PANORAMIC

RESTRUCTURING & INSOLVENCY

Switzerland

LEXOLOGY

Restructuring & Insolvency

Contributing Editors

Catherine Balmond and Katharina Crinson

Freshfields Bruckhaus Deringer

Generated on: January 5, 2024

Contents

Restructuring & Insolvency

GENERAL

Legislation
Excluded entities and excluded assets
Public enterprises
Protection for large financial institutions
Courts and appeals

TYPES OF LIQUIDATION AND REORGANISATION PROCESSES

Voluntary liquidations
Voluntary reorganisations
Successful reorganisations
Involuntary liquidations
Involuntary reorganisations
Expedited reorganisations
Unsuccessful reorganisations
Corporate procedures
Conclusion of case

INSOLVENCY TESTS AND FILING REQUIREMENTS

Conditions for insolvency
Mandatory filing

DIRECTORS AND OFFICERS

Directors' liability – failure to commence proceedings and trading while insolvent
Directors' liability – other sources of liability
Directors' liability – defences
Shift in directors' duties
Directors' powers after proceedings commence

MATTERS ARISING IN A LIQUIDATION OR REORGANISATION

Stays of proceedings and moratoria
Doing business
Post-filing credit
Sale of assets
Negotiating sale of assets
Rejection and disclaimer of contracts
Intellectual property assets
Personal data
Arbitration processes

CREDITOR REMEDIES

Creditors' enforcement
Unsecured credit

CREDITOR INVOLVEMENT AND PROVING CLAIMS

Creditor participation
Creditor representation
Enforcement of estate's rights
Claims
Set-off and netting
Modifying creditors' rights
Priority claims
Employment-related liabilities
Pension claims
Environmental problems and liabilities
Liabilities that survive insolvency or reorganisation proceedings
Distributions

SECURITY

Secured lending and credit (immovables)
Secured lending and credit (movables)

CLAWBACK AND RELATED-PARTY TRANSACTIONS

Transactions that may be annulled
Equitable subordination
Lender liability

GROUPS OF COMPANIES

Groups of companies
Combining parent and subsidiary proceedings

INTERNATIONAL CASES

Recognition of foreign judgments
UNCITRAL Model Laws
Foreign creditors
Cross-border transfers of assets under administration
COMI
Cross-border cooperation
Cross-border insolvency protocols and joint court hearings
Winding-up of foreign companies

UPDATE AND TRENDS

Trends and reforms

Contributors

Switzerland

Walder Wyss Ltd

walderwyss attorneys at law

Dominik Hohler dominik.hohler@walderwyss.com
Stéphanie Oneyser stephanie.oneyser@walderwyss.com

GENERAL

Legislation
What main legislation is applicable to insolvencies and reorganisations?

In Switzerland, the Debt Collection and Bankruptcy Act of 1889 (DCBA) governs the enforcement of pecuniary claims and claims for the furnishing of security against private individuals and legal entities of private law. In 1994, the 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. Further amendments were enacted on 25 September 2020 and entered into force on 1 August 2021. Finally, following the revision of the corporate law in the Code of Obligations, further amendments entered into force on 1 January 2023. The DCBA is supplemented by other federal statutes, including:

- the Federal Civil Code of 10 December 1907 (the Civil Code), as amended on 1 September 2023;
- the Federal Code of Obligations of 30 March 1911 (CO), as amended on 1 September 2023;
- the Private International Law Act of 18 December 1987 (PILA), as amended on 1 September 2023;
- the Federal Act Regarding Merger, Demerger, Conversion and Transfer of Assets and Liabilities of 3 October 2003 (the Merger Act), as amended on 1 January 2023;
- the Swiss Federal Banking Act of 8 November 1934 (SFBA), as amended on 1 January 2023;
- the Ordinance of the Swiss Financial Market Supervisory Authority (FINMA) on the Insolvency of Banks and Securities Dealers of 30 August 2012 (BIO-FINMA), as amended on 1 January 2021;
- the Federal Act on Financial Institutions of 15 June 2018 (FinIA), as amended on 1 August 2021, in particular article 67;
- the Ordinance on Financial Institutions of 6 November 2019 (FinIO), as amended on 23 January 2023;
- the Federal Act on Financial Services of 15 June 2018 (FinSA), as amended on 1 August 2021;
- the Collective Investment Schemes Act of 23 June 2006, as amended on 1 January 2023;
- the Ordinance of FINMA on the Insolvency of Collective Investment Schemes of 6 December 2012, as amended on 1 January 2021;
- the Federal Act on the Oversight of Insurance Companies of 17 December 2004, as amended on 1 January 2023 (some important amendments were adopted and will enter into force on 1 January 2024);
- the Ordinance of FINMA on the Insolvency of Insurance Companies of 17 October 2012, as amended on 1 January 2013;
- the Federal Insurance Contract Act of 2 April 1908, as amended on 1 September 2023;

- the Penal Code of 21 December 1937, as amended on 1 September 2023;
- the Federal Act on the Mandatory Unemployment Insurance and the Indemnity for Insolvency of 25 June 1982, as amended on 1 September 2023;
- historic bankruptcy treaties of the nineteenth century, such as the Bankruptcy Treaty of 1825/1826 between all Swiss cantons (except Schwyz and Neuenburg) and the (former) kingdom of Württemberg (currently valid for the district of the Oberlandesgericht Stuttgart) or the Bankruptcy Treaty of 1834 between most of the Swiss cantons and the (former) kingdom of Bavaria on consistent handling of mutual citizens;
- specific rules regarding the foreclosure of aircraft or vessels, which to a large extent follow the provisions of the Ordinance of the Federal Tribunal on Foreclosure of Real Properties of 23 April 1920, as amended on 1 January 2012;
- the Lugano Convention on the Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters 1988, which was replaced by the Lugano Convention 2007 and repealed on 1 May 2011;
- the Lugano Convention on the Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters of 30 October 2007 (the Lugano Convention), effective as of 1 January 2011, which is not per se bankruptcy related but has a substantial impact when it comes to the enforcement of judgments, as amended on 8 April 2016;
- the Swiss Code of Civil Procedure of 19 December 2008 (CPC), as amended on 1 September 2023 (important amendments were adopted and will enter into force on 1 January 2024);
- the Federal Act on Data Protection of 19 June 1992 (DPA), as amended on 1 September 2023;
- the Federal Act on Financial Market Infrastructures and Market Conduct in Securities and Derivatives Trading (Financial Market Infrastructure Act) of 19 June 2015, as amended on 1 January 2023;
- the Ordinance on the Liquidity of Banks of 30 November 2012 (LiqO), as amended on 1 January 2023;
- the Ordinance on Capital Adequacy and Risk Diversification for Banks and Securities Dealers of 1 June 2012, as amended on 1 January 2023;
- the Ordinance on Banks and Savings Banks of 30 April 2014, as amended on 23 January 2023;
- the Federal Act on Granting Loans and Joint Securities as a consequence of the Coronavirus of 18 December 2020 (the Covid-19 Joint Security Act), as amended on 31 March 2023; and
- the Federal Act on the Legal Foundations for Ordinances of the Federal Council regarding the Mastery of the Covid-19 Pandemic of 25 September 2020 (the Covid-19 Act), as amended on 1 January 2023.

In the case of a corporate debtor (corporations, corporations with unlimited partners, limited liability companies and cooperatives), insolvency proceedings are frequently initiated upon the occurrence of over-indebtedness. Over-indebtedness occurs if the liabilities of the company are not covered by the assets on the balance sheet, irrespective of whether the

assets are appraised at ongoing business value or at liquidation value. Also, insolvency proceedings can be initiated by a debtor (whether corporate or individual) by filing a declaration of illiquidity in the sense of article 191 of the DCBA.

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.

Excluded entities and excluded assets

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

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

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

In general, all assets belonging to the debtor with a monetary value form part of the insolvent estate. Assets that qualify as purely personal assets or do not qualify for seizure are exempt from claims of creditors. In the case of an individual debtor, this also applies to benefits under a pension plan that are not yet due. Third-party assets in possession of the debtor may be segregated for the benefit of the third party.

Notably, insolvencies of banks, securities dealers, mortgage bond clearing houses, insurance companies, collective investment scheme companies (SICAFs and SICAVs, and limited partnerships for collective investments) and fund managers will be handled by FINMA

according to the special insolvency rules, as applicable. The respective rules are not discussed further herein.

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

Public enterprises

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

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

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

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

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

During the same period, the Swiss banking law was partially revised. Systemically important banks were obliged to increase their equity and to ensure essential political economic functions if they go bankrupt. The new banking law provides for contingent convertible

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

On 1 November 2012, BIO-FINMA entered into force to replace the former Bank Bankruptcy Ordinance. BIO-FINMA consolidated the implementing provisions governing the restructuring and bankruptcy procedure for banks and securities dealers into a single decree. It completed Swiss legislation on insolvency and crisis prevention and meets international requirements. BIO-FINMA contains detailed regulations on the restructuring process, while the bankruptcy provisions enshrined in the former Bank Bankruptcy Ordinance were taken over in BIO-FINMA without substantial changes. However, BIO-FINMA introduced a new approach to make the restructuring and bankruptcy process both rapid and effective, taking proper account of individual cases, and preserving legal certainty. BIO-FINMA contains detailed regulations on the restructuring powers available to FINMA. In particular, instead of restructuring an entire bank, FINMA can opt to convert debt capital into equity capital and to prescribe other corporate actions to ensure the continuation of certain core banking services.

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

Courts and appeals

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

The main decision-makers involved in the enforcement of Swiss insolvency proceedings are the bankruptcy administrator, the creditors' meeting or its elected administrator or receiver as well as the creditors' committee, if appointed. Their decisions are subject to a specific appeal procedure before the competent court. Essentially, court decisions in insolvency proceedings are restricted to specific procedural stages, namely the

opening, revocation, suspension and termination of a bankruptcy proceeding. Moreover, in composition proceedings with creditors, the composition agreement must be approved by the composition court.

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

Against a decision on the opening of a bankruptcy proceeding (granting or rejecting the request to open such proceeding), an appeal according to CPC and DCBA can be filed within 10 days of its notification. The parties may allege new facts provided that the facts had arisen before the decision of the bankruptcy court was rendered. Procedural errors aside, the court of appeal will only set aside the lower court decision on the opening of a bankruptcy proceeding if the appellant can present prima facie evidence that the appellant 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 court of appeal for account of the creditor, or that the creditor has waived the conduct of bankruptcy proceedings. A further appeal to the Swiss Federal Tribunal is possible.

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

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

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

TYPES OF LIQUIDATION AND REORGANISATION PROCESSES

Voluntary liquidations

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

Corporate law provides for the possibility for legal entities to be dissolved, leading to a voluntary liquidation of the business with full protection of creditors' claims.

Companies limited by shares, partnerships limited by shares, partnerships with limited liability and cooperatives may be subject to bankruptcy proceedings without prior enforcement proceedings in the instances set forth in the FederalCode of Obligations of 30 March 1911 (CO) (articles 725b, 764(2), 820 and 903). A comprehensive revision of the rules on company law of the CO entered into force on 1 January 2023 and provides for a better coordination between the CO and the Debt Collection and Bankruptcy Act of 1889 (DCBA).

The application for bankruptcy in this case is based on a demonstration of manifest (ie, not just temporary) insolvency (over-indebtedness) and is to be supported by a shareholders' resolution and a recently drawn up balance sheet. As such, voluntary liquidation leads to a liquidation proceeding and its effects concur with those of an involuntary liquidation; if the liquidators conclude that the company to be liquidated is over-indebted, they must file for bankruptcy. Debtors that are not otherwise subject to bankruptcy proceedings may file for bankruptcy upon declaration of insolvency (illiquidity).

Voluntary reorganisations

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

A composition proceeding aims to protect the debtor from the consequences of bankruptcy. It allows the debtor to postpone payment of debts or to satisfy them in total or in part according to a specific plan. The composition agreement must be ratified by the creditors. According to the revised DCBA, the Swiss composition procedure is designed to rehabilitate the company under the auspices of the court or to reorganise unsecured and unprivileged claims. However, in some cases, composition proceeding may lead to a liquidation of the company and of its assets in a more flexible framework than bankruptcy proceeding. Over-indebtedness is no longer required to initiate a composition proceeding.

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

A temporary debt moratorium not exceeding four months may be granted by the court and can be extended up to an additional four months. The court may order the necessary conservatory measures to protect the debtor's assets. However, the court will open bankruptcy proceedings if it concludes that it is unlikely that the rehabilitation or the conclusion of a composition agreement with creditors will succeed. At the discretion of the court, one or several provisional commissioners may be appointed for the temporary debt moratorium to assess the viability of the debtor's proposal. Provided that all third-party interests remain protected, the court may abstain from giving public notice of the temporary debt moratorium (in which case a commissioner must be appointed). In essence, the effects of the temporary debt moratorium are the same as for the definitive debt moratorium:

- in particular, the creditors may no longer enforce their claims against the debtor, save for claims secured by a mortgage;
- civil and administrative court proceedings are stayed (with some exceptions);
- set-off is only admitted under restrictive conditions;
- interest on all claims (except the claims secured by a pledge) cease to accrue (unless provided otherwise in the composition agreement); and
- the statute of limitation is suspended for the duration of the composition proceeding.

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 definitive moratorium may be extended to 12 months and, in complex cases, 24 months upon application of the commissioner. The commissioner's primary duties are to supervise the debtor's activities and to perform the tasks set forth in articles 298 to 302 and 304 of the DCBA. The actual powers of the commissioner are determined on a case-by-case basis and can involve actual managerial powers. The commissioner must present interim reports at the request of the composition court and must inform the creditors of the progress of the moratorium. Depending on the circumstances, the court can establish a creditors' committee that will act as a supervisory body for the commissioners. The creditors' committee should be composed of representatives of the various classes of creditors. Once established, the creditors' committee will decide on the sale or charges of assets.

A definitive debt moratorium will suspend pending execution proceedings including bankruptcy and asset-freezing orders (but the prosecution of claims secured by a mortgage remains possible without the realisation of the assets). Civil and administrative litigations will be suspended unless the pending matter is urgent. 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 of the counterparty will be subject to the composition agreement.

Successful reorganisations

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

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

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

It is essential to understand that the composition agreement under the DCBA aiming at reorganising the debts of the company is designed to reorganise the non-secured (including the portion of secured claims that remains uncovered) and non-priority creditors' claims only and does not encompass a full reorganisation plan involving all creditors' claims.

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

Non-debtor parties may be released from liability as part of the agreement. In this context, article 303 of the DCBA specifically rules on the duties of a creditor to maintain its rights against third-party debtors and provides that a creditor agreeing to a composition agreement must inform co-debtors and guarantors about the place and date of the creditors' meeting and offer to assign its claim to them against cash payment; non-compliance with this rule will release the third parties from their liabilities.

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

Involuntary liquidations

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

To place a debtor into an involuntary liquidation proceeding, the creditor must have undergone the preliminary debt collection procedure that involves the issuance 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 court procedure and the petition to continue execution. Upon filing of the petition to continue execution, an ultimate order to pay is issued by the debt collection and bankruptcy office, which includes a formal bankruptcy warning notice. At this point in time, the bankruptcy court, at the creditor's request, may order as a protective measure the drawing up of an inventory of all the debtor's assets. If the claim is not satisfied within 20 days after the service of the bankruptcy warning notice, the creditor can apply to the bankruptcy court to declare the opening of the bankruptcy over the debtor.

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 or an emergency moratorium is submitted.

The bankruptcy proceeding begins upon issuance of the bankruptcy judgment and is to be conducted by the bankruptcy office; it results in a general execution upon the debtor's assets, with all civil and procedural legal effects.

The declaration of bankruptcy and the beginning of the bankruptcy proceeding have 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 bankruptcy administration draws up an inventory of all assets and takes protective measures;
- other enforcement proceedings directed against the debtor are automatically suspended and pending litigations are generally suspended as well;
- all obligations of the debtor against the bankrupt estate become due with the exception of those secured by mortgages on real estate;
- except for claims secured by pledge, interest ceases to accrue against the debtor;
- claims subject to a suspensive condition are admitted in their full amount in the bankruptcy;
- claims that are not for a sum of money have to be converted into a monetary claim of corresponding value;
- a creditor may set off its claim against a claim that the debtor has against the creditor, provided that the obligation was contracted bona fide prior to the opening of the bankruptcy; and
- the creditors' claims are ascertained and listed in the schedule of claims by order of ranking and secured rights.

Involuntary reorganisations

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

The possibility for creditors to initiate an involuntary reorganisation over the debtor in the form of a composition proceeding was introduced by the DCBA revision in 1994. In practice, creditors do not initiate such proceedings frequently.

The main prerequisite for creditors to commence an involuntary reorganisation over the debtor is their right to request the opening of bankruptcy proceedings pursuant to article 166 or 190 of the DCBA. In addition, the court may also stay the judgment on the opening of bankruptcy proceedings of its own motion if it appears that an agreement will be reached with the creditors. In this case, the file will be transferred to the composition court.

Apart from that, the requirements for involuntary reorganisation do not differ from those for voluntary reorganisation, and it is conducted through the same procedure as the voluntary reorganisation.

Expedited reorganisations

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

Under Swiss law, no specific procedures exist for expedited reorganisations. The length of the debt moratorium period and of the composition proceeding can be considerably reduced based on a prior consensus with the creditors. In cases where the company has a substantial balance sheet, a business or other substantial assets linked to the company's business, the prepackaged deal envisaged during the compositions proceeding is frequently discussed with the commissioner, or with the court that has the authority to approve the transaction, before the petition to facilitate prepackaged reorganisations is filed. The amended DCBA favours a pure debt moratorium for a period of up to eight months to rehabilitate financially distressed companies.

Unsuccessful reorganisations

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

A reorganisation plan may fail for the following reasons:

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

If the reorganisation plan is rejected, the court will declare the debtor bankrupt. The same applies in the event an insolvent corporation is no longer capable of reorganisation.

If a binding composition agreement is not fulfilled regarding a specific creditor, the latter may apply to the composition court to have the agreement revoked as far as claim is concerned, without prejudice to the creditor's rights.

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

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

Corporate procedures

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

According to articles 736 to 751 of the CO, a corporation may be subject to an ordinary dissolution or liquidation procedure that involves no intervention by the judge or creditors. In that event, one or several liquidators are in charge of the liquidation.

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

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

As opposed to bankruptcy proceedings, corporate dissolution is not subject to verification by the court. However, if the corporation is found to be over-indebted during the liquidation, the bankruptcy court will declare the corporation bankrupt.

Conclusion of case

How are liquidation and reorganisation cases formally concluded?

In the event of bankruptcy, the bankruptcy court closes the proceeding by issuing an order as soon as the liquidation is finished.

In the event of reorganisation, either a report is submitted to the judge after the composition agreement has been implemented or the composition court closes the proceeding by releasing the successfully restructured debtor from the proceeding.

INSOLVENCY TESTS AND FILING REQUIREMENTS

Conditions for insolvency

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

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

Mandatory filing

Must companies commence insolvency proceedings in particular circumstances?

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

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

As long as at least half of the equity capital still exists, an adverse balance sheet does not trigger (yet) measures in connection with over-indebtedness. However, if the previous annual balance sheet shows that half of the share capital and the legal reserves are no longer covered by the assets, the board of directors must, without delay, call a general meeting of shareholders and propose a financial reorganisation.

If there is a valid concern of over-indebtedness, an interim balance sheet must be prepared and submitted to the auditors for examination. If the concern is confirmed, the company bodies (board of directors, liquidators and auditors) are obliged, in the interest of the creditors, to notify the judge (article 725b(3) of the Federal Code of Obligations of 30 March 1911 (CO)) and 'deposit the balance sheet'. When to proceed with the notification is determined based on the specific circumstances of the case; however, in light of the recent court cases, the notice should be filed within a few weeks.

However, according to the revised corporate law provisions, which entered into force on 1 January 2023, the board of directors does not have to notify the bankruptcy court in the event of over-indebtedness, if there is a reasonable prospect of restructuring within a reasonable period of time, but no later than 90 days after the (audited) interim financial statements are available, provided the creditors' claims are not additionally jeopardised. The deadline cannot be extended and is likely to put significant pressure on the board of directors to raise funds or find another suitable solution to restructure the company in a very short period.

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

After a summary examination of the situation of over-indebtedness, the judge declares the company bankrupt ex officio. Despite over-indebtedness, the court may refrain from or postpone the declaration of bankruptcy if there are indications of the conclusion of a composition agreement with the company creditors; in this case, it will forward the file to the composition court.

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 facing insolvency, the Swiss Financial Market Supervisory Authority (FINMA) has authority under the Swiss Federal Banking Act of 8 November 1934 to order far-reaching protective measures or the restructuring of the bank. For instance, FINMA may appoint an independent expert investigator to examine certain matters within the bank or to monitor the implementation of measures imposed by FINMA. Also, FINMA may appoint a restructuring administrator to establish a restructuring plan. In case of liquidation, FINMA appoints a liquidator.

Finally, the new corporate law that entered into force on 1 January 2023 introduced an explicit duty of the board of directors to monitor the company's liquidity and to take appropriate action to ensure the company's ability to pay debts as they fall due. If necessary, the board

of directors must take or propose additional restructuring measures to the shareholders' meeting or apply for a debt restructuring moratorium.

DIRECTORS AND OFFICERS

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

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

The members of the board of directors and all persons involved 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, which includes articles 725 to 725c of the Federal Code of Obligations of 30 March 1911 (CO). The provisions regarding liability (articles 752 to 760 of the CO) also apply to the founders, organs or supervisors of banks.

As a further consequence, certain transactions conducted by the company while being over-indebted may be the subject of avoidance actions (article 287 of the Debt Collection and Bankruptcy Act of 1889 (DCBA)) to refer the assets in question to the estate.

Criminal liability may play a role for acts that are performed while being fully aware that the company will not be able to pay its debts.

Directors' liability – other sources of liability

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

In general, legal entities must satisfy their liabilities with their own assets. The personal liability of corporate officers and directors arises only in the context of a violation of their duties. This also applies to public law claims, in particular social security contributions or withholding of taxes.

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

Of particular interest is the duty to act in case of financial difficulties or over-indebtedness pursuant to articles 725 to 725c of the CO. Lastly, the Swiss Penal Code sanctions reckless bankruptcy or mismanagement.

Directors' liability – defences

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

Directors and officers can benefit from five means and defences to exclude or reduce their liability, as follows.

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

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

- First, discharge granted by a shareholders' meeting is only effective for claims held by those who granted the discharge. As a result, claims by creditors and by the bankruptcy administrator remain unaffected.
- Second, indemnification agreements prevent liability if entered into by (individual) shareholders. Yet, it is debated whether this is also the case when the company entered into the indemnification agreement.

Shift in directors' duties

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

It is noteworthy that the duties of the board of directors relate to the specific company on a stand-alone basis only. The company's interests must be defined according to the prevailing circumstances (essentially following business judgement). Swiss corporate law is based on the notion that each legal entity must protect and pursue its own interests. Cash management is of particular interest.

However, personal liability to the creditors can arise if the directors breach their duties or if they support actions that are subject to challenge.

Directors' powers after proceedings commence

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

Under the supervision of the commissioner and at the direction of the composition court, the debtor may continue its business operations. However, certain transactions will require approval from the court or the creditors' committee, if appointed. The debtor is prohibited to divest, encumber or pledge fixed assets, to give guarantees or to donate assets without the authorisation of the composition court or the creditors' committee, respectively. Moreover, if the debtor contravenes the commissioner's instructions, the court can revoke the debtor's capacity to dispose of its assets or declare bankruptcy. At the discretion of the court, the authority to operate the business can be given to the commissioner. The court may deprive management of its power of disposal or make its resolutions conditional on the commissioner's approval. Contracts entered into during the debt moratorium with the commissioner's approval enjoy priority over pre-petition rights. Unless a creditors' committee is appointed, the role of the creditors during the entire proceeding is mainly of a participative nature. They must 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.

MATTERS ARISING IN A LIQUIDATION OR REORGANISATION

Stays of proceedings and moratoria

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

Liquidation

Regarding liquidation, the opening of bankruptcy affects enforcement and legal proceedings in two ways.

First, enforcement proceedings against the debtor that were already pending prior to bankruptcy are terminated; new enforcement proceedings relating to claims that arose

before the opening of bankruptcy proceedings are no longer possible (except for the enforcement of pledges given by third parties). The enforcement proceedings for claims that arose after the declaration of bankruptcy can be continued during the bankruptcy proceedings only by seizure or realisation of pledges.

Second, civil and administrative court proceedings to which the debtor is a party and that affect 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 issued and made available.

Reorganisation

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

Doing business

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

Under the supervision of the commissioner and at the direction of the composition court, the debtor may continue its business operations. However, the composition court may require the approval of the commissioner for certain transactions. Moreover, the transactions listed in article 298 of the Debt Collection and Bankruptcy Act of 1889 (DCBA) will require approval from the court or the creditors' committee, if appointed; the debtor is prohibited to divest, encumber or pledge fixed assets, to give guarantees or to donate assets without the authorisation of the composition court or the creditors' committee, respectively. Moreover, if the debtor contravenes the commissioner's instructions, the court can revoke the debtor's capacity to dispose of its assets or declare bankruptcy. At the discretion of the court, the authority to operate the business can exclusively be given to the commissioner. The court may deprive management of its power of disposal or make its resolutions conditional on the commissioner's approval. Contracts entered into during the debt moratorium with the commissioner's or the court's approval enjoy priority over pre-petition rights. Moreover, transactions that were approved by the composition court or the creditors committee are protected from clawback claims. Since 1 January 2023, transactions or payments (that are not subject to the composition court or the creditors committee's approval) that were approved by the commissioner are also explicitly protected from clawback claims. Unless a creditors' committee is appointed, the role of the creditors during the entire proceeding is mainly of a participative nature. They must 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.

Under certain conditions, it is possible to carry on business during the bankruptcy proceeding; however, it is not often used in practice. The debts arising out of it after the bankruptcy judgement enjoy priority over pre-petition rights, provided they have been approved by the liquidator.

Post-filing credit

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

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

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

Sale of assets

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

Sale of assets in a reorganisation

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

Sale of assets in a liquidation

In liquidation, the debtor loses its right of disposal over its assets as soon as the judge opens bankruptcy proceedings. Although the debtor remains the legal owner of its assets, the right of disposal is transferred to the administration for liquidation purposes. As soon as the bankruptcy judgment is published, any unilateral or bilateral transactions that concern

assets belonging to the bankrupt estate and were entered into by the debtor, and not the estate, are void against its creditors. However, neither the payment of a promissory note to a bona fide creditor prior to the publication of the opening of the bankruptcy nor the sale or encumbrance of real estate when the restriction on the debtor's right of disposal is not yet registered in the land register will be regarded as void.

Liabilities

When acquiring immovable property, the charges and liabilities registered for that property will generally pass on to the acquirer. To ascertain such charges, a special procedure will be conducted. The acquirer will also inherit existing environmental liabilities subject to possibility of recourse against the previous owner. Movables, however, will be transferred free and clear of claims. The Federal Code of Obligations of 30 March 1911 (CO) clarifies that a transfer of a business or part thereof in the course of a debt moratorium, a bankruptcy or a composition agreement with assignment of assets will not automatically result in the liability of the acquirer for employees-related claims, but rather these liabilities will be passed on onto the acquirer only upon explicit consent by the acquirer.

Negotiating sale of assets

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

Stalking horse procedure

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

Credit bidding in sales

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

Rejection and disclaimer of contracts

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

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

While pecuniary claims become due, non-pecuniary obligations are translated into pecuniary claims. Special rules apply for 'synallagmatic contracts' (contracts that involve contractual obligations by both parties) that have not or only partially been fulfilled at the time of the opening of the insolvency proceeding. Pursuant to article 211 of the DCBA, bankruptcy administrators can decide whether they (in lieu of the debtor who has lost its rights to dispose over assets and contractual rights) want to fulfil such contracts. The law does not specify within what period the decision should be made. As a consequence, the discretion to 'cherry pick' can create legal uncertainty for the parties involved. Contractual clauses to avoid uncertainty may be considered. As a matter of law, discretion is excluded in cases of contracts that need to be performed at a specific date or of financial future, swap and option transactions if the value of the contractual performance can be determined by market price. If the administrator chooses to continue with the contract, the adversary party may request security for its performance and decline performance if insufficient security is provided.

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

Intellectual property assets

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

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

contract party can request appropriate security for further performance, and if not provided terminate the agreement.

It is controversial how the monetary and the non-monetary claims resulting from the licence agreement (the latter will have to be converted into monetary claims) are actually treated in the proceeding. It is generally (but not universally) accepted that article 211(2) of the DCBA is a procedural rule only so that contractual clauses addressing termination should take precedence. Such clauses, however, will be tested against voidance rules. During the debt moratorium, the debtor is entitled to terminate long-term contracts with the commissioner's approval if their continuation would impede the debtor's rehabilitation. Compensation for early termination must be granted, but the respective claim for damages will only be treated as an ordinary creditor's claim.

Personal data

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

The sale of personal information or customer data collected by an insolvent company in the course of an insolvency proceeding is not restricted by Swiss insolvency provisions but has to be in compliance with the general rules of the Federal Act on Data Protection of 19 June 1992 (DPA), as amended on 1 September 2023. The DPA allows, under certain conditions, the sale of personal information or customer data to a third party. Moreover, article 242b of the DCBA provides for a right to handover the data to third parties who have a legal or a contractual right to the data in the bankruptcy estate.

Arbitration processes

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

Given the extensive international exposure of the Swiss economy, arbitration issues often arise in collective enforcement proceedings with a Swiss context. The availability of and the limitations to arbitration in connection with insolvency proceedings are the subject of ongoing legal discussion. The admissibility of arbitration is largely dependent on the nature of the specific dispute and on whether the bankruptcy trustee or receiver is bound by a given pre-existing arbitration clause. Whereas for Swiss international arbitration (where the seat of arbitration is in Switzerland but at least one party is domiciled abroad) a matter is arbitrable if the dispute involves 'an economic interest' (article 177(1) of the Private International Law Act of 18 December 1987 (PILA)), in Swiss domestic arbitration the test is whether the parties are free to dispose of the rights of the dispute (article 354 of the Swiss Code of Civil Procedure of 19 December 2008). In the first case the concept is of a liberal nature but restricted by public policy, while in the second cases limitations are set by the mandatory rules of collective enforcement. Despite the liberal concept of arbitrability in Swiss international and domestic arbitration law, certain types of insolvency and insolvency-related proceedings cannot be

brought before an arbitral tribunal. This relates in particular to actions that exclusively aim at enforcing debts, such as the creditor's application to the court to (definitively or provisionally) set aside the debtor's objection in summary proceedings (articles 80 to 84 of the DCBA). It also applies to proceedings that are considered as purely related to insolvency proceedings, such as the opening of bankruptcy or the challenge of the schedule of claims. Because arbitration proceedings may only replace ordinary judicial proceedings, but not (administrative) enforcement proceedings, only actions under the DCBA of substantive nature (such as the action for contested claims in composition proceedings pursuant to article 315 of the DCBA) are considered as arbitrable. It is disputed among the Swiss scholars whether actions with a reflexive effect on substantive law (such as clawback claims pursuant to articles 285 to 292 of the DCBA), are arbitrable. While the Swiss insolvency scholars exclude the arbitrability of such actions, the Swiss arbitration scholars plead the contrary; the Federal Supreme Court has not ruled on this issue.

Although still a matter of debate, it seems widely established that an arbitration clause entered into by the debtor before the start of the insolvency proceeding remains binding on the trustee or receiver absent specific limitations in the arbitration agreement (however, this does not affect the question whether the award can or must be recognised in the bankruptcy or composition proceeding of the party to the arbitration). Likewise, the trustee or receiver may enter into new arbitration agreements during the course of the insolvency proceeding.

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

CREDITOR REMEDIES

Creditors' enforcement

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

Apart from the ordinary liquidation procedure that may be requested by shareholders, it is possible to liquidate a business outside the bankruptcy process by merger, demerger or transfer of assets and liabilities. This is specifically provided for by the Federal Act Regarding Merger, Demerger, Conversion and Transfer of Assets and Liabilities of 3 October 2003. Full creditor protection is required in these cases.

Unsecured credit

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

A simple request by the creditor to the debt collection office at the debtor's domicile or registered office suffices to commence enforcement proceedings of a monetary claim. Upon

receipt of the debt collection request, the debt collection office issues a summons to pay. The debtor can file an objection within 10 days of notification without giving any reasons. This forces the creditor to set aside the objection and, depending on the evidence at hand, to:

- institute ordinary legal action to prove the claim; or
- request, in a summary proceeding:
- the enforcement of an enforceable judgment rendered by a Swiss court, by a foreign court or by an arbitral tribunal that can be recognised and enforced in Switzerland, in which case the court will definitively set aside the objection;
- the enforcement of a debt acknowledgment that is established by way of a notarial deed; or
- to set aside in a provisional manner the objection made by the debtor against the payment order to continue the enforcement proceedings if the claim is evidenced by a written debt acknowledgement duly signed by the debtor (which can be incorporated in a bilateral agreement under certain circumstances).

Considerable case law has been developed to establish what qualifies as written debt acknowledgement duly signed by the debtor. If the debtor's objection is temporarily set aside, the debtor can resort to ordinary legal action to quash the summary decision.

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

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

Pre-judgment attachment proceeding

A special asset freeze proceeding is provided for under articles 271 et seq of the Debt Collection and Bankruptcy Act of 1889 (DCBA). Freezing orders are available to both local and foreign creditors, but subject to specific prerequisites. The application for freezing order must be filed with the court at the place where a debt collection against a debtor can be initiated or where the asset is located. It will be granted in an ex parte summary proceeding, upon demonstrating prima facie evidence of a liquid and due but unsecured monetary claim.

The creditor must further establish, based on prima facie evidence, where the assets to be attached are located; 'fishing expeditions' are not allowed. If requested by the creditor, the court may issue freezing orders for the entire territory of Switzerland and there is no need to obtain several orders if the assets were kept in different local districts.

Freezing orders can be directed against assets located in Switzerland that belong to debtors residing abroad. Unless other grounds of attachment apply, the claims in this case must be based on an enforceable court decision, arbitral award or a debt acknowledgement or must at least be sufficiently connected to Switzerland. In the context of the Lugano Convention on the Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters of 30 October 2007 (the Lugano Convention), the freezing order is recognised as the protection measure to be provided for in article 47(2) of the Lugano Convention. Swiss law provides for the possibility for the debtor to file a pre-petition protection letter to challenge an ex parte 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 posterior court reassessment upon challenge by the debtor. The creditor is liable for damages resulting from an unjustified attachment and must, to maintain the attachment, pursue the enforcement proceedings (validation of the attachment) in a timely manner. As the assets are merely provisionally secured during the attachment proceedings, the assets may be subsequently seized in parallel attachment or enforcement proceedings, or both. In this case, the proceedings are coordinated once one of the creditors is entitled to request the proper seizure of the assets. If the assets were already seized and enforced in enforcement prior to the issuance of the freezing order, the freezing order only affects the surplus of the assets seized that is not distributed to the other creditors.

CREDITOR INVOLVEMENT AND PROVING CLAIMS

Creditor participation

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

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

- personal information on the debtor and the time of the declaration of bankruptcy;
- a call for the creditors of the debtor and all persons having assets in the debtor's possession to file such claims with the bankruptcy office within one month of the publication (including evidence);
- the order to debtors of the bankrupt company to report to the bankruptcy office within the same period, subject to criminal law consequences in case of non-compliance;
- the order to persons in possession of items belonging to the debtor, as holders of security rights or for other reasons, to hand over such items to the bankruptcy office; and

- if the bankruptcy proceeding is conducted in an ordinary procedure (which is, in practice, not very frequent), the invitation to attend the first creditors' meeting, which takes place at the latest 20 days after the publication. Bankruptcy proceedings conducted in a summary procedure do not hold creditors' meetings; in such cases, the bankruptcy office sends out circular letters to the creditors and calls for a vote when necessary by setting a deadline for the creditors who wish to oppose to the resolution to file an opposition in writing.

If the bankruptcy is conducted in an ordinary procedure, 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 must provide a report on the inventory and the bankrupt estate.

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

A creditor may pursue a claim or a remedy that the bankruptcy estate holds against third parties if the majority of the admitted creditors decided not to pursue the claim or remedy, the bankruptcy officer has offered the assignment of the rights of the bankrupt estate to pursue this claim or remedy, and the creditor has requested the assignment of these rights with the bankruptcy officer pursuant to article 260 of the Debt Collection and Bankruptcy Act of 1889 (DCBA).

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 must be submitted to the court by the liquidator in cases where the liquidation exceeds one year. This report must be pre-approved by the creditors' committee. In addition, a conclusive final report must be prepared and approved by the court.

If the bankruptcy is conducted in summary procedure, the creditors usually take all decisions in writing, upon receipt of a letter to the creditors sent by the bankruptcy office.

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

In essence, similar rules apply to a liquidation proceeding pursuant to a composition agreement with assignment of assets. A creditors' committee is usually appointed in these proceeding.

Creditor representation

What committees can be formed (or representative counsel appointed) and what powers or responsibilities do they have? How are they selected

and appointed? May they retain advisers and how are their expenses funded?

The DCBA provides for the possibility for the court to appoint a creditors' committee during the definitive debt moratorium. The commissioner must then report to the creditors' committee, which has supervisory authority. In particular, the creditors' committee will authorise transactions during the debt moratorium involving the sale or charge of fixed assets, the provision of security or transactions without receiving consideration.

In the event of bankruptcy conducted in ordinary procedure (this possibility is excluded in bankruptcy conducted in summary procedure), the DCBA provides for the possibility to appoint a creditors' committee 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 amount of the claim and whether the claim is prioritised. One-quarter of the known creditors must be present to qualify. In the case of a composition agreement, the head count applies as well, but it is disputed whether the same qualifications apply as for the approval of the composition agreement or the requirements as they apply in a bankruptcy. In a bankruptcy situation, the creditors' committee is composed of three to five creditors or their (legal) representatives and ensures that the interests of all creditors are preserved. The committee has no executive power, but its decisions must be implemented by the bankruptcy administration. It is not possible for creditors who disagree to challenge decisions of the creditors' committee regarding transactions subject to authorisation pursuant to article 298 of the DCBA.

The creditors' committee regularly has the following tasks:

- supervising the activities of the bankruptcy administration, addressing questions submitted and objecting to any measures that contravene the creditors' interest;
- authorising that the debtor may continue to run its business or trade, and under what conditions;
- approving invoices and authorising the continuation of court proceedings and the conclusion of settlements and arbitration agreements; and
- objecting 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. The creditors' committee deals with the tasks set forth under the bankruptcy regime (above) and is assigned the following additional responsibilities:

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

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

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

Enforcement of estate's rights

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

If the bankrupt estate lacks sufficient free assets to conduct the bankruptcy proceeding, the proceeding will be terminated unless the necessary funds to cover the costs of the bankruptcy proceedings are provided by the creditors (article 230 of the DCBA).

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. The creditors who have received the rights assigned can pursue the claims at their own risk and costs. If successful, the proceeds (after deduction of the costs) are used to satisfy the claims of those creditors who have pursued the claim relative to their amounts and ranking.

Claims

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

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

A creditor can appeal against the rejection of the claim filed by challenging the schedule of claims in court proceedings within 20 days upon the publication of the schedule of claim. A creditor may also challenge the admission of another creditor's claim in court if the creditor can establish that its interest or the interest of the bankruptcy estate are violated by the admission of the other creditor's claim.

Provided the majority of the creditors decided not to pursue a claim that belongs to the bankruptcy estate, the bankruptcy authority may assign the rights to conduct a proceeding in connecting with a claim of the bankruptcy estate to any creditor who requests it in accordance with article 260 of the DCBA. The assignee will act in its own name and at its own risk to recover the claim. If the creditor is successful, the proceeds may be used to pay off the creditor's claim irrespective of its ranking or privilege and to reimburse the costs incurred. Should a balance subsist after this, it will be proportionally distributed among the creditors according to the schedule of claims.

With some minor exceptions stated in the DCBA and in the Federal Code of Obligations of 30 March 1911 (CO) that prohibit the assignment of specific claims, creditors are generally entitled to assign their own claims (ie, the claims they filed in the insolvency proceedings) to a third party. A partial assignment, however, may not be misused to amend the original voting rights allocated to a specific claim. In addition, contractual agreements may stipulate restrictions regarding assignment. Only a creditor duly registered is considered as being a creditor in the insolvency proceedings, including for distribution. Hence, any assignment of claim from one admitted creditor to a third party should be notified to the bankruptcy officer or liquidator. As a consequence of the (notified) assignment, the assignee assumes the legal status of the creditor. Regardless of whether the assignee acquired a claim at a discount, the assignee may register the claim for its full-face value.

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

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

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

Set-off and netting

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

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

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

Set-off against claims generally occurs when the creditor establishes that the rights were acquired bona fide prior to the adjudication of bankruptcy. The set-off is voidable when the debtor of a bankrupt debtor has acquired, prior to the opening of bankruptcy but knowing about the insolvency of the counterparty (the debtor to become bankrupt), a claim against it, with the goal to obtain by way of set-off an advantage for itself or a third party to the prejudice of the assets in bankruptcy (article 214 of the DCBA). The same provisions apply to composition proceedings.

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 (article 211 of the DCBA) 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 the 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).

Modifying creditors' rights

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

The DCBA (and the 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 in the schedule of claims. Any creditor whose claim has been rejected in part or totally or was not allocated the rank requested can challenge the decision by initiating court proceedings against the bankrupt estate. Similarly, a creditor may challenge in court the admission of another creditor's claim (article 250 of the DCBA).

Priority claims

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

All creditors that dispose of claims against the bankrupt debtor can 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 classes of unsecured creditors for the distribution out of the proceeds of the entire remainder of the bankrupt estate:

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

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

Employment-related liabilities

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

Employment contracts are not automatically terminated upon opening of a bankruptcy, liquidation or composition proceeding; they need to be terminated in accordance with the contractual termination terms. However, the employee may request early termination unless the payment of compensation for future services is adequately secured. In the case of a complete or partial transfer of business, the buyer can decide whether it wants to continue the employment. If the employment is continued after the transfer, there will be a joint and several liability with the seller for the acquirer in connection with employment claims only if the acquirer agreed to it. The rules relating to mass dismissals do not 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

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

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

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

Environmental problems and liabilities

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

Swiss legislation on insolvency does not provide for specific environmental-related provisions. Pursuant to the Federal Environmental Protection Act of 7 October 1983 (EPA), which applies in principle also to insolvency proceedings, the operator of an establishment or an installation that represents a special risk to the environment is liable for the loss or damage arising from effects that occur when this risk is materialised (article 59a of the EPA). 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 it has intentionally or negligently acted in breach of its duties defined by environmental law. Subject to specific situations (eg, factual corporate bodies), there is no mechanism that directly shifts liability to a secured or unsecured creditor or any other third party.

Liabilities that survive insolvency or reorganisation proceedings

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

The balance of the claims that are admitted in the schedule of claims in a bankruptcy proceeding that are not satisfied following the distribution of the proceeds will be

incorporated in a loss certificate. If the debtor recognised the claim, the loss certificate qualifies as a debt acknowledgement. The statute of limitation period for the loss certificate is 20 years.

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 debt moratorium or have arisen without the receiver's consent and all respective enforcement proceedings are terminated (article 310 of the DCBA).

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

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

Distributions

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

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

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

Each creditor receives a certificate of loss in respect of the unsatisfied amount of its claim. This is an official certification of the loss incurred by the creditor, which entitles the creditor to subsequently initiate new proceedings against the debtor on this basis. The statute of limitation period for the loss certificate is 20 years.

SECURITY

Secured lending and credit (immovables)

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

A debtor may provide its creditors with a variety of forms of security and quasi-security interests. The subject matter of charges on immovable property is real estate pursuant to article 655(2) of the Federal Civil Code of 10 December 1907 (the Civil Code). A real estate security interest can be established in only two ways: as a mortgage or as a real estate bond. Detailed provisions regulate these different types of security interests. Such 'real estate security interest' must 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.

As an alternative to the real estate bond, a paperless register bond has been established. The paperless register bond comes into existence with an entry in the land register.

Secured lending and credit (movables)

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

Regarding movable property, there are different options to secure a claim:

- right of retention (security interest) – a right to satisfy a claim by enabling a creditor (with the consent of the debtor) to retain and sell movable property or securities that are in the creditor's possession and that the creditor would otherwise be obliged to surrender. The creation and continuation of the right of retention is dependent upon possession of the movables. If the debtor fails to fulfil its obligation, the creditor may, if it is not sufficiently secured, realise the retained asset, following prior notification of the debtor, in the same manner as a pledge; and
- pledges – to secure a present or future claim, movable goods can also be pledged. Delivery of possession of the specific movables to the creditor or to a third person holding the pledge for the creditor is a prerequisite.

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

- retention of title – frequently, general business terms and conditions will provide for a retention of title by the seller of goods until the purchase price is fully paid. It is necessary for the parties to explicitly agree upon a retention of title and the goods concerned have to be registered item by item in the Public Retention Title Register (article 715 of the Civil Code). Swiss law presumes that the possessor of goods is the legal owner. The registration does not prevent a transfer of the property title to a third party that acts in good faith. The entitled creditor is, however, protected in the case of seizure of the goods or bankruptcy of the debtor; the monitoring of the register of title retention is cumbersome, with the consequence that this security instrument is not widely used. If movable property arrives in Switzerland and is subject to a reservation of title validly established abroad but for which the requirements of Swiss law are not yet satisfied, the retention of title will remain effective in Switzerland for a period of three months (article 102(2) of the Private International Law Act of 18 December 1987);
- 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 (article 111 of the Federal Code of Obligations of 30 March 1911 (CO)); and
- undertaking as a suretyship (articles 492 et seq of the CO). Because of the strict formalities to be observed in the case of a suretyship and its similarity to a guarantee, the parties must 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.

CLAWBACK AND RELATED-PARTY TRANSACTIONS

Transactions that may be annulled

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

Swiss law explicitly provides that the bankrupt estate includes everything that can be the subject of an avoidance action (also referred to as clawback claim) – 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 retransferred to the estate and the creditor is left with the claim it had prior to receiving the debtor's assets.

Three different types of transactions are voidable:

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

A considerable number of court decisions have admitted clawback claims and ordered the restitution of the debtor's assets. 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. Transactions that occurred during the debt moratorium may not be challenged if duly approved by the creditors' committee, the court or the commissioner.

Equitable subordination

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

Article 286, paragraph 3 and article 288, paragraph 2 of the Debt Collection and Bankruptcy Act of 1889 (DCBA) provide for a shift of 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. When these persons received assets from the debtor prior to being declared insolvent, 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.

Lender liability

Are there any circumstances where lenders could be held liable for the insolvency of a debtor?

Generally, as long as the lender is not a member of the board of directors and does not commit an act that qualifies as a tort claim, the lender should not be held liable for the insolvency of a debtor. However, if the lender acted de facto as a director, in other words took management decisions on behalf of the debtor, the lender may be considered a de facto director and be held liable if the acts of the lender lead to a damage. Also, the repayments of the claims that the debtor owes to the lender may be subject to clawback claims depending on the circumstances.

GROUPS OF COMPANIES

Groups of companies

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

Neither Swiss corporate nor insolvency law provides for a formal legal framework for groups of companies. Swiss law assumes that each legal entity acts on its own. In principle, each company is obliged to protect and pursue its own interests independently of the interest of the controlling party and, in principle, the shareholder's duty is limited to paying the share capital that has been subscribed. A parent or affiliated corporation or natural person may, however, become responsible for the liabilities of a subsidiary if undue influence on the decision-making process of the subsidiary is exerted and the position of a material or factual corporate body is assumed. Often, contractual undertakings are entered into, such as primary or accessory guarantees, undertakings as direct co-obligor or letters of

responsibility. Case law has developed for parental liability based on justified reliance by third parties on the business conduct of the parent company supporting the subsidiary. On fairly rare occasions, the piercing of the corporate veil doctrine is applied when it is considered abusive to claim legal independence of a company. In such abusive, rare cases, a court may decide to order the distribution of group company assets without regard to the assets of the individual corporate entities involved. A court may not intervene in the allocation of assets for the benefit of another group company.

Combining parent and subsidiary proceedings

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

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

INTERNATIONAL CASES

Recognition of foreign judgments

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

Switzerland is a signatory to the Lugano Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters 1988, and to the revised Lugano Convention on the Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters of 30 October 2007 (the Lugano Convention), which entered into force on 1 January 2011. In proceedings regarding 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 have exclusive jurisdiction. The Lugano Convention aligns Switzerland with the

EU system of jurisdiction and enforcement of judgments throughout Europe and includes the new member states of the European Union. The provisions of the Debt Collection and Bankruptcy Act of 1889 (DCBA) are aligned with the Lugano Convention. However, bankruptcy proceedings relating to the winding-up of insolvent companies or other legal persons, judicial arrangements, compositions and analogous proceedings are excluded from the scope of application of the Lugano Convention.

If the Lugano Convention does not apply, the provisions of the Private International Law Act of 18 December 1987 (PILA) will determine the conditions of recognition of a foreign judgment and the effects of this recognition in Switzerland.

Likewise, a Swiss bankruptcy decree does not deploy its effects automatically outside Switzerland; if the debtor is domiciled in Switzerland and there are assets abroad, article 197(1) of the DCBA provides that all sizeable assets owned by the debtor at the time of the opening of the bankruptcy proceedings, irrespective of where they are located, form one sole estate (the bankrupt estate). However, the extraterritorial effect of the Swiss bankrupt estate depends on whether and to what extent the foreign state where the assets are located recognises the Swiss bankruptcy decree. Therefore, the inclusion of foreign assets in the Swiss bankrupt estate is only possible if the foreign authorities recognise the Swiss bankruptcy decree (as is the case in Germany, for example).

If the debtor is domiciled abroad and part of the debtor's assets are located in Switzerland, the PILA requires the foreign bankruptcy decree to be recognised in Switzerland for the foreign bankruptcy estate to have access to these assets. The PILA provides for basic rules for the recognition in Switzerland of foreign bankruptcy decrees or orders for a composition with creditors or similar proceedings and has been revised with effect as of 1 January 2019 to modernise the existing framework, increase international cooperation and simplify enforcement of foreign bankruptcy decrees in Switzerland. In accordance with the provisions of the PILA, a foreign bankruptcy decree can be recognised, provided that the following prerequisites are met:

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

Since the revision of the PILA, the reciprocal recognition of bankruptcy decrees in the country where the bankruptcy decree was issued is no longer required. To be recognised, the request must be filed with the court at the location of the assets in Switzerland. If successful, the recognition of the foreign bankruptcy decree subjects the debtor's assets in Switzerland to the consequences of Swiss law (the DCBA). As a result of this, an ancillary bankruptcy proceeding (which is referred to as a 'mini-bankruptcy' proceeding) is opened for the assets located in Switzerland; the mini-bankruptcy proceeding is then conducted by the Swiss bankruptcy officer. A schedule of claims must be established with respect to these assets. The 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 schedule of claims, any balance will be remitted to the foreign bankrupt estate or to those creditors who

are entitled to it. However, the 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. Provided there are no secured creditors or unsecured privileged creditors domiciled in Switzerland involved, and the Swiss domiciled creditors are adequately treated in the foreign bankruptcy proceeding, the court may decide upon a special request of the applicant that no mini-bankruptcy proceeding is required and the Swiss-domiciled creditors must file their claims in the foreign bankruptcy proceedings. In this case, foreign bankruptcy administration may, in compliance with Swiss law, exercise all powers to which it is entitled under the law of the state in which the bankruptcy is opened; in particular, it may transfer assets abroad and conduct proceedings. These powers do not include the performance of sovereign acts, the use of coercive measures or the right to decide disputes.

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

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

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

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

UNCITRAL Model Laws

Have any of the UNCITRAL Model Laws on Cross-Border Insolvency been adopted or is adoption under consideration in your country?

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

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

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.

Foreign creditors

How are foreign creditors dealt with in liquidations and reorganisations?

In Swiss main proceedings, foreign creditors enjoy the same recognition as domestic creditors. Regarding Swiss secondary proceedings (mini-bankruptcy) over the assets of a foreign bankrupt company, there are certain privileges in favour of secured creditors and unsecured privileged creditors domiciled in Switzerland in connection with the assets located in Switzerland.

Cross-border transfers of assets under administration

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

Swiss statutory law does not provide a formal legal framework for groups of companies. Swiss law operates under the assumption that each legal entity acts on its own. In principle, each company is obliged to protect and pursue its own interests independently from the interest of the controlling party. Therefore, insolvency proceedings are conducted separately. There is no pooling of assets and liabilities for a corporate group. Consequently, assets may not be transferred from an administration in Switzerland to an administration abroad. Assets located in Switzerland can, however, be marshalled by the foreign administrator, pursuant to the rules applicable to the Swiss mini-bankruptcy proceeding; if no such ancillary proceeding is required and the court confirms that the proceeding is not required in the particular case, the foreign administrator may transfer the assets located in Switzerland directly to the foreign bankruptcy estate.

COMI

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

In Switzerland, debt enforcement and bankruptcy proceedings can exclusively be initiated 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 (article 3 of EC 1346/2000), Swiss law focuses on the formal criterion of the registered seat according to the theory of incorporation. However, with the latest revision of the PILA in the chapter regarding the recognition of foreign bankruptcy decrees, the concept of COMI (with certain limitations) has been introduced for the recognition of foreign bankruptcy decrees.

Cross-border cooperation

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

The Swiss legal system provides for recognition of foreign insolvency proceedings, in particular pursuant to the rules of the mini-bankruptcy proceeding (articles 166 to 175 of the PILA). The latest revision of the PILA focused on increasing international cooperation and simplified enforcement of foreign bankruptcy orders in Switzerland. The PILA explicitly states that the authorities and official bodies may coordinate their actions with each other, and with foreign authorities, if the proceedings have a certain connection. In the course of a Swiss mini-bankruptcy (a secondary proceeding), so far coordination is to a certain degree formalised. On an informal basis, certain exchanges 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 must marshal the assets worldwide; the administrator's authority abroad will be determined by the law of the country concerned. On that level, pragmatic solutions are often sought.

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

FINMA acts in court capacity regarding institutions regulated under the Swiss Federal Banking Act of 8 November 1934. FINMA may recognise an insolvency decree issued by the court of actual (instead of registered) domicile of the debtor. The Ordinance of the Swiss Financial Market Supervisory Authority (FINMA) on the Insolvency of Banks and Securities Dealers of 30 August 2012 (BIO-FINMA) requires that the actions taken are coordinated with foreign authorities.

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

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

Cross-border insolvency protocols and joint court hearings

In cross-border cases, have the courts in your country entered into cross-border insolvency protocols or other arrangements to coordinate proceedings with courts in other countries? Have courts in your country

communicated or held joint hearings with courts in other countries in cross-border cases? If so, with which other countries?

Cross-border protocols are increasingly used in international insolvency cases but are dealt with at the insolvency administrator's level. Sweden was one of the first countries to adopt a cross-border protocol. A Swedish administrator was the first to conclude a cross-border protocol with a Swiss administrator.

Winding-up of foreign companies

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

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

- First, under the PILA, a foreign bankruptcy decree can be recognised by a Swiss court, which subjects the debtor's assets located in Switzerland to Swiss law, namely to the DCBA. This is referred to as the mini-bankruptcy proceeding. After distribution of the proceeds according to the Swiss schedule of claims, any balance will be remitted to the foreign bankrupt estate or to entitled creditors. However, this balance will only be remitted after recognition of the foreign schedule of claims by the Swiss court. The Swiss court will examine whether the ordinary (ie, unsecured and not privileged) claims of Swiss creditors have been properly admitted in the foreign (main) proceeding. With certain restrictions, Swiss assets can thus be marshalled for the main foreign proceeding. No mini-bankruptcy proceeding is required if there are no secured creditors or unsecured privileged creditors domiciled in Switzerland involved (however, the applicant must seek for the court's authorisation to refrain from undergoing a mini-bankruptcy proceeding), and the Swiss domiciled creditors will be treated appropriately in the foreign bankruptcy proceeding. In this case, the foreign bankruptcy administration may, in compliance with Swiss law, exercise all powers to which it is entitled under the law of the state in which the bankruptcy is opened; in particular, it may transfer assets abroad and conduct proceedings. These powers do not include the performance of sovereign acts, the use of coercive measures or the right to decide disputes.
- Second, if a foreign company runs a business operation in Switzerland, the 'branch bankruptcy' pursuant to article 166(2) of the PILA and article 50 of the DCBA is to be followed. According to the majority view, branch offices are considered as business operations irrespective of their registration with the commercial register. The local and foreign creditors of the Swiss business operation (but only to the extent that such claims derive from operations of the branch office) can enforce their respective claims against the debtor's assets located in Switzerland. This can lead to a specific 'branch bankruptcy' bankruptcy proceeding, which is however only possible until the recognition of the foreign bankruptcy decree against the foreign company in Switzerland. Similarly, in case of failures in the organisation of the branch office, the courts may, as ultima ratio only, dissolve the branch office and order its liquidation pursuant to article 50 of the DCBA (article 731b of the Federal Code of Obligations of 30 March 1911).

- Third, foreign companies may elect special domicile in Switzerland for the performance of an obligation, which subjects them to Swiss debt enforcement for that obligation (article 50(2) of the DCBA). A Swiss place of performance or forum selection generally does not establish this special domicile, except for the place of payment in case of a bill of exchange.
- Fourth, if foreign companies own assets located in Switzerland proceedings can be initiated where the assets are located. This applies to assets securing claims (article 51 of the DCBA) or subject to a freezing order (articles 52 and 271 of the DCBA). Freezing orders, however, cease to apply once the foreign bankruptcy administration or another bankruptcy creditor successfully requests the opening of a mini-bankruptcy proceeding. In case of an insolvency of a foreign bank with assets in Switzerland, FINMA has far-reaching authority to recognise the foreign decree and to possibly cooperate with the foreign administration.

UPDATE AND TRENDS

Trends and reforms

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

New legislation

There are numerous projects pending with the legislator.

- First, the corporation law has been revised and the amendments entered into force on 1 January 2023. The most significant consequence regarding insolvency and restructuring law is the abolishment of the corporation moratorium pursuant to article 725a of the Federal Code of Obligations of 30 March 1911 (CO). The abolishment of this provision is compensated by the introduction of a new provision according to which the board of directors does not have to notify the bankruptcy court immediately if the over-indebtedness may be remedied in a period of 90 days. Furthermore, in contrast to the current law, the board of directors must already take action to ensure solvency in the event of impending illiquidity. The revision has a new provision on liquidity and provides for a soft revision of the provisions on capital loss and over-indebtedness.
- Second, on 18 March 2022, the parliament voted on a package of amendments aiming at fighting abusive bankruptcies, which include among other things several amendments to the Debt Collection and Bankruptcy Act of 1889 (DCBA) and the CO. The amended provision should enter into force in 2025 (further details are not known at the time of writing). For instance, article 43 of the DCBA will be amended and allow bankruptcy proceedings for public claims (such as taxes).
- Third, on 18 March 2022, the parliament voted on the revision of the Federal Act on the Oversight of Insurance Companies, which among others introduces a

restructuring proceeding for insurance companies as an alternative to bankruptcy. The amendments will enter into force on 1 January 2024.

- Fourth, on 3 June 2022, the Federal Council sent an amendment to the DCBA regarding debt restructuring for private individuals. The amendment aims to provide insolvent private individuals with a simplified composition proceeding as a means to reorganise their debts. For cases where the financial situation of the private individual is hopeless, the Federal Council aims to introduce a bankruptcy-like restructuring proceeding.
- Fifth, on 22 June 2022, the Federal Council sent another amendment to the DCBA regarding digitalisation in the debt enforcement system for consultation. The Federal Council intends to increase the possibilities of digitalisation in the debt enforcement system in the future, for example by allowing cantonal debt collection offices to have Switzerland-wide access to residents' database when needed. This would also help in the fight against the misuse of debt collection register information. Furthermore, electronic service, and in particular the use of electronic loss certificates, is intended to be regulated in a clearer way. The draft sent to consultation also suggests the introduction of online auctions for movables. In addition, further punctual amendments are foreseen in the draft.