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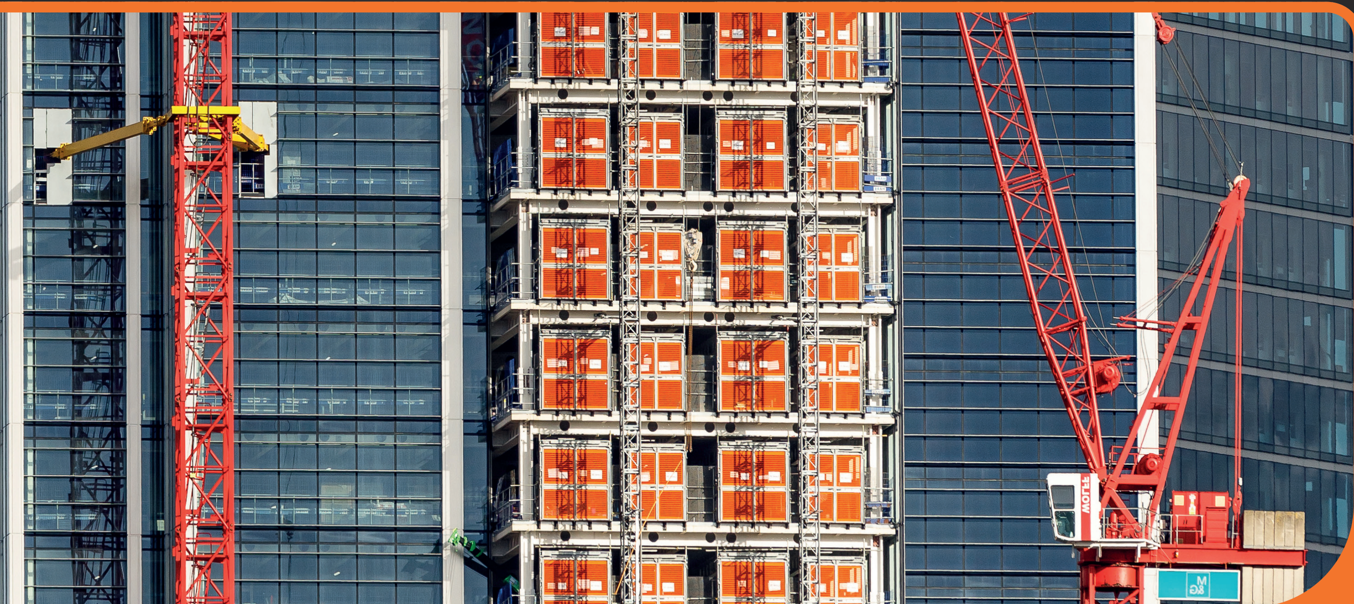

Practical cross-border insights into restructuring & insolvency law

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1 Overview

1.1 Where would you place your jurisdiction on the spectrum of debtor- to creditor-friendly jurisdictions?

The recovery and insolvency of companies incorporated in Switzerland is governed by the Swiss Code of Obligations (**CO**) and the Swiss Debt Enforcement and Bankruptcy Act (**DEBA**). The CO and the DEBA generally strike a fair balance of rights and obligations of both debtors and creditors. In 2014, the DEBA was amended to make in-court restructuring options more appealing to debtors. Based on our experience, this has slightly shifted the balance. That said, Switzerland is lagging behind the current international trend of establishing more powerful pre-insolvency restructuring tools that allow the debtor to propose tailored solutions for individual creditor classes with cram-down options.

1.2 Does the legislative framework in your jurisdiction allow for informal work-outs, as well as formal restructuring and insolvency proceedings, and to what extent are each of these used in practice?

There are two main types of formal insolvency and restructuring proceedings in Switzerland: bankruptcy (i.e. liquidation) proceedings (*Konkursverfahren/faillite*); and composition proceedings (*Nachlassverfahren/concordat*). Whereas in bankruptcy proceedings, a company is eventually wound up, composition proceedings can either: (i) be used to liquidate and realise the debtor's assets in a more flexible manner than in bankruptcy (composition agreement with assignment of assets); (ii) result in a debt restructuring (be it through a debt-rescheduling, dividend agreement or a combination thereof); or (iii) be used as a mere restructuring moratorium, which may be terminated without the need to reach a composition agreement or to open bankruptcy liquidation proceedings, if the debtor can be successfully restructured during the moratorium with the consent of all relevant creditors. More specifically, the restructuring of liabilities in composition proceedings may be achieved in two ways, with or without a cram-down element.

First, composition proceedings may be used as a mere restructuring moratorium (article 296a DEBA). A termination is only possible if it can be established before the court that the debtor is restructured (without the need for a debt rescheduling or a dividend agreement). An individual agreement must be reached with each single creditor or contractual group of creditors that is expected to make a concession.

Second, where it is not possible to receive consent from each single creditor or contractual group of creditors, a composition agreement may be proposed. In a debt-rescheduling agreement (*Stundungsvergleich/concordat moratoire*), the debtor offers the creditors full discharge of their claims according to a fixed time schedule and, hence, the contractual terms and conditions of the credits are modified. In a dividend agreement (*Prozent- oder Dividendenvergleich/concordat dividende*), the debtor offers the creditors only a partial payment of their claims in connection with a creditors' waiver of the remainder. The debtor is not wound up as a consequence of such debt-rescheduling or dividend agreement, and once such agreement has been adopted by the required quorum of creditors and the approval of the competent court, the debtor regains full power to manage the company's affairs.

It is fair to say that although both types of formal proceedings are used in practice, bankruptcy proceedings are opened significantly more frequently than composition proceedings. Special insolvency regimes exist for certain types of companies, most notably banks, securities dealers, insurance companies and other players in the financial industry.

Further, Swiss law provides for the possibility of an informal work-out (see question 3.2 below). It is frequently chosen in practice where financial creditors are supportive of the process.

2 Key Issues to Consider When the Company is in Financial Difficulties

2.1 What duties and potential liabilities should the directors/managers have regard to when managing a company in financial difficulties? Is there a specific point at which a company must enter a restructuring or insolvency process?

The CO provides for various inalienable and non-transferable responsibilities for the directors of a Swiss company, which specifically apply in financial distress. The regime is identical for the corporate forms most frequently used in practice, i.e., corporations (*Aktiengesellschaften/sociétés anonymes*) and limited liability companies (*Gesellschaften mit beschränkter Haftung/sociétés à responsabilité limitée*). On 1 January 2023, a revision of Swiss corporate law; which has come, *inter alia*, with a number of changes aimed at clarifying certain elements in relation to insolvency triggers and bankruptcy filing obligations; entered into force.

If, based on the last annual financial statements, half of the share capital and the legal reserves of the company are no longer covered by its assets (article 725a par. 1 CO, *Kapitalverlust/perte de capital*), the directors must take measures to eliminate such capital loss and, if necessary, take further restructuring measures. The convening of an extraordinary shareholders' meeting is only necessary if such measures fall within its competence.

If a Swiss company is over-indebted (*überschuldet/surendetté*) within the meaning of article 725b CO, i.e., if its assets no longer

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cover its liabilities, the board of directors must notify the court without delay unless (a) certain creditors are willing to subordinate their claims to those of all other company creditors in an amount sufficient to cover the capital deficit and any losses anticipated to be incurred in the next 12 months, or (b) as long as there is reasonable prospect that the over-indebtedness can be cured within a reasonable timeframe, but no later than 90 days, and that the claims of creditors are not additionally jeopardised (see question 3.1 below). Notification of the court will typically lead to the opening of bankruptcy proceedings or, if so requested by the board of directors, the grant of a composition moratorium. Furthermore, bankruptcy proceedings must be initiated if a meeting of shareholders resolves on the dissolution of the corporation as a result of its illiquidity (*zahlungsunfähig/insolvable*) pursuant to article 191 DEBA.

In the revised CO, the board's duty to monitor the company's solvency is stated explicitly in article 725 par. 1 CO together with an obligation to adopt measures to ensure liquidity in case there is a risk of imminent illiquidity (*drohende Zahlungsunfähigkeit/menace d'insolvabilité*), or propose such measures to the shareholders' meeting if it is within the latter's competence (e.g. capital increase). It is the general view among practitioners that these new obligations did not lead to a conceptual change for board members as corresponding obligations already existed under the former fiduciary duty concept.

Non-compliance with the aforementioned duties may lead to personal liability for the directors. The general legal basis as regards the civil liability of directors (*Haftung für Geschäftsführung/responsabilité dans la gestion*) is article 754 CO, pursuant to which the members of the board of directors and any person entrusted with the management or the liquidation of a corporation shall be liable for damages "caused by wilful or negligent violation of their duties". Accordingly, the liability of a director requires: (i) a breach of the director's duties; (ii) damages caused to the corporation or a particular creditor; (iii) wilful or negligent conduct (a fault); and (iv) a causal link between the breach and the damage. In a distressed context, courts have specifically held directors liable who failed to take the steps required by law by not notifying the court about the over-indebtedness of the company. In such scenarios, damages typically cover the increase of loss that occurred between the moment the directors should have known of the corporation's distressed situation and failed to take appropriate actions and the moment the bankruptcy was actually declared (*Konkursverschleppung/retard de la prononcé de la faillite*). Further civil law liability risks may arise in cases of mismanagement, or in the context of transactions that are at risk of being challenged (see question 2.3).

Swiss social security laws provide for a strict civil and criminal liability regime for board members in case of a failure to pay certain social security contributions. The relevant social security institutions actively pursue such claims.

Certain actions or inactions by a director in a distress situation may also entail the risk of criminal sanctions under the Swiss Criminal Code (CrimC). Among the provisions that are most often applied in financial distress is article 165 CrimC, which punishes debtors whose acts of mismanagement have caused the company's bankruptcy (*Misswirtschaft/gestion fautive*). Mismanagement may exist, e.g., where an insufficient capital endowment causes or aggravates a company's over-indebtedness. Special attention must also be paid to article 167 CrimC, which targets preferences granted to certain creditors by an insolvent debtor that is subsequently declared bankrupt (*Bevorzugung eines Gläubigers/avantages accordés à certains créanciers*). The standard sanctions for the relevant criminal offences are (conditional or unconditional) fines or imprisonment. Theoretically, a disqualification preventing an individual from exercising their profession (*Berufsverbot/interdiction d'exercer une profession*) may be ordered by the court, but this is rarely applied in practice.

2.2 Which other stakeholders may influence the company's situation? Are there any restrictions on the action that they can take against the company? For example, are there any special rules or regimes which apply to particular types of unsecured creditor (such as landlords, employees or creditors with retention of title arrangements) applicable to the laws of your jurisdiction? Are moratoria and stays on enforcement available?

Moratoria and stays on enforcement are generally available under Swiss insolvency law (see question 1.2 above and question 3.3 *et seq.* below). They would not, however, prevent foreclosure in all types of collateral. Most importantly, foreclosure in assets where legal title has been transferred for security purposes may still occur despite a composition moratorium, and certain types of intermediated securities may also be realised during a stay.

As to the possibility of other stakeholders influencing the company's situation, it should be noted that the company's statutory auditors (*Revisionsstelle/organe de révision*) must notify the court if the company is manifestly over-indebted and the board of directors fails to notify the court itself. In addition, creditors may petition the court to open bankruptcy proceedings or composition proceedings in respect of the company under certain circumstances. As long as no such proceedings have been opened by the court, creditors may take the same debt enforcement actions against a company in financial distress as they may against a company in good standing (including attachment orders or interim relief to prevent certain acts of disposition).

Available enforcement actions under the DEBA are generally the same for all unsecured creditors. Notwithstanding this, the claims of certain creditor categories, such as employees or social security institutions, are privileged in the context of insolvency proceedings (see also question 4.6 below), and some creditors may have additional rights *vis-à-vis* the debtor under their contracts or Swiss statutory laws (such as termination or retention rights in financial distress). Landlords benefit from a specific lien (*Retentionsrechts des Vermieters/droit de rétention du bailleur*) which, under certain circumstances, provides that the inventory kept in the premises leased under a commercial lease serves as collateral to secure outstanding rent payments for a period of up to one-and-a-half years.

While retention of title arrangements can be established under Swiss law, the formal requirements are stringent and the retention of title does not protect against the *bona fide* acquisition of title by a third party. Consequently, such arrangements are used for limited types of assets in practice.

2.3 In what circumstances are transactions entered into by a company in financial difficulties at risk of challenge? What remedies are available?

According to the DEBA, certain preferential or fraudulent acts made by the debtor within certain suspect periods may become subject to challenge. The avoidance regime set forth in articles 285 *et seq.* DEBA provides for three different avoidance actions (*Anfechtungsklage/action révocatoire*), i.e.: (i) the action to avoid gratuitous transactions (*Schenkungsanfechtung/révocation des libéralités*), which targets, in particular, all gifts and other dispositions made by the debtor without any, or without adequate, consideration during the year prior to the opening of bankruptcy

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proceedings, the granting of a moratorium or the seizure of assets; (ii) the voidability of certain specified transactions during the year prior to the opening of bankruptcy proceedings, the granting of a moratorium or the seizure of assets while the debtor is already over-indebted (*Überschuldungsanfechtung/révocation en cas de surendettement*), i.e., the granting of a security interest for existing debts without being, by prior agreement, contractually obligated to create the relevant security interest, the settlement of a monetary claim in a manner other than by usual means of payment, or the payment of a debt which was not yet due, in each case provided that the recipient is unable to prove that it was unaware, and must not have been aware, of the debtor's over-indebtedness; and (iii) the avoidance for intent (*Absichtsanfechtung/révocation pour dol*), which targets dispositions and other acts made by the debtor within a period of five years prior to the opening of bankruptcy proceedings, the granting of a moratorium or the seizure of assets if the disposition was made by the insolvent with the intent to disadvantage its creditors or to prefer certain creditors to the detriment of other creditors, and if the privileged creditor knew or should have known of such intent. For all challenges, it is further required that the challenged transaction has caused damages to other creditors of the debtor. The rules regarding avoidance for intent as well as avoidance of gratuitous transactions provide for an inversion of the burden of proof whenever these transactions are entered into by related parties (including affiliated entities). Accordingly, in such cases, the benefitting party must prove that it could not have been aware of the disproportion between performance and consideration (in case of avoidance of gratuitous transactions) or of the intention of the insolvent debtor to prefer certain creditors over others (in case of avoidance for intent).

If all prerequisites are met, the court orders the defendant to return the specific assets to the estate. If the return of a specific asset is no longer possible, the court may order the defendant to compensate the estate in cash.

3 Restructuring Options

3.1 Is it possible to implement an informal work-out in your jurisdiction?

Under the revised CO, the board of directors must only convene an extraordinary shareholders' meeting in cases of a loss of capital (*Kapitalverlust/perte de capital*) if corresponding restructuring measures fall within the competence of the shareholders' meeting (article 725a CO, see question 2.1). For the implementation of other measures, the shareholders' meeting (and the court) does not need to be involved. It is therefore primarily the duty and responsibility of the board of directors to eliminate the capital loss.

While according to article 725b par. 3 CO there is an obligation to notify the court in case of over-indebtedness (*Überschuldung/surendettement*), this provision also states that an informal work-out may be carried out without court involvement where: (i) there are well-founded prospects that the over-indebtedness will be eliminated in due course; however, by no later than 90 days as of the date on which audited financial statements are available; and (ii) creditors' claims are not jeopardised any further.

With the entry into force of the revised law, the postponement of bankruptcy (*Konkursaufschub/ajournement de la faillite*) which allowed the court, at the request of the board of directors or a creditor, to postpone the adjudication of bankruptcy, provided that there was the prospect of a financial reorganisation, was abolished, leaving the restructuring moratorium as the only court-sanctioned restructuring procedure.

3.2 What informal rescue procedures are available in your jurisdiction to restructure the liabilities of distressed companies?

Swiss law provides for several financial restructuring measures which may be implemented to cure a capital loss and/or over-indebtedness, of which the most important instruments are described below. Such measures are targeted at a balance sheet restructuring, and therefore only some of the following measures impact the liquidity situation of the company.

Subject to applicable statutory accounting principles, revaluation of certain assets and liabilities may be permissible, which leads to a dissolution of hidden reserves (*stille Reserven/réserves latent*). In addition, in a status of capital loss or over-indebtedness, the company may revalue real estate and participations in other companies in excess of acquisition costs or costs of manufacture up to their fair value (article 725c par. 1 CO). The authority for such revaluation lies with the board of directors. The revaluation must be disclosed in the notes to the annual financial statements, according to article 959c par. 1 ciph. 1 CO.

Furthermore, creditors can subordinate their claims (including interest) against the company to the claims of all other creditors (*Rangrücktritt/postposition de créances*) (see also question 2.1). Subordination implies a deferral of maturity of the subordinated claims (*Stundung/sursis*) and may, as a rule, only be terminated once the over-indebtedness has been cured. In contrast to a mere subordination of claims, an outright waiver of claims may be suitable to eliminate both a capital loss and an over-indebtedness. The relevant creditor and the board of directors may implement these measures without the assistance of the shareholders.

Further capital measures include: (a) a capital reduction without distributions to the shareholders (*deklaratorische Kapitalherabsetzung/réduction déclarative du capital-action*) which requires the consent of the shareholders; (b) a capital injection (*Zuschuss;* à fonds perdu *Zahlungen/à fonds perdu paiments*) which may not only cure a capital loss and an over-indebtedness, but may also remove an illiquidity situation and can generally be implemented without the assistance of the shareholders; (c) a capital increase (*Aktienkapitalerhöhung/augmentation du capital-actions*) (be it in cash or in the form of a debt-for-equity swap); or (d) a reduction of the capital to zero which is combined with an immediate capital increase, typically to the pre-existing level (*Kapitalschnitt/réduction de capital*). In addition, the shareholders' meeting may – by means of a relevant provision in the articles of association – introduce a capital band (*Kapitalband/marge de fluctuation du capital*) which allows the board of directors to change the share capital independently within a bandwidth defined in the articles of association for a maximum of five years, thereby giving the board of directors an agile instrument which allows it to act quickly, and which improves the possibilities for restructuring outside of composition proceedings.

3.3 Are debt-for-equity swaps and pre-packaged sales possible? In the case of a pre-packaged sale, are there any restrictions on the involvement of connected persons?

Debt-for-equity swaps, and/or composition agreements with incorporation of a company (*Nachlassvertrag mit Gesellschaftsgründung/concordat avec constitution de société*), are admissible in Switzerland. In a typical debt-for-equity swap, creditors receive interests by the debtor in proportion to their recognised claims. Under a composition agreement with incorporation of a company, the debtor undertakes to assign its assets

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to a newly created company in which the creditors obtain interests in proportion to their recognised claims. Furthermore, pre-packaged sales are possible under Swiss law. Such sales require the consent of the court-appointed administrator (*Sachwalter/commissaire*) and the court. In this context, no statutory restrictions apply to the involvement of connected persons, but the administrator and the court will examine the conditions of the proposed pre-packaged sale to ensure that it complies with arm's length terms and does not disadvantage the debtor's creditors.

Specific rules apply to debt-for-equity swaps for certain entities that are subject to a special insolvency regime, most notably to banks.

3.4 To what extent can creditors and/or shareholders block such procedures or threaten action (including enforcement of security) to seek an advantage? Do your procedures allow you to cram-down dissenting stakeholders? Can you cram-down dissenting classes of stakeholder?

While the board of directors can implement several informal rescue measures without involving the shareholders and/or creditors (e.g. revaluation of assets, real estate and participations) , other informal rescue measures may require the consent of the shareholders (e.g. capital measures). Finally, there are certain informal rescue measures which can only be implemented with the consent of the creditors (e.g. subordination or waiver of claims; see question 3.2).

During formal rescue procedures (see question 1.2 above), creditors of claims are not entitled to commence or continue debt enforcement proceedings (*Betreibung/poursuite*). This restriction does not apply to creditors whose claims are secured by real estate, but who are, however, precluded from foreclosing on the real estate. For further limitations on the effects of a stay, see question 2.2.

As soon as a draft composition agreement (*Nachlassvertrag/concordat*) is proposed, the administrator convenes a creditors' meeting. Only creditors who have filed claims in time are given the right to vote in the creditors' meeting. Other than the right to vote in the creditors' meeting, creditors are generally not able to influence composition proceedings.

Approval of the proposed composition agreement requires an affirmative vote by a quorum of either (i) a majority of creditors representing two-thirds of the total debt, or (ii) one-quarter of the creditors representing three-quarters of the total debt. All creditors entitled to vote form one single voting class. Creditors with privileged claims and secured creditors (to the extent that their claims are covered by the estimated liquidation proceeds of the collateral) will not be entitled to vote on the composition agreement. After approval by the creditors, the composition agreement requires confirmation by the composition court. With the court's confirmation, the composition agreement becomes valid and binding upon all creditors of claims subject to the composition agreement, whether or not they have participated in the composition proceedings and irrespective of their non-approval of the composition agreement. It is thus possible to cram down dissenting creditors in such proceedings. In turn, Swiss law does not provide for different classes of creditors that are subject to a composition agreement, hence no cram-down of dissenting classes of creditors is available and a strict equal treatment rule of creditors applies.

As opposed to the creditors, shareholders have no voting rights over court-adjudicated composition agreements. The DEBA, however, provides that in order for an ordinary composition agreement to be approved by the court, the equity holders must make an appropriate contribution to the restructuring efforts.

3.5 What are the criteria for entry into each restructuring procedure?

Composition proceedings are typically initiated by the debtor. No specific trigger event exists that must have occurred for the debtor to be entitled to request the opening of composition proceedings. In particular, it is not required for the admissibility of composition proceedings and the grant of a moratorium that the company be over-indebted within the meaning of article 725b CO, or that it be unable to pay its debts within the meaning of article 190 par. 1 no. 2 DEBA. That said, some degree of financial distress must exist, which may be in the form of looming illiquidity, or over-indebtedness. In addition, both creditors entitled to request the opening of bankruptcy proceedings and the bankruptcy court may request the opening of composition instead of bankruptcy proceedings.

Upon receipt of a request to this effect, the court grants a provisional moratorium (*provisorische Nachlassstundung/sursis provisoire*) of up to four months, which may be extended for a further four months in exceptional cases. Furthermore, a provisional administrator (*provisorischer Sachwalter/commissaire provisoire*) may be appointed by the court to assess the prospects of a successful reorganisation or of a composition agreement.

If the court finds that there are reasonable prospects for a successful reorganisation or that a composition agreement is likely to be concluded, it must grant a definitive moratorium (*definitive Nachlassstundung/sursis concordataire*) for a period of four to six months, and appoint an administrator (*Sachwalter/commissaire*). Upon application by the administrator, the duration of the moratorium may be extended to up to 12, and in particularly complex cases, 24 months (not including the duration of the provisional moratorium).

3.6 Who manages each process? Is there any court involvement?

If the provisional moratorium is made public, it is not compulsory (but customary) to appoint an administrator during the provisional moratorium. An administrator must always be appointed for the duration of the definitive moratorium. In addition, the court may appoint a creditors' committee (*Gläubigerausschuss/commission des créanciers*) to supervise the administrator and the proceedings in general.

The debtor may continue its business activities under the supervision of the administrator and the court. The composition court may, however, direct that certain acts require the administrator's participation in order to be legally valid, or authorise the administrator to take over the management from the debtor. Without the authorisation of the composition court or the creditors' committee (if appointed), the debtor is prohibited from divesting, encumbering or pledging fixed assets; granting guarantees; and making gifts.

Major steps in the composition proceedings require the involvement of the court. This holds true for the opening of composition proceedings, the appointment of an administrator, the approval of certain transactions involving the debtor and, finally, the approval of the composition agreement.

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3.7 What impact does each restructuring procedure have on existing contracts? Are the parties obliged to perform outstanding obligations? What protections are there for those who are forced to perform their outstanding obligations? Will termination and set-off provisions be upheld?

Contractual relationships between the debtor and its counterparties generally continue to be effective unless: (i) there is a specific statutory provision under applicable contract law, providing for an automatic termination of the relevant agreement or a termination right upon the grant of a moratorium; or (ii) the specific contract provides for an automatic termination or a termination right upon the grant of a moratorium. If so, the termination would generally be valid and enforceable *vis-à-vis* the Swiss debtor and the administrator, from a Swiss insolvency law perspective. Notwithstanding the foregoing, there are certain restrictions (see question 3.6) that may prohibit the debtor from disposing of its assets or continuing its business.

If, in contrast, a contract is not terminated, while the contracting party would generally have to perform its obligations in kind, it may demand that security be provided if the debtor's restructuring has an adverse effect on the counterparty's claim (which would typically be the case). In the event that no security is provided in due course – with the applicable time period depending on the underlying circumstances – the counterparty is entitled to unilaterally rescind the relevant agreement. In the case of long-term contracts (*Dauerschuldverhältnisse/contrats de durée*), to the extent the counterparty performs its obligations during a moratorium with the consent of the administrator, its claims against the debtor constitute so-called 'debts of the estate' (*Masseverbindlichkeiten/dettes de la masse*), and must be paid with priority (prior to all other non-secured creditors).

Further, the administrator has the authority to order conversion of a performance owed by the debtor in kind into a monetary claim of corresponding value, which will then become subject to the terms of the composition agreement. Set-off rights are modified upon the grant of a moratorium in much the same way as upon the opening of bankruptcy proceedings (see question 4.5 below).

Finally, with the consent of the administrator, the debtor may extraordinarily terminate long-term contracts (*Dauerschuldverhältnisse/contrats de durée*) during the moratorium against full indemnification of the counterparty, if the continuing existence of these contracts would defeat the restructuring purpose (article 297a DEBA).

3.8 How is each restructuring process funded? Is any protection given to rescue financing?

Costs triggered by composition proceedings qualify as debts of the estate (*Masseverbindlichkeiten/dettes de la masse*) and must be paid with priority from funds available at the outset of the proceedings, trading results or realisation proceeds. External funding is possible. An administrator will carefully analyse whether external funding is appropriate.

As for rescue financing, a distinction must made between funds made available prior to the opening of insolvency proceedings, and funds granted in the context of composition proceedings:

- If financing is made available during the moratorium, the administrator's consent to such financing will lead to a super-priority status of the relevant claims, insofar as they qualify as debts of the estate (*Masseverbindlichkeiten/dettes de la masse*), which are paid with priority before any distributions are made to other creditors. In addition, if collateral is granted for such financings with the approval of the competent court or – if applicable – the creditors' committee, the granting of collateral is exempted from the scope of avoidance actions as described in question 2.3 above.
- Rescue financing granted prior to the opening of insolvency proceedings does not benefit from super-priority status. That said, in a 2020 court precedent, the Swiss Federal Supreme Court clarified that pre-insolvency rescue financing (so-called *Sanierungsdarlehen/prêt accordés dans un but d'assainissement*) may benefit from claw-back protection. A loan to a debtor in financial distress qualifies as protected rescue financing if: (i) the debtor attempts to restructure the company; (ii) the efforts to restructure the company support a legitimate view that justifies the probability of a favourable prospect; and (iii) the loan is granted for the very purpose of such restructuring. Whether or not such criteria are met will have to be assessed on a case-by-case basis and involve some (court) discretion.

4 Insolvency Procedures

4.1 What is/are the key insolvency procedure(s) available to wind up a company?

The key insolvency procedure that leads to the winding up of a company is bankruptcy. Additionally, composition proceedings can be used to liquidate and realise the debtor's assets in a more flexible manner than in bankruptcy (composition agreement with assignment of assets, *Nachlassvertrag mit Vermögensabtretung/concordat par abandon d'actif*) but with the same result, i.e., the winding up of the company.

4.2 On what grounds can a company be placed into each winding up procedure?

A company may be placed into bankruptcy proceedings by the competent court: (i) if a creditor whose claim has not been settled, but was upheld within the course of debt enforcement proceedings, has successfully requested the opening of bankruptcy proceedings (*Konkursbegehren/réquisition de faillite*); (ii) upon a debtor's request, by declaring to the court that it is insolvent; (iii) upon a creditor's request if the company has committed certain acts to the disfavour of its creditors, if it has ceased payments, or if certain events have happened during composition proceedings; or (iv) upon the notification of the court, by the board of directors (or the statutory auditors) of the company, that the company is over-indebted. As for the opening of composition proceedings with the intention of concluding a composition agreement with assignment of assets, see question 4.1 above.

4.3 Who manages each winding up process? Is there any court involvement?

Bankruptcy proceedings are opened by the competent court and, within the course of bankruptcy proceedings, the insolvent company is represented exclusively by the bankruptcy administration. The bankruptcy administration publishes a notice of bankruptcy instructing all creditors and debtors to file their claims and debts within one month. For the further process, ordinary proceedings must be distinguished from summary proceedings:

- In ordinary proceedings, creditors are invited to a first creditors' meeting together with the creditors' call. The first creditors' meeting may appoint a private bankruptcy

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administration acting instead of the state bankruptcy office as well as a creditors' committee, which has certain supervisory (and limited decisive) competencies. A second creditors' meeting is convened to pass resolutions as to all important matters, including the commencement or continuation of claims against third parties and the method of realisation of the assets belonging to the bankruptcy estate (the actual realisation, however, is reserved to the bankruptcy administrator).

- In summary proceedings (which are the rule in practice, with the exception of a few large-scale bankruptcies), no creditors meetings are held and there is no option to appoint a private bankruptcy administration. Creditors may be approached by circular letter, and may resolve on certain matters (including whether or not certain claims should be pursued by the estate or should be offered for assignment to creditors).

Following distribution of the proceeds (according to question 4.6 below), the bankruptcy administration submits its final report to the bankruptcy court. If the court finds that the bankruptcy proceedings have been completely carried out, it declares them closed.

For composition proceedings with assignment of assets, please refer to question 4.1 above. Once a composition agreement with assignment of assets has been approved by the creditors and confirmed by the court, the liquidator will take over the realisation of the assets.

4.4 How are the creditors and/or shareholders able to influence each winding up process? Are there any restrictions on the action that they can take (including the enforcement of security)?

Once bankruptcy proceedings have been opened, all debt enforcement proceedings come to an end and creditors may not commence new debt enforcement proceedings against the debtor. Apart from attending the creditors' meetings (see question 4.3 above), unsecured creditors have no individual rights to enforce their claims. Secured creditors must: (i) notify the bankruptcy administrator if they are holding assets owned by the debtor within 30 days of the public announcement of the creditors' call; and (ii) hand in the collateral to the bankruptcy administrator. As a rule, contractual or statutory rights to privately realise such collateral are no longer enforceable in bankruptcy. Notable exceptions exist with respect to individual assets, most importantly for certain intermediated securities. Furthermore, the restrictions do not apply to certain types of security interests involving an outright transfer of title. In any event, the secured creditors keep their preferential rights with respect to the collateral and will be satisfied out of the net proceeds of the sale of such collateral in priority to any other creditors. Real estate mortgages are only realised, and proceeds paid out to creditors, if their claims against the debtor are due; claims secured by real estate mortgages that are not yet due are transferred to the acquirer of the real property.

For composition proceedings with assignment of assets, please refer to question 4.1 above. Once a composition agreement with assignment of assets has been approved and confirmed by the creditors and the court, private realisation of collateral is available for movable assets on the basis of article 324 DEBA.

4.5 What impact does each winding up procedure have on existing contracts? Are the parties obliged to perform outstanding obligations? Will termination and set-off provisions be upheld?

Whether existing contracts are terminated upon the initiation of winding up procedures is primarily governed by statutory contract law and the specific terms of a contract, which are generally upheld in a Swiss winding up proceeding. Under Swiss contract law, certain types of contracts are terminated *ex lege*, whereas others can be terminated immediately by one party in case of bankruptcy of the other.

If contracts are not terminated, the contracting party would generally be bound to accept a dividend rather than full payment or specific performance. Whether or not the contracting party would have to perform itself in kind is disputed. However, should the bankruptcy administration elect in its sole discretion to pursue the performance of a contract that was not, or only partially, fulfilled at the time of opening of the bankruptcy proceedings, the counterparty may demand that security be provided, and it may further expect full performance by the bankruptcy administration. In turn, it would have to perform its obligations as well. The right of the bankruptcy administration to elect performance of the contract is excluded in the case of financial future, swap, option and similar strict deadline transactions, if the value of the contractual performance can be determined based on market or stock exchange prices at the time of the opening of the bankruptcy. The bankruptcy administration and the contractual partner are each entitled to claim the difference between the agreed value of the contractual performance and the market value at the time of the opening of the bankruptcy proceedings.

Special insolvency rules apply to long-term contracts. Even if they are not terminated upon the opening of bankruptcy procedures, future claims arising under such long-term contracts will only be admitted to the schedule of claims for the period until the next possible termination date (calculated from the opening of bankruptcy) or until the end of the fixed duration of a contract. If the bankruptcy estate has made full or partial use of performances under the long-term contracts, article 211a DEBA provides for the indemnification thereof to be a claim against the bankruptcy estate (*Masseverbindlichkeiten/dettes de la masse*) and, thus, it must be paid with priority.

Set-off rights are also available in cases of bankruptcy; however, the substantive set-off rules are subject to certain modifications in bankruptcy. First, a distinction needs to be made between: (i) claims of the insolvent party forming part of the insolvency estate, and claims against the insolvent party (*Konkurs- oder Nachlassforderungen/créances dans la faillite ou le concordat*), to be satisfied with a dividend payment out of the proceeds of the insolvency estate; and (ii) claims of, and against, the insolvency estate (*Masseforderungen und verbindlichkeiten/créances et dettes de la masse*), which are mainly characterised by the fact that they have come into existence only after the opening of insolvency proceedings with the consent of the insolvency administration. As a rule, set-off is only possible between claims of the same category. In addition, the set-off of claims of the first category is not admissible if: (i) the debtor of the insolvent party became a creditor of the latter only after the opening of bankruptcy proceedings or the grant of a moratorium, respectively; or (ii) the creditor of the insolvent party did not become a debtor of the insolvent party or the insolvency estate until after the opening of the bankruptcy proceedings or

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the grant of a moratorium, respectively. Furthermore, set-off is voidable if a debtor of the insolvent party acquires a claim against the latter prior to the opening of bankruptcy proceedings or the grant of a moratorium, respectively, but in awareness of the insolvency in order to gain an advantage for himself or a third party to the detriment of the insolvency estate.

4.6 What is the ranking of claims in each procedure, including the costs of the procedure?

Secured claims (*pfandgesicherte Forderungen/créances garanties par gage*) are satisfied directly out of the net proceeds from the realisation of the collateral. Should the proceeds not be sufficient to satisfy the claim of a secured creditor, such creditor shall rank as an unsecured and non-privileged creditor for the outstanding amount of its claim.

Unsecured claims are ranked within three classes of claims. Leaving aside claims that are irrelevant in a corporate context, the classes are composed as follows:

- The first class consists of claims of employees: (i) derived from the employment relationship that arose during the six months prior to the opening of bankruptcy proceedings, and which do not exceed the maximum insurable annual salary as defined by the Federal Ordinance on Accident Insurance (which is currently CHF 148,200); (ii) in relation to the restitution of deposited security; and (iii) derived from social compensation plans that arose during the six months prior to the opening of the bankruptcy proceedings. The first class also includes claims of the assured, derived from the Federal Statute on Accident Insurance and from facultative pension schemes, as well as claims of pension funds against employers.
- The second class includes claims of various contributions to social insurances.
- All other claims are comprised in the third class. Claims in a lower ranking class will only receive dividend payments once all claims in a higher-ranking class have been satisfied in full. Claims within a class are treated on a *pari passu* basis.

The costs incurred during the bankruptcy proceedings are debts of the estate (*Masseverbindlichkeiten/dettes de la masse*) and must be paid with priority, i.e., before any other creditor is paid.

4.7 Is it possible for the company to be revived in the future?

Once the bankruptcy proceedings have been terminated, this is generally not possible. In this scenario, following distribution of the proceeds, the bankruptcy administration submits its final report to the bankruptcy court, which declares the bankruptcy proceedings closed if it finds that they have been completely carried out. As a consequence, the company ceases to exist and will be removed from the commercial register. However, if previously unknown assets of the insolvent are discovered after the bankruptcy proceedings have been closed, the bankruptcy administration distributes the proceeds of such assets without further formalities.

In contrast, there are limited options for the debtor to have bankruptcy proceedings revoked during the course of proceedings. At the outset of bankruptcy proceedings, the debtor has the possibility to appeal the declaration of bankruptcy ordered by the competent court within 10 days. To this effect, the debtor must: (i) make it plausible that it is able to pay its debts (*zahlungsfähig/solvable*); and (ii) provide evidence that the relevant claim has been settled or deposited with the court on behalf of the respective creditor, or that the creditor, having requested the opening of bankruptcy proceedings, renounces that such proceedings be carried out. Alternatively, at a later stage, as of the expiration of the deadline for the creditors' call (*Schuldenruf/appel aux créanciers*) until the closure of proceedings, the debtor may request the competent court to revoke bankruptcy (*Widerruf des Konkurses/revocation de la faillite*), provided that: (i) the debtor is able to evidence that all claims have been settled; (ii) the debtor submits a written statement of all creditors, having requested the opening of bankruptcy proceedings, that such request is withdrawn; or (iii) a composition agreement has been achieved.

5 Tax

5.1 What are the key tax risks which might apply to a restructuring or insolvency procedure?

As a rule, companies in financial difficulties do not benefit from any special tax treatment under Swiss law. In particular, dissolving hidden reserves or the forgiveness of debt granted by third parties is generally considered a taxable profit. However, a company in financial difficulties has generally incurred losses in previous years that can be set off against these profits. In this context, one must note that as a general rule, Swiss tax law enables set-off with reported losses of the seven prior years only. For companies with a loss of capital (*Kapitalverlust/perte de capital*; article 725a par. 1 CO, see question 2.1), this time limit for offsetting of prior losses does not generally apply. Such companies may therefore use all of their reported losses incurred to the extent these were not already set off with profits of prior years. The forgiveness of debt granted by shareholders is, under certain circumstances, treated as a contribution for no remuneration, and is subject to an issuance stamp duty (*Emissionsabgabe/timbre d'émission*) of one per cent, as is the case with respect to an increase of capital. The same analysis prevails in case of a reduction of the share capital, followed by an increase of the share capital, or the contribution for no remuneration ("*Harmonika*"). However, in case of a financial restructuring, a company may apply for a waiver of issuance stamp duty to the extent that the increase of share capital, the contribution for no remuneration, or the forgiveness of debt does not exceed CHF 10 million; and further provided that such amount covers the company's. In addition, even if such threshold is exceeded, a waiver of stamp duty can be obtained if levying such duty would be excessively harsh for the company.

6 Employees

6.1 What is the effect of each restructuring or insolvency procedure on employees? What claims would employees have and where do they rank?

Employment agreements are not automatically terminated upon the opening of insolvency proceedings by the employer. In cases where the employer becomes insolvent, however, an employee may terminate the employment relationship without notice, unless such employee is provided security for claims arising from the employment relationship. Subject to such termination rights, the bankruptcy administration may decide to maintain some employment contracts, in which case salary payments become obligations of the estate. The administration may also, as happens in the majority of cases, cease the business and

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therefore decide to terminate the work contracts. When doing so, it must comply with the applicable notice period. Unpaid salaries must be claimed and scheduled. Composition proceedings generally have a legal effect that is similar to bankruptcy with respect to employment contracts. That said, it is much more common to maintain employment contracts in composition proceedings than in bankruptcy.

Employee claims are privileged claims, and rank in the first class of creditors. They comprise: (i) claims having their basis in the employment relationship which arose during a period of six months prior to the opening of insolvency proceedings, up to a maximum amount determined by Swiss accident insurance legislation, which is currently equivalent to CHF 148,200 (see also question 4.6 above); as well as employee claims for (ii) return of deposits; and (iii) social compensation plans (*Sozialplan/plan social*) that came into existence or fell due no earlier than six months prior to the opening of insolvency proceedings. Claims exceeding such maximum amount are allocated to the third class of (unsecured and non-privileged) creditors, while claims in relation to social insurance contributions are privileged and rank in the second class.

7 Cross-Border Issues

7.1 Can companies incorporated elsewhere use restructuring procedures or enter into insolvency proceedings in your jurisdiction?

Pursuant to the DEBA, bankruptcy and composition proceedings may only be opened in respect of companies incorporated in Switzerland, meaning that such companies must be registered with the Swiss commercial register (*Handelsregister/register du commerce*). A Swiss court is not competent to order the bankruptcy or composition of a company with its registered seat outside Switzerland, even if such company has substantial trade and business activities in Switzerland. A company incorporated outside Switzerland may therefore only restructure or enter into insolvency proceedings in Switzerland after such company has re-domiciled in Switzerland.

For the sake of completeness, it should be noted that Swiss legal doctrine discusses the availability of main Swiss proceedings for a non-Swiss incorporated entity in exceptional circumstances, where main insolvency proceedings in the jurisdiction at the registered seat are either unavailable or impracticable (high requirements), and there is a close nexus to Switzerland (which may be satisfied through a debtor's centre of main interests (**COMI**) in Switzerland). We are not, however, aware of a precedent that would have opened main proceedings in Switzerland on the basis of this theory. Notwithstanding this, if a debtor incorporated outside of Switzerland operates a branch in Switzerland, Swiss insolvency proceedings may be opened against such debtor in the jurisdiction where the Swiss branch is located (*Niederlassungskonkurs/faillite de la succursale*). Such proceedings, however, are limited to obligations incurred by the branch (article 50 DEBA).

7.2 Is there scope for a restructuring or insolvency process commenced elsewhere to be recognised in your jurisdiction?

In bankruptcy matters, Switzerland follows the principle of territoriality. Accordingly, a foreign bankruptcy or any similar proceeding has no effect in Switzerland unless it has been recognised. The recognition of foreign proceedings (*Anerkennung/reconnaissance*) is governed by a special chapter in the Swiss Private International Law Act (**PILA**). The conditions for recognition are as follows:

(i) the insolvency decree must have been rendered in the state of the debtor's domicile or where the debtor has its COMI outside of Switzerland;

(ii) the petition for recognition has been introduced by the bankruptcy's administrator, by the debtor itself, or by a creditor;

(iii) the bankruptcy decree must be enforceable in the state where it was rendered; and

(iv) the bankruptcy must not be inconsistent with Swiss public policy and the fundamental principles of Swiss procedural law.

Since 2019, reciprocity is no longer a requirement. As soon as the petition for recognition has been filed, the court may, on application of the petitioner, order conservatory measures. In principle, once the recognition is granted, the foreign bankruptcy decree has the same effects as a Swiss bankruptcy decree with regard to the debtor's assets located in Switzerland.

Prior to a revision of the PILA entering into force in 2019, the opening of Swiss ancillary proceedings in cases of bankruptcy was mandatory whereas, under certain circumstances, such ancillary proceedings were not necessary in the case of restructuring-type proceedings (*Nachlass- oder ähnliches Verfahren/concordat ou procedure analogue*). Under the revised PILA, effective since 2019, it is also possible for the Swiss courts to waive the opening of ancillary proceedings in cases of the recognition of a foreign bankruptcy decree, provided that: (i) a request to this effect is made by the foreign bankruptcy administration; (ii) there are no creditors in Switzerland the claims of which are privileged or secured by a pledge; and (iii) the claims of non-privileged and unsecured creditors in Switzerland are adequately taken into account in the foreign proceedings and such creditors were granted an opportunity to be heard. In cases where no ancillary proceedings are opened but the foreign bankruptcy decree has been recognised by the competent Swiss court, the foreign insolvency administration may carry out all actions for which it is authorised pursuant to the applicable foreign law in Switzerland, including, most notably, the transfer of assets of the foreign debtor located in Switzerland to the foreign insolvency estate. In this context, the foreign insolvency administration must ensure that it is at all times compliant with all applicable Swiss laws. In particular, it must not perform any official acts, use any means of coercion or adjudicate on any disputes.

If, by contrast, ancillary insolvency proceedings are opened, pursuant to article 172 par. 1 PILA, only certain claims may be included in the schedule of admitted debts, i.e.: (i) the claims secured by pledged assets located in Switzerland according to article 219 pars 1 to 3 DEBA; (ii) the unsecured but privileged claims of creditors having their domicile in Switzerland according to article 219 par. 4 DEBA (first and second classes); and (iii) claims for liabilities on account of a branch (*Zweigniederlassung/succursale*) of the debtor registered in the commercial register in Switzerland. After the satisfaction of these creditors, any remaining balance is remitted to the foreign bankruptcy estate (article 173 par. 1 PILA). This transfer, which represents the result of the Swiss ancillary bankruptcy, requires, however, the prior recognition of the foreign schedule of claims, whereby the Swiss courts review, in particular, whether the creditors domiciled in Switzerland were fairly treated in the procedure and were granted an opportunity to be heard.

Special provisions exist for banks and other financial institutions where foreign insolvency proceedings are recognised by the Swiss Financial Market Supervisory Authority (**FINMA**).

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7.3 Do companies incorporated in your jurisdiction restructure or enter into insolvency proceedings in other jurisdictions? Is this common practice?

As stated in question 7.1 above, Swiss courts have exclusive jurisdiction over companies registered in Switzerland for the opening of insolvency proceedings. The fact that a company domiciled and registered in Switzerland has already requested the opening of insolvency proceedings outside of Switzerland would not prevent the Swiss court from opening separate Swiss main proceedings. In fact, the Swiss authorities would not accept any proceedings outside Switzerland in such instances.

Notwithstanding this, we note that Swiss companies are occasionally looking abroad for restructuring tools that are currently unknown in Switzerland (see question 1.1 above). So far, this has happened only a few times, and the underlying facts have been very specific. Given that any such proceedings cannot be recognised in Switzerland, we do not expect this to become a major trend but rather a niche option to be analysed carefully.

8 Groups

8.1 How are groups of companies treated on the insolvency of one or more members? Is there scope for co-operation between officeholders?

Swiss insolvency law is based on the principle of "one company, one proceeding". Hence, if multiple members of the same corporate group request the opening of insolvency proceedings, there will be separate insolvency proceedings for each group member. The group itself is not subject to insolvency. This principle notwithstanding, pursuant to article 4a DEBA, Swiss bankruptcy authorities must coordinate their actions to the extent possible in a group insolvency scenario. In particular, based on article 4a DEBA, it would be possible to appoint one sole administrator in the insolvency proceedings of affiliate entities within the same group or to decide on the exclusive jurisdiction of the insolvency courts and authorities that are competent for one group entity for all affected group entities, subject to prior agreement of all involved authorities. However, as this provision was introduced only recently, there is little guidance available with regards to how such coordination is handled in practice.

This duty to cooperate does not extend to foreign insolvency proceedings of group members outside of Switzerland. In practice, however, Swiss bankruptcy authorities in charge of liquidating a Swiss group member often enter into mutual agreements with foreign insolvency administrations, and settle mutual claims amicably.

9 The Future

9.1 What, if any, proposals exist for future changes in restructuring and insolvency rules in your jurisdiction?

In 2022, the Swiss parliament adopted new rules to be introduced, *inter alia*, in the CO, the DEBA and the CrimC, to combat the abusive use of bankruptcy proceedings. The goal is to prevent debtors from abusing bankruptcy proceedings to discharge their obligations, thereby damaging their creditors and competing unfairly with other companies. The entry into force of the amendments is not expected before 2024.

In addition, a special insolvency regime for insurance companies was adopted by the Swiss parliament in 2022 to enable a restructuring of an insolvent insurance company rather than the direct opening of bankruptcy proceedings. The aim of this revision is to protect the interests of the insured parties. The entry into force of the amendments is not expected before July 2023.

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