure unpaid debts; mandatory set-off of mutual debts on insolvency; state support for distressed businesses; rescue and insolvency procedures; stakeholders' roles; liability for an insolvent company's debts; setting aside an insolvent company's pre-insolvency transactions; carrying on business during insolvency; additional finance; multinational cases; and proposals for reform.

To compare answers across multiple jurisdictions, visit the Restructuring and insolvency Country Q&A tool.

This Q&A is part of the multi-jurisdictional guide to restructuring and insolvency law. For a full list of jurisdictional Q&As visit www.practicallaw.com/restructure-mjg.

Forms of security

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1. What are the most common forms of security granted over immovable and movable property? What formalities must the security documents, the secured creditor or the debtor comply with? What is the effect of non-compliance with these formalities?

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Immovable property

**Common forms of security and formalities.** For charges on immoveable property, the most common form of security is a legal mortgage over real estate within the meaning of Article 655(2) of the Civil Code. Security over real estate security can generally be established in two ways:

- Mortgage.
- Mortgage certificate.

Under a partial revision of the Civil Code which became effective on 1 January 2012, the mortgage certificate can take the form of either a:
• Mortgage certificate on paper (Papierschuldbrief).
• Paperless register mortgage certificate (Register-Schulbrief).

Detailed provisions regulate these different types of security.

Security over real estate is perfected by recording the mortgage in the Land Register. In addition, the underlying transactions creating a charge on immovable property must be performed as a public deed.

**Effects of non-compliance.** The security is void if the underlying transaction does not satisfy the formal requirements set out by Swiss law. As a consequence of the constitutive effect of the land register entry, a non-registered charge is deemed to not exist.

**Movable property**

**Common forms of security and formalities.** There are various forms of security for movable property, including:

• **Pledge.** To secure a present or future claim, movable goods can be pledged. To validly establish a pledge, it is necessary to transfer possession of the specific movable property to the creditor or a third party.
• **Right of retention (security interest).** See **Question 3**.
• **Retention of title (Eigentumsvorbehalt).** See **Question 3**.
• **Fiduciary transfer of property title.** In practice, full property title of an asset is often vested in the creditor (or a third party) with the understanding that the asset serves as security only. A fiduciary relationship is thereby created, by which the holder of the property enjoys the legal position of a proprietor but the transfer is connected with the (implied or explicit) contractual obligation to act in the best interest of the principal and to return the property once the contractual obligations are met. Notably, this applies to the assignment of claims.
• **Person-related securities.** The creditor can seek an undertaking from a third party to pay the debt (or secure the specific performance) of the primary debtor. These undertakings are either an:
  • undertaking of a guarantee (Article 111, Code of Obligations); or
  • undertaking as a suretyship (Articles 492 et seq, Code of Obligations).

**Effects of non-compliance.** The effects of non-compliance depend on the type of security:

• **Pledge.** Since the transfer of possession is mandatory, the effects of a pledge are suspended for as long as the pledger has, with the pledgee's consent, exclusive possession of the pledged chattel.
• **Right of retention.** See **Question 3**.
• **Retention of title.** See **Question 3**.
• **Fiduciary transfer of property title.** In the absence of the transfer of possession of the chattel to the holder and a valid underlying transaction, the fiduciary transfer of property title is void. As far as the fiduciary transfer of claims is concerned, the assignment requires a written agreement.
• **Person-related securities.** Due to the strict formalities to be observed in the case of a suretyship and its similarity to a guarantee, the parties must be prudent when employing these security instruments. In all cases, the suretyship must specify the maximum amount of liability and, if issued by a natural person, the suretyship must be recorded as a notarised deed.

**Creditor and contributory ranking**

1. Where do creditors and contributories rank on a debtor's insolvency?

In bankruptcy proceedings, the creditors rank as follows:

- All costs for the opening and carrying out of the bankruptcy proceeding and for the drawing up of the inventory are paid directly out of the proceeds. Only the costs of inventorising, administration and realisation are deducted from the proceeds of the realised collateral.

- Secured claims are satisfied directly out of the proceeds from the realisation of the collateral. If several items of collateral secure the same claim, the amount realised is applied proportionally to the claim.

- Unsecured claims and the uncovered part of secured claims are divided into three classes and satisfied out of the proceeds of the entire remainder of the bankrupt estate. Creditors of the three classes below only receive proceeds once the above payments are satisfied. Creditors of the same class rank pari passu.

The first class of claims rank as follows:

- claims of employees derived from the employment relationship which arose or became due during the six months prior to the opening of bankruptcy proceedings, up to the maximum insured amount per year pursuant to the mandatory accident insurance;

- claims of employees in relation to the repayment of deposits;

- claims of employees derived from social-compensation plans which arose or became due during the six months prior to the opening of bankruptcy proceedings;

- claims of the assured derived from the Federal Statute on Accident Insurance and from facultative pension schemes, and claims of pension funds against employers;

- claims for maintenance and assistance derived from family law and the Statute on Registered Partnership which arose during the six months prior to the opening of bankruptcy proceedings and which are to be performed by payments of money.

The second class of claims rank as follows:
• claims of persons whose assets were entrusted to the debtor as holder of parental power, for everything which the debtor owes them out of such capacity. This preferential right is only valid if bankruptcy proceedings are opened during the parental administration or within a year of termination of the proceedings;

• claims for contribution pursuant to the:
  • Statute on the Old-Age and Survivor's Insurance, the Statute on Disability Insurance;
  • Statute on Accident Insurance;
  • Statute on Loss of Earnings for Military Personnel and due to Maternity; and
  • Statute on Unemployment Insurance.

• premium and cost contribution claims of the social health insurance;
• contributions to the family allowance fund; and
• privileged deposits pursuant to Article 37a of the Statute on Banking.

The third class comprises all other claims, including unsecured creditors and contributories. Claims of shareholders/ contributories can only be satisfied when all other claims are satisfied.

The following are not counted when calculating the deadlines specified in classes one and two:

• The duration of prior composition proceedings.
• The duration of court proceedings in relation to the claim.
• In the bankruptcy liquidation of an estate: the time between the decease of the deceased and the liquidation order.

**Unpaid debts and recovery**

3. Can trade creditors use any mechanisms to secure unpaid debts? Are there any legal or practical limits on the operation of these mechanisms?

Trade creditors can use the following mechanisms to secure unpaid debts:

• **Right of retention (security interest).** The debtor has a right to satisfy a claim by enabling a creditor to retain and sell movable property or securities that:
  • are in the creditor's possession with the debtor's consent; and
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- the creditor would otherwise be obliged to surrender.

If the debtor fails to fulfil his obligation, the creditor can realise the retained asset.

- Retention of title (Eigentumsvorbehalt). The parties can agree on a retention of title by the seller of goods until the purchase price is fully paid. To be valid, the parties must explicitly agree the retention of title and each item of the goods must be registered item by item in the Public Retention Title Register (Article 715, Civil Code). Swiss law presumes that the possessor of goods is the legal owner. The registration does not prevent a transfer of the property title to a third party that acts in good faith. The entitled creditor is, however, protected in the case of seizure of the goods or bankruptcy of the debtor. However, monitoring the register of title retention is cumbersome and accordingly, this security instrument is not widely used.

Retention of title is only effective if entered in the official register kept by the debt collection office at the acquirer's domicile. Despite an explicit agreement, a non-registered retention of title, however, may not hinder the transfer of property to the acquirer. If movable property arrives in Switzerland and is subject to a reservation of title validly established abroad but for which the requirements of Swiss law are not yet satisfied, the retention of title will remain effective in Switzerland for three months (Article 102(2), Federal Act of 18 December 1987 on International Private Law).

- Set-off rights. Swiss law provides for mutual set-off rights between the respective parties (see Question 4, Set-off rights).

Freezing order

A special asset freeze proceeding is provided for under Articles 271 et seq of the Swiss Debt Collection and Bankruptcy Act (DCBA).

In connection with the Lugano Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters 2007 (effective from 1 January 2011), the regime for freezing orders has been modified and its scope has been extended.

Under the new rules, freezing orders are available to both local and foreign creditors (subject to specific requirements). Such a freezing order must be applied for by the court of the place where a debt collection against a debtor can be initiated, or where the asset is located. The order will be granted if the creditor can demonstrate prima facie evidence of a liquid and due but unsecured money claim. Therefore, the creditor must plausibly demonstrate to the court in a summary ex-parte proceeding where the assets to be attached are located. "Fishing expeditions" (that is, investigations based on hope that are undertaken without a plausible claim) are unlikely to be heard.
However, under the revised law, the court can now issue freezing orders for the entire territory of Switzerland. This is a substantial improvement, as previously it was necessary to obtain several orders if the assets were located in different local districts.

Freezing orders can also be applied against assets located in Switzerland belonging to debtors resident abroad. Unless other grounds of attachments apply, respective claims must be based on an enforceable court decision, arbitral award or a debt acknowledgment, or at least, must be "sufficiently connected" with Switzerland.

The "sufficient connection" test was introduced by the recent partial revision of the DCBA and is subject to qualification by case law. With the revised Lugano Convention and related revision of the DCBA, any creditor with an enforceable judgment can request a freezing order against a Swiss debtor. An enforceable judgment can include a:

- Request from a Swiss court.
- Request from a court of an EU member state (or court of the Lugano Convention, such as Norway or Iceland).
- Notarised debt acknowledgment.

The freezing order is now recognised as the protection measure to be provided for under Article 39 of the Lugano Convention (or for the revised Lugano Convention, Article 47, Paragraph 2). The revised law has also introduced the possibility for the debtor to file a pre-petition protection letter to challenge an application for a freezing order.

The effects of a freezing order are to provisionally secure assets for the specific creditor. However, the freezing order can be challenged by the debtor and the creditor is liable for damages resulting from an unjustified attachment.

If the freezing is challenged by the debtor, to maintain the attachment, the creditor must pursue a validation proceeding in a timely manner.

During a legally determined period, creditors who also qualify may join in the proceeding and therefore frustrate the result of the first attachment.

**Set-off rights**

Swiss law does not provide for a mandatory set-off of mutual debts. It is principally at the discretion of the parties whether their right to set off may be exercised or not.

In insolvency proceedings, a specific regime applies, whereby a creditor can set off his claim against a claim which the debtor has against him.

However, a set-off is not admissible if either:

- A debtor of the bankrupt estate became the debtor's creditor only after the opening of the bankruptcy proceedings (except in the case of fulfilment of a pre-existing obligation or redemption of a pledged object of which he is owner or which he has a restricted right over in rem).
- A creditor of the bankrupt did not become debtor of the bankrupt or the bankruptcy estate until after the opening of the bankruptcy proceedings.
State support

In a single case during the 2007 financial crisis, the Swiss State and the Swiss National Bank had to bail out a distressed bank which was deemed “too big to fail”. Since this incident, Swiss banking legislation has been revised to prevent such situations from occurring again.

It is unclear whether the revised banking legislation resolved the "too big to fail" problem. It may be possible that a state bailout will become necessary in extraordinary situations in the future (such as financial distress of banking or insurance companies of national importance). However, there are no legal provisions regulating such state bail-outs.

Rescue and insolvency procedures

Debt moratorium and composition

**Objective.** A composition is a measure to protect the debtor from the consequences of bankruptcy. It allows the debtor to either postpone the payment of the debts or satisfy them in total or in part, according to a specific plan (composition agreement).

Under the newly amended Debt Collection and Bankruptcy Act (DCBA), the Swiss composition procedure is now designed to rehabilitate the company under the supervision of the court or to reorganise unsecured and unprivileged claims.

**Initiation.** Any debtor (whether or not subject to bankruptcy proceedings) seeking to reach an agreement with its creditors, can initiate a debt moratorium proceeding by submitting a reasoned application to the court and attaching recent financial statements and a liquidity plan, together with relevant documentation demonstrating the present and future financial status of the debtor, as well as a provisional rehabilitation plan. The composition court will usually request additional documentation.

In addition, a reorganisation can also be initiated by the creditors. However, in practice there is much less demand for a reorganisation by creditors. The main requirement for creditors to commence a reorganisation is the creditor's right to request the opening of bankruptcy proceedings according to Article 166 or 190 of the DCBA.

Furthermore, the court may also stay a judgment requesting the opening of bankruptcy proceedings of its own motion, if it appears that an agreement can be reached with the creditors. In this case, the bankruptcy court will transfer the file to the composition court.
Substantive tests. For a composition to commence, the composition agreement must be approved by the court and ratified by the creditors.

Consent and approvals. The agreement is deemed ratified if a majority of creditors representing two thirds of the total of claims, or one quarter of creditors representing at least three quarters of the claims, give their consent.

Supervision and control. The court will normally appoint one or more commissioners. The commissioner's primary duties are to supervise the debtor's activities and to perform the tasks set out in Articles 298 to 302 and 304 of the DCBA. The commissioner must:

- Present interim reports to the composition court (if requested).
- Inform the creditor of the progress of the moratorium.

Depending on the circumstances, the court can establish a creditors' committee which will act as supervisory body for the commissioner(s). The creditors' committee should be composed of representatives of the various classes of creditors. Once established, the creditors' committee will decide on the sale or charges of assets.

Protection from creditors. The effects of a debt moratorium are a stay of all pending execution proceedings, including bankruptcy and asset freezing orders (however, the prosecution of claims secured by a mortgage remains possible without the realisation of the asset). Emergency matters provided, civil and administrative litigations will be suspended.

In addition, one of the main features of the amended DCBA is to allow the termination of long-term contracts if both:

- Express consent is provided by the commissioner(s).
- The debtor's rehabilitation would otherwise be jeopardised if the contract were to continue.

The resulting claims (damages) will be subjected to the composition agreement.

Length of procedure. After a summary examination of over-indebtedness, the judge may adjudicate a temporary debt moratorium not exceeding four months if either:

- There is a possibility of financial reorganisation (in which case the judge will take appropriate measures to preserve the value of the assets).
- There are indications of accomplishing a composition with creditors.

If the temporary debt moratorium shows that there is likely to be rehabilitation of the debtor or conclusion of a composition agreement with its creditors, the court will grant a definitive debt moratorium for an additional four to six months. The definitive moratorium can be extended to 12 months. In very exceptional/complex cases, the definitive moratorium can be extended for to up to 24 months.

If the court concludes that a rehabilitation or conclusion of a composition agreement with the creditors is likely to be unsuccessful, the court will open bankruptcy proceedings (see Question 7). At the discretion of the court, one or several provisional commissioners for the temporary debt moratorium may be appointed with the purpose of assessing the viability of the debtor's proposal.
Conclusion. The effects of the composition depend on the type of composition agreement approved by the court and if there are any unsettled claims existing up to the time of granting the debt moratorium:

- In the case of a debt composition agreement, the non-secured unprivileged claims will be reduced and the business will usually continue. The shareholders will have to make their contribution to be defined by the court in the individual case.
- In the case of a composition agreement for liquidation, the assets will be assigned to the creditors for recovery and the company will be liquidated (see Question 7).

7. What are the main insolvency procedures in your jurisdiction?

Bankruptcy proceedings

Objective. The objective of bankruptcy proceedings is to liquidate the debtor's assets and satisfy the creditors' claims from the proceeds of the bankruptcy estate. All companies registered in the Register of Commerce can be subject to bankruptcy proceedings.

Initiation. Bankruptcy proceedings can be initiated following an application to the competent court by either the:

- **Creditor of the bankrupt company.** To initiate the proceeding, the creditor must file an enforcement request with the debt enforcement office. The office will then serve the debtor with the summons to pay. The summons to pay provides that the debtor can either:
  - pay the indicated debt within twenty days; or
  - deny the claim within ten days. If the debtor denies the claim, he must state his reasons for the objection to pay. This objection brings the procedure to a suspension and the proceeding is stayed.

If the debtor does not raise an objection within the ten days, the creditor can immediately file for the adjudication of the debtor's bankruptcy. If the debtor states an objection (for example, because the claim is not due and payable) and the creditor still wishes to collect the debt, the creditor must commence an ordinary or, in some specific cases, summary court proceeding for the stay to be lifted.

There are very limited exceptions to these principles which allow a creditor to file a petition for bankruptcy directly (that is, without previous debt collection proceedings taking place). A bankruptcy without prior enforcement proceeding at a creditor's request can only be declared if one of the following limited and very restrictive conditions is met:

- the debtor has acted fraudulently, or is attempting to act fraudulently to the detriment of his creditors; or
- the debtor has obviously and permanently stopped all payments to his creditors.
In practice, these cases are rare, as in most cases the creditors are unable to prove the required qualified circumstances.

- **Bankrupt company (or its corporate bodies).** The bankrupt company can directly initiate the proceedings by filing a petition for over-indebtedness with the competent court. The board of directors must notify the court once the over-indebtedness has been detected. If the board of directors fail to do so, the auditors of the company are obliged to notify the court instead.

A company can also voluntarily declare itself insolvent (that is, unable to pay its due obligations) to initiate bankruptcy proceedings if the company has a lack of liquidity (as opposed to being over-indebted).

**Substantive tests.** The necessary requirements for a court to check before opening bankruptcy proceedings depend on the initiation proceeding.

If the process is initiated by a creditor, the court must ensure the enforcement proceedings have been validly completed by the creditor (all objections of the company have been set aside). This is also the case if the creditor files a direct petition for bankruptcy.

If the process is initiated by the company due to over-indebtedness, the court must open bankruptcy proceedings if both:

- The board based its request on an audited interim balance sheet.
- The board passes a corresponding board resolution, declaring the need to inform the competent court about the over-indebtedness.

However, on application by the board of directors or creditor, the court can suspend the opening of bankruptcy proceedings if it can be demonstrated to the court that a financial rehabilitation of the company can be achieved.

If the process is initiated by the company due to a lack of liquidity, the court must open bankruptcy proceedings.

**Consent and approvals.** The decision to open bankruptcy proceedings lies fully with the competent court and there are no voting thresholds to be met.

However, once the procedure is opened by the bankruptcy court, it must decide the applicable rules. To do so, the bankruptcy office must establish whether the costs of bankruptcy proceedings will be covered by the proceeds of liquidation. Depending on the outcome of its calculus, the bankruptcy office can request the bankruptcy court to either:

- Terminate the proceedings due to insufficient funds.
- Order summary bankruptcy or ordinary bankruptcy proceedings to be conducted.

If the bankruptcy office requests to terminate the proceedings, secured creditors can declare to have the pledged assets to be sold. The rules of the summary bankruptcy proceedings will be applicable to this sale.

If the bankruptcy office comes to the conclusion that the costs of ordinary procedure would be covered, but qualifies the liquidation to be manageable (that is, that the liquidation will not to be too complex), it may still request to apply the set of rules for the summary bankruptcy proceedings.

In ordinary bankruptcy proceedings, the creditors must consent to various acts within the proceedings. Generally, there will be two creditors' meetings:
• At the first meeting, the creditors may appoint a:
  • private bankruptcy administrator to act instead of the state bankruptcy office; and
  • creditors’ committee with certain supervisory (and limited decisive) responsibilities.

• The second meeting of creditors is convened to pass resolutions in relation to all important matters, including:
  • the commencement or continuation of claims against third parties (such as avoidance claims); and
  • the method of realisation of the assets belonging to the bankruptcy estate.

Further meetings are possible if deemed necessary. The creditors’ meeting are decided by majority vote (head count) (the claim value is not taken into account as to the individual voting power a creditor has).

In summary proceedings, there are generally no creditors' meetings. The bankruptcy office can make the necessary decision on its own without approval by the creditors.

**Supervision and control.** Bankruptcy proceedings are conducted by the bankruptcy office.

In ordinary bankruptcy proceedings, certain decisions are made at creditors’ meetings. The creditors may also appoint a private bankruptcy administrator or a creditor committee to supervise the bankruptcy office/administrator. Supervision is first with a cantonal supervisory body and ultimately with the Swiss Federal Supreme Court.

Bankruptcy proceedings do not allow for debtor-in-possession management.

**Protection from creditors.** Once bankruptcy has been declared, creditors can no longer validly start enforcement proceedings against the bankrupt estate.

Except for claims secured by a pledge, interest ceases to accrue against the debtor once bankruptcy proceedings are opened.

**Length of procedure.** In a normal case, bankruptcy proceedings can take from six to 18 months. However, in exceptional cases, proceedings can take several years (see for example the Swissair case).

**Conclusion.** Ordinary and summary bankruptcy proceedings both conclude with the distribution of the proceeds. The creditors receive certificates of shortfall for the uncovered portions of their claims. Certificates of shortfall entitle the holders to obtain freezing orders or to initiate new enforcement proceedings once the debtor comes in to new fortune.

After distribution, the bankruptcy administration submits a final report to the bankruptcy court. Once the court finds that the bankruptcy proceedings are completely carried out, it will declare them closed. The bankruptcy office makes a public announcement that the bankruptcy proceedings are closed. The bankrupt company is then also deleted from the Commercial Registry and ceases to exist.

It is possible to re-open bankruptcy proceedings at a later stage, subject to specific conditions.

**Stakeholders' roles**
8. Which stakeholders have the most significant role in the outcome of a restructuring or insolvency procedure? Can stakeholders or commercial/policy issues influence the outcome of the procedure?

Stakeholders

Due to their corporate duties, the members of the board/management of the debtor company are in charge of restructuring measures and are therefore relevant to initiating the restructuring or insolvency proceeding.

Influence on outcome of procedure

Typically on granting of the moratorium, the administrator appointed by the court will play a significant role. In addition, a creditor committee can be appointed to supervise the administrator and to decide for a sale of assets during the moratorium. However, the court has overall authority.

The interests of the employees are also well protected, as they enjoy priority over other creditors.

Liability

9. Can a director, partner, parent entity (domestic or foreign) or other party be held liable for an insolvent debtor's debts?

With the exception of companies incorporated in a form that allows for subsidiary liability of partners and owners (Kollektivgesellschaft), there is no mechanism that directly shifts liability of insolvent debtor's debt to its directors, partners, parent entity or any other party.

However, a director or person entrusted with the company's management or liquidation may be liable for any damage caused to the corporation, its shareholders or creditors if he has intentionally or negligently acted in breach of his duties.

This responsibility applies to both formally appointed representatives and "factual corporate bodies" (that is, persons who have a decisive influence over the corporate decision-making process).

The principles of fiduciary duties are specified in a number of statutory provisions that are intended to protect shareholders and the interests of creditors.

Further specifications are set out in the company's bye-laws and organisational rules. Of particular interest is the obligation to notify the court once over-indebtedness has been detected by the company (see Question 7).
Setting aside transactions

10. Can an insolvent debtor's pre-insolvency transactions be set aside? If so, who can challenge these transactions, when and in what circumstances? Are third parties' rights affected?

Certain transactions carried out by a Swiss debtor may be subject to challenge if the debtor is subsequently declared bankrupt.

If the third party beneficiary of the targeted transaction is unwilling to comply with the relevant request from the bankruptcy office (or a creditor to whom the relevant right to pursue the avoidance action has been assigned to), a court proceeding must be commenced. If the challenge succeeds, as a rule, the third party must return the assets formerly belonging to the debtor to the bankruptcy office. If restitution-in-kind is no longer possible, there is a subsidiary obligation of the defendant to pay a corresponding amount to the insolvency estate.

For all avoidance actions, the challenged transaction must have caused damage to the other creditors of the relevant debtor, which is generally presumed by law but may be overcome by counterproof of the defendant in an avoidance action.

The targeted transactions that may be subject to challenge are:

- **Donations/dispositions without any or adequate consideration made within one year prior to the opening of bankruptcy proceedings.** The adequacy or inadequacy of the consideration will be interpreted objectively in relation to the facts that existed when the transaction was entered into. Therefore, it is irrelevant whether or not the debtor and/or the counterparty were aware of the disproportionate nature of its consideration. The burden of proof for the inadequacy of the consideration lies with the party challenging the transaction, unless the counterparty was a related party to the debtor (including group companies).

- **Specific transactions carried out when the company was over-indebted, if the disposition took place within one year prior to the opening of bankruptcy proceedings.** The targeted transactions are:
  - the grant of a security interest for existing debts, if the company was not by prior agreement contractually obligated to create the relevant security interest;
  - the payment of claims other than by means of cash or other ordinary means of payment; or
  - payment of a claim which has not yet fallen due.

Even if such requirements are met, avoidance is not available if the relevant counterparty can prove that it did not know (and did not need to know) that the company was over-indebted.

In addition, avoidance is not available if both:
• securities, book entry securities or other financial instruments traded on a representative market were granted as collateral; and

• the debtor previously entered into an obligation to provide top-up collateral or previously reserved the right to substitute one collateral for another.

• **Dispositions made with the intention of disadvantaging creditors or preferring certain creditors within five years prior to the opening of bankruptcy proceedings.** This will be a targeted transaction if the privileged creditor knew or should have known of such intent. Intent is presumed where the debtor could and must have recognised that the challenged act would prefer or disadvantage creditors.

However, it is sufficient that the debtor, while not directly intending such a preference or disadvantage by its act, merely accepts such preference or disadvantage as a possible consequence of its act. Swiss law provides that such intent is recognisable to the counterparty, if the counterparty, using the diligence warranted under the specific circumstances, should have foreseen a disadvantage to the other creditors as the consequence of the act of the debtor. If there are signs of a potential disadvantage to other creditors, the counterparty must interrogate the debtor and make the necessary further inquiries. If the counterparty is a related party to the debtor (including group companies), the burden of proof that the counterparty did not know of the intent of the debtor lies with the counterparty.

A successful avoidance action does not render the relevant agreement void or invalid from a civil law perspective. Rather, the civil law effects of the targeted transaction will be disregarded for the purposes of the insolvency proceedings. Therefore, third-party rights are not affected by a successful avoidance action. If restitution-in-kind is no longer possible (for example, because the counterparty has already sold the assets to a third party), the obligation simply changes into an obligation of the counterparty to pay a corresponding amount to the insolvency estate.

### Carrying on business during insolvency

11. In what circumstances can a debtor continue to carry on business during rescue or insolvency proceedings? In particular, who has the authority to supervise or carry on the debtor's business during the process and what restrictions apply?

### Reorganisation proceedings

During debt moratorium/composition proceedings, the debtor can continue its business operations under the supervision of the commissioner and at the direction of the composition court.

However, certain transactions will require approval from the court or the creditors' committee (if appointed). The debtor cannot divest, encumber or pledge fixed assets, give guarantees or donate assets without the authorisation of the composition court or the creditors' committee.

Moreover, if the debtor contravenes the commissioner's instructions, the court can revoke the debtor's capacity to dispose of its assets or declare bankruptcy. At the discretion of the court, authority to operate the business can be given to the commissioner(s).
Unless a creditors' committee is appointed when the definitive debt moratorium is granted (one of the new features of the revised Debt Collection and Bankruptcy Act (DCBA), the creditors' role during the moratorium proceeding is fairly passive: they must file their claim, can attend the creditors' meeting, approve or reject the proposed composition agreement and have a right to be heard in court.

Bankruptcy proceedings

In contrast to reorganisation proceedings, the debtor is basically prevented from carrying on the business during bankruptcy proceedings. Therefore, legal acts by the debtor in relation to assets belonging to the estate are principally void.

Additional finance

| 12. Can a debtor that is subject to insolvency proceedings obtain additional finance both as a legal and as a practical matter (for example, debtor-in-possession financing or equivalent)? Is special priority given to the repayment of this finance? |

Transactions entered into with the approval by the administrator, creditor committee or the court during the moratorium enjoy priority over other claims. Apart from this, no specific rules for additional finance have been established in Switzerland.

Multinational cases

| 13. What are rules that govern a local court's recognition of concurrent foreign restructuring or insolvency procedures for a local debtor? Are there any international treaties or EU legislation governing this situation? What are the procedures for foreign creditors to file claims in a local restructuring or insolvency process? |

Recognition

If the debtor is domiciled abroad and some of his assets are located in Switzerland, Swiss legislation has established basic rules for the recognition in Switzerland of foreign bankruptcy decrees or orders for a composition with creditors or similar proceedings. Based on these rules, the foreign main proceeding can be recognised, provided:

- The foreign court has proper jurisdiction.
- The proceeding is enforceable.
- The proceeding observes the minimal due process standards.
• The proceeding has reciprocity.

• The proceeding does not violate Swiss public policy.

To receive recognition, the request must be brought before the court of the location of the assets in Switzerland.

If successful, the recognition of the foreign decree subjects the debtor's assets in Switzerland to the consequences of Swiss law in a "mini-bankruptcy proceeding". Such proceedings do not provide for a creditors' meeting or a supervisory committee.

The Swiss schedule of claims only includes secured creditors and unsecured privileged creditors domiciled in Switzerland. After distribution of the proceeds according to the Swiss schedule of claims (see Question 2), any balance is remitted to the foreign bankruptcy estate or to those creditors who are entitled to it. However, the balance will only be remitted after recognition of the foreign schedule of claims by the Swiss court. The Swiss court will examine whether the ordinary (that is, unsecured and non-privileged) claims of Swiss creditors have been properly admitted in the foreign main proceeding. With certain restrictions, Swiss assets can therefore be marshalled for the main foreign proceeding.

In addition, there are some historic international bankruptcy treaties entered into by certain Swiss cantons. These include the:

• Bankruptcy Treaty of 12 December 1825 and 13 May 1826 with the (former) Kingdom of Württemberg.

• Treaty with the (former) Kingdom of Bavaria of 11 May and 27 June 1834.

• Treaty with the (former) Kingdom of Saxony of 4 and 18 February 1837.

However, since these rules have not been adopted by all cantons in Switzerland, the rules of the specific cantons must be consulted.

**Concurrent proceedings**

Swiss legislation does not specifically address international co-operation between local and foreign courts, or between local and foreign insolvency administrators.

In the course of a Swiss mini-bankruptcy (a secondary proceeding), co-ordination is to a certain degree, carried out on an informal basis and the exchange of information from court to court is arranged on a case-by-case basis.

See also above, Recognition.

**International treaties**

Switzerland is not party to any international treaties, model laws or EU legislation with regard to bankruptcy proceedings.

However, there are the following historic international bankruptcy treaties which were entered into by certain (but not all) Swiss cantons:

• Bankruptcy Treaty of 12 December 1825 and 13 May 1826 with the (former) Kingdom of Württemberg.

• Treaty with the (former) Kingdom of Bavaria of 11 May and 27 June 1834.

• Treaty with the (former) Kingdom of Saxony of 4 and 18 February 1837.
Procedures for foreign creditors

Generally, foreign creditors can submit their claims in Swiss bankruptcy proceedings in the same way as creditors domiciled in Switzerland. If a foreign creditor's claim is not listed, it can challenge the decision of the bankruptcy office in court.

If a foreign bankruptcy estate wishes to submit a claim in a Swiss bankruptcy proceeding, the foreign bankruptcy proceeding must first to be recognised in Switzerland (see above, Recognition).

In a recent decision of the Swiss Federal Supreme Court, the Court ruled that the decision of a foreign court will not be recognised in Switzerland to justify the submitted claim of a foreign creditor if the foreign proceedings were initiated after the date bankruptcy proceedings were opened over the Swiss debtor.

Reform

14. Are there any proposals for reform?

The moratorium proceeding was revised and became effective on 1 January 2014 (see Question 6).

The insolvency procedure applicable to banks and other financial institutions in Switzerland under the supervision of FINMA is currently being revised.

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