LEXOLOGY
Getting The Deal Through

Restructuring & Insolvency

in Switzerland

Report generated on 15 April 2021

Table of contents

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Switzerland

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GENERAL

Legislation

What main legislation is applicable to insolvencies and reorganisations?

In Switzerland, the Debt Collection and Bankruptcy Act of 1889 (DCBA) governs the enforcement of pecuniary claims and claims for the furnishing of security against private individuals and legal entities of private law. In 1994, this Act was partly revised and the amendments entered into force on 1 January 1997. A further amendment (which also relates to certain sections of the Code of Obligations and other federal acts) was enacted on 21 June 2013, which came into force on 1 January 2014. Finally, the latest amendments were enacted on 15 June 2018 and entered into force on 1 January 2020. The DCBA is supplemented by other federal statutes, including:

- the Federal Civil Code of 10 December 1907, as amended on 28 September 2018 (CC);
- the Federal Code of Obligations of 30 March 1911, as amended on 15 June 2018 (CO);
- the Private International Law Act of 18 December 1987 (PILA), as amended on 16 March 2018;
- the Federal Act Regarding Merger, Demerger, Conversion and Transfer of Assets and Liabilities of 3 October 2003 (the Merger Act), as amended on 17 December 2010;
- the Swiss Federal Banking Act of 8 November 1934 (SFBA), as amended on 15 June 2018, the Ordinance of the Swiss Financial Market Supervisory Authority (FINMA) on the Insolvency of Banks and Securities Dealers of 30 August 2012 (BIO-FINMA), as amended on 9 March 2017;
- the Federal Act on Financial Institutions of 15 June 2018, in particular article 67;
- the Ordinance on Financial Institutions of 6 November 2019;
- the Federal Act on Financial Services of 15 June 2018;
- the Ordinance of FINMA on the Insolvency of Collective Investment Schemes of 6 December 2012, as amended on 1 March 2013;
- the Ordinance of FINMA on the Insolvency of Insurance Companies of 17 October 2012, as amended on 1 January 2013;
- the Collective Investment Schemes Act of 23 June 2006, as amended on 15 June 2018;
- the Penal Code of 21 December 1937, as amended on 14 December 2018;
- the Federal Insurance Contract Act of 2 April 1908, as amended on 19 December 2008;
- the Federal Act on the Mandatory Unemployment Insurance and the Indemnity for Insolvency of 25 June 1982, as amended on 15 June 2018;
- historic bankruptcy treaties of the nineteenth century, such as the Bankruptcy Treaty of 1825/1826 between all Swiss cantons (except Schwyz and Neuenburg) and the (former) kingdom of Württemberg (currently valid for the district of the Oberlandesgericht Stuttgart) or the Bankruptcy Treaty of 1834 between most of the Swiss cantons and the (former) kingdom of Bavaria on consistent handling of mutual citizens;
- specific rules regarding the foreclosure of aircraft or vessels, which to a large extent follow the provisions of the Ordinance of the Federal Tribunal on Foreclosure of Real Properties of 23 April 1920, as amended on 23 September 2011;
- the Lugano Convention on the Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters 1988 (the Lugano Convention) as revised on 30 October 2007, effective as of 1 January 2011, which is not per se bankruptcy-related but has a substantial impact when it comes to the enforcement of judgments, as amended on 8 April 2016;
- the Swiss Code of Civil Procedure of 19 December 2008 (CPC), as amended on 17 June 2016;
- the Federal Act on Data Protection of 19 June 1992 (DPA), as amended on 28 September 2018;
- the Federal Act on Financial Market Infrastructures and Market Conduct in Securities and Derivatives Trading (Financial Market Infrastructure Act) of 19 June 2015, as amended on 14 September 2018;

- the Federal Act on the Oversight of Insurance Companies of 17 December 2004, as amended on 17 February 2016;
- the Ordinance on the Liquidity of Banks of 30 November 2012 (LiqO), as amended on 27 November 2019;
- the Ordinance on Capital Adequacy and Risk Diversification for Banks and Securities Dealers of 1 June 2012, as amended on 27 November 2019;
- the Ordinance on Banks and Savings Banks of 30 April 2014, as amended on 6 November 2019;
- the Ordinance on Granting of Loans and Joint Securities as a consequence of the Coronavirus of 25 March 2020 (Covid-19 Joint Security Ordinance); and
- the Federal Act on the Legal Foundations for Ordinances of the Federal Council regarding the Mastery of the Covid-19-Pandemic of 25 September 2020 (Covid-19 Act).

In the case of a corporate debtor (corporations, corporations with unlimited partners, limited liability companies and cooperatives), over-indebtedness is the most frequent criterion for the beginning of insolvency. Over-indebtedness occurs if the liabilities of the company are not covered, irrespective of whether the assets are appraised at ongoing business value or at liquidation value. Also, a declaration of illiquidity in the sense of article 191 of the DCBA by a debtor (whether corporate or individual) initiates insolvency proceedings.

A debtor in bankruptcy may be any person or entity registered in the commercial register with one of the following capacities:

- an individual owning a business;
- a member of a partnership;
- a member with unlimited liability of a limited partnership;
- a member of the board of a partnership limited by shares;
- a partnership;
- a limited partnership;
- a company or partnership limited by shares;
- a partnership with limited liability;
- a cooperative;
- an association;
- a foundation;
- a trust;
- an investment company with variable or fixed capital (SICAV or SICAF); or
- a limited partnership for collective investments.

Law stated - 26 October 2020

Excluded entities and excluded assets

What entities are excluded from customary insolvency or reorganisation proceedings and what legislation applies to them? What assets are excluded or exempt from claims of creditors?

A debtor who is not registered in the commercial register is subject to individual debt collection, but will also be adjudicated bankrupt if articles 190 to 194 of the DCBA apply.

Debt collection by means of bankruptcy proceeding is in any event excluded for taxes, duties, contributions, emoluments, fines and other obligations based on public law and owed to public treasuries or officials.

In general, all assets belonging to the debtor and having a monetary value form part of the insolvent estate. Assets that

qualify as purely personal assets or do not qualify for seizure are exempt. In the case of an individual debtor, this also applies to benefits under a pension plan that are not yet due. Third-party assets in possession of the debtor may be segregated for the benefit of this third party.

Notably, insolvencies of banks, securities dealers, mortgage bond clearing houses, insurance companies, collective investment scheme companies (SICAFs and SICAVs, and limited partnerships for collective investments) and fund managers will be handled by FINMA according to the special insolvency rules, as applicable. The respective rules are not discussed further herein.

Under the SFBA and BIO-FINMA, specific rules apply to protect bank customer deposits and claims.

Law stated - 26 October 2020

Public enterprises

What procedures are followed in the insolvency of a government-owned enterprise? What remedies do creditors of insolvent public enterprises have?

In principle, the insolvency proceedings of fully or partially government-owned enterprises are also governed by the procedure stated in the DCBA (ie, the same rules apply irrespective of whether an enterprise is owned by the government or not). The insolvency of government-owned banks (eg, the government-owned cantonal banks and PostFinance) is, like other banks and securities dealers, additionally governed by the restructuring and bankruptcy procedure of BIO-FINMA. For shipping and railway companies, whether government-owned or not, the Pledge and Compulsory Liquidation of Railway and Shipping Companies Act of 1917 applies.

Federal and cantonal laws can, however, stipulate exceptions for specific types of government-owned enterprises. One such exception is entities established under public cantonal law whose insolvency is primarily governed by the Debt Collection Against Communities and Other Entities of Public Cantonal Law Act of 1947. The rules of the DCBA may only be applied subsidiarily. In particular, these entities are not subject to the bankruptcy proceeding under the DCBA. Only debt collection by realising pledged property or seizure of assets is possible. However, assets needed for fulfilling public tasks (administrative assets), including tax assets, may not be seized. Seizable are therefore only the financial assets of the public entity. The Swiss Confederation and its public institutions are subject to debt collection under the DCBA, but seizure is also limited to financial assets.

Law stated - 26 October 2020

Protection for large financial institutions

Has your country enacted legislation to deal with the financial difficulties of institutions that are considered ‘too big to fail’?

Following the bailout of UBS in 2008, different legislative projects were initiated to avoid further public bailouts of banks. In the meantime, Switzerland has enacted comprehensive legislation. In April 2010, the two major Swiss banks (UBS and Credit Suisse) were identified by a commission of experts as companies ‘too big to fail’ in Switzerland. In 2013 and 2014, two other Swiss banks, the Zürcher Kantonalbank (November 2013) and Raiffeisen (June 2014), were declared systemically important by the Swiss National Bank. In September 2015, PostFinance, a wholly owned subsidiary of the government-owned Swiss Post, was added as number five to the list of systemically important banks.

During the same period, the Swiss banking law was partially revised. Systemically important banks were obliged to increase their equity and to ensure essential political economic functions if they go bankrupt. The new banking law provides for contingent convertible bonds (Coco-Bonds). More stringent requirements on capital, liquidity and risk have

been imposed to limit the risks of systemically important banks. The respective provisions entered into force on 1 March 2012. Pursuant to the LiqO, effective since 2012, banks are obliged to manage and monitor liquidity risks appropriately. On 25 June 2014, the LiqO was revised and supplemented by quantitative liquidity requirements in accordance with the international liquidity standards. On 22 November 2017, the LiqO was amended again. The new law provides smaller financial institutions with reliefs regarding their liquidity coverage ratios. The amendments entered into force on 1 January 2018.

On 1 November 2012, FINMA replaced the former Bank Bankruptcy Ordinance with the Banking Insolvency Ordinance (BIO-FINMA). BIO-FINMA consolidates the implementing provisions governing the restructuring and bankruptcy procedure for banks and securities dealers into a single decree. It completes Swiss legislation on insolvency and crisis prevention and meets international requirements. BIO-FINMA contains detailed regulations on the restructuring process, while the bankruptcy provisions were adopted practically unchanged from the former Bank Bankruptcy Ordinance. The expectation is that BIO-FINMA will make the restructuring and bankruptcy process both rapid and effective, taking proper account of individual cases, and preserving legal certainty. BIO-FINMA contains detailed regulations on the restructuring powers available to FINMA. In particular, instead of restructuring an entire bank, FINMA can opt to convert debt capital into equity capital and to prescribe other corporate actions to ensure the continuation of certain core banking services. BIO-FINMA was revised again on 9 March 2017.

On 1 January 2013, the revised Banking Ordinance and the Capital Adequacy Ordinance entered into force. As a result, banks must comply with the new rules of the Basel Committee on Banking Supervision (Basel III). Moreover, big banks whose failure would considerably harm the Swiss economy must comply with supplementary capital and risk diversification requirements, as well as present an effective emergency plan to the supervisory authority. On 30 April 2014, the Banking Ordinance was totally revised. This revision, together with a partial revision of the SFBA and the revised provisions of the Capital Adequacy Ordinance, entered into force on 1 January 2015. With the revision of the Banking Ordinance, the new accounting legislation (accounting standards) and the regulations regarding unclaimed assets were implemented. The Banking Ordinance and the Capital Adequacy Ordinance were revised on 22 November 2017 and 27 November 2019. The revised law introduces a leverage ratio and new regulations in the field of risk allocation. With this amendment, two additions to the international standards of the Basel Committee on Banking Supervision (Basel III) were implemented.

Law stated - 26 October 2020

Courts and appeals

What courts are involved? What are the rights of appeal from court orders? Does an appellant have an automatic right of appeal or must it obtain permission? Is there a requirement to post security to proceed with an appeal?

The main decision-makers involved in the enforcement of Swiss insolvency proceedings are the bankruptcy administrator, the creditors' meeting or its elected administrator or receiver as well as the creditors' committee, if appointed. Their decisions are subject to a specific complaint before the competent court. Essentially, court decisions in insolvency proceedings are restricted to specific procedural stages, namely the opening, revocation, suspension and termination of a bankruptcy proceeding. Moreover, in the course of the composition with creditors, the composition agreement has to be approved by the composition court.

In particular, the court's decision on the opening of a bankruptcy proceeding and its approval of a composition agreement are of considerable legal and practical relevance. In either instance, an appeal can be filed to challenge the respective court's decision.

Against a decision on the opening of a bankruptcy proceeding (granting or rejecting the request to open such proceeding), an objection according to CPC and DCBA can be filed within 10 days of its notification. The parties may

plead new facts provided that these had arisen before the decision of the lower court was rendered. The appellate court will only set aside the lower court's decision on the opening of a bankruptcy proceeding if the appellant can present prima facie evidence that he or she is solvent as well as documentary evidence that, in the meantime, the debt, including interest costs, has been discharged, or that the amount owed has been deposited with the upper court for account of the creditor, or that the creditor has waived the conduct of bankruptcy proceedings. A further appeal to the Swiss Federal Tribunal is possible.

An objection against the decision of the composition court can also be made. It must be filed within 10 days of notification of the parties about the composition agreement. The creditor's right of appeal against the court's confirmation of the composition agreement requires that he or she did not agree to the composition agreement and participated in the hearings before the composition court stating his or her objection to the composition agreement. Again, a further appeal to the Swiss Federal Tribunal is possible.

Provided that the appellant fulfils the statutory requirements, he or she does not have to obtain a permission to appeal but has an 'automatic' right of appeal by law.

The requirement to deposit a security (advance payment) to proceed with an appeal from a court order in an insolvency proceeding is governed by the CPC or the DCBA. Within these guidelines, the court can exercise certain discretionary powers. The provision to deposit a security has become standard procedure.

Law stated - 26 October 2020

TYPES OF LIQUIDATION AND REORGANISATION PROCESSES

Voluntary liquidations

What are the requirements for a debtor commencing a voluntary liquidation case and what are the effects?

Corporate law provides for dissolution procedures for legal entities leading to a voluntary liquidation of the business with full protection of creditors' claims.

Companies limited by shares, partnerships limited by shares, partnerships with limited liability and cooperatives may move to have bankruptcy proceedings opened against them without prior enforcement proceedings in the instances set forth by the Code of Obligation (articles 725a, 764(2), 817 and 903).

The respective motion is based on a demonstration of manifest (ie, not just temporary) insolvency and is to be supported by a shareholders' resolution and a recently drawn up balance sheet. As such, voluntary liquidation leads to a bankruptcy proceeding, its effects concur with those of an involuntary liquidation. Debtors that are not otherwise subject to bankruptcy proceedings may request their application upon declaration of insolvency.

Law stated - 26 October 2020

Voluntary reorganisations

What are the requirements for a debtor commencing a voluntary reorganisation and what are the effects?

A composition proceeding is a measure to protect the debtor from the consequences of bankruptcy. It allows the debtor to postpone payment of debts or to satisfy them in total or in part according to a specific plan. The proposed composition agreement must be ratified by the creditors. According to the revised Debt Collection and Bankruptcy Act (DCBA), the Swiss composition procedure is designed to rehabilitate the company under the auspices of the court or to reorganise unsecured and unprivileged claims. Over-indebtedness is no longer required.

Any debtor, whether subject to a bankruptcy proceeding or not, seeking an agreement with its creditors, may initiate a debt moratorium proceeding by submitting to the court a reasoned application enclosing recent financial statements and a liquidity plan together with relevant documentation demonstrating the debtor's current and future financial status, as well as a provisional rehabilitation plan. Usually, the composition court will request additional documentation.

A temporary debt moratorium not exceeding four months may be granted by the court. To protect the debtor's assets, the court will implement the necessary conservatory measures. Should the court conclude that it is unlikely that the rehabilitation or the conclusion of a composition agreement with creditors will succeed, the court will open bankruptcy proceedings. At the discretion of the court, one or several provisional commissioners for the temporary debt moratorium may be appointed for the purpose of assessing the viability of the debtor's proposal. Provided that all third-party interests remain protected, the court may abstain from giving public notice of the temporary debt moratorium (in which case a commissioner has to be appointed). In essence, the effects of the temporary debt moratorium are the same as for the definitive debt moratorium. If the temporary debt moratorium shows that a rehabilitation of the debtor or conclusion of a composition agreement with its creditors can be expected, the court, acting ex officio, may grant a definitive debt moratorium for an additional four to six months and will appoint one or more commissioners. The commissioner's primary duties are to supervise the debtor's activities and to perform the tasks set forth in articles 298 to 302 and 304 of the DCBA. The actual powers of the commissioner are determined on a case-by-case basis and can involve actual managerial powers. The commissioner has to present interim reports at the request of the composition court and has to inform the creditors of the progress of the moratorium. The definitive moratorium may be extended from the usual period (four to six months) to 12 months and, in complex cases, 24 months. Depending on the circumstances, the court can establish a creditors' committee that will act as a supervisory body for the commissioners. The creditors' committee should be composed of representatives of the various classes of creditors. Once established, the creditors' committee will decide on the sale or charges of assets.

A provisional or temporary debt moratorium will suspend pending execution proceedings including bankruptcy and asset-freezing orders (but the prosecution of claims secured by a mortgage remains possible without the realisation of the assets). Emergency provisions, and civil and administrative litigations will be suspended. As one of the centrepieces of the amended DCBA, subject to the express consent of the commissioners and provided the rehabilitation would otherwise be jeopardised, the debtor is entitled to terminate long-term contracts. Resulting (damage) claims will be subject to the composition agreement.

Law stated - 26 October 2020

Successful reorganisations

How are creditors classified for purposes of a reorganisation plan and how is the plan approved? Can a reorganisation plan release non-debtor parties from liability and, if so, in what circumstances?

It is essential to realise that (as opposed to a corporate moratorium pursuant to article 725a of the Code of Obligations (CO)) the composition agreement under DCBA is designed to affect the non-secured (including the portion of secured claims that remains uncovered) and non-priority creditors only and thus does not encompass a full reorganisation plan involving all creditors' claims.

The prerequisite for the confirmation of the composition agreement by the court is that, pursuant to the findings of the court, the value to be received by the affected creditors must be in sound proportion to the debtor's means. The terms of the composition agreement are not prescribed by law, which offers a wide variety of features. It is within the discretion of the court to improve insufficient proposals. In case of a composition with a dividend payment and continuation of business, the equity holders must provide adequate contributions. In case of a composition agreement with a liquidation of the assets, the result must be more favourable than in a bankruptcy.

Non-debtor parties may be released from liability as part of the agreement; article 303 of the DCBA specifically rules on the duties of a creditor to maintain its rights against third-party debtors. Swiss law provides that a creditor agreeing to a composition agreement shall inform co-debtors and guarantors about the place and date of the creditors' meeting and shall offer to assign his or her claim to them against cash payment. If a creditor refrains from doing so, the aforementioned third parties are released from their liabilities.

Furthermore, a contractual condition may be included in the composition agreement according to which the agreement is only concluded if certain third parties are also released from their liabilities. An out-of-court settlement requires the approval of all creditors affected.

In general, the DCBA may allow a financially distressed company to seek rehabilitation under the protection of the court. Special rules apply to public entities, hotels, farms and other regulated businesses such as banks. Such a rehabilitation procedure is generally referred to as a composition proceeding. Its most significant feature is that it allows the debtor, with the approval of the court, to force its creditors to conclude a settlement agreement and make it equally binding on dissenting creditors. The proceeding is designed to protect the debtor from enforcement proceedings (except for the realisation of collateral for claims secured by a mortgage of real property) and to work out a suitable offer for a composition. During the proceeding, the debtor's business is generally operated under the supervision of a court-appointed commissioner. The amended DCBA provides for the possibility of a debt moratorium to give the debtor time under protection of the court to rehabilitate without a composition agreement involving a haircut of the claims being intended. Upon order of the court, this debt moratorium, which may not exceed four months, does not require public notification. In such an event, a commissioner needs to be appointed to protect third-party interests.

Any composition agreement can only be confirmed by the court upon approval of either the majority of the admitted (ie, non-secured and non-priority claims) creditors representing two-thirds of the qualifying claims, or one-quarter of creditors with at least three-quarters of the qualifying claims.

Law stated - 26 October 2020

Involuntary liquidations

What are the requirements for creditors placing a debtor into involuntary liquidation and what are the effects? Once the proceeding is opened, are there material differences to proceedings opened voluntarily?

To place a debtor into an involuntary liquidation proceeding, the creditor must have complied with the preliminary debt collection procedure that involves the issuing and notification of a payment order by the debt collection and bankruptcy office at the request of the creditor, a successful setting aside of a possible objection raised by the debtor in a summary procedure and the petition to continue execution. If the creditor has complied with the above, a bankruptcy warning is issued by the debt collection and bankruptcy office. At this point in time, the bankruptcy court, at the creditor's request, may order as a protective measure the drawing up of an inventory of all the debtor's assets. If the claim is not satisfied within 20 days after the service of the bankruptcy warning, the creditor can apply to the bankruptcy court to declare the opening of the bankruptcy. The bankruptcy order marks the start of the bankruptcy proceeding to be conducted by the bankruptcy office and results in a general execution with all civil and procedural legal effects. A creditor may request the court to declare a debtor bankrupt without prior enforcement proceedings if the whereabouts of the debtor are unknown, or if the debtor evades its liabilities, engages in fraudulent conduct, has concealed assets in a preceding debt collection, or has ceased to make payments. The declaration of bankruptcy can be suspended by the court if a petition for a debt moratorium, emergency moratorium or, alternatively (but only for stock corporations, limited liability companies and cooperatives), for a corporate moratorium pursuant to article 725a of the Code of Obligations is submitted. The start of a bankruptcy liquidation has the following effects:

- one single bankrupt estate is formed consisting of all assets to which the debtor is entitled (irrespective of where they are located or whether they serve as security). The right to dispose of the assets is automatically transferred to the bankruptcy administration. The administration office draws up an inventory of all assets and takes protective measures;
- other enforcement proceedings directed against the debtor are automatically suspended and pending litigations are generally suspended as well;
- all obligations of the debtor against the bankrupt estate become due with the exception of those secured by mortgages on real estate;
- except for claims secured by pledge, interest ceases to accrue against the debtor;
- claims subject to a suspensive condition are admitted in their full amount in the bankruptcy;
- claims that are not for a sum of money have to be converted into a monetary claim of corresponding value;
- a creditor may set off its claim against a claim that the debtor has against him or her, provided that the obligation was contracted bona fide prior to the opening of the bankruptcy; and
- the creditors' claims are ascertained and listed in the schedule of claims by order of ranking and secured rights.

Law stated - 26 October 2020

Involuntary reorganisations

What are the requirements for creditors commencing an involuntary reorganisation and what are the effects? Once the proceeding is opened, are there any material differences to proceedings opened voluntarily?

The possibility for creditors to commence an involuntary reorganisation was introduced by the DCBA revision in 1994. In practice, the demand for reorganisation by creditors is not very frequent. The main prerequisite for creditors to commence an involuntary reorganisation is their right to request the opening of bankruptcy proceedings pursuant to article 166 or 190 of the DCBA. In addition, the court may also stay judgment on the opening of bankruptcy proceedings of its own motion if it appears that an agreement will be reached with the creditors. In this case, the file will be transferred to the composition court.

Apart from that, the effects of involuntary reorganisations do not differ from those for voluntary reorganisation.

Law stated - 26 October 2020

Expedited reorganisations

Do procedures exist for expedited reorganisations (eg, 'prepackaged' reorganisations)?

Under Swiss law, no specific procedures exist for expedited reorganisations. The moratorium period and the proceeding can be considerably reduced based on a prior consensus with the creditors. In more substantial cases, it is not unusual that advisers discuss pre-petition with the court. The amended DCBA favours a pure debt moratorium for a period of up to four months to rehabilitate financially distressed companies.

Law stated - 26 October 2020

Unsuccessful reorganisations

How is a proposed reorganisation defeated and what is the effect of a reorganisation plan not being approved? What if the debtor fails to perform a plan?

The following can cause failure of a reorganisation plan:

- a strong minority of creditors disapproves of the reorganisation and is in a position to preclude the twofold majority requirement from being met;
- the assets are insufficient to fully cover the privileged creditors and the claims incurred by the commissioner or administrator;
- the corporation is unable to do business during the moratorium period because of a loss of reputation and lack of business;
- it becomes obvious to the court that the intended rehabilitation will not be achieved; or
- the debtor acts against the instructions of the commissioner.

An insolvent corporation that is no longer capable of reorganisation becomes bankrupt. If the reorganisation plan is rejected, the court will declare bankruptcy. If the composition agreement is not fulfilled with regard to a specific creditor, the latter may apply to the composition court to have the agreement revoked as far as its claim is concerned, without prejudice to its rights.

In a dividend (or percentage) composition, a creditor who has not received its dividend may request the revocation of the composition for its claim only and may demand full payment.

Finally, each creditor may apply to the composition court to revoke an agreement obtained by dishonest means.

Law stated - 26 October 2020

Corporate procedures

Are there corporate procedures for the dissolution of a corporation? How do such processes contrast with bankruptcy proceedings?

According to articles 736 to 751 of the Code of Obligations, a corporation may be subject to an ordinary dissolution or liquidation procedure that involves no intervention by the judge or creditors. In that event, the board of directors or the liquidator is in charge of the liquidation.

Liquidators are appointed by the shareholders or by the court where the dissolution of the corporation is judicially ordered. The duties of liquidators include establishing a balance sheet and information regarding the creditors of the dissolution. The liquidators terminate all current business before distributing the corporate assets, or the proceeds thereof, among the shareholders. They also give notice to the commercial register that the corporation has been dissolved.

All creditors' claims must be satisfied in full before such dissolution. A blocking period of at least one year must be observed prior to the payment of the liquidation dividend. An early distribution after three months is possible upon certification by a qualified auditor that no creditor or possible third-party interests are jeopardised.

As opposed to bankruptcy proceedings, corporate dissolution is not subject to verification by the court.

Law stated - 26 October 2020

Conclusion of case

How are liquidation and reorganisation cases formally concluded?

In the event of bankruptcy, closing judgment is given as soon as the liquidation is finished.

In the event of reorganisation, a report is submitted to the judge after the composition has been implemented.

Law stated - 26 October 2020

INSOLVENCY TESTS AND FILING REQUIREMENTS

Conditions for insolvency

What is the test to determine if a debtor is insolvent?

Under Swiss law, the relevant test is over-indebtedness, meaning that the liabilities exceed the assets at going concern values and at liquidation values. Going concern values may be maintained if it is demonstrated that the business operation can be continued for 12 months.

Law stated - 26 October 2020

Mandatory filing

Must companies commence insolvency proceedings in particular circumstances?

Over-indebtedness forms a special cause of bankruptcy for corporations, corporations with unlimited partners, limited liability companies and cooperatives.

Over-indebtedness means that the liabilities of the company are not covered irrespective of whether the assets are appraised at going concern values or at liquidation values. To maintain going concern values, a sound cash-flow plan securing the business operation for a reasonable period (typically 12 months) is requested.

As long as at least half of the equity capital still exists, an adverse balance sheet remains unremarkable. But if the previous annual balance sheet shows that half of the share capital and the legal reserves are no longer covered, the board of directors must, without delay, call a general meeting of shareholders and propose a financial reorganisation.

If there is substantiated concern of over-indebtedness, an interim balance sheet must be prepared and submitted to the auditors for examination. If the concern is approved, the company bodies (board of directors, liquidators, auditors) are obliged, in the interest of the creditors, to notify the judge (Code of Obligations, article 725(2)). This notification of over-indebtedness is generally referred to as 'dumping of the balance sheet'. The timeline of the filing is decided on a case-by-case basis; in light of recent court cases, the breathing period tends to be restricted to a couple of weeks.

Notification of over-indebtedness may only be avoided if the balance sheet can be reorganised within a short time, in particular because creditors of the company subordinate their claims to those of all other company creditors to the extent of such insufficient coverage.

After a summary examination of over-indebtedness, the judge adjudicates bankruptcy ex officio. Despite over-indebtedness, the judge may refrain from or postpone adjudicating bankruptcy if: (i) there is a possibility of a financial reorganisation, in which case he or she will take appropriate measures to preserve the value of the assets; or (ii) there are indications of accomplishing a composition with creditors.

A bank that no longer fulfils the licensing requirements or violates its legal obligations risks the withdrawal of its banking licence, which inevitably results in its liquidation. In these situations, or if the bank is facing insolvency, the Financial Market Supervisory Authority (FINMA) has authority under the Swiss Federal Banking Act, which was revised in several steps to order far-reaching protective measures or the restructuring of the bank. For instance, FINMA may appoint an independent expert investigator so as to examine certain matters within the bank or to monitor the implementation of measures imposed by FINMA. Also, FINMA may appoint a restructuring administrator to establish a restructuring plan. In case of liquidation, FINMA appoints a liquidator.

Law stated - 26 October 2020

DIRECTORS AND OFFICERS

Directors' liability – failure to commence proceedings and trading while insolvent

If proceedings are not commenced, what liability can result for directors and officers? What are the consequences for directors and officers if a company carries on business while insolvent?

The members of the board of directors and all persons engaged in the management or liquidation of the company, as well as all persons engaged in the audit of the annual account, are liable not only to the company, but also to the shareholders and to the company's creditors for the damage caused by an intentional or negligent violation of their duties, for which a disregard of the provisions set out in article 725 of the Code of Obligations is being considered. The provisions regarding liability (Code of Obligations, articles 752 to 760) also apply to the founders, organs or supervisors of banks.

As a further consequence, certain transactions conducted by the company while insolvent may be the subject of avoidance actions (Debt Collection and Bankruptcy Act (DCBA), article 287) to refer the assets in question to the estate.

Criminal liability may eventually occur for acts that are conducted fully aware that the company will not be able to pay its debts.

Law stated - 26 October 2020

Directors' liability – other sources of liability

Apart from failure to file for proceedings, are corporate officers and directors personally liable for their corporation's obligations? Are they liable for corporate pre-insolvency or pre-reorganisation actions? Can they be subject to sanctions for other reasons?

For legal entities in general, their liabilities have to be satisfied by their own assets. The personal liability of corporate officers and directors arises only in the context of a violation of their duties. This also applies to governmental claims, in particular to the non-payment of social security contributions or withholding of taxes.

Article 754 of the Code of Obligations provides that members of the board of directors or persons entrusted with the management or liquidation of the corporation is liable for any damage caused to the corporation, its shareholders or creditors where they have intentionally or negligently acted in breach of their duties. This responsibility applies not only to the formally appointed representatives, but also to what are termed 'factual corporate bodies' (all persons who in fact decisively influence the corporate decision-making process). The principles of fiduciary duties are specified in a number of statutory provisions that aim to protect the shareholders' as well as the creditors' interests. Further specifications are set forth in the company's by-laws and organisational rules.

Of particular interest is article 725 of the Code of Obligations. Lastly, the Swiss Penal Code sanctions reckless bankruptcy or mismanagement.

Law stated - 26 October 2020

Directors' liability – defences

What defences are available to directors and officers in the context of an insolvency or reorganisation?

Directors and officers can benefit from five means and defences to reduce their liability:

- First, they only incur liability if the following prerequisites are met: damage, breach of duty, causal nexus and fault. Objecting to fault, however, is challenging as it is based on objective criteria and unaffected by the obedience to shareholder instructions.
- Second, to reduce the risk of liability, directors and officers are advised to comply with corporate law and to take adequate action and precaution, especially with regard to the protection of corporate assets and to mandatory action in case of over-indebtedness.
- Third, courts generally exercise restraint in reviewing corporate decisions if the latter result from a sound decision-making process, are based on pertinent information and made in the absence of conflicts of interests ('business judgement rule'). In this context, courts examine these requirements in an objective manner, do not consider alternatives for action and rule only in cases of conduct that is relevant to criminal law or clearly in the interest of the respective director or officer.
- Fourth, directors and officers do not incur liability for decisions to which they opposed in a substantiated and recorded manner.
- Fifth, they can benefit from directors' and officers' insurance, which, tailored to their function and context, protects their private assets against liability and defence costs.

The following two general defences, however, are only partially available in the context of insolvency and reorganisation:

- First, discharge granted by a shareholders' meeting is only effective towards claims by those who granted it. As a result, claims by creditors and by the bankruptcy administrator remain unaffected.
- Second, indemnification agreements prevent liability if entered into by (individual) shareholders. Yet, it is contested whether they do so if entered into by the company itself.

Law stated - 26 October 2020

Shift in directors' duties

Do the duties that directors owe to the corporation shift to the creditors when an insolvency or reorganisation proceeding is likely? When?

If the duties are not observed by the directors or if they support actions that are subject to challenge, personal liability to the creditors can ensue. The duties of the board relate to the specific company on a stand-alone basis only. The company's interests have to be defined according to the prevailing circumstances (essentially following business judgement). Swiss corporate law is based on the notion that each legal entity has to protect and pursue its own interests. Cash management is of particular interest.

Law stated - 26 October 2020

Directors' powers after proceedings commence

What powers can directors and officers exercise after liquidation or reorganisation proceedings are commenced by, or against, their corporation?

Under the supervision of the commissioner and at the direction of the composition court, the debtor may continue its business operations. However, certain transactions will require approval from the court or the creditors' committee, if appointed. The debtor is prohibited to divest, encumber or pledge fixed assets, to give guarantees or to donate assets

without the authorisation of the composition court or the creditors' committee, respectively. Moreover, if the debtor contravenes the commissioner's instructions, the court can revoke the debtor's capacity to dispose of its assets or declare bankruptcy. At the discretion of the court, the authority to operate the business can be given to the commissioner. The court may deprive management of its power of disposal or make its resolutions conditional on the commissioner's approval. Contracts entered into during the moratorium with the commissioner's approval enjoy priority over pre-petition rights. Unless a creditors' committee is appointed, which is one of the new features of the revised DCBA, the role of the creditors during the entire proceeding is fairly passive. They have to file their claims, can attend the creditors' meeting, can approve or reject the proposed composition agreement and have the right to be heard in court.

Law stated - 26 October 2020

MATTERS ARISING IN A LIQUIDATION OR REORGANISATION

Stays of proceedings and moratoria

What prohibitions against the continuation of legal proceedings or the enforcement of claims by creditors apply in liquidations and reorganisations? In what circumstances may creditors obtain relief from such prohibitions?

Liquidation

Regarding liquidation, the adjudication of bankruptcy affects enforcement and legal proceedings in two ways. First, if enforcement proceedings against the debtor are affected, these proceedings cease and new enforcement proceedings relating to claims that arose before the opening of bankruptcy proceedings are no longer possible (except for the enforcement of pledges given by third parties). The enforcement proceedings for claims that arose after the declaration of bankruptcy can be continued during the bankruptcy proceedings only by seizure or by realisation of pledges.

Second, civil court actions to which the debtor is a party and that affect the composition of the bankrupt estate are stayed, with the exception of urgent matters. In ordinary bankruptcy proceedings they can be resumed, at the earliest, 10 days after the second creditors' meeting. In summary bankruptcy proceedings, they can be resumed, at the earliest, 20 days after the schedule of claims is made available for inspection. Under the same conditions, administrative proceedings are stayed.

Reorganisation

As a general effect of composition, all pending execution proceedings, including petitions for bankruptcy and asset freezing, are stayed. Secured creditors may, regarding charges on immovable property, initiate procedures for the realisation of security, but charges will not actually be realised. Except for urgent cases, pending civil and administrative proceedings are stayed.

Law stated - 26 October 2020

Doing business

When can the debtor carry on business during a liquidation or reorganisation? Is any special treatment given to creditors who supply goods or services after the filing? What are the roles of the creditors and the court in supervising the debtor's business activities?

Under the supervision of the commissioner and at the direction of the composition court, the debtor may continue its business operations. However, certain transactions will require approval from the court or the creditors' committee, if appointed. The debtor is prohibited to divest, encumber or pledge fixed assets, to give guarantees or to donate assets without the authorisation of the composition court or the creditors' committee, respectively. Moreover, if the debtor contravenes the commissioner's instructions, the court can revoke the debtor's capacity to dispose of its assets or declare bankruptcy. At the discretion of the court, the authority to operate the business can exclusively be given to the commissioner. The court may deprive management of its power of disposal or make its resolutions conditional on the commissioner's approval. Contracts entered into during the moratorium with the commissioner's approval enjoy priority over pre-petition rights. Unless a creditors' committee is appointed, which is one of the new features of the revised Debt Collection and Bankruptcy Act (DCBA), the role of the creditors during the entire proceeding is fairly passive. They have to file their claims, can attend the creditors' meeting, can approve or reject the proposed composition agreement and have the right to be heard in court.

Law stated - 26 October 2020

Post-filing credit

May a debtor in a liquidation or reorganisation obtain secured or unsecured loans or credit? What priority is or can be given to such loans or credit?

In accordance with article 204 of the DCBA, one of the main effects of bankruptcy is that the debtor is deprived of all rights of disposal over its assets. The administrator, however, is able to contract new obligations such as loans or credits, which may touch the free assets of the bankrupt estate.

Any debt contracted during the debt moratorium with the commissioner's approval constitutes a debt against the assets in a composition with assignment of assets or in a subsequent bankruptcy proceeding and is therefore privileged.

Law stated - 26 October 2020

Sale of assets

In reorganisations and liquidations, what provisions apply to the sale of specific assets out of the ordinary course of business and to the sale of the entire business of the debtor? Does the purchaser acquire the assets 'free and clear' of claims or do some liabilities pass with the assets?

Sale of assets in a reorganisation

The right of the debtor to dispose of its assets is generally preserved but restricted by the way in which the business activities are supervised by a commissioner. The debtor is prohibited to divest, encumber or pledge fixed assets, to give guarantees or to donate assets without the authorisation of the composition court or the creditors' committee, respectively. Any such transactions, if entered into, are null and void against creditors. In some cases, the judge may authorise the commissioner to conduct business instead of the debtor, which effectively puts the debtor under guardianship. These statutory restrictions do not affect the validity of transactions concluded with bona fide third parties. If the debtor refuses to follow the commissioner's instructions, the court can revoke the debtor's capacity to dispose of its assets or declare bankruptcy. The amended DCBA provides for the possibility of establishing a rescue company whose shares may be used, with the court's approval, to satisfy creditors.

Sale of assets in a liquidation

In liquidation, the debtor loses its right of disposal over its assets as soon as the judge opens bankruptcy proceedings. Although the debtor remains the legal owner of its assets, the right of disposal is transferred to the administration for liquidation purposes. As soon as the bankruptcy judgment is published, any unilateral or bilateral transactions that concern assets belonging to the bankrupt estate and were entered into by the debtor, and not the estate, are void against its creditors. However, neither the payment of a promissory note to a bona fide creditor nor the sale or encumbrance of real estate when the restriction on the debtor's right of disposal is not yet registered in the land register will be regarded as void.

Liabilities

In an acquisition of immovable property, the charges and liabilities registered for that property will generally pass on to the acquirer. To ascertain such charges, a special procedure will be conducted. The acquirer will also inherit existing environmental liabilities subject to possibility of recourse against the previous owner. Movables, however, will be transferred free and clear of claims. The amended DCBA clarifies that a transfer of a business or part thereof in the course of a debt moratorium, a bankruptcy or a composition agreement with assignment of assets will not automatically result in an assumption of employees-related liability by the acquirer, but rather these liabilities will be assumed only upon explicit consent by the acquirer.

Law stated - 26 October 2020

Negotiating sale of assets

Does your system allow for 'stalking horse' bids in sale procedures and does your system permit credit bidding in sales?

Stalking horse procedure

Swiss bankruptcy law does not provide for a specific stalking horse procedure. In a bankruptcy or insolvency liquidation, assets are sold by public auction or free sale, as the liquidator may determine. Generally, in the case of real estate and other substantial assets, the creditors will be granted a right to participate in the sale process and make higher bids. While the liquidator has substantial discretion in organising a free sale process, the procedure should be fair in terms of time, grant equal treatment and disclose specific conditions of the interim sale agreement.

Credit bidding in sales

The sale of assets under any DCBA enforcement procedure requires cash payment by the bidder and the sale proceeds will be allocated to the creditors according to their rankings. Exceptionally, monetary claims may be transferred at par value to a creditor in satisfaction of the equivalent amount. Courts have also accepted a set-off against secured claims in specific circumstances but only when it was obvious and uncontested that the sales proceeds would have to be handed over to the acquiring creditor. To the extent that a transaction is governed by Swiss law, there is no difference whether the original secured creditor or an assignee of the original creditor requests a set-off. Private sales, which are typically stipulated in security contracts and which may also provide the creditor with a right to step in as acquirer, are not enforceable in bankruptcy situations.

Law stated - 26 October 2020

Rejection and disclaimer of contracts

Can a debtor undergoing a liquidation or reorganisation reject or disclaim an unfavourable contract? Are there contracts that may not be rejected? What procedure is followed to reject a contract and what is the effect of rejection on the other party? What happens if a debtor breaches the contract after the insolvency case is opened?

The debtor is allowed to cancel onerous long-term contracts if their continuation would frustrate the intended rehabilitation. This early termination requires the commissioner's approval. Compensation for early termination may be granted, but respective claims will be treated as ordinary creditor claims. The special provisions for employment contracts remain reserved. Otherwise, contracts entered into by the debtor prior to the commencement of the respective proceeding remain in force. By operation of law, some specific contracts such as mandate agreements will end with bankruptcy or involuntary liquidation.

While pecuniary claims become due, non-pecuniary obligations are translated into pecuniary claims. Special rules apply for 'synallagmatic contracts' (meaning contracts that involve contractual performances by both parties) that have not or only partially been fulfilled at the time of the opening of the insolvency proceeding. Pursuant to article 211 of the DCBA, the bankruptcy administrator can decide whether he or she (in lieu of the debtor who has lost its rights to dispose over assets and contractual rights) wants to fulfil such contracts. The law does not specify within what period of time such a decision should be made. As a consequence, this discretion to 'cherry pick' can create legal uncertainty for the parties involved. Contractual clauses to avoid such uncertainty may be considered. As a matter of law, such discretion is warranted neither in cases of contracts that need to be performed at a specific date nor for financial future, swap and option transactions if the value of the contractual performance can be determined by market price. If the administrator chooses to continue with the contract, the adversary party may request security for its performance, and decline performance if insufficient security is provided.

Claims resulting from contracts or breach of contracts, respectively, that are fulfilled with the administrator's approval enjoy privileged treatment. In contrast, claims resulting from contracts that were entered into or fulfilled without the administrator's approval are treated as ordinary creditor claims.

Law stated - 26 October 2020

Intellectual property assets

May an IP licensor or owner terminate the debtor's right to use the IP when a liquidation or reorganisation is opened? To what extent may IP rights granted under an agreement with the debtor continue to be used?

Bankruptcy does not result per se in a termination of ongoing agreements, and respective claims that are incurred up to the date of first ordinary termination of the expiry of the contract term can be submitted, whereby benefits accruing to the creditor must be accounted for. The bankruptcy administrator is entitled to step into a contract that has not or only partly been fulfilled. Therefore, if considered beneficial for the estate, the bankruptcy administrator will select a continued performance of the licence agreement, which will result in a privileged treatment of the accepted claims. If the administrator opts not to step in, the contract party can request appropriate security for further performance, and if not provided, terminate the agreement.

It is controversial how the monetary and the non-monetary claims resulting from the licence agreement (the latter will have to be converted into monetary claims) will actually be treated in the proceeding. It is generally (but not universally) accepted that article 211(2) of the DCBA is a procedural rule only so that contractual clauses addressing termination

should take precedence. Such clauses, however, will be tested against voidance rules. Under the amended DCBA – during the debt moratorium – the debtor is entitled to terminate long-term contracts with the commissioner's approval if their continuation would impede the debtor's rehabilitation. Compensation for such early termination must be granted but the respective claim for damages will only be treated as an ordinary creditor's claim.

Law stated - 26 October 2020

Personal data

Where personal information or customer data collected by a company in liquidation or reorganisation is valuable, are there any restrictions in your country on the use of that information or its transfer to a purchaser?

The sale of personal information or customer data collected by an insolvent company in the course of an insolvency proceeding is not restricted by Swiss insolvency provisions but has to be in compliance with the general rules of the Federal Act on Data Protection (DPA). The DPA allows, under certain conditions, the sale of personal information or customer data to a third party.

Law stated - 26 October 2020

Arbitration processes

How frequently is arbitration used in liquidation or reorganisation proceedings? Are there certain types of disputes that may not be arbitrated? Can disputes that arise after the liquidation or reorganisation case is opened be arbitrated with the consent of the parties?

Given the extensive international exposure of the Swiss economy, arbitration issues often arise in collective enforcement proceedings with a Swiss context. The availability of and the limitations to arbitration in connection with insolvency proceedings are the subject of ongoing legal discussion. The admissibility of arbitration is largely dependent on the nature of the specific dispute and on whether the bankruptcy trustee or receiver is bound by a given pre-existing arbitration clause. Whereas for Swiss international arbitration (where the seat of arbitration is in Switzerland but at least one party is domiciled abroad) a matter is arbitrable if the dispute involves 'an economic interest' (Private International Law Act, article 177(1)), in Swiss domestic arbitration the test is whether the parties are free to dispose of the rights of the dispute (Code of Civil Procedure, article 354). In the first case, the concept is of a liberal nature but restricted by public policy, while in the second cases, limitations are set by the mandatory rules of collective enforcement. Despite the liberal concept of arbitrability in Swiss international and domestic arbitration law, certain types of insolvency proceedings cannot be brought before an arbitral tribunal. This especially relates to actions that exclusively aim at enforcing debts, such as the creditor's application to the court to (definitively or provisionally) set aside the debtor's objection in summary proceedings (DCBA, articles 80 to 84). Because an arbitration process can only replace ordinary judicial proceedings, but not (administrative) enforcement proceedings, in relation to the DCBA only actions of substantive nature (such as the action for contested claims in composition proceedings pursuant to article 315 of the DCBA) and, according to the dominant Swiss doctrine, actions with a reflexive effect on substantive law (such as clawback claims pursuant to the articles 285 to 292 of the DCBA), respectively, are considered as arbitrable.

In practice, the possibility to arbitrate is often dependent on whether the trustee or receiver in a bankruptcy takes the role of a defendant or rather acts as plaintiff. It is still contested whether parties may validly agree to resolve a dispute regarding a voidance action by arbitration.

Although still a matter of debate, it seems widely established that an arbitration clause entered into by the debtor

before the start of the insolvency proceeding remains binding on the trustee or receiver absent specific limitations in the arbitration agreement. Likewise, the trustee or receiver may enter into new arbitration agreements during the course of the insolvency proceeding.

In domestic arbitration, article 207 of the DCBA is to be observed, which requires the stay of all pending actions until the second creditor's meeting (except for urgent matters). In Swiss international arbitration, the relevant procedural rules adopted for the proceeding are decisive. It is suggested that in any event arbitration proceedings should allow for sufficient time for the trustee (or the respective creditors) to familiarise itself with the claim.

Law stated - 26 October 2020

CREDITOR REMEDIES

Creditors' enforcement

Are there processes by which some or all of the assets of a business may be seized outside of court proceedings? How are these processes carried out?

Apart from the ordinary liquidation procedure that may be requested by shareholders, it is possible to liquidate a business outside the bankruptcy process by merger, demerger or transfer of assets and liabilities. This is specifically provided for by the Merger Act, which came entered into force on 1 July 2004. Full creditor protection is required in such cases.

Law stated - 26 October 2020

Unsecured credit

What remedies are available to unsecured creditors? Are the processes difficult or time-consuming? Are pre-judgment attachments available?

A simple statement by the creditor to the debt collection office at the debtor's domicile or registered office suffices to commence enforcement proceedings of a monetary claim. Upon receipt of the enforcement request, the debt collection office issues a summons to pay. The debtor can file an objection within 10 days of notification without giving any reasons. This forces the creditor to set aside the objection and, depending on the evidence at hand, to:

- institute ordinary legal action (in the event of illiquidity cases in a summary proceeding) to prove the claim;
- request, in a summary proceeding:
  - the enforcement of an enforceable judgment rendered by a Swiss court, or an equivalent order of a recognised foreign court, in which case the court will definitively set aside the objection; or
  - reach a provisional setting aside of the objection if the claim is evidenced by a written debt acknowledgement duly signed by the debtor.

Considerable case law has been developed to establish what qualifies as such debt acknowledgement. In this instance, the debtor can resort to ordinary legal action to quash the summary decision. Pursuant to the Code of Civil Procedure, the setting aside of an objection can become definitive, as in the case of an enforceable decision, provided the debt acknowledgment is established by way of a notarial deed.

A fast-track proceeding is available to creditors who hold on to a bill of exchange or a cheque.

If the debtor neither pays nor objects in a timely manner, or if the creditor has successfully set aside the objection raised by the debtor, the creditor is entitled to apply for the continuation of the enforcement proceeding after 20 days,

at the earliest, as the summons to pay has been served. If successful, the creditor may then continue the debt collection proceeding by filing a bankruptcy petition, or, if the debtor is not subject to bankruptcy proceedings, to have the debt collection office seize enough of its assets to cover the claim (other creditors who file their own request for continuation within 30 days of seizure will participate in the proceeds realised from seized assets). A new debt collection proceeding must be started if the proceeding is not continued within one year of service of the payment order, not counting the period used for setting aside the objection.

Whereas the purpose of bankruptcy proceeding is to realise all assets of the debtor to satisfy out of the proceeds the claims of all creditors in accordance with their secured rights and priorities, the seizure procedure is for individual creditors and aims at realising only certain assets of the debtor.

Pre-judgment attachment proceeding

A special asset freeze proceeding is provided for under articles 271 et seq of the Debt Collection and Bankruptcy Act (DCBA). In connection with the revised Lugano Convention, effective as of 1 January 2011, the regime for freezing orders has been modified and its scope has been extended. Freezing orders are available to both local and foreign creditors, but subject to specific prerequisites. Such a freezing order has to be applied for by the court at the place where a debt collection against a debtor can be initiated or where the asset is located. It will be granted upon demonstrating prima facie evidence of a liquid and due but unsecured monetary claim. The creditor has to plausibly demonstrate to the court in a summary ex parte proceeding where the assets to be attached are located; 'fishing expeditions' are unlikely to be heard. However, pursuant to the revised law, the court can issue freezing orders for the entire territory of Switzerland. This is a substantial improvement, as before, several orders needed to be obtained if the assets were kept in different local districts.

Freezing orders can be applied against assets located in Switzerland that belong to debtors residing abroad. Unless other grounds of attachments apply, respective claims must be based on an enforceable court decision, arbitral award or a debt acknowledgement or must at least be sufficiently connected to Switzerland. This sufficient connection test was introduced by the more recent partial revision of the DCBA and is subject to qualification by case law. With the revised Lugano Convention and related revision of the DCBA, any creditor holding an enforceable judgment, be it from a Swiss court or from a court of a member state of the European Union (or of the Lugano Convention, such as Norway or Iceland), or having a notarised debt acknowledgment at hand, will have the right to request a freezing order against a Swiss debtor. The freezing order is recognised as the protection measure to be provided for in article 47(2) of the Lugano Convention. The revised law has also introduced the possibility for the debtor to file a pre-petition protection letter to challenge an application for a freezing order.

The effects of a freezing order are to provisionally secure assets for the specific creditor. The freezing order is subject to challenge by the debtor. The creditor is liable for damages resulting from an unjustified attachment and must, to maintain the attachment, pursue a validation proceeding in a timely manner. During a legally determined period, creditors who likewise qualify may join in the proceeding and thereby frustrate the result of the first attachment.

Law stated - 26 October 2020

CREDITOR INVOLVEMENT AND PROVING CLAIMS

Creditor participation

During the liquidation or reorganisation, what notices are given to creditors? What meetings are held and how are they called? What information regarding the administration of the estate, its assets and the claims against it is available to creditors or creditors' committees? What are the liquidator's reporting obligations?

The opening of the bankruptcy proceeding is publicly announced by the bankruptcy office as soon as it has been determined whether ordinary or summary proceedings will be adopted. The announcement contains:

- personal information on the debtor and the time of the declaration of bankruptcy;
- the enjoinder to creditors of the debtor and all persons having claims to assets in the debtor's possession to file such claims with the bankruptcy office within one month of the announcement (including means of evidence);
- the enjoinder to debtors of the bankrupt to report to the bankruptcy office within the same period, subject to penal law consequences in case of non-compliance;
- the enjoinder to persons in possession of items belonging to the debtor, as holders of security rights or for other reasons, to deliver such items to the bankruptcy office; and
- the invitation to attend the first creditors' meeting, which takes place 20 days, at the latest, after the publication.

The first creditors' meeting makes the first decisions relating to the liquidation and the option of appointing a creditors' committee that will supervise the administration of the bankruptcy.

In the first creditors' meeting, the bankruptcy officer has to provide a report on the inventory and on the bankrupt estate.

A second creditors' meeting is held after the claims are established in the creditors' schedule. Upon presentation of the administrator's report, it determines the further course of the proceedings. The report includes a comprehensive presentation of the assets, the creditors' claims and the status of the proceedings. Additional creditors' meetings will be called upon motion of one-quarter of the creditors, or of the creditors' committee or at the discretion of the bankruptcy officer. A final comprehensive report has to be submitted to the court by the bankruptcy officer upon close of the proceeding.

The reporting obligations of the insolvency administrator include a comprehensive report on the financial situation of the debtor on the occasion of the creditors' meeting and a report to the court as to the approval of the proposed composition agreement. In addition, annual status reports have to be submitted to the court by the liquidator in cases where the liquidation exceeds one year. This report has to be pre-approved by the creditors' committee. In addition, a conclusive final report must be prepared and approved by the court.

During liquidation, additional reports will often be provided by the insolvency administrator to the creditors.

For a liquidation proceeding pursuant to a composition agreement with assignment of assets, in essence, similar rules apply.

A creditor may pursue a remedy of the estate against third parties if the insolvency administrator, with the support of the majority of the admitted creditors decided not to pursue the claim and the creditor has requested the assignment of the rights of the bankrupt estate.

Law stated - 26 October 2020

Creditor representation

What committees can be formed (or representative counsel appointed) and what powers or responsibilities do they have? How are they selected and appointed? May they retain advisers and how are their expenses funded?

With the amended Debt Collection and Bankruptcy Act (DCBA), the legislator has introduced the opportunity of appointing a creditors' committee by the court during the definitive debt moratorium. The commissioner must then report to the creditors' committee, which has supervisory authority. In particular, the creditors' committee will authorise transactions during the debt moratorium involving the sale or charge of fixed assets, the provision of security or

transactions without receiving consideration. In the event of bankruptcy, the creditors' committee is appointed at the first creditors' meeting. In the case of a composition agreement with liquidation, the appointment takes place at the creditors' meeting approving the composition agreement. The election is done with a head count of the claims, each creditor having one vote only, irrespective of the magnitude of the claim and whether the claim is prioritised or not. One-quarter of the known creditors must be present to qualify. In the case of a composition agreement, the head count applies as well, but it is disputed whether the same qualifications apply as for the approval of the composition agreement or the requirements as they apply in a bankruptcy. In a bankruptcy situation, the creditors' committee is composed of three to five creditors or their (legal) representatives and ensures that the interests of all creditors are preserved. The committee has no executive power, but its decisions have to be implemented by the bankruptcy administration. It is not possible for disagreeing creditors to take voidance actions against decisions of the creditors' committee regarding transactions of the debtor subject to authorisation pursuant to article 298 DCBA. The creditors' committee regularly has the following tasks:

- to supervise the activities of the bankruptcy administration, to address questions submitted and to object to any measures that contravene the creditors' interest;
- to authorise that the debtor may continue to run its business or trade, and under what conditions;
- to approve bills and to authorise the continuation of court proceedings and the conclusion of settlements and arbitration agreements; and
- to object to claims in the bankruptcy that the administration has admitted.

In a composition agreement with liquidation of assets, the liquidator acts under the control and supervision of the creditors' committee. It deals with the tasks set forth under the bankruptcy regime (above) and is assigned the following additional responsibilities:

- complaints by creditors regarding the liquidation of assets can be brought before this supervisory authority;
- approval of the creditors' claims schedule;
- decisions on the timing and procedure of asset liquidation;
- renouncement to pursue contested or otherwise difficult claims;
- approval of the reports presented by the liquidator; and
- decision on payments of interim dividends.

Additional authority and tasks may be stipulated in the composition agreement.

Compensation of the members of the creditors' committee is made in accordance with the specific tariff and subject to court approval. Advisers may be retained but it is uncertain whether the (modest) rates of the tariff apply.

Law stated - 26 October 2020

Enforcement of estate's rights

If the liquidator has no assets to pursue a claim, may the creditors pursue the estate's remedies? If so, to whom do the fruits of the remedies belong? Can they be assigned to a third party?

If the bankrupt estate lacks sufficient free assets to conduct the bankruptcy proceeding, the proceeding will be terminated unless the necessary funds are provided by the creditors (DCBA, article 230). If the insolvency administrator with the support of the majority of the admitted creditors decides not to pursue a claim, each creditor is entitled to request the assignment of rights of the bankrupt estate to pursue. After deduction of the costs, the proceeds are used

to satisfy the claims of those creditors who have pursued the claim relative to their amounts and ranking.

Law stated - 26 October 2020

Claims

How is a creditor's claim submitted and what are the time limits? How are claims disallowed and how does a creditor appeal? Can claims for contingent or unliquidated amounts be recognised? Are there provisions on the transfer of claims and must transfers be disclosed? How are the amounts of such claims determined?

Creditors must submit their claims to the debt collection and bankruptcy office within a month after the public announcement of the opening of the bankruptcy. If filed late, the claim will nonetheless be admitted prior to the closing of the bankruptcy proceedings. Once the deadline for filing has elapsed, the bankruptcy authority examines each claim filed and undertakes the necessary inquiries for their verification. It invites the debtor to comment on each claim. Within 60 days, the bankruptcy authority is expected to draw up the plan for the order of the creditors (creditors' schedule), a time limit that, in practice, is extended regularly. This creditors' schedule contains all claims retained, including a statement of charges where the assets comprise real property. The creditors' schedule also indicates which claims have been disallowed and why. As long as the creditors have constituted a creditors' committee, the creditors' schedule and the statement of charges are submitted to it for approval.

A creditor can appeal against the disallowance of its claim by instituting legal proceedings. This has to happen within 20 days of the announcement of the claims schedule. If the creditors have agreed not to pursue a claim against the debtor, the bankruptcy authority may authorise the transfer of the claim to any creditor who requests it. The assignee will act in its own name and at its own risk to recover the claim. Should a balance subsist after realisation, it will be proportionally distributed among the creditors according to the claims schedule.

With some minor exceptions stated in the DCBA that prohibit the transfer of specific claims, creditors are generally entitled to transfer claims. A partial assignment, however, may not be misused to change the original voting power allocated to a specific claim. In addition, contractual agreements may stipulate restrictions regarding assignment. The relevant creditor for the proceedings, including for distribution, is the duly registered creditor. Hence, any claim transfer should be notified to the bankruptcy officer or liquidator. As a consequence of the (notified) transfer, the transferee assumes the legal status of the creditor. Regardless of whether the transferee acquired a claim at a discount, the transferee may register the claim for its full face value.

Contingent claims (ie, those that have not materialised but are subject to a post-petition or bankruptcy opening event) will be fully recognised in a liquidation but the liquidation proceeds allocated to those claims may not be received by the creditor until the event has materialised. In the case of a composition agreement, the court decides if and to what extent contingent liabilities shall be admitted. Claims for unliquidated amounts are admitted in liquidation proceedings provided the cause of the claim is established prior to bankruptcy or the beginning of the composition proceeding. The amount of the claim to be admitted is subject to the verification process described above. In the case of a composition agreement, the court decides if and to what extent contingent liabilities or unliquidated amounts shall be admitted for the purposes of voting on the composition agreement.

For a composition agreement with assignment of assets, similar rules apply as for bankruptcy. Claims already submitted for the preceding debt moratorium do not have to be refiled.

With regard to the interest, a creditor may, in principle, only claim for the interest that had accrued by the date of the opening of the bankruptcy proceedings. As an effect of the opening of bankruptcy proceedings, interest ceases to accrue against the debtor. However, an exception is made for claims secured by pledge. For these types of claims, interest continues to accrue until the realisation of the respective collateral, provided the proceeds exceed the amount

of the claim and the interest that had accrued by the date of the opening of bankruptcy proceedings.

Law stated - 26 October 2020

Set-off and netting

To what extent may creditors exercise rights of set-off or netting in a liquidation or in a reorganisation? Can creditors be deprived of the right of set-off either temporarily or permanently?

With respect to any claim a bankrupt debtor has against a creditor, the latter can exercise a right of set-off. The right of set-off is, however, excluded in the following situations:

- if a debtor of the bankrupt debtor became a creditor only after the opening of the bankruptcy proceeding (except if such a debtor only fulfils an obligation that was pre-existing at the time of the opening of the bankruptcy or if debts of the bankrupt are satisfied by using collateral made available by such a third-party debtor);
- if a creditor of the bankrupt debtor became a debtor of the bankrupt debtor or the bankrupt estate only after the declaration of bankruptcy; or
- if the claim to be set off results from unpaid capital contributions.

Set-off against claims generally arises where the creditor establishes that the rights were acquired bona fide prior to the adjudication of bankruptcy. The set-off is voidable where the debtor of a bankrupt debtor has acquired, prior to the opening of bankruptcy but knowing its creditor is insolvent, a claim against him or her, with a view to procure for itself or a third person, by way of set-off, an advantage to the prejudice of the assets in bankruptcy (DCBA, article 214). Regarding composition, the same provisions apply.

While there is some room for cherry-picking by the administration regarding the performance of unfulfilled contracts in general concerning netting, the administrator's right to decide whether to perform contracts concluded by the bankrupt party is excluded under Swiss law (DCBA, article 211) in respect of contracts to be performed at a fixed date as well as in respect of forward, swap and option contracts, provided the value of the obligations yet to be performed can be determined on the basis of a market or stock exchange price. Swiss law further provides that both the administration and the solvent counterparty have the right to claim the difference between the agreed value of the contractual obligations and their market or stock exchange value on the date of the opening of bankruptcy proceedings, which will enable the set-off of the claim arising from such a liquidation procedure against any debt of the other party (as Swiss law allows the set-off of claims that came into existence prior to the bankruptcy judgment).

Law stated - 26 October 2020

Modifying creditors' rights

May the court change the rank (priority) of a creditor's claim? If so, what are the grounds for doing so and how frequently does this occur?

The DCBA (and the Code of Obligations in the case of an absolute subordination) clearly defines the ranking of claims. In bankruptcy or liquidation proceedings, the decision on the ranking of a claim is part of the adjudication process. Any creditor whose claim has been rejected in part or totally or was not allocated the rank requested can bring legal action against the bankrupt estate. Similarly, a creditor may challenge in court the admission of another creditor's claim (DCBA, article 250).

Law stated - 26 October 2020

Priority claims

Apart from employee-related claims, what are the major privileged and priority claims in liquidations and reorganisations? Which have priority over secured creditors?

All creditors that dispose of claims against the bankrupt debtor are able to participate in the bankruptcy proceedings. No restrictions exist as to nationality, jurisdiction or territory, but secured creditors always enjoy priority over unsecured creditors. Article 219 of the DCBA sets up three different classes of unsecured creditors for the distribution out of the proceeds of the entire remainder of the bankrupt estate:

- first class – unpaid claims of employees that arose or became due no more than the six months prior to the opening of bankruptcy proceedings, but not exceeding (currently) 148,200 Swiss francs, and claims arising from premature dissolution of the employment relationship because of the opening of bankruptcy proceedings against the employer and the restitution of deposited securities; insurance policyholders may avail themselves of their rights granted by the federal legislation and may enforce claims in connection with professional welfare institutions; outstanding pension plan contributions to be paid by the employer; claims for maintenance and assistance derived from family law that arose during the six months prior to the opening of bankruptcy proceedings and that are to be performed by payments of money;
- second class – unpaid social security contributions; certain claims of persons whose assets were entrusted to the debtor as holder of parental power; deposits with banks kept in the name of the depositor (or short-term bonds) up to 100,000 Swiss francs; and
- third class – all other claims.

Taxes are not prioritised; the privilege for VAT claims was abolished as of 1 January 2014.

Law stated - 26 October 2020

Employment-related liabilities

What employee claims arise where employees' contracts are terminated during a restructuring or liquidation? What are the procedures for termination? (Are employee claims as a whole increased where large numbers of employees' contracts are terminated or where the business ceases operations?)

Employment contracts are not terminated for reason of opening a bankruptcy, liquidation or composition agreement, but essentially in accordance with the contractual termination terms. However, the employee can request early termination unless the payment of compensation for future services is adequately secured. In the case of a transfer of business (or part) the buyer can decide whether it wants to continue the employment. Also, joint and several liability with the seller for employment claims is no longer enforced. The rules relating to mass dismissals no longer have to be observed in the case of a bankruptcy or composition proceeding. Generally, pensions plan schemes in Switzerland are operated independently of the employer's business. The pension fund enjoys first-class privilege for unpaid contributions.

Law stated - 26 October 2020

Pension claims

What remedies exist for pension-related claims against employers in insolvency or reorganisation proceedings and what priorities attach to such claims?

The Swiss pension and social security system is operated by entities that are legally independent of employers. Claims under occupational pension schemes (second pillar) enjoy first-class priority, and claims of all the other social insurance institutions are satisfied in the second class. The status of the occupational pension scheme does not only apply to outstanding premiums but to all claims by the scheme against the insolvent employer (eg, loan claims).

If an occupational pension scheme suffers a cover shortage and the employer becomes insolvent, the contract between the occupational pension scheme and the employer will be terminated. A cover shortage is given when the pension benefits of a pension scheme are no longer covered in full (100 per cent) by the pension scheme assets. In this case, the occupational pension scheme is obliged to conduct a partial liquidation and the cover shortage is proportionally passed on to the insured persons. However, such reductions are only permitted in non-mandatory occupational pension provision (pillar 2b).

Law stated - 26 October 2020

Environmental problems and liabilities

Where there are environmental problems, who is responsible for controlling the environmental problem and for remediating the damage caused? Are any of these liabilities imposed on the insolvency administrator personally, secured or unsecured creditors, the debtor's officers and directors, or on third parties?

Swiss legislation on insolvency does not provide for specific environmental-related provisions. Pursuant to the Federal Environmental Protection Act of 7 October 1983 (EPA), which applies, in principle, also to insolvency proceedings, the operator of an establishment or an installation that represents a special risk to the environment is liable for the loss or damage arising from effects that occur when this risk is materialised (EPA, article 59a). This applies to parties who acquire the establishment or operation from an insolvent estate. A director, officer, liquidator or other person entrusted with the debtor company's management or liquidation may (indirectly) be held liable for damages caused to the debtor company or its creditors if he or she has intentionally or negligently acted in breach of his or her duties defined by environmental law. Subject to specific situations (eg, factual corporate bodies), there is no mechanism that directly shifts liability to a secured or unsecured creditor or any other third party.

Law stated - 26 October 2020

Liabilities that survive insolvency or reorganisation proceedings

Do any liabilities of a debtor survive an insolvency or a reorganisation?

The claims that form part of a reorganisation proceeding will be consummated by the payment plan and the composition agreement becomes binding on all creditors whose claims either arose before the granting of the moratorium or have arisen without the receiver's consent and all respective enforcement proceedings are terminated (DCBA, article 310).

If the composition agreement is not fulfilled, respective creditors may apply to the court to have the agreement revoked (DCBA, article 316).

Liabilities secured by mortgages on real estate and similar registered assets will be passed on to the purchaser.

Law stated - 26 October 2020

Distributions

How and when are distributions made to creditors in liquidations and reorganisations?

Upon receipt of the proceeds of the entire bankrupt estate and after the schedule of claims has become definitive, the bankruptcy administration prepares the distribution plan and the final account. All costs for the opening and carrying out of the bankruptcy proceedings and for the drawing up of the inventory are paid first, directly out of the proceeds. The distribution list and the final account are made available for inspection at the enforcement office for 10 days. Interim dividend payments can be made.

Secured creditors have a preferential right to be paid out of the proceeds of the realisation of their collateral. They participate as unsecured creditors to the extent of a shortfall of the collateral.

Each creditor receives a certificate of loss in respect of the unsatisfied amount of its claim. This is an official certification of the loss incurred by the creditor, which allows the creditor to subsequently initiate new proceedings against the debtor.

Law stated - 26 October 2020

SECURITY

Secured lending and credit (immovables)

What principal types of security are taken on immovable (real) property?

A debtor may provide its creditors with a variety of forms of security and quasi-security interests. With regard to charges on immovable property, the subject matter of the security is real estate within the meaning of article 655(2) of the Civil Code. A real estate security interest can be established in only two ways: as a mortgage or real estate bond. Detailed provisions regulate these different types of security interests. Such 'real estate security interest' has to be recorded in the land register.

Real estate interest may only be established for a specified amount of the claim denominated in Swiss currency. If the amount of the claim is not or cannot yet be determined, the parties can fix a maximum amount. Likewise, interest charges need to be fixed by the parties and are subject to the permissible maximum interest rate fixed by cantonal legislation.

Pursuant to a partial revision of the Civil Code, which became effective on 1 January 2012, as an alternative to the real estate bond, a paperless register bond has been established. The paperless register bond comes into existence with an entry in the land register.

Law stated - 26 October 2020

Secured lending and credit (movables)

What principal types of security are taken on movable (personal) property?

With regard to movable property, various means are on hand to secure a claim:

- right of retention (security interest) – a right to satisfy a claim by enabling a creditor (with the consent of the

debtor) to retain and sell movable property or securities that are in his or her possession, and that the creditor would otherwise be obliged to surrender. The creation and continuation of the right of retention is dependent upon possession of the movables. If the debtor fails to fulfil his or her obligation, the creditor may, if he or she is not sufficiently secured, realise the retained asset, following prior notification of the debtor, in the same manner as a pledge; and

- pledges – to secure a present or future claim, movable goods can also be pledged. Delivery of possession of the specific movables to the creditor or to a third person holding the pledge for the creditor is a prerequisite.

The two security rights differ primarily in that the right of pledge is usually based on a contract, whereas the right of retention is also of statutory nature and can therefore be applied without a specific contract:

- retention of title – frequently, general business terms and conditions will provide for a retention of title by the seller of goods until the purchase price is fully paid. It is necessary for the parties to explicitly agree upon such a retention of title and the goods concerned have to be registered item by item in the Public Retention Title Register (Civil Code, article 715). Swiss law presumes that the possessor of goods is the legal owner. The registration does not prevent a transfer of the property title to a third party that acts in good faith. The entitled creditor is, however, protected in the case of seizure of the goods or bankruptcy of the debtor; the monitoring of the register of title retention is cumbersome, with the consequence that this security instrument is not widely used. If movable property arrives in Switzerland and is subject to a reservation of title validly established abroad but for which the requirements of Swiss law are not yet satisfied, the retention of title will remain effective in Switzerland for a period of three months (Private International Law Act, article 102(2));
- fiduciary transfer of property title – in practice, full property title of an asset is often vested in the creditor (or a third party) with the understanding that the asset serves as security only. A fiduciary relationship is thereby created, by which the holder of the property enjoys the legal position of a proprietor but the transfer is connected with the (implied or explicit) contractual obligation to act in the best interest of the principal and to return the property once the contractual obligations are met; and
- person-related securities – the creditor may seek an undertaking from a third party to pay the debt (or secure the specific performance) of the primary debtor. Types of such undertakings are:
  - undertaking of a guarantee (Code of Obligations, article 111); and
  - undertaking as a suretyship (Code of Obligations, articles 492 et seq). Because of the strict formalities to be observed in the case of a suretyship and its similarity to a guarantee, the parties have to be attentive when employing these security instruments. The suretyship must in all cases specify the maximum amount of liability and must be recorded in a notarised deed if issued by a natural person.

Law stated - 26 October 2020

CLAWBACK AND RELATED-PARTY TRANSACTIONS

Transactions that may be annulled

What transactions can be annulled or set aside in liquidations and reorganisations and what are the grounds? Who can attack such transactions?

It is explicitly provided that the bankrupt estate includes everything that can be the subject of an avoidance action (similar rules exist for individual enforcement proceedings). Certain transactions that were concluded pre-bankruptcy can be challenged and set aside by the court with the effect that specific assets of the debtor will be referred to the estate and the creditor is left with the claim he or she had prior to receiving the consideration now restituted.

Three different types of transactions are voidable:

- gifts and equivalent transactions;
- transactions concluded in an over-indebted situation such as the provision of security for an unsecured debt without prior respective obligations, the satisfaction of a monetary claim other than by usual methods of payment, and the payment of claims that are not yet due. The transaction will not be set aside if the beneficiary can demonstrate that it did not know about the critical financial status of the debtor and was not bound to know; and
- transactions concluded that are knowingly disadvantageous to creditors in general, or for the benefit of individual creditors (fraudulent conveyance).

A considerable number of court decisions have been delivered supporting clawback claims. As a result, lenders' risks have substantially increased for pre-petition transactions. The same rules apply for a composition agreement in liquidation proceedings. In the case of a reorganisation, the court may consider the impact and remedy of illicit transactions when asked to approve the composition agreement (special procedural rules apply to transactions with closely related persons). Transactions that occurred during the debt moratorium may no longer be challenged if approved by the creditors' committee or the court.

Law stated - 26 October 2020

Equitable subordination

Are there any restrictions on claims by related parties or non-arm's length creditors (including shareholders) against corporations in insolvency or reorganisation proceedings?

The amended Debt Collection and Bankruptcy Act, in articles 286, paragraph 3 and 288, paragraph 2 have changed the burden of proof for closely related persons, such as directors of the board, controlling shareholders and other closely related persons, including, in particular, group companies. They (and not the claimant) must prove that the respective transaction was at arm's length or that there was no intent to harm other creditors.

Law stated - 26 October 2020

GROUPS OF COMPANIES

Groups of companies

In which circumstances can a parent or affiliated corporation be responsible for the liabilities of subsidiaries or affiliates?

Neither Swiss corporate nor insolvency law provides for a formal legal framework for groups of companies. Swiss law assumes that each legal entity acts on its own. Basically, each company is obliged to protect and pursue its own interests independently of the interest of the controlling party and, in principle, the shareholder's duty is limited to paying the share capital that has been subscribed. A parent or affiliated corporation or natural person may, however, become responsible for the liabilities of a subsidiary if undue influence on the decision-making process of the subsidiary is exerted and the position of a material or factual corporate body is assumed. Often, contractual undertakings are entered into such as primary or accessory guarantees, undertakings as direct co-obligor or letters of responsibility. Case law has developed for parental liability on the basis of justified reliance by third parties on the business conduct of the parent company supporting the subsidiary. On fairly rare occasions the piercing of the corporate veil doctrine is applied, when it is considered abusive to claim legal independence of a company. In such abusive, rare cases a court may decide to order the distribution of group company assets without regard to the assets of the individual corporate entities involved. A court may not intervene in the allocation of assets for the benefit of

another group company.

Law stated - 26 October 2020

Combining parent and subsidiary proceedings

In proceedings involving a corporate group, are the proceedings by the parent and its subsidiaries combined for administrative purposes? May the assets and liabilities of the companies be pooled for distribution purposes?

Except for accounting rules applied in a group context, Swiss statutory law does not provide a formal legal framework for groups of companies. Swiss law assumes each legal entity acts on its own. Basically, each company is obliged to protect and pursue its own interests independently from the interest of the controlling party. Therefore, insolvency proceedings are conducted separately. There is no pooling of assets and liabilities for a corporate group. Consequently, assets may not be transferred from an administration in Switzerland to another administration. Occasionally, for the purpose of coordination, the same administrator is appointed in a group situation. Assets located in Switzerland can, however, be marshalled by the foreign administrator pursuant to the Swiss mini-bankruptcy proceeding. It may be assumed that orders, decrees or judgments in bankruptcy proceedings under Chapter 11 of Title 11 of the United States Code regarding a foreign ultimate parent company of a Swiss subsidiary will not be enforced by Swiss courts as insolvency procedures must be brought before the court at the place of the relevant insolvency procedure. If the board of directors of the Swiss subsidiary takes any action based on such orders, decrees or judgments, this may lead to civil law and criminal liability under Swiss law. Jurisdiction clauses may have no effect either. However, there is no case law regarding the remote effect of Chapter 11 proceedings.

Law stated - 26 October 2020

INTERNATIONAL CASES

Recognition of foreign judgments

Are foreign judgments or orders recognised, and in what circumstances? Is your country a signatory to a treaty on international insolvency or on the recognition of foreign judgments?

Switzerland is a signatory to the Lugano Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters 1988. In proceedings concerned with the enforcement of judgments, the courts of the contracting state in which the judgment has been or is to be enforced according to the Lugano Convention shall have exclusive jurisdiction. The revised Lugano Convention entered into force on 1 January 2011. It aligns Switzerland with the EU system of jurisdiction and enforcement of judgments throughout Europe. With the revision, the territorial application of the convention has been enlarged to include the new member states of the European Union; significant changes relating to jurisdictional issues, exequatur proceedings and new provisions for provisional and protective measures were adopted. In line with this, significant amendments were made to Debt Collection and Bankruptcy Act (DCBA), for example, regarding freezing orders ('arrest').

If the debtor is domiciled in Switzerland and there are assets abroad, article 197(1) of the DCBA provides that all sizeable assets owned by the debtor at the time of the opening of the bankruptcy proceedings, irrespective of where they are located, form one sole estate (the bankrupt estate). However, the extraterritorial effect of the Swiss bankrupt estate depends on whether and to what extent the foreign state where the assets are located recognises the Swiss bankruptcy decree. Therefore, the inclusion of foreign assets in the Swiss bankrupt estate is only possible if the foreign authorities are obliged to recognise the Swiss bankruptcy decree (as is the case in Germany, for example).

If the debtor is domiciled abroad and part of his or her assets are located in Switzerland, the Private International Law

Act (PILA) has established basic rules for the recognition in Switzerland of foreign bankruptcy decrees or orders for a composition with creditors or similar proceedings. The revised PILA entered into force on 1 January 2019. The revised PILA increases international cooperation and simplifies enforcement of foreign bankruptcy orders in Switzerland. Based on the amended law, the foreign main proceeding can be recognised, provided that the following prerequisites are met:

- proper jurisdiction of the foreign court (debtor's country of residence or domicile or, for non-Swiss residents, centre of debtor's main interest (COMI));
- enforceability;
- observation of minimal due process standards; and
- no violation of Swiss public policy.

With the latest revision of the PILA, the former requirement of reciprocal recognition of bankruptcy orders has been relinquished. To receive recognition, the request must be brought before the court at the location of the assets in Switzerland. If successful, the recognition of the foreign decree subjects the debtor's assets in Switzerland to the consequences of Swiss law (the DCBA) in what is referred to as a 'mini-bankruptcy' proceeding. Such proceeding neither provides for a creditors' meeting nor a supervisory committee. The (Swiss) schedule of claims only includes secured creditors and unsecured privileged creditors domiciled in Switzerland. After distribution of the proceeds according to the (Swiss) schedule of claims, any balance will be remitted to the foreign bankrupt estate or to those creditors who are entitled to it. However, such balance will only be remitted after recognition of the foreign schedule of claims by the Swiss court. The Swiss court will examine whether the ordinary (ie, unsecured and not privileged) claims of Swiss creditors have been properly admitted in the foreign (main) proceeding. With certain restrictions, Swiss assets can thus be marshalled for the main foreign proceeding. No 'mini-bankruptcy' proceeding is required, if there are no secured creditors or unsecured privileged creditors domiciled in Switzerland involved and the Swiss domiciled creditors will be treated appropriately in the foreign bankruptcy proceeding. In this case, foreign bankruptcy administration may, in compliance with Swiss law, exercise all powers to which it is entitled under the law of the state in which the bankruptcy is opened; in particular, it may transfer assets abroad and conduct proceedings. These powers do not include the performance of sovereign acts, the use of coercive measures or the right to decide disputes.

Alternatively, if the debtor is domiciled abroad but runs a business operation in Switzerland, the 'branch bankruptcy' according to article 166(2) of the PILA and article 50 of the DCBA must be followed. The local and foreign creditors of the Swiss business operation (but only to the extent that these claims derive from operations of this branch office) can enforce their respective claims against the debtor's assets located in Switzerland, which can lead to a specific branch bankruptcy proceeding. However, the initiation of this branch proceeding is only feasible until the recognition of the foreign bankruptcy order against the foreign debtor in Switzerland.

Also, debtors domiciled abroad may elect special domicile in Switzerland for the performance of an obligation with the consequence that they become subject to Swiss enforcement for that obligation (DCBA, article 50(2)).

Another possibility is a freezing order according to article 271 of the DCBA. Such a freezing order, however, ceases to apply once the foreign bankruptcy administration or another bankruptcy creditor successfully requests the opening of a mini-bankruptcy proceeding.

In the case of an insolvency of a foreign bank with assets in Switzerland, the Financial Market Supervisory Authority (FINMA) has far-reaching authority to recognise the foreign decree and to possibly cooperate with the foreign administrator.

Law stated - 26 October 2020

UNCITRAL Model Law

Has the UNCITRAL Model Law on Cross-Border Insolvency been adopted or is it under consideration in your country?

The UNCITRAL Model Law has not been adopted by Switzerland but its development is closely observed by the Swiss legislator.

The latest revision of the PILA focuses on increased international cooperation and simplified enforcement of foreign bankruptcy orders in Switzerland. In particular, the former requirement of reciprocal recognition of bankruptcy orders has been relinquished and the concept of COMI (with certain limitations) has been introduced with regard to the recognition of foreign bankruptcy orders.

In the case of an insolvency of a foreign bank with assets in Switzerland, FINMA has far-reaching authority to recognise the foreign decree and to possibly cooperate with the foreign administrator.

Law stated - 26 October 2020

Foreign creditors

How are foreign creditors dealt with in liquidations and reorganisations?

In Swiss main proceedings, foreign creditors enjoy the same recognition as domestic creditors.

Law stated - 26 October 2020

Cross-border transfers of assets under administration

May assets be transferred from an administration in your country to an administration of the same company or another group company in another country?

Swiss statutory law does not provide a formal legal framework for groups of companies. Swiss law assumes each legal entity acts on its own. Basically, each company is obliged to protect and pursue its own interests independently from the interest of the controlling party. Therefore, insolvency proceedings are conducted separately. There is no pooling of assets and liabilities for a corporate group. Consequently, assets may not be transferred from an administration in Switzerland to an administration abroad. Assets located in Switzerland can, however, be marshalled by the foreign administrator, normally, pursuant to the Swiss mini-bankruptcy proceeding.

Law stated - 26 October 2020

COMI

What test is used in your jurisdiction to determine the COMI (centre of main interests) of a debtor company or group of companies? Is there a test for, or any experience with, determining the COMI of a corporate group of companies in your jurisdiction?

In Switzerland at this point in time, debt enforcement and bankruptcy proceedings can exclusively be initiated and take place at the registered seat of a debtor company as reflected in the commercial register. In contrast to the European Regulation on insolvency proceedings, which is based on the principle of COMI (EC 1346/2000, article 3), Swiss law focuses on the formal criterion of the registered seat according to the theory of incorporation. However, with the latest

revision of the PILA, the concept of COMI (with certain limitations) has been introduced with regard to the recognition of foreign bankruptcy orders.

Law stated - 26 October 2020

Cross-border cooperation

Does your country's system provide for recognition of foreign insolvency proceedings and for cooperation between domestic and foreign courts and domestic and foreign insolvency administrators in cross-border insolvencies and restructurings? Have courts in your country refused to recognise foreign proceedings or to cooperate with foreign courts and, if so, on what grounds?

The Swiss legal system provides for recognition of foreign insolvency proceedings, in particular pursuant to the rules of the 'mini-bankruptcy' proceeding (PILA, articles 166 to 175). The latest revision of the PILA focused on increasing international cooperation and simplified enforcement of foreign bankruptcy orders in Switzerland. The new law explicitly states that the authorities and official bodies may coordinate their actions with each other and with foreign authorities, if the proceedings have a certain connection. It remains to be seen how international coordination will be interpreted by the authorities and how far such coordination will go. In the course of a Swiss mini-bankruptcy (a secondary proceeding), so far, coordination is to a certain degree formalised. On an informal basis, certain exchange of information court-to-court may be arranged on a case-by-case basis. Once the insolvency proceeding is opened, the insolvency administrator will handle the proceeding. A Swiss administrator has to marshal the assets worldwide; his or her authority abroad will be determined by the law of the country concerned. On that level, pragmatic solutions are often sought.

Orders, decrees or judgments of foreign insolvency proceedings (eg, US Chapter 11 proceedings) concerning a foreign co-debtor have no direct effect on the Swiss obligor and may not be enforced by Swiss courts.

FINMA acts in court capacity with regard to institutions regulated under the Swiss Federal Banking Act. FINMA may recognise an insolvency order issued by the court of actual (instead of registered) domicile of the debtor. The Ordinance of FINMA on the Insolvency of Banks and Securities Dealers requires that actions taken shall be coordinated with foreign authorities.

Some historic international bankruptcy treaties that were entered into by certain (but not all) Swiss cantons also need to be consulted to see whether different rules of cross-border cooperation apply:

- Bankruptcy Treaty of 12 December 1825 and 13 May 1826 with the (former) Kingdom of Württemberg;
- Treaty with the (former) Kingdom of Bavaria of 11 May and 27 June 1834; and
- Treaty with the (former) Kingdom of Saxony of 4 and 18 February 1837.

Law stated - 26 October 2020

Cross-border insolvency protocols and joint court hearings

In cross-border cases, have the courts in your country entered into cross-border insolvency protocols or other arrangements to coordinate proceedings with courts in other countries? Have courts in your country communicated or held joint hearings with courts in other countries in cross-border cases? If so, with which other countries?

Cross-border protocols are increasingly used in international insolvency cases but are dealt with at the administrator's

level. Sweden was one of the first countries to adopt a cross-border protocol. A Swedish administrator was the first to conclude a cross-border protocol with a Swiss administrator.

Law stated - 26 October 2020

Winding-up of foreign companies

What is the extent of your courts' powers to order the winding-up of foreign companies doing business in your jurisdiction?

The courts' powers to order the winding-up of foreign companies doing business in Switzerland is limited to the following four scenarios:

- First, under the revised PILA a foreign bankruptcy order can be recognised by a Swiss court, which subjects the debtor's assets located in Switzerland to Swiss law, namely to the DCBA. This is referred to as the 'mini-bankruptcy' proceeding. After distribution of the proceeds according to the (Swiss) schedule of claims, any balance will be remitted to the foreign bankrupt estate or to entitled creditors. However, this balance will only be remitted after recognition of the foreign schedule of claims by the Swiss court. The Swiss court will examine whether the ordinary (ie, unsecured and not privileged) claims of Swiss creditors have been properly admitted in the foreign (main) proceeding. With certain restrictions, Swiss assets can thus be marshalled for the main foreign proceeding. No 'mini-bankruptcy' proceeding is required if there are no secured creditors or unsecured privileged creditors domiciled in Switzerland involved and the Swiss domiciled creditors will be treated appropriately in the foreign bankruptcy proceeding. In such a case, the foreign bankruptcy administration may, in compliance with Swiss law, exercise all powers to which it is entitled under the law of the state in which the bankruptcy is opened; in particular, it may transfer assets abroad and conduct proceedings. These powers do not include the performance of sovereign acts, the use of coercive measures or the right to decide disputes.
- Second, if a foreign company runs a business operation in Switzerland, the 'branch bankruptcy' pursuant to article 166(2) of the PILA and article 50 of the DCBA is to be followed. According to the majority view, branch offices are considered as business operations irrespective of their registration with the commercial register. The local and foreign creditors of the Swiss business operation (but only to the extent that such claims derive from operations of the branch office) can enforce their respective claims against the debtor's assets located in Switzerland. This can lead to a specific 'branch bankruptcy' bankruptcy proceeding, which is, however, only feasible until the recognition of the foreign bankruptcy order against the foreign company in Switzerland. Similarly, in case of defects in the organisation of the branch office, the courts may, as ultima ratio only, dissolve the branch office and order its liquidation pursuant to article 50 DCBA (Code of Obligations, article 731b).
- Third, foreign companies may elect special domicile in Switzerland for the performance of an obligation, which subjects them to Swiss debt enforcement for that obligation (DCBA, article 50(2)). A Swiss place of performance or forum selection generally does not establish this special domicile, except for the place of payment in case of a bill of exchange.
- Fourth, if foreign companies own assets located in Switzerland proceedings can be instituted where the latter are situated. This applies to assets securing claims (DCBA, article 51) or subject to a freezing order (DCBA, 52 and 271). Freezing orders, however, cease to apply once the foreign bankruptcy administration or another bankruptcy creditor successfully requests the opening of a 'mini bankruptcy' proceeding. In case of an insolvency of a foreign bank with assets in Switzerland, FINMA has far-reaching authority to recognise the foreign decree and to possibly cooperate with the foreign administration.

Law stated - 26 October 2020

UPDATE AND TRENDS

Trends and reforms

Are there any emerging trends or hot topics in the law of insolvency and restructuring? Is there any new or pending legislation affecting domestic bankruptcy procedures, international bankruptcy cooperation or recognition of foreign judgments and orders?

New legislation

Simplified recognition procedure under the Private International Law Act (PILA)

Since 1 January 2019, the revised provisions of PILA no longer require evidence of reciprocal recognition. In addition, proceedings opened in the state where the debtor has the centre of its main interests (COMI) may also be recognised. Furthermore, the Swiss secondary bankruptcy proceedings ('mini-bankruptcy' proceedings) only need to be conducted if there are creditors in need of protection in Switzerland.

Improved protection against unjustified debt enforcement proceedings

Since 1 January 2019, anyone against whom debt enforcement proceedings have been unjustifiably initiated can ensure that third parties are not informed about such proceedings, either through a request with the register or a court finding (Debt Collection and Bankruptcy Act (DCBA), articles 8a(3)(d), 73 and 85a).

Limitation period for avoidance action

As of 1 January 2020, the limitation period for avoidance action was increased to three years (DCBA, article 292).

There are numerous projects pending with the legislator.

- First, the legal and regulatory framework governing distributed ledger technology is being revised. With regard to bank insolvency, criteria are being developed to clearly distinguish between crypto assets and data belonging to the debtor (bankrupt estate) and those belonging to third parties (segregation).
- Second, the Banking Act and Ordinances are being revised to re-transfer competencies from the Financial Market Supervisory Authority (FINMA) to federal and state authorities. With regard to the restructuring of banks, debt equity swaps and reductions of receivables in particular, owner and creditor claims are to be regulated at the legislative level. Proceedings regarding the bankruptcy of unapproved societies are to be brought before the state bankruptcy office in DCBA proceedings.
- Third, several acts and ordinances are being revised to prevent abusive bankruptcies. The prohibition from carrying on an activity is to be enforced more effectively with the person concerned being deleted from the commercial register. For public law claims, creditors are to choose whether to pursue enforcement via garnishment or bankruptcy. Further, bankrupt companies are to be deleted from the commercial register only after two years.
- Fourth, negotiations have started to abolish historic cantonal treaties on bankruptcy with individual German principalities.
- Fifth, the corporation law is being revised and an amendment will most likely enter into force at the end of 2021 or the beginning of 2022. The most significant consequence regarding insolvency and restructuring law is the abolition of the corporation moratorium pursuant to 725a of the Code of Obligations. This tightening of the law is compensated as the board of directors does not have to notify the bankruptcy court immediately if the over-indebtedness may be remedied in a period of 90 days. Further, in contrast to the current law, the board of

directors must take action to ensure solvency in the event of impending illiquidity.

Law stated - 26 October 2020

Coronavirus

What emergency legislation, relief programmes and other initiatives specific to your practice area has your state implemented to address the pandemic? Have any existing government programmes, laws or regulations been amended to address these concerns?

On 18 March 2020, the Swiss Federal Council published an ordinance ordering a nationwide standstill of deadlines in debt-collection proceedings, which lasted until 19 April 2020. In practical terms, this standstill of deadlines meant that debt collection offices and courts did not take any action to collect debts; in particular, they did not serve any payment orders on debtors or declare a company bankrupt. However, among others, freezing orders against debtors could still be initiated. Even though the suspension of the deadlines applied to all Swiss companies, it did not release them from their duty to settle due invoices and their boards of directors to notify the judge in cases of over-indebtedness. Moreover, creditors were still able to initiate debt-collection proceedings against their debtors; however, the enforcement measures were stayed.

The Swiss Federal Council decided against an extension of this standstill of deadlines for debt collection proceedings. However, the Swiss Federal Council adopted the Covid-19 Ordinance Insolvency Law on 16 April 2020, which remained in force for six months and lapsed on 19 October 2020. The ordinance provided various relief measures for businesses in financial difficulties owing to the covid-19 crisis, such as the suspension of the notification duties of directors in cases of over-indebtedness, facilitated prerequisites for filing for composition proceedings and the extension of the temporary composition moratorium period up to six months (as opposed to four months).

Most significantly, the Covid-19 Ordinance Insolvency Law introduced the Covid-19 Moratorium with the objective of granting extra time to small and medium-sized companies to reorganise themselves and recover from the crisis. Companies that had their application for the Covid-19 Moratorium approved by a court were relieved from the obligation to settle pre-existing debts and creditors were not able to enforce such claims during the moratorium period of three months. Moreover, creditors were not allowed to request judicial freezing orders, and limitation and forfeiture periods of debts prior to the moratorium decision stood still. The Swiss Federal Council decided against an extension of the measures under the Covid-19 Ordinance Insolvency Law and repealed the ordinance in general. This decision was justified on the grounds that relief for debtors always entails a burden for creditors and thus for the entire economy.

For constitutional reasons, the Swiss parliament passed the Covid-19 Act in September 2020. This act democratically legitimises the emergency ordinances of March 2020. Section 9 of the Covid-19 Act allows the measures taken by the Swiss Federal Council regarding insolvency law to remain in force until 31 December 2021 and therefore provides legal certainty for companies in financial difficulties because of the coronavirus pandemic for the following year. The Covid-19 Act authorises the Swiss Federal Council to react dynamically to changes in the pandemic situation and take further action if necessary. Based on this legal framework, the Swiss Federal Council is enabled to reinstate the Covid-19 Ordinance Insolvency Law without delay if the economic situation requires such measures again.

Covid-19 loans

In addition to the above-mentioned emergency legislation, the Swiss Confederation guaranteed loans to small and medium-sized companies in order to easily bridge liquidity problems of such companies. Eligible companies can apply for these loans in an unbureaucratic way to their principle bank and receive the needed liquidity in rapid time.

Such loans under the guarantee programme must be booked by the borrower as normal liabilities (debt). They are not

subordinated to other claims. However, loans of up to 500,000 Swiss francs that are guaranteed by the Swiss Confederation are not considered debt when applying the balance sheet test.

This rule is intended to prevent companies from getting into a capital loss or over-indebtedness situation as a result of financing under the guarantee programme by the Swiss Confederation. However, this relief is valid only until 31 March 2022. After that date, such loans will have to be considered debt again when applying the balance sheet test.

Loans exceeding 500,000 Swiss francs under the guarantee programme are considered normal debt with respect to article 725 of the Swiss Code of Obligations and can therefore result in a capital loss or even over-indebtedness situation of the company.

Covid-19 relief in a nutshell

The exceptions and reliefs still in force ordered by the Swiss Federal Council can be summarised as follows:

- any loan of up to 500,000 Swiss francs guaranteed by the Swiss Confederation in accordance with the federal guarantee programme shall not be considered a liability in the company's balance sheet. Therefore, such a loan is not taken into account in the over-indebtedness test (this relief is valid until 31 March 2022); and
- as compensation for the non-extension of the Covid-19 Ordinance Insolvency Law, the Swiss Federal Court decided to set some insolvency law-related provisions of the planned corporate law revision already in force in October 2020. As a result, under the amended article 293a DCBA, the maximum duration of the temporary debt moratorium can now be extended up to eight months. By doing so, the Swiss government intends to facilitate restructuring proceedings by alleviating the pressure of reaching an agreement between creditors and the debtor in a short period of time. However, time will tell if four additional months will have a significant impact on the chances of a successful restructuring of companies in financial distress owing to the covid-19-crisis.

Law stated - 26 October 2020