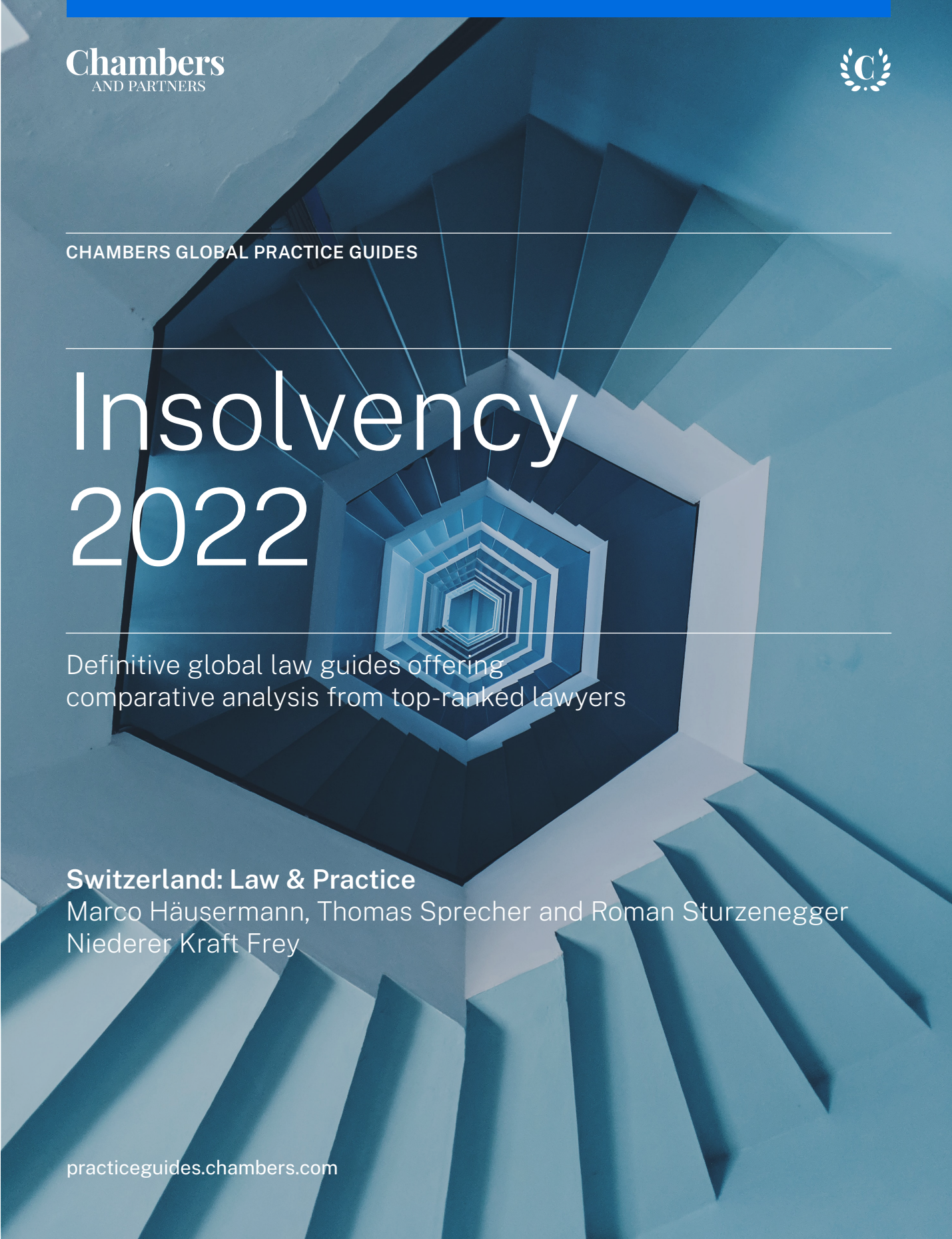
Chambers AND PARTNERS

CHAMBERS GLOBAL PRACTICE GUIDES

Insolvency 2022

Definitive global law guides offering comparative analysis from top-ranked lawyers



Switzerland: Law & Practice

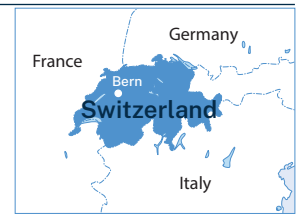
Marco Häusermann, Thomas Sprecher and Roman Sturzenegger
Niederer Kraft Frey

practiceguides.chambers.com

SWITZERLAND

Law and Practice

Contributed by:
Marco Häusermann, Thomas Sprecher and Roman Sturzenegger
Niederer Kraft Frey see p.29



Contents

SWITZERLAND

1. State of the Restructuring Market

1.1 Market Trends and Changes

Statistics and Impact of COVID-19

It was reported in the 2021 edition of this practice guide that the COVID-19 had influenced official data for 2020 showing a decrease in the total number of bankruptcy proceedings that had been opened. It was stated that the decrease was somewhat counterintuitive given the devastating impact of the COVID-19 pandemic on certain industry sectors (tourism, air travel, gastronomy), but that this could possibly be explained by the government's intense support measures for the economy and individual businesses in light of COVID-19.

With the government's support measures ending in 2020, it is not surprising that the Swiss market has experienced a surge in bankruptcy cases. In 2021, 16,253 bankruptcy proceedings were opened (compared to 14,770 in 2020). Thus, the amount of losses incurred in ordinary and summary bankruptcy proceedings increased significantly compared to the long-term average to CHF4,184 billion (the annual average for the years 2015 to 2019 being CHF2,294 billion). Almost 60% of the bankruptcy proceedings were not concluded in ordinary or summary proceedings but were terminated for lack of assets. With the ongoing disruption of supply chains, the raising geopolitical tensions, high inflation combined with raising interest rates, and the energy crises in Western Europe, this trend is expected to continue.

Legal Changes

From a legal standpoint, Switzerland continues to be an increasingly friendly jurisdiction for restructurings. This trend started in 2014, triggered by the collapse of the Swissair Group, with a change of the statutory composition procedures that permitted restructuring of a company in the course of a moratorium without the requirement 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 includes a significant ruling by the Federal Supreme Court (the highest Swiss court) in 2021 acknowledging pre-pack deals while limiting creditors' rights to interfere with such deals considerably (Switzerland has no statutory provisions regulating pre-pack deals) as well as a ruling in 2020 denying avoidance actions (see **11. Transfers/Transactions that May Be Set Aside**) against restructuring loan repayment.

As of 1 August 2021, Switzerland has introduced a new bill that will provide explicit legal basis under the Federal Debt Enforcement and Bankruptcy Act (DEBA) for segregating crypto-based assets from the bankruptcy estate in addition to allowing access to and segregation of data that has no asset value in the event of bankruptcy. The new provisions may support maintaining a business during bankruptcy for subsequent sales out of the bankruptcy estate.

On 1 January 2023, a comprehensive reform of the Swiss stock corporation law (New Law) will enter into force, which will also amend the Swiss Code of Obligations (CO) in terms of out-of-court restructuring provisions (see **3. Out-of-Court Restructurings and Consensual Workouts**). The most notable changes from a restructuring perspective are:

- new elements (liquidity issues; amended calculation of thresholds) based on which the board of directors is explicitly required to

implement restructuring measures or to enter into composition proceedings;
- a maximum (no safe harbour) deadline of 90 days, during which over-indebted companies may delay the filing for bankruptcy if there are reasonable and specific prospects of an out-of-court restructuring instead of a situational approach; and
- strict separation of in-court and out-of-court restructuring measures by abolishing the Stay of Bankruptcy Proceedings.

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 CO contains out-of-court restructuring provisions and governs the voluntary liquidation of business entities and partnerships. It 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). It further 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 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 New Law as on 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 value, the board of directors must file for bankruptcy (or it may initiate composition proceedings if there is a reasonable prospect of 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 in proportion to the negative equity (and, in practice, any 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. Generally, the delay should not be greater than four to six weeks, but it may vary depending on the situation (for a summary overview of the legal situation under the New Law as of 1 January 2023, see **1 State of the Restructuring Market**).

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 needs to file a form (one-pager) asserting a claim against the debtor and stating the legal basis for such claim with the competent debt enforcement agency. 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 at several levels. It is stated in Article 958a paragraph 2 of the CO that the financial statements are to be based on liquidation values when it is intended or likely that business activities will cease within the next 12 months from the date of the balance sheet. If, for example, the liquidity planning at the beginning of the business year indicates that the company cannot continue to operate for the next 12 months, the assets of the company must be appraised at their liquidation value. The balance sheet drawn up based on liquidation values usually shows negative equity, triggering the bankruptcy filing requirement.

A company may also declare itself insolvent to start bankruptcy proceedings (Article 191 of the DEBA; the court does not conduct an actual insolvency test) 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 situation, a court can declare a company insolvent if the company was unable to pay undisputed and due claims, if it consistently opposed payment summonses, or if stopped paying even small amounts as they become due.

For a summary overview of the legal situation under the New Law as of 1 January 2023, see **1 State of the Restructuring Market**.

2.6 Specific Statutory Restructuring and Insolvency Regimes

Regulated entities in the financial sector are subject to specific insolvency regimes, including:

- 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. Shareholders and unsecured lenders, as well as banks and other lenders are often willing to contribute to financial restructuring if there are reasonable prospects for success and a symmetry between losses and 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 tend to be perceived as not being very restructuring friendly, resulting in the perception that out-of-court restructuring solutions preserve value for stakeholders (see **1.1 Market Trends and Changes** for positive trends for the Swiss restructuring market).

3.2 Consensual Restructuring and Workout Processes

Balance Sheet Test: Statutory "Alarm Bell"

The Swiss law system provides for a balance sheet test which requires 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 is intended to alert shareholders to the critical financial situation and to prevent a delay in implementing restructuring measures beyond a point of no return. Under the New Law as of 1 January 2023, the duty to convene shareholders' meetings only arises to the extent restructuring measures require shareholders' approval (the mere information duty is abolished).

Balance Sheet Restructuring Measures and Internal Workout Process

The CO provides for certain balance sheet restructuring, such as:

- the 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 los-

ing 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 in accordance with Article 725 paragraph 2 of the CO (Article 725b paragraph 4 under the New Law) is also a relevant method for consensual workouts with third-party creditors but does not constitute an actual restructuring measure. Typical negotiations with third-party creditors focus on restructuring 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 tremendous pressure when negotiating out-of-court restructurings due to the requirement to file for bankruptcy and the risk of liability for delaying the filing of such a bankruptcy. Consequently, out-of-court restructuring negotiations tend to be very intense and of relatively short duration even in more complex cases.

It is not necessary for a debtor to attempt out-of-court restructuring measures before filing for insolvency.

3.3 New Money

New capital is usually provided to distressed companies in the form of (secured) loans, especially if the distressed company is still in a position to provide collateral.

In normal circumstances, providing security against loans should not be subject to avoidance actions (the simultaneous granting of loan to a distressed company and the acceptance of security for the loan is regarded as equal rewards by Swiss courts).

3.4 Duties on Creditors

Under Swiss law, creditors do not have specific statutory obligations in out-of-court workout situations that significantly affect the workout process. However, creditors may wish to examine out-of-court workouts in the context of a possible bankruptcy scenario in light of potential avoidance actions.

3.5 Out-of-Court Financial Restructuring or Workout

The Swiss law does not provide for a “cram-down” in out-of-court situations for “normal” creditors. In the case of holders of Swiss law governed bonds, a “cram-down”-scenario is possible. However, relevant decisions of bondholders require approval by two thirds of the outstanding capital and such decisions are difficult 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 provided in the form of a pledge. Generally, Swiss law requires the possession of the moveable assets to be transferred to or controlled by the pledgee in order to perfect a pledge. A pledge must also be based on a written agreement. A seller (or a lessor in the case of a sale and leaseback transaction) may reserve proprietary rights to protect its claims. However, this instrument requires a public registration in Switzerland and is generally seen as impractical and not widely used.

Lien and Other Security over Receivables, Shares and Other Rights

The most common form of security for trade and intercompany receivables is a security assignment, while for other rights such as shares and intellectual property(IP), the most common form is a pledge. From an insolvency standpoint, security assignments are more beneficial since assigned receivables are not subject to a formal realisation by bankruptcy authorities but may be realised by the secured party itself outside of the insolvency proceedings. Usually, this process is faster and more flexible.

Security over Real Property

In Swiss law, there are two types 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. The mortgage certificate differs from the mortgage contract in that it 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 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 beginning the debt enforcement on pledge process, 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 bank-

ruptcy 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.

The secured creditors have limited influence on the modalities through which the authorities will realise their collaterals, but they do not have the power, in general, to materially disturb the debt enforcement or insolvency processes because of their privileged position. Conversely, creditors in general have several opportunities to challenge decisions and disturb the process if they wish.

4.3 Special Procedural Protections and Rights

Secured creditors are super-privileged in that the proceeds from the realisation of the collateral after costs are used to discharge their 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).

In the event that bankruptcy proceedings over a company are discontinued due to a lack of assets, secured creditors still have the right to request the bankruptcy authority to realise the collateral (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. According to Article 219 of the DEBA, the following order of priority is given to 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 satisfied only if and to the extent that there is an excess after satisfying the claims of the higher-ranking class. In practice, creditors from the third class who have agreed to subordinate their claims to those of all other creditors will be satisfied last, and therewith form a fourth class of creditors.

5.2 Unsecured Trade Creditors

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

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

5.3 Rights and Remedies for Unsecured Creditors

The bankruptcy authority is required to prepare a schedule ranking the creditors, subject to the extent that their claims are accepted (Article 247 of the DEBA; schedule of claims) within the priority classes (Article 219 of the DEBA). It is possible for unsecured creditors to petition the bankruptcy court within 20 days of being notified of the plan if their claims are not fully accepted or if their claim is not ranked in the requested class of priority.

A creditor may also challenge the acceptance of a claim made by another creditor or its ranking in court against that creditor. If the lawsuit against another creditor is successful, the benefits resulting from such claim will be used to repay the suing creditor for their initial claim, including litigation costs. By successfully litigating against other creditors, a creditor ranked in a low priority class may establish a privileged position.

5.4 Pre-judgment Attachments

According to Swiss law, unsecured creditors may apply to the competent court for an attachment order either prior to or following judgment in accordance with the provisions of Articles 271 et seq of the DEBA. For an attachment order to be issued, 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 an 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 Work-**

outs. 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 rarely used and will be abolished with the implementation of the new law (as of 1 January 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 entry into a composition agreement.

The provisional moratorium provides a company with a certain level of protection from creditors and their legal actions against the company so that the company can undergo restructuring while preserving its legal entity and its business. Accordingly, a provisional moratorium does not necessarily lead to a composition agreement or the initiation of bankruptcy proceedings if sufficient restructuring measures may be achieved during the provisional (or subsequent definitive) moratorium (Article 296a of the DEBA).

The provisional moratorium is based on the following specifics:

- initial duration of up to four months, which may subsequently be extended by up to four months (maximum duration of eight months);
- generally, the court appoints a provisional administrator, but it may refrain from doing so in 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); and
- 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** for 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 fails to comply with the limitations placed on it by law or court order or the instructions of the administrator (Article 296b of the DEBA).

The definitive moratorium is based on the following specifics:

- duration of four to six months (which may be extended 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 who will supervise the debtor's actions and report 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 announce the definitive moratorium publicly (and the commercial register will reflect such).

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 being converted to monetary claims;
- creditors' ability to off-set claims against the debtor is 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 the permission 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, then the liabilities will bind the estate in any subsequent bankruptcy proceedings. Therefore, the approval of the administrator is often a condition of further business dealings between 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 must evaluate whether there is a possibility of entering into and prepare a composition agreement during the moratorium and prepare such a composition agreement (if necessary and if it has the potential to be approved) for approval by the creditors' meeting.

Composition Agreements

Basic form of composition agreements

The restructuring during the moratorium may generally take any form agreed on by the creditors and the debtor. Composition agreements are, however, subject to statutory provisions as well as approval by creditors and the court. 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 must agree on what percentage of outstanding claims should be re-paid to the creditors and to what extent creditors will 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. As part of a composition agreement with the assignment of assets, the debtor and the creditors agree to assign some or all of the debtor's assets to the creditors or a third party in order to discharge 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 not approve 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 administrator's 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. It is possible for the company to continue conducting its business under a provisional and definitive moratorium supervised by the administrator and subject to restrictive measures imposed 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 the circumstances of the case require it, which is typically the case in large or highly complex cases.

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 creditors if the duration of the definitive moratorium exceeds 12 months (see below). An appointment of a creditors' committee is always made as part of the process of implementing and executing a composition agreement that includes the assignment of assets.

Creditors' Meeting in the Composition Proceedings

A creditors' meeting is convened by the administrator if a composition agreement is contemplated and a draft composition agreement has been drafted with 30 days' notice. Creditors are entitled to review the files of the composition proceedings as of 20 days prior to the meeting. The administrator presents the financial situation of the distressed company. The creditors' meeting then votes on whether to approve the composition agreement (and those creditors who approve must sign the composition agreement).

In the event that a definitive moratorium is prolonged beyond 12 months, another creditors' meeting must be convened to appoint a creditors' committee, to change its members, or to change the administrator.

Further Creditor Rights

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

- to be heard by the court before the court's decision to grant a definitive moratorium;
- to participate in the court proceedings on the confirmation of the composition agreement and voice their objection against the composition agreement;
- to appeal against the composition court's decision on the confirmation of the composition agreement; and
- to 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 they may challenge several other decisions). In a very significant decision of 2021, the Swiss Federal Supreme Court held that creditors cannot generally appeal the court's approval of certain transactions during the composition agreement (apart from certain very limited grounds that would render such decisions void).

Categories of Creditors

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

- a composition agreement is only effective for creditors whose claims arose before the opening of the composition proceedings or thereafter but without the administrator's approval;
- creditor claims arising during composition proceedings with the approval of the administrator are deemed to be claims against the bankruptcy estate in subsequent bankruptcy proceedings and 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 in approving 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 area. In connection with such restructuring loans (*Sanierungsdarlehen*), the main issues/uncertainties concern the risk of avoidance actions and preferential treatment of creditors (ie, if such loans are secured) and the validity of granting security for 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 a subsequent bankruptcy proceeding and therewith become super-privileged in comparison to all unsecured creditors; and
- a distressed company may also enter into pledge agreements over fixed assets but this must be approved by the court or creditor committee.

6.11 Determining the Value of Claims and Creditors

Following the opening of a composition proceeding, the administrator determines the assets of the distressed company upon the administra-

tor's appointment (Article 299 of the DEBA) and requests the creditors to file their claims (Article 300 of the DEBA). The administrator obtains a statement from the distressed company regarding whether it acknowledges the claims and reports this information 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 occurs where filed claims are ranked in order of priority and creditors can oppose the acknowledgment or ranking of their or other creditors' claims in light of the distribution of the liquidation proceeds.

6.12 Restructuring or Reorganisation Agreement

Composition agreements require court ratification. The court considers whether the offer to creditors is reasonable based on the debtor's financial capacity and, when it comes to ordinary composition agreements (haircuts for creditors while the distressed company or a rescue company is still operational), whether the distressed company's equity owners are sufficiently supportive of the restructuring process, 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 relieved from their duties as a result.

The law expressly specifies (Article 303 of the DEBA) that a creditor maintains full rights towards joint debtors, surety providers, and guarantors if a creditor does not agree to the composition agreement. A creditor also maintains full rights against these non-debtor third parties if the creditor agrees to the composition agreement, provided that he has notified them of the time and place of the creditors' meeting at least ten days before the meeting and has offered them the assignment of its claim against payment. Furthermore, a creditor does not lose its rights against third parties who are not debtors if the creditor authorises them to decide on the composition agreement on its behalf.

6.14 Rights of Set-Off

In the course of composition proceedings, the same Swiss law rules regarding set-off apply as in bankruptcy proceedings (Article 297 paragraph 8 of the DEBA in conjunction with Articles 213 et seq of the DEBA). Consequently, a creditor may set-off its claims against those of the distressed company. A set-off is not permitted under 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 creditor by operation of law); and
- if the off-setting creditor only became a debtor of the distressed company after the moratorium was granted.

The distressed company may oppose set-off declarations on the basis of an abuse of legal rights if the off-setting debtor acquires a claim against the distressed company prior to the moratorium, knowing the distressed company's (near) insolvency, and intending to gain an advantage by such actions for the off-setting debtor or a third party. In addition, 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 fails to 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 that are 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 information on 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 initiated by a creditor or by a 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 of the statutory restructuring proceedings, see **6. Statutory Restructuring, Rehabilitation and Reorganisation Proceedings**.

Effects of Bankruptcy Declaration

The declaration of bankruptcy has various implications for both the affected company and its creditors. Among the main effects of bankruptcy on a company are:

- The company is dissolved and placed in liquidation. The bankruptcy declaration is published, and the company name is completed with the suffix “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 initiated against the company and all pending debt enforcement proceedings are being cancelled.
- Upon the formal conclusion of the bankruptcy proceedings, the company is deleted from

the commercial registry and 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 formal in nature, with extensive creditors rights, including creditors' 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 resources for handling 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 recognises the termination of bankruptcy proceedings due to a lack of assets as its own type of bankruptcy proceedings, with specific legal consequences. Bankruptcy proceedings are discontinued when the bankruptcy office estimates that the costs of the summary bankruptcy proceedings are not covered. This decision is based on the estimated value of the company's free assets (excluding those assets that are used as collateral and/or for which third parties claim ownership). The

same procedure applies in the event that, during the course of the bankruptcy proceeding, the bankruptcy estate has been exhausted and the bankruptcy authority is no longer able to complete the bankruptcy proceedings with adequate funds.

In order to discontinue bankruptcy proceedings, the bankruptcy office must file an application with the bankruptcy court. If the court approves the request, the bankruptcy office will publish a notification stating that bankruptcy proceedings will be discontinued unless a creditor advances the costs for the bankruptcy proceedings within ten days of the publication.

Upon discontinuation of bankruptcy proceedings, all bankruptcy authorities' powers end, and the company (ie, its corporate bodies) may conduct a private liquidation. Within two years of the termination of bankruptcy proceedings, creditors may initiate (or continue) debt enforcement procedures against the company for special execution rather than general execution through bankruptcy proceedings. Two years after the bankruptcy proceedings have been discontinued, companies are deleted from the commercial registry and cease to exist legally, unless an interested party objects to the deletion (prior to 2021, deletion occurred after three months). Secured creditors are subject to specific rules. They may request the bankruptcy authority to realise the pledged assets. For a practical overview, see **1.1 Market Trends and Changes**.

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 determines and values the bankrupt company's assets and implements measures to protect and manage the bankruptcy estate. In accordance with these assessments and valuations, the bankruptcy authority determines the type of bankruptcy proceeding that should be applied to the case. In an ordinary bankruptcy proceeding, the first creditors' meeting determines the governing structure of the bankruptcy estate (external bankruptcy administrator, creditors' committee). The bankruptcy authority is responsible for handling ownership claims with third parties.

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

In this phase, the bankruptcy authority determines whether to accept or reject claims filed by creditors (collocation procedure; Articles 244 et seq of the DEBA) and, accordingly, assesses and determines the bankruptcy estate's liabilities. 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)

The bankruptcy authority then realises the assets. In ordinary bankruptcy proceedings, assets of the bankrupt company are only realised following a second creditors' meeting (see further above in this section for summary proceedings). The creditors' meeting decides on the method of realisation (public auction or 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 prepares a distribution list that 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. The bankruptcy proceedings are then formally concluded by the bankruptcy court.

It is stated in Article 270 of the DEBA that bankruptcy proceedings should be concluded within one year of their commencement. The supervisory authority may, however, extend the period. In most cases, bankruptcy proceedings last between two and three years, although they can take considerably longer in complex cases.

7.2 Distressed Disposals

In accordance with Swiss law, bankruptcy authorities may normally only sell assets following the second creditors meeting (ordinary proceedings) or one months after creditors have been notified (summary proceedings), which on a timeline means several weeks or, in the case of ordinary proceedings, even several years after the start of bankruptcy proceedings.

However, Swiss law also permits emergency sales (Article 243 paragraph 2 of the DEBA) or urgent sales (Article 238 paragraph 1 of the DEBA) in ordinary bankruptcy proceedings. Such fire sales are generally conducted on assets that are subject to rapid depreciation, are costly to maintain, or require disproportionately high storage costs. The Swiss Federal Supreme Court has determined that these rules may also be applied to the sale of a business or parts thereof, and that the emergency sale (of a business) may also be made in summary proceedings.

Urgent sales are based on the resolution of the first creditors meeting. However, emergency sales may be conducted without the involvement of creditors. 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 by the sale. This view is supported by a number of lower tier court decisions. There are, however, no rulings in this regard from the Swiss Federal Supreme Court at present. For sales during a moratorium, the Swiss Federal Supreme Court has ruled that creditors have no right to be involved in the sales process.

Although Swiss law does not explicitly provide for the conclusion of a pre-packaged transaction during composition proceedings or bankruptcy

proceedings, this is nonetheless an option available.

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' meetings possible upon request of a quorum of creditors, the creditor committee, or the bankruptcy authority).

The first creditors' meeting (which requires an attendance quorum of one quarter of the creditors known to be able to pass resolutions) 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 the external bankruptcy administrator;
- resolving on whether or not to appoint a creditors' committee and determining its members; and
- making urgent decisions such as on continuing business, on continuing litigation, or on entering into urgent sales agreements.

The first creditors meeting is quorate to pass resolutions if at least a quarter of the creditors attend and may pass resolutions by an absolute majority of the voting creditors. The same quorums and majorities apply 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, to supervise the bankruptcy authority. In order to avoid challenges to its constitution, it should be comprised of different categories of creditors (small and large creditors, private and corporate creditors, as well as local and foreign creditors).

8. International/Cross-Border Issues and Processes

8.1 Recognition or Relief in Connection With Overseas Proceedings

The Federal Act on Private International Law (PILA), articles 166 et seq, govern cross-border aspects of Swiss Insolvency law, such as recognition of foreign bankruptcy decrees, related court decisions, foreign composition agreements, 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. In addition, the stipulated rules shall ensure that secured and privileged creditors domiciled in Switzerland are covered by the assets located within Switzerland.

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

8.2 Co-ordination in Cross-Border Cases

The Swiss authorities (including the courts) and bodies (such as bankruptcy offices or external bankruptcy administrators) involved in proceedings that have a factual connection may coordinate their activities among themselves as well as 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 state of the debtor's domicile or in the state of the centre of the debtor's main interests (COMI). However, the COMI-approach is only applicable to companies domiciled outside of Switzerland.

For litigation connected to auxiliary bankruptcy proceedings, such as 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

According to Swiss insolvency law, Swiss-based and foreign creditors are equal in bankruptcy proceedings governed by Swiss law.

8.5 Recognition and Enforcement of Foreign Judgments

Basic Requirement for Recognition

According to the revised article 166 IPLA, foreign bankruptcy decrees may be recognised in Switzerland upon request from 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 removed the requirement of reciprocal recognition of Swiss bankruptcy decrees in the state where the insolvency decree, for which recognition is sought in Switzerland, was rendered. In practice, a majority of recognition requests have been denied due to the strict requirement that decrees must be issued in the state of formal domiciliation. Among the other reasons for denying recognition would be that foreign law does not provide equal treatment to domestic and foreign creditors, or that foreign insolvency proceedings have a confiscatory nature, or that minimum standards of Swiss procedural law are not adhered to.

Enforcement

When a foreign bankruptcy decree is recognised by a Swiss court, the Swiss court normally initiates an auxiliary bankruptcy proceeding, which imposes legal consequences of bankruptcy on the debtor's assets located in Switzerland according to Swiss law (Article 167 of the IPLA). The auxiliary bankruptcy proceedings are conducted 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).

As per the schedule of claims, the Swiss bankruptcy authorities realise the assets and distribute the proceeds to the Swiss-based secured and privileged creditors. Whenever there is a surplus, it is remitted to the foreign bankruptcy estate or to the creditors 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).

The revised Swiss law allows Swiss authorities to refrain from conducting auxiliary bankruptcy proceedings if there are no Swiss-based secured or privileged creditors and if unprivileged creditors' claims are adequately considered in foreign insolvency proceedings. In these circumstances, foreign bankruptcy administrators may, subject to Swiss law, exercise all powers to which they are entitled under foreign law. These actions include the transfer of assets to their jurisdiction, the commencement of debt collection proceedings, and engaging in litigation. However, they may not act authoritatively in Switzerland (eg, no issuance of rulings or use of force).

9. Trustees/Receivers/Statutory Officers

9.1 Types of Statutory Officers

Bankruptcy Proceedings

In Swiss law bankruptcy proceedings, the bankruptcy office serves as the default statutory officer. It is a local authority. An external bankruptcy administrator (normally a specialised law firm or audit company) may be appointed during bankruptcy proceedings, which assumes the duties of the bankruptcy office. Additionally, creditors' meetings and creditors' committees have governance functions (see **7. Statutory Insolvency and Liquidation Proceedings**).

Statutory Restructuring Proceedings

In restructuring proceedings, the statutory officer is the court appointed administrator. The court may appoint one or more administrators in different roles as necessary, such as supervisory or managerial roles. The administrators are usually law firms or audit companies, while in certain cantons administrators are required to hold a certificate of proficiency according to cantonal law to carry out such tasks (see **6. Statutory Restructuring, Rehabilitation and Reorganisation Proceedings**).

9.2 Statutory Roles, Rights and Responsibilities of Officers

The bankruptcy office or, in its stead, the bankruptcy administrator is responsible for administering 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 assigns to it, ranging 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 competence of the bankruptcy court and the bankruptcy office is determined by the bankrupt company's domicile. The bankruptcy office assumes responsibility for administrating the bankruptcy estate with the bankruptcy court's declaration of bankruptcy over the 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 when granting a provisional moratorium and must appoint an administrator when granting the definitive moratorium (see **6.1 Statutory Process for a Financial Restructuring/Reorganisation**). Under certain circumstances, the creditors' meeting may replace the administrator (for example, if the definitive moratorium lasts for 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

Under Swiss law, the board of directors has an inalienable duty to monitor the financial situation of the company. Swiss law requires the board of directors to take specific actions depending on the severity of a company's 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

According to Swiss law, directors have a duty to act in the best interest of the company. Under normal circumstances, creditors are not owed any obligations (except 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 directly cause damages to creditors (damages that only affect the assets of the creditor, such as causing a lender to provide a loan based on inaccurate financial statements), creditors may bring claims against directors without restriction.

Indirect Damages to Creditors

In the event that directors cause damages to the company and, therefore, indirectly harm creditors (in the form of a devaluation of claims against the company and subsequent loss on those claims resulting from bankruptcy proceedings), credi-

tors rights to bring claims are restricted. In such a case, they may only bring claims against directors for compensation of the company only if the bankruptcy authority refrains from making such claims. In the event that their claims are successful, they are compensated from the proceeds of the litigation before other shareholders who have also initiated lawsuits. If any surplus is generated, it goes to the bankruptcy estate (Article 757 of the CO).

11. Transfers/Transactions That May Be Set Aside

11.1 Historical Transactions

The Swiss law provides for avoidance actions (resulting in specific transactions being set aside for the purpose of the insolvency proceedings; Articles 285 et seq of the DEBA) in the following general 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 described in Articles 287 and 288 of the DEBA, bona fide counterparties 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. The approval of transactions by a composition court cannot be set aside in subsequent bankruptcy proceedings.

11.2 Look-Back Period

Generally, transactions are voidable only if they occurred during a specific period of time prior to the declaration of bankruptcy (hardening period). In the case of the avoidance for intent (Article 288 of the DEBA), there is a hardening period of five years. In all other scenarios (Articles 286 and 287 of the DEBA), the hardening period is one year.

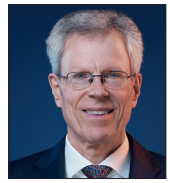
11.3 Claims to Set Aside or Annul Transactions

An avoidance action may be brought against the counterparty or beneficiary of the suspect transaction by creditors who hold a certificate of a loss sustained in debt enforcement proceedings, by the bankruptcy authority, or by creditors to whom the bankruptcy authority assigned the right to bring such claims.

Niederer Kraft Frey (NKF) is a full-service Swiss firm with over 140 lawyers who provide legal advice in 12 languages and a proven track record in Swiss law. Its domestic and international client base makes it a valuable partner to the world's best law firms. In addition to extensive industry knowledge, the firm has a wide range of specialist legal expertise covering all aspects of business, corporate and finance law. In collaboration with its own teams, partner firms and clients, it works towards providing sustainable solutions to complex problems. The firm's offices are located in the banking and financial district of Zurich and Geneva.

Authors

Marco Häusermann is a partner at Niederer Kraft Frey specialising in banking, finance and debt capital market transactions, as well as restructuring and insolvency matters. In addition to being co-author of the Swiss ICMA/ISLA industry netting opinion for GMRAs and GMSLAs, he frequently advises repo and securities lending market participants on cross-border insolvency and netting issues. His recent advice on gategroup's comprehensive financial restructuring resulted in a landmark case. His expertise is widely recognised. He has recently been appointed as an officer of the International Bar Association's Banking Law Committee.



Thomas Sprecher is a partner in the dispute resolution team at Niederer Kraft Frey. Besides his extensive experience in litigation, bankruptcy and restructuring law, he also advises on commercial issues. He has been a member of several creditors' committees, including ISMM, ISL Worldwide, Flightlease and Zeromax. He is a member of the Swiss Bankruptcy Association and chairs the authoritative annual seminars on corporate insolvency and restructuring at the Europa Institute of the University of Zurich.

Roman Sturzenegger is a partner at Niederer Kraft Frey. He advises domestic and international clients on bankruptcy and restructuring matters, corporate law, distressed mergers and acquisitions transactions, and other related matters. Recently, he was a member of the NKF team that advised gategroup on its financial restructuring, resulting in a landmark case. A member of INSOL Europe and the Swiss Bankruptcy Association, he regularly publishes and delivers public speeches.

Niederer Kraft Frey

Bahnhofstrasse 53
8001
Zurich
Switzerland

Tel: +41 58 800 8000
Fax: +41 58 800 8080
Email: nkf@nkf.ch
Web: www.nkf.ch

CHAMBERS GLOBAL PRACTICE GUIDES

Chambers Global Practice Guides bring you up-to-date, expert legal commentary on the main practice areas from around the globe. Focusing on the practical legal issues affecting businesses, the guides enable readers to compare legislation and procedure and read trend forecasts from legal experts from across key jurisdictions.

To find out more information about how we select contributors, email Katie.Burrington@chambers.com