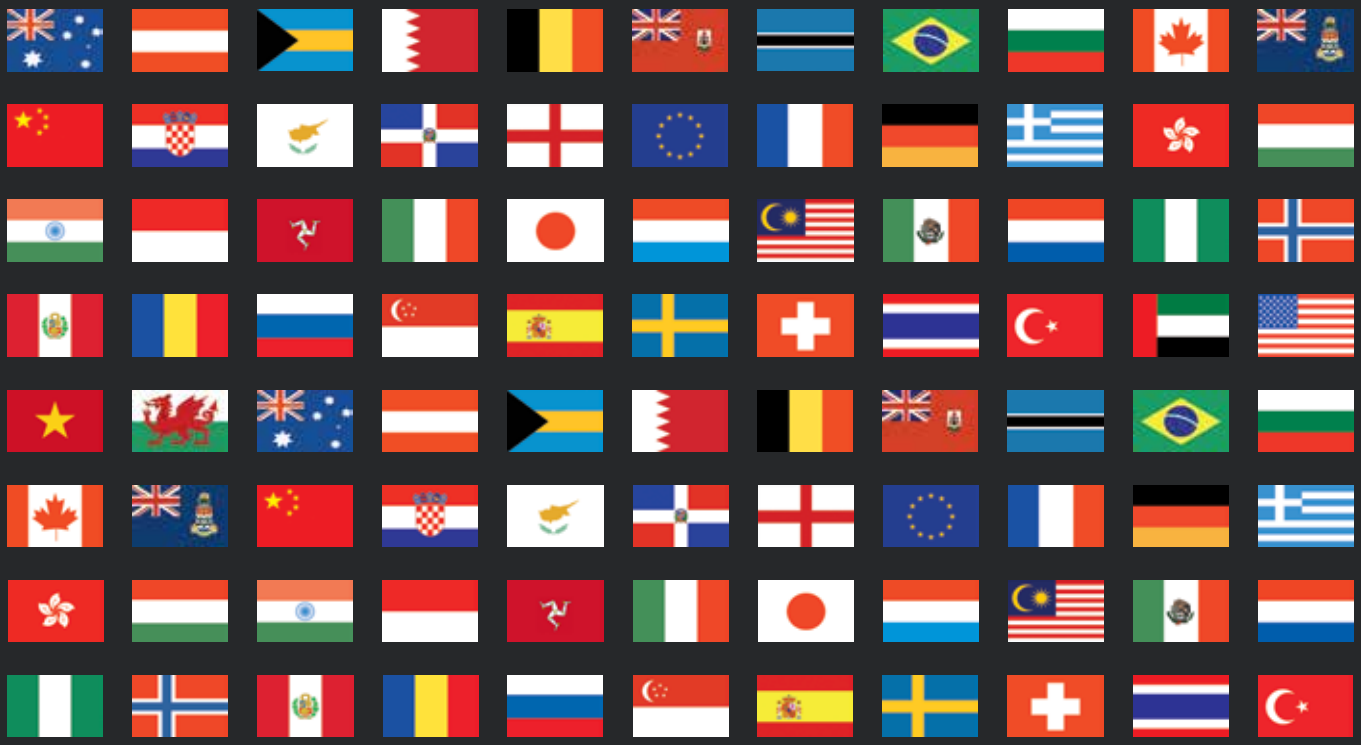
Restructuring & Insolvency

Contributing editor
Bruce Leonard



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GETTING THE DEAL THROUGH

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Restructuring & Insolvency 2017

Contributing editor

Bruce Leonard

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CONTENTS

Global overview 7
Richard Tett
Freshfields Bruckhaus Deringer
Alan W Kornberg
Paul, Weiss, Rifkind, Wharton & Garrison LLP

Australia 9
Dominic Emmett and Sabrina Ng
Gilbert + Tobin

Austria 22
Friedrich Jergitsch and Carmen Redmann
Freshfields Bruckhaus Deringer

Bahamas 33
Leif G Farquharson and Michelle M Pindling-Sands
Graham Thompson

Bahrain 42
Harnek S Shoker
Freshfields Bruckhaus Deringer

Belgium 50
Geert Verhoeven and Satya Staes Polet
Freshfields Bruckhaus Deringer

Bermuda 62
Andrew A Martin
MJM Limited

Botswana 68
Kwadwo Osei-Ofei
Osei-Ofei Swabi & Co

Brazil 73
Luciana Faria Nogueira and Gabriela Martines Gonçalves
TozziniFreire Advogados

Bulgaria 82
Ina Bankovska and Tsvetelina Stoilova
Kinkin & Partners

Canada 91
Bruce Leonard
Chair, The International Insolvency Institute
Craig Mills
Miller Thomson LLP

Cayman Islands 101
Andrew Bolton and Andrew Jackson
Appleby

China 110
Frank Li, Allan Chen and Rebecca Lu
Fangda Partners

Croatia 120
Pavo Novokmet and Andrej Skljarov
Žurić i Partneri

Cyprus 129
Lia Iordanou Theodoulou, Angeliki Epaminonda and Stylianos Trillides
Patrikios Pavlou & Associates LLC

Dominican Republic 138
Mary Fernández, Jaime Senior and Melba Alcántara
Headrick

England & Wales 149
Catherine Balmond and Katharina Crinson
Freshfields Bruckhaus Deringer

European Union 166
Rachel Seeley and Katharina Crinson
Freshfields Bruckhaus Deringer

France 180
Fabrice Grillo and Alexandra Szekely
Freshfields Bruckhaus Deringer

Germany 193
Franz Aleth and Nils Derksen
Freshfields Bruckhaus Deringer

Greece 209
Stathis Potamitis and Eleana Nounou
PotamitisVekris

Hong Kong 221
Georgia Dawson and Look Chan Ho
Freshfields Bruckhaus Deringer

Hungary 232
Zoltán Varga and Balázs Baranyai
Nagy és Trócsányi Law Firm

India 240
Nihar Mody and Ankit Majmudar
Platinum Partners

Indonesia 249
Herry N Kurniawan, Theodoor Bakker and Ridzky Firmansyah Amin
Ali Budiardjo, Nugroho, Reksodiputro

Isle of Man 257
Stephen Dougherty and Tara Cubbon
DQ Advocates

Italy 264
Raffaele Lener and Giovanna Rosato
Freshfields Bruckhaus Deringer

Japan 282
Kazuki Okada, Shinsuke Kobayashi and Daisuke Fukushi
Freshfields Bruckhaus Deringer

Luxembourg 297
Christel Dumont
Dentons Luxembourg

Malaysia 305
Lee Shih and Nathalie Ker
Skrine

Mexico 312
Darío U Oscós Coria and Darío A Oscós Rueda
Oscós Abogados

Netherlands 325
Michael Broeders and Rodolfo van Vlooten
Freshfields Bruckhaus Deringer

Nigeria 341
Emmanuel Ekpenyong and Cinderella Agunanna
Fred-young & Evans LP

Norway 348
Stine D Snertingdalen and Ingrid E S Tronshaug
Kvale Advokatfirma DA

Peru 356
Rafael Corzo de la Colina, Renzo Agurto Isla and Lisbeth Benavides Kolind-Hansen
Miranda & Amado Abogados

Romania 365
Bogdan Bibicu
Kinstellar

Russia 372
Dmitry Surikov, Maria Zaitseva and Svetlana Tolstoukhova
Freshfields Bruckhaus Deringer

Singapore 386
Sean Yu Chou, Manoj Pillay Sandrasegara and Mark Choy
WongPartnership LLP

Spain 395
Silvia Angós
Freshfields Bruckhaus Deringer

Sweden 406
Mathias Winge and Henrik Davidsson
Setterwalls Advokatbyrå

Switzerland 415
Christoph Stäubli*
Walder Wyss Ltd

Thailand 429
Suntus Kirdsinsap, Natthida Pranutnorapal, Piyapa Siriveerapoj and Patinya Sriwatcharodom
Weerawong, Chinnavat & Peangpanor Ltd

Turkey 438
Çağlar Kaçar
Kaçar, Attorneys at Law

United Arab Emirates 448
Pervez Akhtar and William Coleman
Freshfields Bruckhaus Deringer

United States 458
Alan W Kornberg and Claudia R Tobler
Paul, Weiss, Rifkind, Wharton & Garrison LLP

Vietnam 470
Thanh Tien Bui
Freshfields Bruckhaus Deringer

Quick reference tables 480

Switzerland

Christoph Stäubli*
Walder Wyss Ltd

Legislation

1 What legislation is applicable to insolvencies and reorganisations? What criteria are applied in your country to determine if a debtor is insolvent?

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. The respective amendments are reflected herein. The DCBA is supplemented by other federal statutes, including:

- the Federal Civil Code of 10 December 1907, amended on 25 September 2015;
- the Federal Code of Obligations of 30 March 1911, amended on 20 June 2014;
- the Private International Law Act of 18 December 1987 (PILA), amended on 19 June 2015;
- the Federal Act Regarding Merger, Demerger, Conversion and Transfer of Assets and Liabilities of 3 October 2003 (the Merger Act), amended on 23 December 2011;
- the Swiss Federal Banking Act of 8 November 1934 (SFBA), amended on 19 June 2015, the Ordinance of the Swiss Financial Market Supervisory Authority (FINMA) on the Insolvency of Banks and Securities Dealers of 30 August 2012 (BIO-FINMA), amended on 3 December 2015;
- Swiss Stock Exchange and Securities Trading Acts of 24 March 1995 (SESTA), amended on 19 June 2015, in particular article 36a;
- the Ordinance of FINMA on the Insolvency of Collective Investment Schemes of 6 December 2012;
- the Ordinance of FINMA on the Insolvency of Insurance Companies of 17 October 2012;
- the Collective Investment Schemes Act of 23 June 2006 (CISA), amended on 25 September 2015;
- the Penal Code of 21 December 1937, amended on 20 June 2014, in particular the prescriptions regarding crimes and offences in debt enforcement and bankruptcy, fraudulent bankruptcy and pledge fraud;
- the Federal Insurance Contract Act of 2 April 1908, amended on 19 December 2008;
- the Federal Act on the Mandatory Unemployment Insurance and the Indemnity for Insolvency of 25 June 1982, amended on 20 June 2014;
- historic bankruptcy treaties of the 19th 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 on Foreclosure of Real Properties of 23 April 1920, 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 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;
- the Swiss Code of Civil Procedure (CPC), which replaced the former 26 cantonal procedure codes, of 19 December 2008, amended on 19 June 2016; and
- the Federal Act on Data Protection of 19 June 1992, amended on 1 January 2014.

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 means the liabilities of the company are not covered 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 proceeding.

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 dealt with by the Swiss Financial Market Supervisory Authority (FINMA) according to the special insolvency rules, as applicable. The respective rules are not discussed further herein.

Courts

2 What courts are involved in the insolvency process? Are there restrictions on the matters that the courts may deal with?

Debt enforcement against legal entities takes place at their registered seat as reflected in the commercial register. The bankruptcy court in the district where the enforcement proceeding was begun is competent to adjudicate the opening of the bankruptcy in a summary proceeding. Bankruptcy proceedings in Switzerland can be carried out at one place only. Following the principle of 'unity of bankruptcy proceedings' they are deemed opened at the place where the debtor was first declared bankrupt. A change of domicile of a debtor has no effect on the venue once the bankruptcy warning has been served.

As the case is automatically transferred to the bankruptcy office after the declaration of bankruptcy by the court, the involvement of the bankruptcy court is limited. The bankruptcy court may ex officio transfer a case to the composition judge for examination of a possible composition agreement and will stay in charge if a corporate moratorium proceeding pursuant to article 725a of the Code of Obligations is applied for.

FINMA has judicial authority for institutions qualified under the SFBA and BIO-FINMA.

Excluded entities and excluded assets

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

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.

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 all events 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 that have a monetary value form part of the insolvent estate. Assets that qualify as purely personal assets and that do not qualify for seizure are exempt. In the case of an individual debtor this also applies to benefits under a pension plan which are not yet due. Third-party assets in possession of the debtor may be segregated for the benefit of such third party. Under the SFBA and BIO-FINMA specific rules apply to protect bank customer deposits and claims.

Public enterprises

4 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 by the DCBA (ie, irrespective of whether an enterprise is owned by the government or not the same rules apply. 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 governed-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 are 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. Such entities are in particular 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.

Protection for large financial institutions

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

Following the rescue of UBS in 2008, different legislative projects were started in order 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 are obliged to increase their equity by 2018 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 Liquidity Ordinance (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. The amendments came into force on 1 January 2015.

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 has the option, to ensure the continuation of individual core banking services, to convert debt capital into equity capital and to prescribe other corporate actions.

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 presenting 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 Banking Act (SFBA) and the revised provisions of the Capital Adequacy Ordinance, came 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.

Secured lending and credit (immoveables)

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

A debtor may provide its creditors with a variety of forms of security and quasi-security interests. With regard to charges on immoveable 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 Federal Civil Code, which became effective on 1 January 2012 as an alternative to the present real estate bond, a paperless register bond has been established. The paperless register bond comes into existence with an entry in the land register.

Secured lending and credit (moveables)

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

As regards moveable 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 moveable 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 moveables. 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, moveable goods can also be pledged. Delivery of possession of the specific moveables 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 moveable 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 (PILA, 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.

Unsecured credit

8 What remedies are available to unsecured creditors? Are the processes difficult or time-consuming? Are pre-judgment attachments available? Do any special procedures apply to foreign creditors?

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

- institute an ordinary legal action (in the event of liquid 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 Swiss Civil Procedure Code (CPC), the setting aside of the 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, since 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 of continuation within 30 days of a seizure will participate in the proceeds realised from the seized assets). A new debt collection proceeding must be started if the proceeding is not continued within one year from service of the payment order, not counting the period used for the setting aside of the objection.

Whereas the purpose of the bankruptcy proceedings is to realise all of the assets of the debtor to satisfy out of the proceeds the claims of all of the 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 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 for both local as well as foreign creditors; they are subject to specific prerequisites. Such a freezing order has to be applied for by the court of the place where a debt collection against a debtor can be initiated or at the place the asset is located. It will be granted upon demonstrating prima facie evidence of a liquid and due but unsecured money 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 now 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 belonging to debtors resident abroad. Unless other grounds of attachments apply, respective claims must be based on an enforceable court decision or arbitral award or a debt acknowledgment or must at least be sufficiently connected with 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 now recognised as the protection measure to be provided for under article 47 paragraph 2 Lugano Convention. The revised law also has 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, thus, frustrate the result of the first attachment.

Voluntary liquidations

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

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

Upon their own motion, bankruptcy proceedings may be opened against companies limited by shares, partnerships limited by shares, partnerships with limited liability and cooperatives without prior enforcement proceedings in the instances provided for by the Code of Obligations (articles 725a, 764(2), 817 and 903). The application is based on a demonstration of manifest (ie, not just temporary) insolvency and is to be supported by a shareholders' resolution and a recently established balance sheet.

As the voluntary liquidation leads to a bankruptcy proceeding, its effects do not differ from those in an involuntary liquidation as described below. Debtors that are not otherwise subject to bankruptcy proceedings may request its application upon declaration of insolvency.

Involuntary liquidations

10 What are the requirements for creditors placing a debtor into involuntary liquidation and what are the effects?

To place a debtor in an involuntary 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 the 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 device the drawing up of an inventory of all the debtor's assets. If the claim is not satisfied 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 its 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 establishes an inventory of all assets and takes protective measures;
- other enforcement proceedings directed against the debtor are automatically suspended and, in general, pending litigations will be suspended as well;
- all obligations of the debtor become due against the bankrupt estate 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 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.

Voluntary reorganisations

11 What are the requirements for a debtor commencing a formal financial 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 the 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 newly amended DCBA, the Swiss composition procedure is now designed to rehabilitate the company under the auspices of the court or to reorganise unsecured and unprivileged claims.

Any debtor, whether subject to a bankruptcy proceeding or not, seeking to reach 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 current and future financial status of the debtor 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 is unlikely that rehabilitation or the conclusion of a composition agreement with creditors will be successful, 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 all third-party interests remain protected, the court may abstain from making a public notice of the temporary debt moratorium (in which case the appointment of a commissioner is mandatory). 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 out in articles 298 to 302 and 304 of the DCBA. The actual powers of the commissioner will be determined case by case 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 creditor 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, which will act as a supervisory body for the commissioners. The creditors' committee should be composed of representatives of the various classes of creditor. Once established, the creditors' committee will decide on the sale or charges of assets.

The effects of a provisional and temporary debt moratorium are the suspension of all 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 asset). 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 become subject to the composition agreement.

Involuntary reorganisations

12 What are the requirements for creditors commencing an involuntary reorganisation and what are the effects?

The possibility for creditors to commence involuntary reorganisation in Switzerland was only 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 the creditor's right to request the opening of bankruptcy proceedings according 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 creditor. 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.

Mandatory commencement of insolvency proceedings

13 Are companies required to commence insolvency proceedings in particular circumstances? If proceedings are not commenced, what liabilities can result? What are the consequences if a company carries on business while insolvent?

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

Over-indebtedness means the liabilities of the company are not covered whether the assets are appraised at ongoing business values or at liquidation values. To maintain going concern value a sound cash-flow plan securing the operation for a reasonable period will be 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 the bankruptcy ex officio. Despite over-indebtedness, the judge may refrain from or postpone adjudicating the bankruptcy in two cases:

- if there is a possibility of a financial reorganisation, in which case he will take appropriate measures to preserve the value of the assets; or
- if 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 the liquidation of the bank. In these situations, or if the bank is threatened by insolvency, FINMA has authority under the SFBA, which was revised in several steps most recently on 22 March 2013 to order far-reaching protective measures or the restructuring of the bank. The appointment of an independent expert investigator by FINMA so as to examine certain matters within the bank or to monitor the implementation of measures imposed by FINMA are among those protective measures. Also, a restructuring administrator can be appointed by FINMA to establish a restructuring plan. In the case of liquidation, FINMA appoints a liquidator.

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 prescriptions set out in article 725 of the Code of Obligations is being considered. The prescriptions 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 carried out by the company while insolvent may be subject of avoidance actions (DCBA, article 287) in order to refer the assets in question to the estate (see question 39).

Doing business in reorganisations

14 Under what conditions can the debtor carry on business during a reorganisation? What conditions apply to the use or sale of the assets of the business? 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? What powers can directors and officers exercise after insolvency 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 itself declare bankrupt. 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 consent of the commissioner. Contracts entered into during the moratorium with the approval of the commissioner 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.

Stays of proceedings and moratoria

15 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, there are two effects of the adjudication of bankruptcy with respect to enforcement and legal proceedings. As long as enforcement proceedings against the debtor are affected, all those proceedings cease and new enforcement proceedings relating to claims that arose before the opening of bankruptcy proceedings are not possible (except the enforcement of pledges given by third parties). Those enforcement proceedings for claims that arose after the declaration of bankruptcy can be continued during the bankruptcy proceedings by seizure or by realisation of pledges.

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 immoveable property, initiate the procedure for the realisation of security, but the charge will not actually be realised. Except for urgent cases, pending civil and administrative proceedings are stayed.

Post-filing credit

16 May a debtor in a liquidation or reorganisation obtain secured or unsecured loans or credit? What priority is 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 a loan or a credit, which may touch the free assets of the bankrupt estate.

Post-filing credit in reorganisation
Any debt contracted during the debt moratorium with the approval of the commissioner constitutes a debt against the assets in a composition with assignment of assets or in a subsequent bankruptcy proceeding and is, therefore, privileged.

Set-off and netting

17 To what extent are creditors able to 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 became a creditor only after the opening of the bankruptcy proceeding (except if such a debtor only fulfils an obligation which 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 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).

Sale of assets

18 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? In practice, does your system allow for 'stalking horse' bids in sale procedures and does your system permit credit bidding in sales?

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 pursue business instead of the debtor, which effectively puts the debtor under guardianship. These statutory restrictions will 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 now refers to the possibility of establishing a rescue company the shares of which can be used, with approval of the court, to satisfy the 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 purposes of their liquidation. As soon as the bankruptcy judgment is published, any unilateral or bilateral transactions concerning assets belonging to the bankrupt estate entered into by the debtor, and not the estate, are void as against its creditors. However, the payment of a promissory note to a bona fide creditor will not be regarded as void, as well as 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.

Liabilities
In an acquisition of immoveable 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 former owner. Moveables, instead, will be transferred free and clear of claims. The amended DCBA makes clear 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 the employees' related liability by the acquirer, but rather such liabilities will be assumed only upon explicit consent by the acquirer.

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

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

Intellectual property assets in insolvencies

19 May an IP licensor or owner terminate the debtor's right to use it when an insolvency case is opened? To what extent may an insolvency administrator continue to use IP rights granted under an agreement with the debtor? May an insolvency representative terminate a debtor's agreement with a licensor or owner and continue to use the IP for the benefit of the estate?

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 expiration 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 is not or only partly fulfilled. So, if considered beneficial for the estate, the bankruptcy administrator will elect 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 the continued performance, and if not provided, terminate the agreement.

It is controversial how the monetary and the non-monetary claims resulting from the licence agreement (which 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 be overriding. 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 consent of the commissioner if the continuation of the contractual relationship would impede the rehabilitation of the debtor. Compensation for such early termination must be granted but the respective damages claim will be treated as an ordinary creditor's claim.

Personal data in insolvencies

20 Where personal information or customer data collected by an insolvent company is valuable to its reorganisation, are there any restrictions in your country on the use of that information in the insolvency 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 Swiss Federal Act on Data Protection (the DPA). The DPA allows, under certain conditions, the sale of personal information or customer data to a third party.

Rejection and disclaimer of contracts in reorganisations

21 Can a debtor undergoing a 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 now allowed to cancel onerous long-term contracts, if their continuation would frustrate the intended rehabilitation. Such early termination requires the consent of the commissioner. Compensation for early termination may be granted but respective claims will be treated as ordinary creditor claim. 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 a mandate will terminate with the bankruptcy or involuntary liquidation.

While pecuniary claims become due, obligations that are not of pecuniary nature will be translated into a pecuniary claim. Special rules apply for 'synallagmatic contracts' (meaning contracts that involve contractual performances by both parties) that had not or only partially been fulfilled at the time of the opening of the insolvency proceeding. Pursuant to article 211 of the DCBA, the administrator in a bankruptcy 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 a contract. The law does not set forth within what time such decision should be made. As consequence, this discretion to 'cherry pick' can create legal uncertainty for the involved party. Contractual clauses to avoid the uncertainty may be considered. As a matter of law such discretion is not warranted in cases of contracts that need do be performed at a specific date as well as for financial future, swap and option transactions if the value of the contractual performance can be determined by a market price. If the administrator chooses to continue with the contract, the adversary party may request security for its performance, and decline the performance if no sufficient security is provided.

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

Arbitration processes in insolvency cases

22 How frequently is arbitration used in insolvency proceedings? Are there certain types of insolvency disputes that may not be arbitrated? Will the court allow arbitration proceedings to continue after an insolvency case is opened? Can disputes that arise in an insolvency case after the case is opened be arbitrated with the consent of the parties? Can the court direct the parties to such disputes to submit them to arbitration?

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 subject of continued 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 the arbitration is in Switzerland but at least one party is domiciled abroad) a matter is arbitrable if the dispute involves 'an economic interest' (PILA, article 177(1)), in Swiss domestic arbitration the test is whether the parties are free to dispose of the rights of the dispute (CPC, article 354). In the first case, the concept is of a liberal nature but is restricted by public policy, while in cases of domestic arbitration the limitations are posed 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 argued before an arbitral tribunal. This especially relates to the actions which 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). Since an arbitration process can only replace the 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 decided by the circumstances whether the trustee or receiver in a bankruptcy takes the role of a defendant or rather acts as plaintiff. It is still questioned 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 meanwhile 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 agreements for arbitration 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 meeting of the creditors (except for urgent matters). In Swiss international arbitration the relevant procedural rules adopted for the proceeding will be guiding. It is suggested that arbitration proceedings in any event should allow for sufficient time for the trustee (or the respective creditors) to familiarise itself with the claim.

Successful reorganisations

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

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 some of the regulated businesses such as banks. Such a rehabilitation procedure is generally referred to as composition proceeding. Its most significant feature is that it is possible for the debtor, with the approval of the court, to force its creditors to conclude a settlement agreement and make it binding also on the dissenting creditors. The proceeding is designed to protect the debtor from enforcement proceedings (except 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 business of the debtor 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 such debt moratorium, which may not exceed four months, no public notification may occur. 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 creditors representing two-thirds of the qualifying claims, or of one-quarter of the creditors with at least three-quarters of the total amount of the qualifying claims.

It is essential to realise that the composition agreement is designed to affect the non-secured (including the portion of secured claims that remains uncovered) and non-priority creditors only and thus it does not encompass a full reorganisation plan involving all creditors' claims. The types of composition agreements fall into the following categories.

Moratorium

The debtor is seeking a deferment of maturity of its obligation but promises to satisfy all creditors in full. This form of agreement could lead to a forfeiture of interest payment as, with the granting of the moratorium, interest ceases to accrue for all unsecured claims, unless the proposal specifically stipulates a claim on interest.

Dividend agreement

The debtor requests to be discharged from a certain portion of its unsecured and non-priority liabilities by proposing to pay to creditors a specific percentage of their claim according to a payment schedule. The proposal must be appropriate in view of the debtor's means, which are established during the proceeding. It is also now required that the owners or shareholder provide an adequate contribution as determined by the court.

In both the moratorium agreement and the dividend agreement, all of the prioritised claims and of the claims resulting during the moratorium with the approval of the commissioner, must be secured, but for third-class claims a secured completion is no longer required.

Composition agreement in liquidation proceedings

This composition agreement leads to an assignment to the creditors of a part or all of the debtor's assets for purposes of their realisation. It is conducted by a special liquidation proceeding that is conceived as a mild version of a liquidation and should allow for a better result for the creditors than with a bankruptcy. As in the case of bankruptcy, the debtor remains the legal owner of the assets until they are realised and their proceeds can ultimately be distributed to the creditors in accordance with the creditors' claim schedule. The creditors act via the appointed liquidator and the elected creditors' committee and they obtain the right to dispose of the debtor's assets.

Such a right can also be granted to a third party for some or all of the assets. A consequence of a composition by assignment of assets is that the creditors waive that part of their claim that will not be satisfied by the proceeds received from the realisation of the assets. No certificate of shortfall will be issued. In addition to the general provisions governing the composition agreement, a number of special provisions apply.

The amended DCBA now clearly stipulates that creditors' claims may be satisfied by issuing shares in a newly formed rescue company or in the debtor company.

Composition agreement in bankruptcy proceedings

As the debtor remains the legal owner of the assets, it can still make a proposal for a composition agreement once the bankruptcy proceeding has begun. The bankruptcy administrator will then assume the tasks of the commissioner and evaluate the proposal. Until the decision by the court to adopt or reject the proposed composition agreement, the liquidation of the debtor's assets will be suspended and if the agreement is confirmed, the court will revoke the bankruptcy.

Procedural phases of a composition

Typically, any composition proceeding is divided into four phases:

- approval procedure, beginning with the filing for a moratorium or initiation of the composition proceeding and ending with the granting of the moratorium by the court;
- moratorium proceeding, dealing with the effects of the moratorium and ending with the approval by the creditors of the proposed composition agreement;
- confirmation proceeding, focusing on the requirements and the procedure to have the composition agreement approved by the court; and
- completion proceeding, dealing with the fulfilment of the composition agreement or its respective supervision. In the case of an assignment of the assets, this phase involves the actual liquidation of assets and distribution of proceeds to the creditors.

Releases in favour of third parties

By operation of law, third parties and joint obligors will not be released because of the composition agreement with the debtor. To preserve such rights against third parties, certain procedural requirements must be observed, however (article 303 of the DCBA). The result of a dividend agreement (as opposed to a composition agreement with liquidation or bankruptcy) is that the creditors are prevented from pursuing officers' and directors' or other third-party liability claims, but such right would remain with the damaged debtor company. In the event of liquidation the right to pursue remedy for officers' and directors' liability (including claims against advisers or lenders when they have acted as factual corporate body) will be with the liquidator or bankruptcy administration. If the estate decides not to pursue such claims, the creditors are entitled to have this right assigned to them.

Expedited reorganisations

24 Do procedures exist for expedited reorganisations?

Under Swiss law, no specific procedures exist for expedited reorganisations. The moratorium period and the proceeding can be considerably reduced on the basis of 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 now favours a pure debt moratorium for a period of up to four months to rehabilitate financially distressed companies.

Unsuccessful reorganisations

25 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 the reorganisation and is in a position to preclude the double 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 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 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.

Insolvency processes

26 During an insolvency case, what notices are given to creditors? What meetings are held? How are meetings 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 insolvency administrators' reporting obligations? May creditors pursue the estate's remedies against third parties?

The opening of the bankruptcy 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 decides 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. Such report has to be pre-approved by the creditors' committee. In addition, a conclusive final report must be prepared and be approved by the court.

During the 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. For the role of a creditors' committee usually appointed in such proceeding see question 28.

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. For the distribution of the fruits of such remedies see question 27.

Swiss law provides that a creditor agreeing to a composition agreement shall inform co-debtors and guarantors about place and date of the creditors' meeting and shall offer to assign them the creditors' claim against cash payment. If a creditor refrains from doing so aforementioned third parties are released of their liabilities. Furthermore, on a contractual basis a condition may be included in the composition agreement according to which the composition agreement is only concluded if certain third parties are also released from their liabilities.

Enforcement of estate's rights

27 If the insolvency administrator 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?

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.

Creditor representation

28 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 DCBA the legislator has now introduced the opportunity of appointing a creditors' committee during the definitive debt moratorium. The commissioner must 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 the interests of all creditors are preserved. The committee has no executive power but its decisions have to be implemented by the bankruptcy administration. 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 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 is subject to court approval. Advisers may be retained but it is uncertain whether the (modest) rates of the tariff apply.

Insolvency of corporate groups

29 In insolvency 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? May assets be transferred from an administration in your country to an administration in another country?

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. So 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 pursuant to the Swiss mini-bankruptcy proceeding (see question 47).

Appeals

30 What are the rights of appeal from court orders made in an insolvency proceeding? Does an appellant have an automatic right of appeal or must it obtain permission to appeal? Is there a requirement to post security to proceed with an appeal and, if so, how is the amount determined?

The main decision-makers involved in the enforcement of Swiss insolvency proceedings are the bankruptcy administrator, the creditors' meeting and/or its elected administrator/receiver as well as the creditors' committee, if appointed. In essence, their decisions are subject to a specific complaint before the court. Basically, court decisions in insolvency proceedings are restricted to specific procedural stages, This includes the opening, revocation, suspension and termination of a bankruptcy proceeding. Moreover, in the course of composition with creditors, the composition agreement is subject to approval by the composition court.

Especially the court's decision on the opening of a bankruptcy proceeding and the confirmation of a composition agreement are of considerable legal and practical relevance. In both instances an appeal can be filed to challenge the respective court's decisions.

Against a decision on the opening of a bankruptcy proceeding (granting or rejection of the request to open such proceeding), an objection according to Swiss Civil Procedure Code (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 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 carrying out 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 day 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 did not agree to the composition agreement and that the appellant took part in the hearings before the composition court stating its objection to the composition agreement. Again, a further appeal to the Swiss Federal Tribunal is possible.

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

The requirement to post a security (advance payment) to proceed with an appeal from a court order in an insolvency proceeding is governed by Federal Law (CPC/DCBA). Within such guidelines the court has certain discretionary authority. The provision to post security has become standard procedure.

Claims

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

An appeal by a creditor is possible 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 to waive 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 if the transferee acquired a claim at a discount, the transferee may enforce 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 the liquidation proceedings provided the cause of the claim is established prior to bankruptcy or 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 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 which 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 which had accrued by the date of the opening of bankruptcy proceedings.

Modifying creditors' rights

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

The DCBA (and the CO in 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).

Priority claims

33 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 not more than the six months prior to the opening of bankruptcy proceedings, but not exceeding (currently) 126,000 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.

It should be noted that taxes are not prioritised; the privilege for VAT claims was abolished as of 1 January 2014.

Employment-related liabilities in restructurings

34 What employee claims arise where employees are terminated during a restructuring or liquidation? What are the procedures for termination?

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 now 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.

Pension claims

35 What remedies exist for pension-related claims against employers in insolvency 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 occupational pension scheme and 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).

Environmental problems and liabilities

36 In insolvency proceedings 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, 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; see question 41), there is no mechanism that directly shifts liability to a secured or unsecured creditor or any other third party.

Liabilities that survive insolvency proceedings

37 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.

Distributions

38 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 initiate new proceedings against the debtor subsequently.

Transactions that may be annulled

39 What transactions can be annulled or set aside in liquidations and reorganisations and what are the grounds? What is the result of a transaction being annulled?

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 money claim other than by usual methods of payment, and the payment of claims which 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. See question 42 for special procedural rules that 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.

Proceedings to annul transactions

40 Does your country use the concept of a 'suspect period' in determining whether to annul a transaction by an insolvent debtor? May voidable transactions be attacked by creditors or only by a liquidator or trustee? May they be attacked in a reorganisation or a suspension of payments or only in a liquidation?

The suspect period for gifts and equivalent transactions and for qualified transactions concluded during the status of over-indebtedness starts one year before the declaration of bankruptcy and five years in the case of fraudulent conveyance (the suspect period does not count preceding term of a moratorium or time used for a preceding debt collection).

Voidable transactions can first be attacked by the bankruptcy administrator or liquidator, respectively. However, if the creditors decide that the estate should not pursue the claim, each individual creditor (secured or unsecured) can request that the right to pursue the claim be assigned to him. Where there are several assignees, they have to proceed jointly. If successful, the assignee (and the co-plaintiffs) will enjoy the benefit but they also have to bear the litigation costs if the case is lost. The prescription period to bring legal action is two years from the date of bankruptcy or confirmation of the composition agreement with assignment of assets, as applicable.

Because the avoidance action is considered an enforcement remedy for which only the local courts have jurisdiction, the recognition and enforcement of a respective judgment will not fall within the scope of the Lugano Convention.

Directors and officers

41 Are corporate officers and directors liable for their corporation's obligations? Are they liable for pre-bankruptcy actions by their companies? 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 in the context of a violation of their duties of responsibilities. This also applies to government claims, in particular personal exposure can result in the context of non-payment of social security or withholding tax.

Article 754 of the Code of Obligations provides that any member of the board of directors or any person entrusted with management or liquidation is liable for any damage caused to the corporation, its shareholders or creditors where he or she has intentionally or negligently acted in breach of his duties. This responsibility does not apply only to the formally appointed representatives but also to what are termed 'factual corporate bodies' (all those persons who in reality decisively influence the corporate decision-making process). The principles of fiduciary duties are specified in a number of statutory provisions that aim at the protection of the shareholders as well as of the creditors' interests. Further specifications are laid down in the company's by-laws and organisational rules.

Of particular interest is the provision of article 725 of the Code of Obligations (see question 13). Lastly, the Swiss Penal Code sanctions reckless bankruptcy or mismanagement.

Groups of companies

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

Neither Swiss corporate or 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 the 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 the legal independence of a company. In such abusive, rare cases a court may decide to order a distribution of group company assets without regard to the assets of the individual corporate entities involved.

Insider claims

43 Are there any restrictions on claims by insiders or non-arm's length creditors against their corporations in insolvency proceedings taken by those corporations?

See questions 39 and 40 for the general rules on clawback claims. The amended DCBA, in sections 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.

Creditors' enforcement

44 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 and transfer of assets and liabilities. This is specifically provided for by the Merger Act, which came into force on 1 July 2004. Full creditor protection is required in such a process.

Corporate procedures

45 Are there corporate procedures for the liquidation or 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 is capable of being subject to an ordinary dissolution or liquidation

Update and trends

The 'too big to fail' issue still influences Swiss insolvency law. In September 2015, PostFinance, a publicly owned subsidiary of Swiss Post, was added as number five to the list of systemically important banks.

A revision of Swiss company law is planned that (among other things) shall include an additional early warning system according to which members of the board of directors are required to prepare a cash flow forecast for the next 12 months that needs to be reviewed by a licensed auditor if there is reasonable doubt that the company remains solvent over the next 12 months or if the income statements of three consecutive years show a loss. This is a strong signal that pre-insolvency restructuring proceedings are further on the rise in Switzerland. However, the aforementioned revision is only proposed and is still in the stage of parliamentary deliberation. It remains uncertain if and when this revision will come into force.

The recognition of foreign bankruptcy and like orders shall be modernised in the future. By mid-October 2015 the Swiss Federal Council released a legislative proposal to change the current law (see question 47). In short, it is planned that the recognition proceeding shall be simplified and international cooperation enhanced. Reciprocal treatment by the requesting state shall no longer be needed and the Swiss 'mini-bankruptcy' (ie, ancillary proceeding for assets located in Switzerland) may not have to be initiated at all if there are no domestic creditors to be protected. If an ancillary proceeding in Switzerland is found not to be necessary for the collection of the assets in Switzerland the foreign bankruptcy administrator may act with the same authority previously given to the debtor. In addition, bankruptcy (and like) orders shall in future be recognised if rendered by the competent authorities at the debtor's centre of main interest (COMI). The proposal is at the stage of legislative consultation.

The Swiss Federal Council intends to impede the abuse of the bankruptcy proceedings by amending the DCBA. To this end, in particular, the costs of bankruptcy proceedings shall be passed on to the debtor. Furthermore, measures shall be introduced to stop businesses from continuing their business activities despite confirmed non-payment of public debts. This proposal is not yet approved.

Finally, the Swiss Federal Council aims to ensure free market access for professional party representatives in foreclosure proceedings. In order to meet this objective and to ensure that every person with capacity to act is eligible to represent parties in Swiss foreclosure proceedings, legislative powers of the cantons shall be withdrawn. This proposal has not yet been approved.

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 the liquidators include the establishment of a balance sheet and of the 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 and give notice to the commercial register that the corporation has been dissolved.

Creditors' claims must be satisfied in full before this. 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 liquidation is not subject to verification by the court.

Conclusion of case

46 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.

International cases

47 What recognition or relief is available concerning an insolvency proceeding in another country? How are foreign creditors dealt with in liquidations and reorganisations? 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? Has the UNCITRAL Model Law on Cross-Border Insolvency been adopted or is it under consideration in your country?

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. The revised Lugano Convention 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 states of the European Union; significant changes relating to jurisdictional issues, exequatur proceedings and new provisions for provisional and protective measures are adopted. In line with this, significant amendments were made to 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 seizable 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 assets are located in Switzerland, the PILA has established basic rules for the recognition in Switzerland of foreign bankruptcy decrees or orders for a composition with creditors or similar proceedings. Based on this law, the foreign main proceeding can be recognised, provided that the following prerequisites are met:

- proper jurisdiction of the foreign court;
- enforceability;
- observation of minimal due process standards;
- reciprocity; and
- no violation of Swiss public policy.

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 must be remitted to the foreign bankruptcy 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.

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 such claims derive from operations of such branch office) can enforce their respective claims against the debtor's assets located in Switzerland, which can lead to a specific branch bankruptcy proceeding.

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, would cease to apply once the foreign bankruptcy administration or another bankruptcy creditor successfully requests the opening of a mini-bankruptcy proceeding.

In a more recent court decision, the adoption of the UNCITRAL Model Law by Japan helped to overcome the denial, so far, by Swiss courts to recognise reciprocity. It could be evidenced that the previous strictly followed principle of territoriality was given up by Japan permitting the Swiss court to acknowledge reciprocity. Hence, reciprocity between Switzerland and Japan for bankruptcy orders should by now be established. (See Update and trends.)

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 (see 'Update and trends').

COMI

48 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, 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. As a consequence of these different approaches, Swiss courts may refuse to recognise a foreign insolvency decree rendered by a court at the COMI of the debtor because of a lack of competence (from the point of view of Swiss law) of the foreign court (PILA, article 166). See question 49 for cases dealt with by FINMA.

(See Update and trends.)

Cross-border cooperation

49 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 pursuant to the rules of the 'mini-bankruptcy' proceeding (PILA, articles 166 to 175; see question 47). Swiss legislation does not specifically address international cooperation court to court or between domestic and foreign insolvency administrators. In the course of a Swiss mini-bankruptcy (a secondary proceeding) 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 authority abroad will be determined by the law of the country concerned. On that level, pragmatic solutions are often sought. Applications for recognition of foreign insolvency orders can be frustrated because of a lack of recognition of reciprocity or for the reason that the insolvency ordered for which recognition is sought is not rendered by the court of the registered office of the corporate debtor (see question 48). FINMA acts in court capacity with regard to institutions regulated under the SFBA. FINMA may recognise an insolvency order issued by the court of actual (instead of registered) domicile of the debtor FINMA. BIO-FINMA 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 applies:

- 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 (see 'Update and trends').

Cross-border insolvency protocols and joint court hearings

50 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.

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