Distressed M&A 2021

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LEXOLOGY
Getting The Deal Through

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Switzerland

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MARKET CLIMATE AND LEGAL FRAMEWORK

Market climate

1 | How would you describe the general market climate for distressed M&A transactions in your jurisdiction?

Due to the covid-19 pandemic, 2020 has been a rather modest year so far in terms of deal volumes and deal counts of M&A transactions in general (Mergermarket, Switzerland M&A Dashboard Q1–Q3, 1 October 2020). After a good start in January, the slump came in spring, with August and September looking much better than the previous year, when deal volumes and deal counts increased. Due to the measures of the Swiss government (the Guarantee Program, Short Work Easements, etc), there has not yet been a wave of distressed M&A deals. This could change in Q4 2020 or Q1 and Q2 2021 as a result of a second wave of the covid-19 pandemic.

Legal framework

2 | What legal and regulatory regimes are applicable to distressed M&A transactions in your jurisdiction?

According to the precedents of the Swiss Federal Supreme Court (SFSC), the sale of a company (share deal) is subject to the legal provisions of the purchase of movable assets. The contractual provisions are thus based on the Code of Obligations of 30 March 1911, as amended (CO). The same contractual provisions apply in the case of a sale of the company's business or parts thereof. These provisions apply in principle also to any transactions with respect to distressed companies. If the company has already been declared bankrupt, it is the bankruptcy officer or the administrator appointed by the creditors who negotiates the sale of assets (auction or single-buyer sale). In a debt-restructuring moratorium the sale of the company or of the company's business must be approved by the composition court. In both of the latter two cases, the Debt Collection and Bankruptcy Act of 1889, as amended (DCBA), which governs the enforcement of pecuniary claims and claims for the furnishing of security against private individuals and legal entities of private law, applies.

Main risk in distressed M&A transactions

3 | Summarise the main risks to all parties involved.

The acquisition of a company in financial distress already entails increased risks for the purchaser, since the company must be restructured, either before the purchase or afterwards, and the economic environment is often difficult. If a sale takes place outside of an insolvency proceedings, there is, on the one hand, the enhanced risk that the sale may be challenged in a subsequent bankruptcy proceeding on the basis of a voidance action (eg, by the bankruptcy officer or one of the creditors claiming that the transaction was under value) and that the purchaser has to return the purchased items to the bankruptcy estate. On the other hand, in such a case, the board of directors of the target company may be exposed to personal liability claims.

Director and officer liability and duties

4 | What are the primary liabilities, legal duties and responsibilities of directors and officers in the context of distressed M&A transactions in your jurisdiction?

In insolvency situations, the main duties and responsibilities of directors are no longer to protect the interests of the company (and as such the shareholders as owners of the company), but to safeguard the interests of the creditors of the company. Swiss law further explicitly deals with the director's duties in the case of loss of capital or over-indebtedness: the directors are under a duty to:

- call a shareholders' meeting and propose adequate measures for remedy, should the last annual balance sheet show that half of the share capital and the legal reserves are no longer covered by the net asset value (as assessed at going concern value) of the company; and
- notify bankruptcy courts in the case of over-indebtedness.

Non-compliance with such duties exposes the directors to liability risks towards creditors and shareholders. However, these duties have been slightly adjusted by the Swiss government during the covid-19 pandemic to grant extra time to reorganise and recover to companies hit by the financial impact of the pandemic.

Differences from non-distressed M&A

5 | In general terms, what are the key legal and practical differences between distressed and non-distressed M&A transactions in your jurisdiction?

In a distressed M&A scenario, unlike in a normal M&A process, creditors take the important part (in out-of-court deals and in formal insolvency proceedings) while shareholders have no (bankruptcy) or a much less significant position (debt-restructuring moratorium) in insolvency proceedings. While the creditors have the right of a better offer with respect to the sale of the assets of the company in a bankruptcy proceeding, the sale of the company or of the company's business must also be approved by the composition court in a debt-restructuring moratorium with composition agreement.

Timing of transactions

6 | What key considerations should be borne in mind when deciding when to acquire distressed companies or their assets?

When buying a distressed company, three aspects are of major importance: transaction certainty, time and risk of avoidance actions or liability claims against directors. While an out-of-court deal (prior to the initiation

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of formal insolvency proceedings) usually provides good transaction certainty and a timely closing of the deal, there is an enhanced risk of a challenge in a subsequent bankruptcy of the company. In contrast, the risk of avoidance action or liability claims as a result of the sale of the company or its business in the course of a bankruptcy or composition proceedings is negligible, whereas in bankruptcy or composition proceedings the purchaser will have to make concessions in terms of transaction certainty and timing, as many more parties are involved.

TRANSACTION STRUCTURES AND SALE PROCESS

Common structures

7 What sale structures are commonly used for distressed M&A transactions in your jurisdiction? What are the pros and cons of each, and what procedures and legal requirements apply?

Asset sales, share sales and any other types of transactions allowed under Swiss law are, in principle, also feasible to purchase a distressed company. If such company owns a business or part of a business that is, per se, economically viable, it is often seen in practice that such business is sold in the form of an asset sale to a 'rescue company'. In such a scenario, the board of directors sells (often with prior consultation or even approval by the shareholders) the business or parts thereof to a newly incorporated company, usually with the involvement or participation of the creditors, and even before the start of any formal insolvency proceedings. If the initiation of an insolvency proceeding is inevitable, at best, a sale of business is already prepared in such a way that it can be executed promptly once the bankruptcy proceeding or debt-restructuring moratorium have started (pre-pack). The advantage of this scenario is that the deal can be structured in a way that the rescue company does not have to assume (too) many liabilities and can get rid of burdensome pledges or other restricting collateral. The main risk of such sale scenario (outside an insolvency proceeding) is that the transaction may be challenged in subsequent bankruptcy proceeding on the basis of a voidance action (eg, by the bankruptcy officer or one of the creditors claiming that the transaction was under value), or that the directors may face liability claims.

Packaging and transferring assets

8 How are assets commonly packaged and transferred in a distressed M&A transaction in your jurisdiction? What procedural, documentary and other requirements apply?

When there is no longer any prospect of a successful restructuring of the company, it is often seen in practice that the company's business or parts thereof is sold in the form of an asset sale to a 'rescue company'.

In most cases, this is either done out-of-court (ie, before any insolvency proceedings are initiated) or under a debt-restructuring moratorium, preferably in a pre-packed deal:

If the board of directors first initiates a debt-restructuring moratorium and sells the business to a rescue company during such moratorium, it will require the consent of the composition court. This approval can be requested together with the application for the provisional moratorium if the sale must be realised urgently to avoid a loss of value. With the request for a provisional debt-restructuring moratorium, a draft composition agreement must be submitted, which outlines the sale of the business to the rescue company.

Transfer of liabilities

9 What legal requirements and practical considerations should be borne in mind regarding the acceptance and transfer of any liabilities attached to the distressed company or assets?

As long as not all creditors agree with the transaction (or the purchaser will not settle their claims in full), the board of directors of the target company must ensure that only assets and no debts, such as bank loans or payables of other (trade) creditors, are transferred to the acquiring party in the case of sale of the company's business or parts thereof. The transfer of such liabilities would not only reduce the purchase price, it would also favour the creditors involved in the transaction and potentially lead to the liability of the board of directors due to the preferential treatment of a part of the creditors. However, the assumption of privileged (eg, employee claims) and secured debt is unproblematic, provided that these will be also fully satisfied in bankruptcy proceedings, as in such case the other creditors are not disadvantaged.

Consent and involvement of third parties

10 What third-party consents are required before completion of a distressed M&A transaction? What are the potential consequences of failure to obtain these consents? In what other ways are third parties commonly involved in the transaction?

If insolvency proceedings have not been initiated, there are no additional approvals required to affect a legal sale and transfer of the business. However, in practice, the main creditor or creditors of the company are often involved in the transaction to reduce a potential subsequent challenge of the transaction in bankruptcy proceeding.

If the company or its business are sold during a debt-restructuring moratorium, the sale transaction requires the consent of the creditors (normally by approving the composition agreement by a quorum of either:

- a majority of creditors representing two-thirds of the total claims; or
- one-quarter of the creditors representing three-quarters of the total claims, and the approval of the composition court.

If bankruptcy proceedings have been initiated, the bankruptcy officer (or appointed administrator) sells the business of the company in the course of an auction or, in cases of urgency, in the form of a single-buyer sale in the best interest of the creditors, however, always offering the creditors the option to submit a better offer.

Time frame

11 How do the time frames and timelines for the various transaction structures differ? Can these be expedited in any way?

Precedents demonstrate that it is possible with the combination of a provisional debt-restructuring moratorium and a (pre-packed) sales application, to sell a company's business (or parts thereof) to a rescue company within a period of approximately one month after filing the request for a provisional debt-restructuring moratorium with the competent composition court if it can be shown that the sale of the business is urgent in order to safeguard the value of the company. The timing of a sale in a bankruptcy proceeding is often (much) longer (even as pre-pack), depending, however on the bankruptcy offices involved.

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Tax treatment

12 | What tax liabilities and related considerations arise in relation to the various structures for distressed M&A transactions in your jurisdiction?

In principle, the same tax rules apply regardless of whether the shares of the company, its business or other asset will be acquired in the course of a distressed M&A transaction or in a non-distressed situation, whereby some special tax reliefs are available in distressed scenarios (eg, for real estate property transactions). Any capital gain derived from the sale of the company's business or parts thereof could basically be offset against existing tax loss carryforwards and hence, should not trigger corporate income tax consequences if such gain can be fully offset against such losses (there is a different assessment for real estate property transactions).

In distressed M&A share deal transactions, the question always arises of how to restructure the outstanding debt in order to recapitalise the insolvent or overindebted company prior or after closing of the transaction. As capital contributions (without consideration) made by the direct shareholder are subject to one-time capital duty at a rate of 1 per cent if no exemption applies (eg, exemption for the recapitalisation for the first 10 million francs or waiver from the one-time capital duty is available if the requirements are met), recapitalisations need to be structured properly in order not to trigger the one-time capital duty. Furthermore, if properly structured, the existing tax loss carryforwards can be preserved.

Auction versus single-buyer sale process

13 | What are the respective pros and cons of auction sales and single-buyer sales? What rules and common practices apply to each?

While, in theory, the best price for the creditors can be achieved at an auction process, the focus of a single-buyer sale is on quick realisation and thus the preservation of the value of the business. The action process can also ensure that an avoidance action in a subsequent bankruptcy proceeding remains unlikely, since a fair market value can be reliably determined by various bidders. On the other hand, the organisation of an auction is often time-consuming and, depending on the circumstances, the only remaining option is a quick sale of the company or its business to ensure that suppliers and customers remain with the company. While out of court auctions will follow in principle the same rules as for non-distressed deals, auction processes in bankruptcy proceedings are governed in detail by the the Debt Collection and Bankruptcy Act of 1889, as amended (DCBA) and supporting ordinances.

DUE DILIGENCE

Key areas

14 | What are the most critical areas of due diligence in a distressed M&A transaction?

Typically, a buyer interested in buying a business in financial distress is interested in understanding the reasons for the financial distress and the exact financial situation of the business. These are areas mainly covered by the financial due diligence, but legal questions can also play an important role, depending on the circumstances.

From the legal perspective assurance that the business to be acquired can be used for the intended purposes is key for the buyer. Therefore, issues like change of control-provisions in material agreements or an analysis of the legal implications of the financial distress of the target are often areas of particular attention. Depending on the specific case employment law issues (need to retain key employees) or ownership or valid rights to use IP rights or other key assets can also be of importance.

Searches

15 | What searches of public records should be conducted as part of a due diligence exercise in distressed M&A transactions in your jurisdiction?

Compared to other jurisdictions, relatively little information on companies can be accessed in public registers in Switzerland (there is, in particular, no register on collateral granted by a company). Typically, a buyer would get an excerpt from the commercial register (which shows legal existence, lack of insolvency proceedings, capital, and names of directors or signatories) and in a distressed situation it is recommended and usual to also get an excerpt from the debt collection register and the retention of title register. If real property is transferred, an excerpt of the land register will be consulted. Apart from that a potential buyer would also search Swiss and international IP registers in case the target owns important IP rights (as in non-distressed transactions).

Contractual protections and risk mitigation

16 | What contractual protections and other strategies are commonly used to mitigate diligence gaps in a distressed M&A transaction?

It is not unusual that buyers of distressed businesses outside of insolvency proceedings accept the risks related to diligence gaps and 'set off' such risks against the lower price that is often accepted by sellers in distressed scenarios. W&I insurance is typically not available to cover diligence gaps because the lack of diligence results in an exclusion of liability under the W&I policy.

A right of the buyer to sell the company back to the seller if certain warranties are not met is practically never seen in practice, and escrow solutions for warranty claims are rather uncommon, but do occur in some cases.

Although statutory law allows the provision of representations and warranties also in a sale of the company or its business in a debt-restructuring mortarium or in bankruptcy proceedings, representations and warranties are rarely seen in practice in these circumstances.

VALUATION AND FINANCING

Pricing mechanisms and adjustments

17 | What pricing methods, adjustments and protections are commonly used in the valuation of distressed M&A transactions in your jurisdiction and what are the pros and cons of each? How are they used to balance the interests of the parties?

The prevailing pricing method used in (non-distressed and) distressed M&A transaction in Switzerland are locked box-accounts with customary leakage provisions. The big advantage of this method is, of course, the fact that no post-closing adjustments, valuations etc, are required (except if leakages occurred), which is in the interest of both parties, in particular if it is unclear whether the seller still exists a few weeks or months after closing.

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Fraudulent conveyance

18 What rules govern fraudulent conveyance of distressed assets sold undervalue in your jurisdiction? How can clawback risks be mitigated when negotiating the deal price?

Fraudulent conveyance is one of the main risks for buyers of companies in financial distress and one of the main reasons for liability claims against directors of companies in financial distress.

According to articles 285 et seq. of the Debt Collection and Bankruptcy Act of 1889, as amended (DCBA), voidance actions are possible against:

1. gifts and other transfers of assets at an undervalue;
2. certain specified acts (payment of claims by unusual means, securing claims without being obliged to, etc) undertaken at the time the debtor was already over-indebted; and
3. intentional acts, i.e. dispositions made with the intent to disadvantage certain creditors.

The suspect period in (1) and (2) is one year prior to the adjudication of bankruptcy or an equivalent event, and five years in (3).

As the clawback risk is difficult or impossible to mitigate, the parties try to conclude a pre-pack deal and have the sale of distressed assets approved by the composition court, in particular in cases where there remains an uncertainty about the true value of the purchased items.

Financing

19 What forms of financing are available and commonly used in distressed M&A transactions? How can financing be secured?

Often (strategic) investors use their own cash flow and investment capacity to acquire distressed assets and businesses. Where this is not possible, the same forms of financing are available to buyers as in non-distressed situations, and the choice of financing form is often strongly influenced by the time frame of the relevant transaction.

Because the time gap between signing and closing is often very small in distressed M&A transactions, funding security is often not the most important element during contract negotiations.

Pre-closing funding

20 What provisions are typically agreed to secure pre-closing funding of distressed businesses and assets?

If the distressed business still has unencumbered assets, lending against such assets (typically from banks) is possible and bankruptcy remote. Depending on the circumstances, a bridge financing through a parent company might be available, typically with a repayment obligation of the bridge loan at closing.

Because the time gap between signing and closing is often very small in distressed M&A transactions, funding security is often not the most important element during contract negotiations between seller and buyer (but, of course, securing funding for the transaction and the target can be a key issue for buyer).

DOCUMENTATION

Closing conditions

21 What closing conditions are commonly agreed in distressed M&A transactions? How do these differ from non-distressed transactions?

Because transaction certainty and time are key factors in distressed M&A transactions, closing conditions are usually limited to a strict minimum (eg, regulatory approvals, approval of the composition court in case of pre-packed deals). If lenders' approval of the transaction is required, such approval is sought for prior to (or concurrently with the) entering into the transaction agreements. It is not unusual to consummate distressed M&A transaction on the day of signing or shortly thereafter.

General MAC clauses are rarely seen in distressed M&A transactions. If for whatever reason there is a significant time gap between signing and closing, parties sometimes agree on 'specific MAC clauses', which allow the buyer not to complete the transaction if certain clearly defined negative events occur between signing and closing.

Representations, warranties and indemnities

22 What representations, warranties and indemnities are commonly given in distressed M&A transactions?

As a rule, no representations, warranties and indemnities are given in the case of a sale in bankruptcy or composition proceedings (exceptions apply).

In out-of-court transactions, the solution varies depending on the circumstances of the specific case. If time allows, it is not unusual that parties negotiate and agree on fundamental and also business reps and warranties like in a non-distressed M&A transaction. Typically, the buyer would then get W&I insurance coverage and the liability of seller would be limited to 1 franc or excluded (depending on the case even for fundamental warranties).

In transactions with increased (time) pressure, representations and warranties are often limited to fundamental warranties (title, authority) and maybe single business warranties of particular importance for buyer (eg, correctness of financial statements; validity and enforceability of material agreements; ownership of certain key assets).

Remedies for breach

23 What remedies are available and commonly sought for breaches of closing conditions, representations, warranties and indemnities in distressed M&A transactions?

The breach of closing conditions typically leads to a termination of the agreement. In distressed M&A transactions, the parties usually try to limit this risk by shortening the time gap between signing and closing as much as possible.

Violations of representations and warranties or indemnities usually lead to a claim for damages against a W&I insurer. Claims directly against the sellers are often excluded (sometimes even for fundamental warranties). Escrow solutions with a retention of a part of the purchase price are no longer the rule in non-distressed transactions and are even less common in distressed situations.

Insurance

24 Is warranty and indemnity (W&I) insurance available for distressed M&A transactions in your jurisdiction? If so, what provisions and exclusions are commonly included in W&I policies?

It is normal practice to get W&I insurance coverage in M&A transactions in Switzerland, including distressed M&A deals. Typically, a W&I insurance policy in a distressed scenario would generally exclude coverage for any loss arising out of alleged or actual insolvency or over-indebtedness of the acquired business.

Synthetic W&I policies are rarely seen in practice (except for tax risks) but – if at least a minimal due diligence is possible – are a suitable alternative for risk mitigation in the case of an acquisition of a business in bankruptcy proceedings, where warranties are excluded by law (auction) or not given in practice (single-buyer sale). The same is true

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if buyer and seller agree on limited warranties in an out-of-court sale, although buyers in such situations often accept the limited risk protection as part of the deal.

REGULATORY AND JUDICIAL APPROVALS

Merger control

25 What merger control rules and filing requirements govern the acquisition of distressed businesses and assets in your jurisdiction? Is the 'failing firm' defence recognised in your jurisdiction?

Distressed M&A transactions are subject to the usual merger control filing requirements. Clearance from the competition commission is needed if the relevant thresholds are met or if one of the parties has been held to be dominant in a market in Switzerland in a binding decision and the concentration concerns either that market or an adjacent market or a market upstream or downstream thereof. The failing firm defence is recognised in Switzerland and may be applied by the competition commission if:

- one or more of the parties to the transaction would exit the market within a short period of time without the acquisition;
- the other parties involved would absorb most or all of the market shares of the disappearing entity; and
- there is no solution less harmful to competition than the proposed acquisition.

These criteria have to be fulfilled cumulatively. The failing firm defence was successfully used for the first time in 1997, and since then the competition commission has approved several transactions which led to the creation or strengthening of a dominant position based on failing firm defence arguments.

Foreign investment review

26 Are distressed M&A transactions subject to foreign investment review in your jurisdiction? What rules, procedures and common practices apply?

Swiss legislation currently does not provide for any foreign investment controls (outside of specific financial market regulations and in the area of residential real property). As long as a distressed M&A transaction does not fall within one of the limited sector specific control regimes, it is exempt from any foreign investment review.

Bankruptcy court

27 What rules and procedures govern the bankruptcy court's approval of distressed M&A transactions in your jurisdiction?

The sale of assets in bankruptcy proceedings is governed in detail by the Debt Collection and Bankruptcy Act of 1889, as amended (DCBA), and supporting ordinances. Generally, two procedures – both governed by the DCBA – are available: auction and single-buyer sale. Because the auction process under the DCBA follows strict rules (all elements of the sale except for the price are set by the bankruptcy officer or the administrator appointed by the creditors), auctions according to the DCBA are not suited for the sale of entire businesses and are rarely used. The procedures for a single-buyer sale are hardly regulated by law and are often conducted in a similar way like out-of-court sales, with the important exception that, as a rule, no warranties are given for a single-buyer sale governed by bankruptcy law.

DISPUTE RESOLUTION

Common disputes and settlement

28 What issues commonly give rise to disputes in the course of distressed M&A transactions and what practical considerations should be borne in mind when seeking to settle such disputes out of court?

The most common issues in distressed M&A transactions outside formal insolvency proceedings relate to the breach of representation and warranties. However, if the sale transaction is carried out in the context of a bankruptcy proceeding (ie, during an auction process or a single-buyer sale), representations and warranties are excluded or severely restricted, which limits the scope of disputes. The main disputes are linked to the creditors of the distressed company, who may appeal against the sale if they consider that such transaction violates their rights.

The same applies if the transaction takes place in the course of a debt-restructuring moratorium: also in such proceeding, the purchaser will rarely be given extensive representations and warranties although it is more often seen as in bankruptcy proceedings. Moreover, such sale must be approved by the composition court, which also increases the hurdle for a successful challenge of the deal.

Litigation and alternative dispute resolution

29 What litigation forums are used to resolve disputes arising from distressed M&A transactions in your jurisdiction and what procedures apply? Is alternative dispute resolution (ADR) commonly used?

The forums used to resolve disputes arising from distressed M&A transactions in Switzerland are the same as for non-distressed M&A transactions (state courts or arbitration in case of an arbitration clause in the underlying agreement) if the transaction takes place outside a bankruptcy or debt-restructuring proceedings. Alternative dispute resolution (ADR) may be used; however, this is less common than litigation and arbitration proceedings.

The same applies if the transaction takes place during a debt-restructuring moratorium; however, it is most likely that the administrator in charge of the proceedings requires a jurisdiction clause in favour of the state courts and a governing law clause in favour of Swiss law. The state court at the seat of the distressed company is always competent to approve the transaction.

State courts (usually at the seat of the bankrupt company) are exclusively competent for disputes arising out of a transaction within the framework of bankruptcy proceedings and Swiss law applies by default as the applicable bankruptcy legislation.

UPDATE AND TRENDS

Recent developments and outlook

30 What have been the most significant recent developments and trends affecting distressed M&A in your jurisdiction, including any notable court decisions, regulatory actions and deals? What is the general outlook for future transactions?

As a reaction to the first wave of the covid-19 pandemic, in April 2020 the Swiss government enacted an ordinance with targeted measures to prevent corona-related bankruptcies, including a temporary suspension of the obligation to notify the court in case of over-indebtedness, amendments to the 'ordinary' composition proceedings and a new temporary covid-19 moratorium, particularly for SMEs. These temporary measures expired on 19 October 2020 and were not extended. Instead, the

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Swiss government put the extension of the provisional debt-restructuring moratorium from four to a maximum of eight months, which was resolved within the framework of the company law reform, and came into effect on 20 October 2020.

On 5 May 2020, the district court of Bülach approved within two business days a pre-packed deal that allowed the partial sale of the business of an insolvent company. Although the decision was made by a lower court, it is seen by practitioners as important, as it shows how pre-packed deals can be structured successfully and quickly implemented in insolvency situations.

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