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Insolvency 2021

Switzerland: Law & Practice
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Law and Practice

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1. STATE OF THE RESTRUCTURING MARKET

1.1 Market Trends and Changes

The Swiss Federal Statistical Office publishes data on the number of opened and concluded bankruptcy proceedings as well as debt collection measures dating back to 1980. Since 2015, the amount of opened bankruptcy proceedings evened out between approximately 14,500 and 16,000 cases per year (including around 2,000 cases per year opened due to a deficiency in the organisation of companies).

Statistics and Impact of COVID-19

The most recent data shows a decrease in the total of opened bankruptcy proceedings to 14,770 (in 2019, 15,808) with the number of concluded bankruptcy proceedings also decreasing to 13,761 (in 2019, 14,707). The recorded decrease in opened bankruptcy proceedings is somewhat counterintuitive given the COVID-19 pandemic but may be explained with the government's intense support measures for the economy and individual businesses related to COVID-19 that included state backed loans, hardship payments to individual businesses but also temporary exempts from the duty to file for bankruptcy in case of an over-indebtedness.

Conversely, the amount of losses accrued in ordinary and summary bankruptcy proceedings saw a staggering increase to an all-time high of around CHF8,192 billion (in 2019, 2,304 billion with the annual average for the years 2015-19 being CHF2,294). However, this statistical anomaly is down to one single case that concluded in 2020 following bankruptcy proceedings lasting 16 years and accounting for a loss of CHF6.5 billion. Without this case, the accrued losses would have decreased in 2020 compared to 2019.

COVID-19 had and continues to have a devastating effect on specific industry sectors, such as on tourism and hotel industry, air travel and related sectors, as well as the gastronomy sector. It remains to be seen, whether the governmental measures were sufficient to prevent a surge in bankruptcy cases or whether such scenario could only be delayed.

Legal Changes

Statistics also show that, on average in the years 2018-20, only slightly more than 40% of the cases are actually concluded in ordinary or summary bankruptcy proceedings. Almost 60% of the bankruptcy proceedings are discontinued due to a lack of assets. In connection therewith, recent changes in statutory law prolonged the duration for which companies continue to exist (in a state of and for the sole purpose of liquidation) following the discontinuation of bankruptcy proceedings prior to a deletion in the commercial registry from three months to two years.

From a legal perspective, Switzerland continues to become a more restructuring friendly jurisdiction. This trend started, triggered by the collapse of the Swissair Group, in 2014 with a change of the statutory composition proceedings allowing restructuring a company in the course of a moratorium without the need to conclude a composition agreement. The trend continued in 2020 with a further change of insolvency law that doubled the maximum duration of the provisional moratorium to eight months. Recent case law included a significant ruling by the Federal Supreme Court (the highest Swiss court) in 2021 acknowledging pre-pack deals while considerably limiting creditors' rights to interfere with such deals (Switzerland has no statutory provisions explicitly regulating pre-pack deals) as well as a ruling in 2020 denying avoidance actions (see **11. Transfers/Transactions that May Be Set Aside**) against the repayment of restructuring loans.

A ground-breaking case
Of note is a ground-breaking case involving gategroup. In the course of the financial restructuring of gategroup, an English court had to decide for the first time whether an English restructuring plan under Part 26A of the United Kingdom's Companies Act 2006 qualifies as a civil and commercial matter (falling within the scope of the Lugano Convention) or as an insolvency matter. The English court decided in February 2021 that gategroup's restructuring plan qualifies as an insolvency matter and hence the English court accepted jurisdiction to allow the involved stakeholders to amend the terms of the Swiss law governed bonds. This could trigger significant market trends for financial restructuring measures involving Swiss law governed bonds.

2. STATUTORY REGIMES GOVERNING RESTRUCTURINGS, REORGANISATIONS, INSOLVENCIES AND LIQUIDATIONS

2.1 Overview of Laws and Statutory Regimes

Swiss laws and statutory regimes that apply to financial restructurings, reorganisations, liquidations and insolvencies of business entities and partnerships may generally be divided into two main parts:

- out-of-court restructuring measures and the voluntary liquidation; and
- insolvency law (including in-court-restructuring).

The Swiss Code of Obligations (CO) contains out-of-court restructuring provisions and governs the voluntary liquidation of business entities and partnerships. The CO also contains the balance sheet and solvency tests that may require a company to start insolvency proceedings (Articles 725 et seq of the CO; Article 958a paragraph 2 of the CO). The CO also contains rules regarding the organisation and governance of legal entities and partnerships (a breach of which may lead to a court ordered dissolution and liquidation of an entity according to the rules of the insolvency law; Article 731b of the CO).

Insolvencies and involuntary liquidations of business entities and partnerships are mainly governed by the Federal Debt Enforcement and Bankruptcy Act (DEBA). The DEBA regulates enforcement and collateralisation of financial claims, the realisation of collaterals, as well as bankruptcy and the most relevant in-court restructuring proceedings (composition proceedings; an instrument denominated stay of bankruptcy proceedings according to Article 725a of the CO, which could be described as in-court restructuring proceeding, will be abolished with the implementation of the revised stock corporation law expected as per 1 January 2023).

The set of rules governing Swiss law restructuring and insolvency matters are complemented by rules for specific industry sectors (see **2.6 Specific Statutory Restructuring and Insolvency Regimes**) and the Swiss Penal Code (PC), which criminalises certain offenses related to insolvency and debt enforcements (Articles 163 et seq of the PC).

Finally, the Federal Act on Private International Law (PILA) governs cross-border aspects of Swiss Insolvency law, including the recognition of foreign bankruptcy decrees and related court decision in Articles 166 et seq of PILA (see **8. International/Cross-Border Issues and Processes**).

2.2 Types of Voluntary and Involuntary Restructurings, Reorganisations, Insolvencies and Receivership

The DEBA provides for rules regarding the voluntary (in-court) restructuring, ie, the composition proceedings as well as for the involuntary bankruptcy proceedings (for the out-of-court restructuring proceedings, see **3.1 Consensual and Other Out-of-Court Workouts and Restructurings**).

Composition Proceedings

Companies suffering from financial distress may petition for the opening of composition proceedings. In composition proceedings, the distressed companies are granted a moratorium, which allows them the time to either privately negotiate restructuring terms with creditors during the moratorium or to negotiate a court-approved composition agreement (see **6.1 Statutory Process for a Financial Restructuring/Reorganisation**).

Bankruptcy Proceedings

Bankruptcy proceedings may be initiated by:

- the debtor
- by creditors; or
- ordered by courts, eg, in case of unsuccessful in-court-restructuring measures or a breach of the minimum organisational requirements.

Bankruptcy proceedings aim at a formal and authoritative liquidation of all of the debtor's assets (achievable also by selling the whole or parts of debtor's businesses) and the distribution of the liquidation proceeds to the creditors (see **7. Statutory Insolvency and Liquidation Proceedings**).

2.3 Obligation to Commence Formal Insolvency Proceedings

One of the main responsibilities of the supreme management or administrative body of a company (eg, the board of directors of a company limited by shares) is to monitor the company's financial situation. If it has good cause to suspect that the company is over-indebted (negative equity), it must draw up interim financial statements with valuations for a going concern and liquidation scenario and have the balance sheets audited by a licensed auditor.

If the interim balance sheet shows negative equity, whether the assets are appraised at going concern or liquidation values, the board of directors must file for bankruptcy (or it may initiate composition proceedings if there is a reasonable prospect for a successful restructuring of the company).

The supreme management or administrative body may refrain from filing for bankruptcy if certain company creditors subordinate their claims to those of all other company creditors to the extent of the negative equity (and, in practice, the additional equity shortfall expected for the following up to 12 months). Filing for bankruptcy may also be delayed for a short period if there are reasonable and specific prospects of an out-of-court restructuring of the company. The delay should normally not exceed around four to six weeks, which is, however, situational.

2.4 Commencing Involuntary Proceedings

Bankruptcy proceedings against Swiss companies may not only be initiated by the company itself but also by third parties or authorities. Shareholders and creditors may petition courts to order the dissolution and liquidation of a company according to the provisions of the DEBA, eg, in case of a deficient organisation of a company. Furthermore, the company's statutory

auditors may file for bankruptcy if the supreme management or administrative body breaches its duty to do so. In the regulated financial sector, authorities may order the involuntary liquidation of entities for, eg, a breach of regulations.

The standard scenario is, however, that bankruptcy proceedings are triggered by creditors of the company enforcing financial claims against the company by commencing debt enforcement procedures.

Debt Enforcement Procedures

A peculiarity of Swiss insolvency law is that such debt enforcement procedures may be triggered with relative ease. A creditor only has to file a form (one-pager) asserting a claim against the debtor and mentioning the legal basis for such claim with the competent debt enforcement authority. The debt enforcement office then issues a payment summon to the debtor. The debtor may dispute the claim within ten days following receipt or accept the claim. If the debtor disputes the claim, the creditor is held to affirm the claim in formal civil law court proceedings (which may take years to conclude).

Swiss law provides for accelerated procedures to set aside the formal opposition of the debtor to enforce court orders (or similar titles) or claims that the debtor acknowledged in writing. If the debtor does not oppose to the payment summon (or the court affirms the creditor's claim) and the claim is not satisfied within the deadlines set, the creditor may continue the debt enforcement proceedings leading, in case of legal entities, to the opening of bankruptcy proceedings.

Bankruptcy without Prior Debt Enforcement Procedures

If a company is insolvent and therefore ceases to pay its liabilities as they fall due, a creditor may also petition a court to directly open bankruptcy proceedings without the need for prior enforcement proceedings (Article 190 of the DEBA).

2.5 Requirement for Insolvency

Insolvency (inability to pay liabilities as they fall due) is one path leading to the start of insolvency proceedings but not a requirement. In Switzerland, the requirement to start insolvency proceedings is triggered by a balance sheet test, notwithstanding the company's actual liquidity situation (see **2.3 Obligation to Commence Formal Insolvency Proceedings**).

Insolvency does, of course, play a relevant part on several levels. Article 958a paragraph 2 of the CO states that the financial statements must be based on liquidation values if it is intended or probably inevitable that business activities will cease in the next twelve months from the balance sheet date. If, for example, the liquidity planning at the beginning of the business year does not allow continuing the business for the next 12 months, the company's assets must be apprised at liquidation values. The balance sheet drawn-up based on liquidation values usually shows negative equity triggering the requirement to file for bankruptcy.

A company may also declare itself insolvent to start bankruptcy proceedings (Article 191 of the DEBA; no actual insolvency test by the court) and a creditor may do the same and therewith trigger bankruptcy proceedings without the need for prior enforcement actions (Article 190 of the DEBA). In the latter case, a court declares a company insolvent if it is unable to pay undisputed and due claims, if it systematically opposes payment summons or stops paying even small amounts as they fall due.

2.6 Specific Statutory Restructuring and Insolvency Regimes

Specific insolvency regimes apply for regulated entities in the financial market, specifically to:

- banks;
- insurance companies;
- fund management companies and securities firms; and
- financial market infrastructure entities such as exchanges or clearing houses.

The Federal Act on Banks and Saving Banks (BankA), and the Ordinance of the Swiss Financial Market Supervisory Authority (FINMA) on the Insolvency of Banks and Securities Firms (BIO-FINMA), the Federal Insurance Supervisory Act (FISA), the Federal Act on Financial Institutions (FinIA) and the Federal Act on Financial Market Infrastructures (FMIA) contain the applicable statutory regimes.

In addition, special regimes apply to businesses governed by public administrative law.

3. OUT-OF-COURT RESTRUCTURINGS AND CONSENSUAL WORKOUTS

3.1 Consensual and Other Out-of-Court Workouts and Restructurings

Consensual out-of-court workouts and restructuring solutions are of considerable importance in Switzerland. Obviously, shareholders and unsecured lenders but also banks and other lenders are often willing to contribute to a financial restructuring if there is reasonable prospect of success and a symmetry of losses/contributions among the financing parties.

The general support of market participants for consensual out-of-court workouts and restructuring solutions might have different reasons. One is that insolvency is still stigmatised in Swiss society and reflects badly on every party involved (the collapse of Swissair Group, for example, had a negative impact on the reputation of large Swiss Banks within Switzerland). Conversely, the Swiss statutory processes tends to be perceived as not being very restructuring friendly, hence the perception that out-of-court restructuring solutions preserve value for stakeholders (for the positive trends for the Swiss restructuring market, see **1.1 Market Trends and Changes**).

3.2 Consensual Restructuring and Workout Processes

Balance Sheet Test: Statutory "Alarm Bell"

Swiss law provides for a balance sheet test requiring a company to start the restructuring process. If a company's equity falls below 50% of the total of the nominal share capital and the legal reserves, its supreme management or administrative body must convene a shareholders' meeting and propose restructuring measures. This provision intends to alert shareholders to the critical financial situation and to prevent a delay in implementing restructuring measures beyond a point of no return.

Balance Sheet Restructuring Measures and Internal Workout Process

The CO provides for certain balance sheet restructuring:

- use of reserves to off-set losses (Article 671 of the CO);
- the subordination of intra-group or shareholder loans (Article 725 paragraph 2 of the CO);
- accelerated capital reduction to eradicate a qualified capital loss (Article 735 of the CO);
- accelerated capital reduction if combined with a capital increase to the previous or a higher capital amount with shareholders losing their equity rights if the capital is cut to zero prior to a subsequent increase (capital cut; Articles 732 et seq of the CO);
- a re-evaluation of fixed assets (release of hidden reserves; Article 670 of the CO);
- capital injections by way of capital increases (Articles 650 et seq of the CO) or by way of

capital contributions to the reserves of the company; and
- debt-equity swaps.

Consensual Workout Process involving Third-Party Creditors

The subordination of loans according to Article 725 paragraph 2 of the CO is also a relevant method for consensual workouts with third-party creditors but is not considered an actual restructuring measure. Typical negotiations with third-party creditors are for the restructuring of loans, involving:

- deferral or waiver of interest payments;
- full or partial write-off of loans (with or without profit participating instruments in the company);
- re-negotiating nature of loan (eg, from fixed interests to a profit participating loan)
- refinancing loans with instruments of lower interests;
- standstill agreements in case of defaults; and
- deferred repayment schedules.

The supreme managing or administrating bodies tend to be under immense pressure when negotiating out-of-court restructurings due to the requirement to file for bankruptcy and the potential liability for delaying such filings. Accordingly, out-of-court restructuring negotiations tend to be very intense and of rather short term even in complex cases.

A debtor is not required to attempt out-of-court restructuring measures before applying for the opening of insolvency proceedings.

3.3 New Money

In distressed situations, new money is usually provided to distressed companies in the form of (secured) loans, especially if the distressed company is still in a position to provide security for the loans provided.

Providing security against loans should, under normal circumstances, not be subject to avoidance actions (simultaneous granting of loans to a distressed company and accepting security fur such loans are regarded as equal rewards by Swiss courts).

3.4 Duties on Creditors

Creditors do not have specific statutory obligations under Swiss law in out-of-court workout situations that significantly affect the workout process. However, creditors might want to examine out-of-court workouts with a view to a potential later bankruptcy scenario against the background of possible avoidance actions.

3.5 Out-of-Court Financial Restructuring or Workout

For "normal" creditors, Swiss law does not provide for a "cram-down" in out-of-court scenarios. For holders of Swiss law governed bonds, a "cram-down"-scenario is possible. However, relevant decisions of the bondholders require approval of two thirds of the outstanding capital and decisions taken by bondholders, are accordingly hard to obtain in practice and eventually require court approval (Articles 1170 et seq of the CO).

4. SECURED CREDITOR RIGHTS, REMEDIES AND PRIORITIES

4.1 Liens/Security

Lien and Other Security over Movable Property and Intangible Assets

Security over tangible moveable assets (eg, inventory and other valuable assets such as art pieces) is usually granted in the form pledges. Under Swiss law, the principle applies that possession of the moveable assets needs to be transferred to or controlled by the pledgee in order to perfect a pledge. A pledge also needs

to be based on a written agreement. A seller (or a lessor in a sale and lease back transaction) might secure its claims by way of reservation of proprietary rights. However, this instrument requires a public registration in Switzerland and is generally perceived as impracticable and not commonly used in the market.

Lien and Other Security over Receivables, Shares and Other Rights

The common form for security over trade or intercompany receivables is a security assignment and for other rights such as shares and IP rights a pledge. Security assignments are more beneficial from an insolvency perspective because assigned receivables are not subject to a formal realisation by bankruptcy authorities in a bankruptcy scenario but might be realised by the secured party itself outside of the insolvency proceedings. This is usually a faster and more flexible process.

Security over Real Property

Swiss law provides for two forms of security over real property: mortgage contract (*Grundpfandverschreibung*) and the more common mortgage certificate (*Schuldbrief*) (Article 793 of the Swiss Civil Code [CC]). A mortgage certificate establishes a personal claim against the debtor, which is secured by a property lien recorded in the land register. A relevant difference to the mortgage contract is that a mortgage certificate is a transferable negotiable security. A mortgage contract, on the other hand, is based on a public deed and a corresponding entry of the security in the land register.

4.2 Rights and Remedies

Rights and Remedies outside a Formal Insolvency Procedures

Creditors' rights and remedies outside of formal insolvency procedures are, in general, subject to the security and other contractual agreements between creditor and debtor (or third-party security provider). If contractually agreed, creditors may realise security by way of a private sale or even by way of a self-sale to the extent permitted by law.

If the agreements do not allow for or if creditors do not attempt to enforce by way of a private realisation of the pledged assets, creditors must enforce the pledge by starting the procedure for the debt enforcement on pledge leading to the authorities issuing payment summons and subsequently realising the pledged assets (Articles 151 et seq of the DEBA). Debt enforcement authorities usually realise assets by way of public auctions unless the requirements for free sale are met (see Article 156 paragraph 1 of the DEBA in conjunction with Article 130 of the DEBA).

Full title transfer security arrangements (such as a security assignment of receivables) are to be realised privately.

Rights and Remedies in the Context of Formal Insolvency Procedures

With the start of insolvency proceedings over a company, the creditor will generally lose control on the realisation of pledged assets and needs to hand over the pledged assets to the bankruptcy authority. A private realisation is no longer possible. The bankruptcy authority will execute the realisation of the pledged assets. The creditor is, as a rule, entitled to the realisation proceeds after cost. The bankruptcy estate receives any surplus from the realisation.

Full title transfer security arrangements (such as a security assignment of receivables) allow creditors a private realisation and the underlying assets do not form part of the debtor's bankruptcy estate.

Secured creditors have limited possibilities to influence the modalities of the realisation of their collaterals by authorities but have, in general, not

the power to materially disturb the debt enforcement or insolvency process based on their privileged position (on the other hand, creditors in general have several possibilities to challenge decisions and therewith disturb the process if they aim to do so).

4.3 Special Procedural Protections and Rights

Secured creditors are super-privileged in the sense that the proceeds from the realisation of the collaterals after costs are used to discharge the secured claims. To the extent that the realisation proceeds do not cover the secured creditor's claim, no additional privileges exist (Article 219 paragraph 4 of the DEBA). If several creditors have a pledge on the same collateral and the proceeds do not cover all of the secured claims, authorities will determine the entitlement of each secured creditor (for real property based on the priority of the claims as per the registration in the land register).

Secured creditors are also privileged in the sense that interest might, to a certain extent and contrary to the general rule for unsecured claims, continue to accrue on their claims following the opening of bankruptcy proceedings (Article 209 paragraph 2 of the DEBA), and creditors secured by real property may, as an exception to the general rule, continue debt enforcement proceedings up to a certain stage following the opening of composition proceedings (Article 297 paragraph 1 of the DEBA).

If bankruptcy proceedings over a company are discontinued due to a lack of assets, secured creditors still have the right to request realisation of the collaterals by the bankruptcy authority (Article 230a paragraph 2 of the DEBA).

5. UNSECURED CREDITOR RIGHTS, REMEDIES AND PRIORITIES

5.1 Differing Rights and Priorities

See **4. Secured Creditor Rights, Remedies and Priorities** for secured creditors. Article 219 of the DEBA provides for the following order of priorities among the unsecured creditors for distributions in the course of ordinary or summary proceedings:

- first class – in particular certain employment-related claims;
- second class – in particular claims related to social security; and
- third class – any other claims (including claims of secured creditors that are not covered from the realisation proceeds).

Claims of a lower ranking class are only satisfied if and to the extent, there is a surplus after satisfaction of the higher-ranking class. Creditors of the third class that have agreed to a subordination of their claims with respect to all other creditors' claims will be satisfied last and in practice therewith form a fourth class.

5.2 Unsecured Trade Creditors

In case of bankruptcy, unsecured trade creditors rank in third class (see **5.1 Differing Rights and Priorities**).

In an out-of-court restructuring scenario, trade creditors are usually not involved due to either their large number or relatively small claims but the focus is usually on restructuring the companies financing. If there is a small number of large trade creditors, it would though not be unusual to also involve them in the restructuring and ask them for a contribution.

5.3 Rights and Remedies for Unsecured Creditors

The bankruptcy authority has to draw up a schedule ranking the creditors, if and to the extent their claims are accepted (Article 247 of the DEBA; schedule of claims), within the classes of priority (Article 219 of the DEBA). Unsecured creditors may petition the bankruptcy court within 20 days of notification of the plan if their claims are not or not fully accepted or if they are not ranked in the requested class of priority.

A creditor may also challenge the acceptance of a claim of another creditor or its rank in court against the other creditor. If the lawsuit against another creditor is successful, the benefits resulting from such claim will be used to pay back the suing creditor for his initial claim including litigation costs. A creditor ranked in a low class of priority may therewith develop a privileged position through successful litigation against other creditors.

5.4 Pre-judgment Attachments

Under Swiss law, unsecured creditors may apply for a pre- or post-judgment attachment orders with the competent court based on Articles 271 et seq of the DEBA. In order to obtain a judgment, the creditor must show credibly:

- a due claim;
- that the debtor has assets in Switzerland; and
- that a reason for granting an attachment order applies, such as that the debtor:
  - (a) has no permanent place of residence in Switzerland;
  - (b) intends to withdraw assets from creditors to prevent fulfilment of its liabilities;
  - (c) prepares to flee the country for that purpose;
  - (d) that the creditor holds a provisional or definitive certificate on a accrued loss from debt enforcement proceedings against the debtor; or
  - (e) the creditor holds a definite title to set aside an objection in debt enforcement proceedings against the debtor (eg, an enforceable court order).

Provided that the above criteria are met and can be credibly shown, the court issues an attachment order to the debt enforcement authority at the location of the assets to be attached for execution.

5.5 Priority Claims in Restructuring and Insolvency Proceedings

For the order of priority among unsecured creditors, see **5.1 Differing Rights and Priorities**.

6. STATUTORY RESTRUCTURING, REHABILITATION AND REORGANISATION PROCEEDINGS

6.1 Statutory Process for a Financial Restructuring/Reorganisation

For the out-of-court workouts, see **3. Out-of-Court Restructurings and Consensual Workouts**. The main restructuring/insolvency proceedings under Swiss law are the following.

Stay of Bankruptcy Proceedings (Article 725a of the CO)

An over-indebted company may notify the judge and request the stay of bankruptcy proceedings. Requirements and effects are comparable to the provisional moratorium. This instrument is very scarcely used and will be abolished with the implementation of revised corporate law (expected in 2023).

Provisional Moratorium (Articles 293 et seq of the DEBA)

Composition proceedings are triggered by the debtor's (or, in exceptional cases, creditor's)

request to grant a provisional moratorium. With the petition, the debtor must file financial statements, a liquidity plan, financial projections and a provisional restructuring plan. The composition court grants a provisional moratorium if it is not obvious that there are no chances of a successful restructuring or the entering into a composition agreement.

The provisional moratorium shall provide a company a certain protection from creditors and their legal actions against the company to allow for a restructuring while preserving the legal entity and the business. A provisional moratorium does, accordingly, not necessarily lead to composition agreements or the opening of bankruptcy proceedings if sufficient restructuring measures may be achieved during the provisional (or subsequent definitive) moratorium (Article 296a of the DEBA).

The following particulars apply to the provisional moratorium:

- initial duration for up to four months; subsequent prolongation for further up to four months;
- the court appoints a provisional administrator but may refrain from doing so under certain circumstances;
- the court may refrain from publicly announcing the granting of a provisional moratorium to prevent negative publicity for and further distress to the company (for listed companies it is difficult to implement a silent moratorium due to ad-hoc publication but this has been achieved in practice);
- creditors may not challenge the court's decision to grant a provisional moratorium and to appoint a provisional administrator.

The provisional moratorium has the same legal effects as the definitive moratorium.

Although Swiss law does not provide for a statutory framework for pre-pack deals, the stage of the provisional moratorium is often used to propose pre-packed deals to the composition court (in accordance with Article 298 of the DEBA). The composition court's approval of a transaction prevents avoidance actions in potential subsequent bankruptcy proceedings (see **1.1 Market Trends and Changes** regarding recent case law).

Definitive Moratorium (Articles 294 et seq of the DEBA)

The composition court may grant a definitive moratorium if there is a prospect of a successful restructuring or confirmation of a composition agreement. The court opens bankruptcy proceedings ex officio:

- if required to protect the company assets;
- if it becomes obvious that no successful restructuring will be possible; or
- if the debtor does not comply with the limitations put on it by law or court order or the instructions of the administrator (Article 296b of the DEBA).

The following particulars apply to the definitive moratorium:

- duration of further four to six months (which may be prolonged to up to 12 or, in particularly complex cases, up to 24 months);
- creditors may be involved in the decision to grant a definitive moratorium and may challenge the court decision;
- the court must appoint an administrator for, among other things, supervising the debtor's actions and reporting to the court;
- the administrator issues a notice to creditors and requests them to file their claims;
- the court may appoint a creditors' committee; and

- the court must publicly announce the definitive moratorium (and according records will be made in the commercial register).

The moratorium (provisional or definitive) has the following legal effects:

- no further debt collection actions may be commenced or continued against the debtor (protecting it from the opening of bankruptcy proceedings);
- pre- or post-judgement attachments or other protective measures will no longer be possible for pre-existing claims;
- the (security) assignment of future claims loses its legal effect;
- litigation (except in cases of urgency) stays;
- limitation and forfeiture periods stand still;
- interests stop accruing for unsecured claims;
- the administrator may notify and effect that claims for performance against the debtor are converted into monetary claims against the debtor;
- creditors ability to off-set claims against the debtor are being limited (see **6.14 Rights of Set-Off**);
- the debtor may terminate continuing obligations (*Dauerschuldverhältnisse*) with the administrator's consent subject to compensation of the counterparty;
- the debtor may continue its business under supervision of the administrator and may conduct certain transactions only with the approval of the administrator;
- without authorisation of the court or the creditors' committee, the debtor can no longer validly sell, encumber, pledge assets or grant guarantees and sureties, or make any disposals for no consideration; and
- the debtor may generate new liabilities. If the administrator approves the according transaction, the liabilities will bind the estate in potential subsequent bankruptcy proceedings. The approval of the administrator is therefore often a condition to any further dealings of creditors and customers with the debtor.

The court lifts the moratorium if the company is restructured successfully during the moratorium (Article 296a of the DEBA). In other scenarios, the court opens bankruptcy proceedings (Article 296b of the DEBA). The administrator has the duty to evaluate the possibility to enter into and to prepare a composition agreement during the moratorium and to draft such composition agreement (if required and if it has potential of being approved) for approval by the creditors' meeting.

Composition Agreements

Basic form of composition agreements

The restructuring during the moratorium may generally take place in any form as agreed among creditors and the debtor. The composition agreements are, however, subject to statutory provisions, creditors' and court approval. The following two basic forms of composition agreements exist under Swiss law in the restructuring process:

- the ordinary composition agreement (Articles 314 et seq of the DEBA); and
- the composition agreement with assignment of assets (Articles 317 et seq of the DEBA).

The ordinary composition agreement generally aims at a collective haircut for the creditors (although the composition agreement may also only contain a deferred payment plan). The debtor and creditors shall agree, what percentage of the outstanding claims shall be re-paid to the creditors and to what extent creditors waive their claims (percentage or dividend agreement). The dividend may also be paid in the form of participation rights in the debtor or a rescue company.

The composition agreement with the assignment of assets is a negotiated liquidation of the debtor. The aim is that the liquidation is economically more beneficial for the creditors compared to the (hard) liquidation in the course of the bankruptcy. In a composition agreement with the assignment of assets, the debtor and the creditors agree on the assignment of all or parts of the debtor's assets to the creditors or a third party in discharges of the debts (liquidation agreement).

Creditor and court approval of the composition agreements

Articles 305 et seq of the DEBA contain general provisions applying to all forms of composition agreements. For composition agreements to become effective, they must be approved by a quorum of creditors and confirmed by the court.

By the time of the confirmation of the composition agreement by the court, it must have been approved by creditors with one of the following quorums (Article 305 of the DEBA):

- the majority of the creditors representing two thirds of the total value of the claims admitted following the notice to creditors; or
- one quarter of the creditors representing three quarters of the value of the claims admitted following the notice to creditors.

Privileged claims, claims of certain related parties and secured claims are not or only partly (for the estimated unsecured amount) factored in when calculating the quorums (Article 305 of the DEBA).

The composition court confirms the composition agreement subject to the following conditions:

- the offer to creditors must be in reasonable relation to the debtor's financial capacity;
- full coverage of privileged claims and liabilities assumed during the moratorium with the administrator's consent have to be reasonably certain; and
- equity owners must contribute to the restructuring in an adequate manner in case of an ordinary composition agreement.

The court may complete deficient provisions of a proposed composition agreement ex officio. Furthermore, the court may defer the realisation of real estate security for claims that came into existence prior to the opening of composition proceedings for up to one year under certain conditions and if the real estate is necessary for the debtor to continue business (Article 306a of the DEBA).

Effect of the composition agreements

The composition court opens bankruptcy proceedings if creditors do or the court does not approve the composition agreement (Article 309 of the DEBA). Conversely, the legally effective confirmation and the subsequent enforceability of the composition agreement marks the end of the moratorium (Article 308 paragraph 2 of the DEBA). The composition agreement has the following legal effects (Articles 310 et seq of the DEBA):

- the composition agreement becomes, as a rule, effective for all creditors of claims that came into existence prior to the opening of composition proceedings or that came into existence thereafter without the administrators consent (other than for secured claims for which security provides sufficient cover);
- claims that came into existence after the opening of the composition proceedings with approval of the administrator are deemed claims against the estate in subsequent bankruptcy proceedings or liquidation agreements;
- all pending debt enforcement proceedings end (other than the debt enforcement proceedings for the realisation of pledged assets); and

- individual agreements between the debtor and individual creditors that offer more to an individual creditor than the creditor is entitled to under the composition agreement are void (Article 312 of the DEBA).

6.2 Position of the Company

The composition proceedings start with the granting of a provisional moratorium. The company may continue its business under the provisional and definitive moratorium under the supervision of the administrator and subject to restrictive measures implemented by the court while specific transactions are subject to court approval (Articles 298 and 293a paragraph 1 of the DEBA).

The composition court may assign tasks to the appointed administrator, ranging from mere supervision to full takeover of management of the distressed company (Article 298 paragraph 1 of the DEBA) (see **6.1 Statutory Process for a Financial Restructuring/Reorganisation**).

6.3 Roles of Creditors

Creditors' Committee as Body of the Composition Proceedings

The involvement of the creditors in the actual restructuring set-up depends on the (scale of) the case. A court may appoint a creditors' committee (as a body of the composition proceedings) if circumstances of the case require such appointment, which is normally the case in large or highly complex scenarios.

The court must ensure that different categories of creditors (small and large creditors, private and corporate creditors, local and foreign creditors) are adequately represented in the creditors' committee.

The creditors' committee supervises the court appointed administrator and may advise the administrator. The administrator has to report to the administrator on the status of the proceedings. Furthermore, the creditors' committee decides on transactions that require approval instead of the composition court (Article 298 paragraph 2 of the DEBA; see **6.2 Position of the Company**).

A creditors' committee may also be appointed by the meeting of creditor if the duration of the definitive moratorium exceeds 12 months (see below). Furthermore, a creditors' committee is always appointed in the process of implementing and executing a composition agreement with assignment of assets.

Creditors' Meeting in the Composition Proceedings

The administrator convenes the creditors' meeting if the entering into a composition agreement is envisaged and the draft composition agreement has been drawn up, with thirty days' notice. Creditors may review the files of the composition proceedings as of twenty days prior to the meeting. The administrator presents the financial situation of the distressed company. Thereafter, the creditors' meeting votes on the approval of the composition agreement (and the approving creditors must sign such composition agreement).

If a definitive moratorium is prolonged over 12 months, another creditors' meeting must be convened that may appoint a creditors' committee, change its members, or change the administrator.

Further Creditor Rights

Creditors have the following additional rights that are specifically related to the composition procedure:

- creditors may be heard by the court before the court's decision to grant a definitive moratorium;

- creditors may participate in the court proceedings on the confirmation of the composition agreement and voice their objection against the composition agreement;
- creditors may appeal against the composition court's decision on the confirmation of the composition agreement; and
- creditors may petition the court to repeal a composition agreement under certain circumstances.

Creditors are not allowed to challenge the composition court's decision to grant a provisional moratorium or to appoint a provisional administrator (but may challenge several other decisions). The Swiss Federal Supreme Court also held in a very significant decision of 2021, that creditors may, in general, not appeal the court's approval of certain transactions during the composition agreement (or only on very limited grounds that would render such decisions void).

Categories of Creditors

The composition proceedings has different effects on different classes and categories of creditors:

- a composition agreement is only effective for creditors, who's claims came into existence prior to the opening of the composition proceedings or thereafter but without approval of the administrator;
- creditor claims that came into existence during the composition proceedings with the approval of the administrator are deemed claims against the bankruptcy estate in subsequent bankruptcy proceedings and therewith become super-privileged; and
- creditors of privilege (ranked in classes 1 and 2, see **5.1 Differing Rights and Priorities**) and secured creditors have no or limited voting power for the approval of the composition agreement.

6.4 Claims of Dissenting Creditors

An approved and court-ratified composition agreement becomes effective for dissenting creditors, see **6.1 Statutory Process for a Financial Restructuring/Reorganisation** (Creditor and Court Approval of the Composition Agreements for the Quorums).

6.5 Trading of Claims against a Company

Claims against a distressed company are generally freely tradeable.

In certain situations, however, the transfer of claims might affect the possibility to offset the claims against the distressed company (eg, if seller and buyer of the claim only enter into the transaction to create set-off positions and to circumvent composition agreement, such transactions could be held as abuse of rights). Such set-off actions may also be subject to avoidance actions.

6.6 Use of a Restructuring Procedure to Reorganise a Corporate Group

Swiss insolvency law is entity specific, and there are no rules to restructure/reorganise a corporate group as a whole.

6.7 Restrictions on a Company's Use of Its Assets

See **6.2 Position of the Company**.

6.8 Asset Disposition and Related Procedures

See **6.2 Position of the Company**.

6.9 Secured Creditor Liens and Security Arrangements

The opening of composition proceedings may temporarily limit secured creditors' ability to enforce their claims and/or realise their security interest. Also, a (security) assignment of receivables by the debtor for receivables that come into

existence after the opening of a moratorium proceeding is no longer effective. Finally, the court may defer the realisation of real estate security for claims that came into existence prior to the opening of composition proceedings for up to one year under certain conditions and if the real estate is necessary for the debtor to continue business (Article 306a of the DEBA).

6.10 Priority New Money

Swiss law does not provide for statutory provisions governing restructuring loans (*Sanierungsdarlehen*), and there is only limited, somewhat controversial jurisprudence in this respect. The main issues/uncertainties in connection with such restructuring loans (*Sanierungsdarlehen*) relate to the risk of avoidance actions and preferential treatment of creditors (ie, if such loans are secured) and the valid granting of security to secure such loans.

Once a composition proceeding has been opened:

- new liabilities incurred during the composition agreement with the approval of the administrator are deemed liabilities against the estate in potential subsequent bankruptcy proceedings and therewith become super privileged compared to all unsecured creditors; and
- a distressed company may enter into pledge agreements also over fixed assets but requires the approval of the court or creditor committee.

6.11 Determining the Value of Claims and Creditors

Once a composition proceeding has been opened, the administrator determines assets of the distressed company upon the administrator's appointment (Article 299 of the DEBA) and request creditors to file their claims (Article 300 of the DEBA). The administrator obtains a statement from the distressed company on whether or not it acknowledges the claims and reports the outcome of this process to the court.

In the course of the liquidation of a distressed company based on a composition agreement with assignment of assets, a collocation process takes place where filed claims are ranked in order of priority and where creditors may oppose the acknowledgment or ranking of their or other creditors' claims in view of the distribution of the liquidation proceeds.

6.12 Restructuring or Reorganisation Agreement

Composition agreements require court ratification. The court tests whether the offer to creditors is reasonable in relation to the debtor's financial capacity and, in case of an ordinary composition agreement (haircut for creditors while the distressed company or a rescue company continues to exist), whether equity owners of the distressed company adequately contribute to the restructuring, see **6.1 Statutory Process for a Financial Restructuring/Reorganisation** (Creditor and Court Approval of the Composition Agreements).

6.13 Non-debtor Parties

In general, composition procedures do not affect the situation of non-debtor parties and they are not released from their duties because of the composition proceedings.

With regards to joint debtors, surety providers, and guarantors, the law explicitly states (Article 303 of the DEBA) that a creditor maintains full rights towards them if such creditor does not agree to the composition agreement or if such creditor agrees to the composition agreement after having previously (ten days) offered to these non-debtor third parties to assign their claims against the debtor to them against payment of the claim. Furthermore, a creditor does not lose the rights against non-debtor third par-

ties if the creditor authorises them to decide on the composition agreement on his behalf.

6.14 Rights of Set-Off

In the course of composition proceedings, the same Swiss law rules apply regarding set-off, as during bankruptcy proceedings (Article 297 paragraph 8 of the DEBA in conjunction with Articles 213 et seq of the DEBA). Accordingly, a creditor may set-off its claims against claims of the distressed company against it. Set-off is not permissible in certain circumstances or for certain claims, eg:

- if the off-setting debtor only became creditor of the distressed company after the moratorium was granted (unless related to pre-existing obligations or if the off-setting debtor became a debtor by operation of law); and
- if the off-setting debtor only became a debtor of the distressed company after the moratorium was granted.

The distressed company may oppose set-off declarations due to an abuse of legal rights if the off-setting debtor acquires a claim against the distressed company prior to the moratorium knowing about the distressed company's (near) insolvency and aiming at gaining an advantage for it or a third party through these actions. Such set-offs may also be subject to avoidance actions (Article 214 of the DEBA).

6.15 Failure to Observe the Terms of Agreements

If a distressed company does not meet its obligations under the composition agreement, the affected creditor may petition the court to repeal the composition agreement for the affected claims without, however, losing the rights granted to it in the composition agreement.

6.16 Existing Equity Owners

The equity ownership of members and the connected rights will, as a rule, not be affected by (ordinary) composition agreements. However:

- the (ordinary) composition agreement may contain a transfer of ownership rights to creditors;
- equity owners must, as part of an ordinary composition agreement, adequately contribute to a restructuring; and
- equity owners lose their ownership rights in a composition agreement with the assignment of assets if the distressed company is fully liquidated.

7. STATUTORY INSOLVENCY AND LIQUIDATION PROCEEDINGS

7.1 Types of Voluntary/Involuntary Proceedings

Initiation of Formal Bankruptcy Proceedings

For the obligations to commence formal insolvency proceedings, see **2.3 Obligation to Commence Formal Insolvency Proceedings**. A company may also be declared bankrupt following debt enforcement procedures by a creditor or by court or authoritative order (see **2.4 Commencing Involuntary Proceedings)**.

In certain scenarios, statutory restructuring proceedings may be initiated instead of bankruptcy proceedings. For an overview on the statutory restructuring proceedings, see **6. Statutory Restructuring, Rehabilitation and Reorganisation Proceedings**.

Effects of Bankruptcy Declaration

The declaration of bankruptcy has various effects on the affected company as well as its

creditors. The main effects on the bankrupt company are as follows:

- The company is dissolved and enters into liquidation. The bankruptcy declaration is published and the company name is completed with the status “in liquidation” in the commercial register.
- The bankrupt company ceases to have any right to dispose of its assets (but may continue business if creditors approve).
- All assets of the company form the bankruptcy estate, which is being realised for the benefit of the creditors.
- The bankruptcy office (a local authority) is empowered to commence bankruptcy proceedings and to manage the bankruptcy estate. Payments may only be made to the bankruptcy office (including the company’s bank accounts controlled by the bankruptcy office) with discharging effect.
- Litigation in which the company participates and which affect the bankruptcy estate are suspended and may be resumed following the second creditors’ meeting.
- In general, no (further) debt enforcement proceedings may be initiate against the company and pending debt enforcement proceedings are being cancelled.
- With the formal conclusion of the bankruptcy proceedings, the company is being deleted in the commercial registry and therewith ceases to exist legally.

In addition, the declaration of bankruptcy has the following effects on the creditors of the company:

- In general, all pre-existing claims against the company fall due.
- Interests stop accruing for unsecured claims.
- All claims against the company for actual performance are converted into money claims (the bankruptcy authority may, however, opt to perform contracts with certain exceptions).
- Claims out of continuing obligations (*Dauerschuldverhältnisse*) may be asserted in the bankruptcy proceedings up to the next contractual termination date or the end of the fixed contractual term. The bankruptcy authority may opt to assume continuing obligations. In this case, the claims arising out of continuing obligations are considered claims against the bankruptcy estate (and are being paid out of the bankruptcy proceeds before all classes of unsecured creditors).
- Creditors’ ability to off-set claims against the debtor remain possible with certain limitations (see **6.14 Rights of Set-Off**).

Creditors have the right to be treated equally subject to provided security and different classes of priority.

Types of Bankruptcy Proceedings

Ordinary bankruptcy proceedings

The ordinary bankruptcy proceeding is the standard bankruptcy proceeding that applies if the bankruptcy estate contains sufficient free assets (ie, assets not used as collateral) to cover the costs of such proceedings and if the complexity of the case so demands. Ordinary bankruptcy proceedings are of very formal nature with extensive creditors rights including with regards to the governance through creditors’ meetings and, optionally, a creditors’ committee (see **7.3 Organisation of Creditors or Committees**).

In ordinary bankruptcy proceedings, bankruptcy offices are usually replaced by an external bankruptcy administrator (bankruptcy offices are local authorities with limited means to process large cases).

Summary bankruptcy proceedings

Summary bankruptcy proceedings apply if the simplicity of a case so allows or if the bankruptcy

estate does not allow to cover the estimated cost of ordinary proceedings. Summary proceedings basically follow the rules of ordinary proceedings but, in particular, allow for the following:

- in general, no creditors' meetings are convened;
- the realisation of the assets starts as soon as the notice period for creditors to file their claims expires;
- the realisation of assets takes place more informally (at the discretion of the bankruptcy authority by public auction or free sale); and
- the distribution schedule is not published.

Termination of the bankruptcy proceedings due to a lack of assets

The Swiss Federal Supreme Court considers the termination of bankruptcy proceedings due to a lack of assets as own type of bankruptcy proceedings with specific legal consequences. Bankruptcy proceedings are discontinued, if the bankruptcy office estimates that the costs of the summary bankruptcy proceedings would not be covered. Such decision is taken based on the estimated value of the company's free assets (not including assets to the extent they are used as collateral for which third parties claim ownership). The same procedure applies if during the course of the bankruptcy proceeding the bankruptcy estate is used up and the bankruptcy authority no longer has sufficient funds to complete the bankruptcy proceeding.

The bankruptcy office needs to apply to the bankruptcy court to discontinue bankruptcy proceedings. If the court approves the request, the bankruptcy office published a notification stating that bankruptcy proceedings will be discontinued unless a creditor advances the costs for the bankruptcy proceedings within ten days following the publication.

With the discontinuation of bankruptcy proceedings, all competences of the bankruptcy authorities end and the company (ie, its corporate bodies) may conduct a private liquidation. Creditors may, within two years following the termination of the bankruptcy proceedings, start (or continue) debt enforcement procedures against the company with the aim of special execution instead of general execution in the form of bankruptcy proceedings. Companies are being deleted in the commercial registry and cease to exist legally after two years following the discontinuation of the bankruptcy proceedings unless an interested party opposes such deletion (prior to 2021 deletion occurred after three months). Specific rules apply to secured creditors. They may request the bankruptcy authority to realise the pledged assets. See **1.1 Market Trends and Changes** for the practical relevance.

Overview of the Main Steps of the Bankruptcy Proceedings

Ascertaining the bankruptcy estate (Articles 221 et seq of the DEBA)

In this phase, the bankruptcy authority starts ascertaining and valuating the bankrupt company's assets and implements measures to protect and manage the bankruptcy estate. Based on these assessments and valuations, the bankruptcy authority determines the type of bankruptcy proceeding to be applied to the case. In ordinary proceedings, the first creditors' meeting decides on the governing structure of the bankruptcy estate (external bankruptcy administrator, creditors' committee). The bankruptcy authority handles ownership claims with third parties.

Consideration of filed claims (Articles 244 et seq of the DEBA)

In this phase, the bankruptcy authority decides on the acceptance or rejection of claims filed by creditors (collocation procedure; Articles 244 et seq of the DEBA) and therewith asses and determines the liabilities of the bankruptcy estate. It

draws up a schedule of claims (*Kollokationsplan*), ranking the claims in order of priority and publishes the schedule of claims and issues and issues a collocation decree to creditors that had a claim or the requested priority for their claim rejected. Creditors may oppose the acknowledgment or ranking of their or other creditors' claims in view of the distribution of the liquidation proceeds (see **5.3 Rights and Remedies for Unsecured Creditors**).

Realisation of the assets (Articles 252 et seq of the DEBA)
Then the bankruptcy authority realises the assets. In ordinary bankruptcy proceedings, assets of the bankrupt company are only realised after a second creditors' meeting (see further above in this section for summary proceedings). The creditors' meeting decides on the form of realisation (public auction of free sale). Specific rules apply to the realisation of real estate and pledged assets. Real estate and other assets of considerable value may only be subject to a free sale if creditors are allowed to make a higher bid.

The right to realise or enforce receivables that are not due or not easily collectible, in particular disputed claims or potential liability claims against directors or avoidance claims against creditors, can be assigned to individual creditors if the creditors so decide. Creditors may use the proceeds of their enforcement to cover their claims and the enforcement costs. The bankruptcy estate is entitled to any surplus. If no creditor requests assignment of the right to enforce such claims, the bankruptcy administrator may auction or sell the claims.

Distribution of liquidation proceeds (Articles 261 et seq of the DEBA)
In this pre-ultimate phase, the bankruptcy authority draws up a distribution list, which is published for inspection by the creditors in ordinary proceedings. For the order of priorities for payment of the creditors, see **5.1 Differing Rights and Priorities**.

Conclusion of, and timeline for, the bankruptcy proceedings (Articles 268 et seq of the DEBA)
Following the distribution of the liquidation proceeds, the bankruptcy authority issues the final report to the bankruptcy court, which declares the bankruptcy proceedings formally concluded.

Article 270 of the DEBA states that bankruptcy proceedings should be concluded within a year following their opening. However, the supervisory authority may prolong the term. In our experience, bankruptcy proceeding usually last two to three years and in complex cases considerably longer.

7.2 Distressed Disposals

Under Swiss law, the bankruptcy authority may normally only sell assets following the second meeting of creditors (ordinary proceedings) or one months following the notice to creditors (summary proceedings), which on a timeline means several weeks or – in the case of ordinary proceedings – even years after the start of bankruptcy proceedings.

However, Swiss law also provides for emergency sales (Article 243 paragraph 2 of the DEBA) or urgent sales (Article 238 paragraph 1 of the DEBA) in ordinary bankruptcy proceedings. Objects of such fire sales are, in general, assets that are subject to rapid depreciation, are costly to maintain, or incur disproportionately high storage costs. The Swiss Federal Supreme Court has held that this rules may also apply to the sale of a business or parts thereof and that the emergency sale (of a business) is also possible in summary proceedings.

Urgent sales are based on the resolution of the first creditors meeting. Emergency sales, how-

ever, might be concluded without creditors' involvement. It remains disputed in Swiss legal doctrine, whether creditors should at least have the right to make a higher bid in such scenarios, at least if their claims will not be fully covered following the sale. There are certain lower tier court decisions backing this view. However, there are currently no rulings of the Swiss Federal Supreme Court in this regard.

Although Swiss law does not contain explicit provisions to conclude a pre-packed transaction during bankruptcy proceedings, this is possible based on the aforementioned mechanics.

7.3 Organisation of Creditors or Committees

As a rule, no creditors' meetings are convened in summary proceedings. In ordinary proceedings, at least two creditors' meetings are convened (with further creditors' meeting possible upon request of a quorum of creditors, the creditor committee, or the bankruptcy authority).

The first creditors' meeting (requiring and attendance quorum of one quarter of the creditors known to be able to pass resolutions) in particular has the following duties and responsibilities:

- acknowledging the bankruptcy authorities' report on the status of the bankruptcy estate;
- resolving on whether or not to appoint an external bankruptcy administrator and determining of the external bankruptcy administrator;
- resolving on whether or not to appoint a creditors' committee and determining its members; and
- making urgent decisions such as the decision to continue business, to continue litigation, or the entering into urgent sales agreements.

The first creditors meeting is quorate to pass resolutions if at least a quarter of the creditors are present at the meeting and may pass resolutions by absolute majority of the voting creditors. The same quorums and majorities applies to the second creditors' meeting, which shall:

- acknowledge the bankruptcy authority's reports;
- confirm the external bankruptcy administrator and the members of the creditors' committee (if any); and
- make any other decision as required for the bankruptcy proceedings (determining form of realisation of assets; resolution on enforcing claims or allowing for assignment of the right to enforce such claims, etc).

The duty of an appointed creditors' committee is, very generally, the supervision of the bankruptcy authority. It should be constituted from different categories of creditors (small and large creditors, private and corporate creditors, local and foreign creditors) to avoid challenges of its constitution.

8. INTERNATIONAL/ CROSS-BORDER ISSUES AND PROCESSES

8.1 Recognition or Relief in Connection with Overseas Proceedings

Articles 166 et seq of the Federal Act on Private International Law (PILA) govern cross-border aspects of Swiss Insolvency law, including the recognition of foreign bankruptcy decrees, related court decision as well as foreign composition agreement and similar proceedings. A recent revision of the law (implemented 2019) aimed at facilitating the recognition process.

The rules stipulated in Articles 166 et seq of the PILA aim at providing judicial assistance for the benefit of the foreign bankruptcy administration. At the same time, the stipulated rules shall

ensure that secured and privileged creditors domiciled in Switzerland are covered out of the assets located in Switzerland.

See **8.5 Recognition and Enforcement of Foreign Judgments**.

8.2 Co-ordination in Cross-Border Cases

Swiss authorities (including courts) and bodies (such as bankruptcy offices or external bankruptcy administrators) concerned with proceedings that have a factual connection may coordinate their activities among themselves and with foreign authorities and bodies (Article 174b of the PILA).

8.3 Rules, Standards and Guidelines

The revised Swiss law provides for the recognition of bankruptcy decrees or similar decrees that have either been issued in the debtor's state of domicile or in the state of the centre of the debtor's main interests (COMI). The COMI-approach does, however, only apply for companies domiciled outside of Switzerland.

For litigation connected to auxiliary bankruptcy proceedings, such as litigation related to the acknowledgement or ranking of a claim or avoidance actions, Swiss law applies (Articles 171 and 172 paragraph 2 of the IPLA).

8.4 Foreign Creditors

Under Swiss insolvency law, Swiss-based and foreign creditors are treated equally in Swiss law governed bankruptcy proceedings.

8.5 Recognition and Enforcement of Foreign Judgments

Basic Requirement for Recognition

The revised article 166 IPLA provides for the recognition of foreign bankruptcy decrees in Switzerland upon request of the foreign bankruptcy administrator, the debtor, or a creditor if:

- the decision is enforceable in the state where it was issued;
- there is no ground to deny recognition because a decision or decree is manifestly incompatible with Swiss public policy; and
- the decision was issued in the debtor's state of domicile, or, for foreign domiciled debtors, in the COMI-state.

With the revision of Articles 166 et seq of the IPLA, the Swiss legislator dropped the requirement of reciprocal recognition of Swiss bankruptcy decrees in the state in which the insolvency decree, for which recognition in Switzerland is sought, was rendered as well as the strict requirement for decrees to be issued in the state of formal domiciliation, which were main reasons for denying a recognition request in practice. Other reasons to deny recognition would, eg, be that foreign law does not provide for equal treatment of domestic and foreign creditors, that foreign insolvency proceedings are of confiscatory nature, or that minimum standards of Swiss procedural law are not adhered to.

Enforcement

With the recognition of a foreign bankruptcy decree, the Swiss court, in normal circumstances, opens auxiliary bankruptcy proceedings, which subjects the debtor's assets located in Switzerland to the legal consequences of bankruptcy according to Swiss law (Article 167 of the IPLA). The auxiliary bankruptcy proceedings are performed according to the rules of the summary bankruptcy proceedings. The schedule of claims (*Kollokationsplan*), however, only contains secured claims and claims that are privileged under Swiss law of Swiss-based creditors (including claims against a Swiss branch).

The Swiss bankruptcy authorities realise the assets and distribute the proceeds to the Swiss-based secured and privileged creditors as per the schedule of claims. Any surplus is remit-

ted to the foreign bankruptcy estate or to those creditors that are entitled to it, provided that the foreign payment schedule has also been recognised in Switzerland (otherwise, the proceeds will be distributed to unprivileged Swiss-based creditors).

Revised Swiss law allows Swiss authorities to refrain from conducting auxiliary bankruptcy proceedings if no Swiss-based secured or privileged creditors exist and if claims of unprivileged creditors are adequately taken into account in foreign insolvency proceedings. In such scenarios, foreign bankruptcy administrators may, subject to Swiss law, exercise all powers to which they are entitled under foreign law. In particular, they may transfer assets to their jurisdiction, start debt collection proceedings and engage in litigation. However, they may not act authoritatively in Switzerland (eg, not issue rulings and not use or threaten authoritative force).

9. TRUSTEES/RECEIVERS/STATUTORY OFFICERS

9.1 Types of Statutory Officers

Bankruptcy Proceedings

The default statutory officer in Swiss law bankruptcy proceedings is the bankruptcy office. This is a local authority. An external bankruptcy administrator (normally a specialised law firm or audit company) may be appointed in the course of bankruptcy proceedings, which takes over the responsibilities of the bankruptcy office. Furthermore, creditors' meetings and creditors' committees have governance functions (see **7. Statutory Insolvency and Liquidation Proceedings**).

Statutory Restructuring Proceedings

For restructuring proceedings, the statutory officer is the court appointed administrator. The court may appoint one or several administrators in different roles as required – eg, for supervisory or for actual management purposes. The administrators are normally specialised law firms or audit companies, while certain cantons request administrators a certificate of proficiency governed by cantonal law to act in such role (see **6. Statutory Restructuring, Rehabilitation and Reorganisation Proceedings**).

9.2 Statutory Roles, Rights and Responsibilities of Officers

Bankruptcy Office/Bankruptcy Administrator

The bankruptcy office or, in its stead, the bankruptcy administrator administers the bankruptcy proceedings (see **7. Statutory Insolvency and Liquidation Proceedings**). It reports to its supervisory authority (in most cantons first instance courts) and/or (depending on competences) to creditors.

The Court-Appointed Administrator in Restructuring Proceedings

The court appointed administrator has the duties and responsibilities that the composition court conveys to it in a range from supervisory duties to full management of the distressed company (see **6. Statutory Restructuring, Rehabilitation and Reorganisation Proceedings**). It reports to the composition court.

9.3 Selection of Officers

Bankruptcy Office/Bankruptcy Administrator

The bankruptcy office assumes responsibility with the bankruptcy court's declaration of bankruptcy over a company based on the place of domicile of the bankrupt company. An external bankruptcy administrator may be appointed by the first creditors' meeting. The second creditors' meeting must confirm or replace the external bankruptcy administrator.

The Court-Appointed Administrator in Restructuring Proceedings:

The court may appoint a provisional administrator with the decision to grant a provisional moratorium and must appoint an administrator when granting the definitive moratorium (see section **6.1 Statutory Process for a Financial Restructuring/Reorganisation)**. The creditors' meeting may replace the administrator under certain circumstances (eg, if the definitive moratorium lasts more than 12 months).

10. DUTIES AND PERSONAL LIABILITY OF DIRECTORS AND OFFICERS OF FINANCIALLY TROUBLED COMPANIES

10.1 Duties of Directors

General Duties of the Board of Directors

Monitoring the financial situation of the company is an inalienable duty of the board of directors of a Company under Swiss law. Swiss law requires the board of directors to take specific actions subject to a company's different levels of distress (see **3.2 Consensual Restructuring and Workout Processes**, **2.3 Obligation to Commence Formal Insolvency Proceedings** and **2.5 Requirement for Insolvency**).

Directors' Duties to Creditors

Under Swiss law, directors are held to act in the Company's best interest. Under normal circumstances, no duties are owed to creditors (other than according to basic principles of law, such as acting in good faith towards contractual parties).

In a financially distressed situation, however, the directors should ensure that categories of creditors are, in general, treated equally. Transactions that disadvantage creditors or give preference to certain creditors to the disadvantage of others may be subject to avoidance actions in potential subsequent bankruptcy proceedings (see **11. Transfers/Transactions that May Be Set Aside**) and may render directors subject to personal (joint and several) liability or even criminal sanctions.

Liability

Directors may become (jointly and severally) liable to the company, the shareholders, and the creditors for damage arising from any intentional or negligent breach of their duties (Article 754 paragraph 1 of the CO). Creditors may only bring claims against directors for indirect damages in case of bankruptcy (see **10.2 Direct Fiduciary Breach Claims**).

Typical scenarios in distressed situations that may lead to a liability of directors are an undue delay in filing for bankruptcy if the delay increases the damage for creditors (see **2.3 Obligation to Commence Formal Insolvency Proceedings**), or transactions that disadvantage creditors or give preference to certain creditors causing damage to other creditors. The latter may also lead to criminal sanctions.

10.2 Direct Fiduciary Breach Claims

Direct Damages to Creditors

If directors cause damages to creditors directly (damages that only affect the assets of the creditor, eg, if director cause a lender to provide a loan based on incorrect financial statements), creditors may bring claims against directors without restrictions.

Indirect Damages to Creditors

If directors cause damages to the company and therewith indirectly damage the creditors (in the form of a devaluation of claims against the company and sustained losses on the claims following bankruptcy proceedings), creditors rights to bring claims are restricted. They may

bring claims against directors for compensation of the company only if the bankruptcy authority refrains from bringing such claims. If their claims are successful, they are compensated out of the proceeds of the litigation prior to shareholders that have also initiated lawsuits. A surplus goes to the bankruptcy estate (Article 757 of the CO).

11. TRANSFERS/ TRANSACTIONS THAT MAY BE SET ASIDE

11.1 Historical Transactions

Swiss law provides for avoidance actions (leading to specific transaction being set aside for the purpose of the insolvency proceedings; Articles 285 et seq of the DEBA) in the following generals scenarios:

- a debtor disposes of assets without any or without adequate compensation (Article 286 of the DEBA);
- an over-indebted company provides security for pre-existing liabilities, repays debts by unusual means, or repays debt early (Article 287 of the DEBA); or
- a debtor engages in transactions with the intention of disadvantaging certain creditors or preferring certain creditors to the detriment of others (Article 288 of the DEBA).

In the scenarios of Articles 287 and 288 of the DEBA, bona fide counter parties are protected from avoidance actions (related parties must proof their good faith). As a rule, avoidance actions are only possible if the transactions in question disadvantaged other creditors. Transactions that have been approved by a composition court cannot be set aside in subsequent bankruptcy proceedings.

11.2 Look-Back Period

Transactions are voidable only if they occurred during a specific time-period prior to date of declaration of bankruptcy (hardening period). For the avoidance for intent (Article 288 of the DEBA), the hardening period is five years. For the other scenarios (Articles 286 and 287 of the DEBA), the hardening period is one year.

11.3 Claims to Set Aside or Annul Transactions

Avoidance actions may be brought against the counterparty or beneficiary of the suspect transaction by creditors holding a certificate of a loss sustained in debt enforcement proceedings, the bankruptcy authority, or creditors to which the right to bring such claims has been assigned by the bankruptcy authority.

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