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1 Overview

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

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

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

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

First, composition proceedings can be used as a mere restructuring moratorium (article 296a DEBA). A termination of these proceedings is only possible if the court is satisfied that the debtor is restructured (without the need for a debt rescheduling or a dividend agreement). There is no cram-down element to this procedure. An individual agreement must be reached with each single creditor or contractual group of creditors that is expected to make a concession.

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

It is fair to say that although both types of formal proceedings are used in practice, bankruptcy proceedings are much more common than composition proceedings. Special insolvency regimes exist for certain types of companies, in particular banks, securities dealers, insurance companies and other players in the financial sector.

Swiss law also provides for the possibility of an informal work-out (see question 3.2 below). In practice, this is often chosen if the financial creditors support the process.

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

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

The CO provides for various inalienable and non-transferable responsibilities of the directors of a Swiss company, which specifically apply in financial distress. The regime is identical for the most commonly used corporate forms, i.e. corporations (*Aktiengesellschaften/sociétés anonymes*) and limited liability companies (*Gesellschaften mit beschränkter Haftung/sociétés à résponsabilité limitée*). On 1 January 2023, a revision of Swiss corporate law came into force, which, among other things, (i) introduced a number of changes aimed at clarifying certain elements relating to insolvency triggers and the obligation to file for bankruptcy, and (ii) implemented an "early warning system" in the event of illiquidity and impending insolvency.

If, based on the last annual financial statements, half of the (i) share capital, (ii) statutory capital reserve not repayable to shareholders, and (iii) statutory profit reserve of the company are no longer covered by its assets (article 725a, par. 1 CO, *Kapitalverlust/perte de capital*), the directors must take measures to eliminate this capital loss and, if necessary, take further restructuring measures. It is only necessary to convene an extraordinary shareholders' meeting if such measures fall within its competence.

If a Swiss company is over-indebted (*überschuldet/surendetté*) within the meaning of article 725b CO, i.e. if its assets no longer cover its liabilities, the board of directors must notify the court without delay, unless (a) certain creditors are willing to subordinate their claims to those of all other creditors of the company to an extent sufficient to cover the capital deficit and any losses expected to arise in the next 12 months, or (b) there is a reasonable prospect that the over-indebtedness can be cured within a reasonable period, but no later than 90 days, and the claims of creditors are not additionally jeopardised (see question 3.1 below). Notification of the court will normally lead to the opening of bankruptcy proceedings or, at the request of the board of directors, to the grant of a composition moratorium. Bankruptcy proceedings must also be opened if a general meeting decides to dissolve the company on the grounds of illiquidity (*zahlungsunfähig/insolvable*) pursuant to article 191 DEBA.

In the revised CO, the board's duty to monitor the company's solvency is explicitly stated in article 725, par. 1 CO, together with the obligation to take measures to ensure liquidity if there is a risk of imminent illiquidity (*drohende Zahlungsunfähigkeit/menace d'insolvabilité*), or to propose such measures to the shareholders' meeting if they fall within its competence (e.g. capital increase). If necessary, the board can apply for a debt restructuring moratorium. The general view among practitioners is that these new obligations have not led to a conceptual change for board members, as corresponding obligations already existed under the previous concept of fiduciary duty.

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

Swiss social security laws impose strict civil and criminal liability on directors for non-payment of certain social security contributions. The relevant social security institutions actively pursue such claims.

Certain actions or omissions by a director in a distress situation may also entail the risk of criminal sanctions under the Swiss Criminal Code (**CrimC**). One of the most frequently applied provisions in financial distress is article 165 CrimC, which punishes debtors whose acts of mismanagement have caused the company's bankruptcy (*Misswirtschaft/gestion fautive*). Mismanagement can occur, for example, when insufficient capitalisation causes or aggravates a company's over-indebtedness. Special attention should also be paid to article 167 CrimC, which targets preferences granted to certain creditors by an insolvent debtor who is subsequently declared bankrupt (*Bevorzugung eines Gläubigers/avantages accordés à certains créanciers*). The standard sanctions for the relevant criminal offences are (conditional or unconditional) fines or imprisonment. In theory, the court can order a disqualification from practising a profession (*Berufsverbot/interdiction d'exercer une profession*), but this is rarely used in practice.

In view of these liability risks, the board of directors of a company in financial distress must assess whether the company can and should be financially restructured and closely monitor the financial position of the company, with particular emphasis on liquidity management and the payment of social security contributions and taxes. In addition, the board should ensure that creditors are generally treated equally, i.e. that no creditor receives preferential treatment. Finally, the board should avoid unusual means of payment (e.g. debt for asset swaps), transactions with no or inadequate consideration, paying obligations before they fall due, and resolve to apply for a moratorium or notifying the court in the event of over-indebtedness.

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

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

Regarding the possibility of other stakeholders influencing the company's situation, it should be noted that the company's auditors (*Revisionsstelle/organe de révision*) must notify the court if the company is manifestly over-indebted and the board of directors fails to notify the court itself. In addition, creditors may, under certain circumstances, request the court to open bankruptcy or composition proceedings in respect of the company. As long as the court has not opened such proceedings, creditors can take the same debt enforcement actions against a company in financial distress as against a company in good standing (including attachment orders or injunctions to prevent certain acts of disposition).

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

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

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

According to the DEBA, certain preferential or fraudulent actions of the debtor within certain suspect periods may become subject to challenge. The avoidance regime set out in articles 285 *et seq.* DEBA provides for three different avoidance actions (*Anfechtungsklage/action révocatoire*), namely: (i) the action for avoidance of gratuitous transactions (*Schenkungsanfechtung/révocation des libéralités*), which is directed against all gifts and other dispositions made by the debtor without any or adequate consideration during the year preceding the opening of bankruptcy proceedings, the granting of a moratorium or the seizure of assets; (ii) the voidability of certain specified transactions during the year preceding the opening of bankruptcy proceedings, the granting of a moratorium or the seizure of assets while the debtor is already over-indebted (*Überschuldungsanfechtung/révocation en cas de surendettement*), i.e. the granting of a security interest in respect of an existing debt without being contractually bound by prior agreement to create such security interest, the payment of a debt other than by usual means of payment, or the payment of a debt not yet due, in each case provided that the recipient cannot prove that it did not know, and could not have known of the debtor's over-indebtedness; and (iii) the avoidance for intent (*Absichtsanfechtung/révocation pour dol*), which targets dispositions and other acts of the debtor within a period of five years prior to the opening of bankruptcy proceedings, the granting of a moratorium or the seizure of assets, if the disposition was made by the insolvent with the intention to disadvantage its creditors or to favour certain creditors to the detriment of others, and if the privileged creditor knew or should have known of such intention. For all avoidance actions, it is further required that the challenged transaction has caused damages to other creditors of the debtor. The rules on avoidance for intent and avoidance of gratuitous transactions provide for an inversion of the burden of proof where such transactions are entered into by related parties (including affiliates). Accordingly, in such cases, the beneficiary must prove that it could not have been aware of the disproportion between performance and consideration (in case of avoidance of gratuitous transactions) or of the intention of the insolvent debtor to prefer certain creditors over others (in case of avoidance for intent).

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

3 Restructuring Options

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

In the event of a capital loss (*Kapitalverlust/perte de capital*), it is primarily the duty and responsibility of the board of directors to take appropriate measures: under the revised CO, the board is only required to convene an extraordinary shareholders' meeting if restructuring measures fall within its competence (article 725a CO, see question 2.1). For the implementation of other measures, the shareholders' meeting (and the court) does not need to be involved.

In case of over-indebtedness (*Überschuldung/surendettement*), the board of directors has an obligation to notify the court according to article 725b, par. 3 CO. However, this provision also states that an informal work-out may be carried out without court involvement where: (i) there are well-founded prospects that the over-indebtedness will be eliminated in due course, but at the latest within 90 days from the date on which audited financial statements are available; and (ii) the claims of creditors are not further jeopardised.

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

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

Swiss law provides for several financial restructuring measures that can be implemented to cure a capital loss and/or over-indebtedness without initiating formal restructuring proceedings. Such measures are aimed at restructuring the balance sheet, and therefore only some of the following measures impact the liquidity situation of the company:

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

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

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

For formal rescue proceedings, see question 1.2.

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

Debt-for-equity swaps, and/or composition agreements with incorporation of a company (*Nachlassvertrag mit Gesellschaftsgründung/concordat avec constitution de société*), are available in Switzerland. In a typical debt-for-equity swap, creditors receive interests from the debtor in proportion to their recognised claims. In a composition agreement with incorporation of a company, the debtor undertakes to assign its assets to a newly created company in which the creditors receive interests in proportion to their recognised claims. Pre-packaged sales are also possible under Swiss law. Such sales require the approval of the court-appointed administrator (*Sachwalter/commissaire*) and the court. There are no statutory restrictions on the involvement of related parties, but the administrator and the court will examine the terms of the proposed pre-packaged sale to ensure that it is at arm's length and does not disadvantage the debtor's creditors.

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

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

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

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

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

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

Unlike creditors, shareholders do not have the right to vote on court-approved composition agreements. However, the DEBA provides that for an ordinary composition agreement to be approved by the court, the shareholders must make an adequate contribution to the restructuring efforts.

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

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

Upon receipt of a respective request, the court will grant a provisional moratorium (*provisorische Nachlassstundung/sursis provisoire*) of up to four months, which may be extended for a further four months in exceptional cases. The court may also appoint a provisional administrator (*provisorischer Sachwalter/commissaire provisoire*) to assess the prospects of a successful reorganisation or of a composition agreement.

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

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

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

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

Important steps in the composition proceedings require the involvement of the court. These include the opening of composition proceedings, the appointment of an administrator, the approval of certain transactions involving the debtor and, finally, the approval of the composition agreement.

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

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

Conversely, if a contract is not terminated, while the counterparty is generally required to perform its obligations in kind, it may demand that security be provided if the debtor's restructuring adversely affects the counterparty's claim (which would typically be the case). If security is not provided in a timely manner – the applicable time period depends on the underlying circumstances – the counterparty is entitled to unilaterally terminate the contract. For long-term contracts (*Dauerschuldverhältnisse/contrats de durée*), to the extent that the counterparty performs its obligations during a moratorium with the consent of the administrator, its claims against the debtor constitute so-called "debts of the estate" (*Masseverbindlichkeiten/dettes de la masse*) and must be paid with priority (before all other unsecured creditors).

In addition, the administrator has the authority to order the conversion of a performance in kind owed by the debtor into a monetary claim of equivalent value, which then becomes subject to the terms of the composition agreement. Set-off rights are modified upon the grant of a moratorium in a similar way to the opening of bankruptcy proceedings (see question 4.5 below).

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

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

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

With regard to rescue financing, a distinction must be made between financing provided prior to the opening of insolvency proceedings, and financing provided in the context of composition proceedings:

- If financing is provided during the moratorium, the administrator's consent to such financing will result in a super-priority status of the relevant claims, i.e. they qualify as debts of the estate (*Masseverbindlichkeiten/dettes de la masse*), which will be paid with priority over any distributions to other creditors. In addition, if security is provided for such financing with the approval of the competent court or – where applicable – the creditors' committee, the granting of this security is excluded from the scope of avoidance actions as described in question 2.3 above.
- Rescue financing granted prior to the opening of insolvency proceedings does not benefit from super-priority status. However, the Swiss Federal Supreme Court has clarified in a 2020 decision that pre-insolvency rescue financing (so-called *Sanierungsdarlehen/prêt accordés dans un but d'assainissement*) may benefit from clawback protection. A loan to a debtor in financial distress qualifies as protected rescue financing if: (i) the debtor attempts to restructure the company; (ii) the efforts to restructure the company support a legitimate view that justifies the likelihood of a favourable outlook; and (iii) the loan is granted for the very purpose of such restructuring. Whether these criteria are met will have to be assessed on a case-by-case basis and will involve a certain degree of (judicial) discretion.

4 Insolvency Procedures

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

The key insolvency procedure leading to the winding up of a company is bankruptcy. Additionally, composition proceedings can be used to liquidate and realise the debtor's assets in a more flexible manner than in bankruptcy (composition agreement with assignment of assets, *Nachlassvertrag mit Vermögensabtretung/concordat par abandon d'actif*) but with the same result, i.e. the winding up of the company. Composition proceedings are also the only formal rescue proceeding under Swiss law (see question 1.2 above).

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

A company may be placed under bankruptcy proceedings by the competent court: (i) if a creditor whose claim has not been paid, but has been upheld in the course of debt enforcement proceedings, has successfully requested the opening of bankruptcy proceedings (*Konkursbegehren/réquisition de faillite*); (ii) at the request of the debtor, by declaring to the court that it is insolvent; (iii) at the request of a creditor, if the company has committed certain acts to the detriment of its creditors, if it has ceased payments, or if certain events have happened during composition proceedings; or (iv) upon the notification of the court by the board of directors (or the statutory auditors) that the company is over-indebted. For the opening of composition proceedings with the intention of rescuing the company or concluding a composition agreement with assignment of assets, see question 3.5 above.

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

Bankruptcy proceedings are opened by the competent court and, during the bankruptcy proceedings, the insolvent company is represented exclusively by the bankruptcy administration. The bankruptcy administration publishes a notice of bankruptcy, inviting all creditors and debtors to file their claims and debts within one month. Thereafter, a distinction is made between ordinary and summary bankruptcy proceedings:

- In ordinary proceedings, creditors are invited to a first creditors' meeting together with the creditors' call. The first creditors' meeting may appoint a private bankruptcy administration acting instead of the state bankruptcy office, as well as a creditors' committee with certain supervisory (and limited decision-making) powers. A second creditors' meeting is convened to decide on all important matters, including the enforcement of claims against third parties and the method of realisation of assets belonging to the bankruptcy estate (the actual realisation is reserved to the bankruptcy administrator).
- In summary proceedings (which are the rule in practice, with the exception of a few large-scale bankruptcies), no creditors' meetings are held and there is no option to appoint a private bankruptcy administration. Creditors may be approached by circular letter, and may resolve on certain matters (including whether certain claims should be pursued by the estate or should be offered for assignment to creditors).

Following distribution of the proceeds (see question 4.6 below), the bankruptcy administration submits its final report to the bankruptcy court. If the court finds that the bankruptcy proceedings have been fully conducted, it will declare them closed.

For composition proceedings (with assignment of assets or as a rescue procedure), please refer to question 3.6 above. Once a composition agreement with assignment of assets has been approved by the creditors and confirmed by the court, the liquidator will take over the realisation of the assets.

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

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

For composition proceedings (with assignment of assets or as a rescue procedure), see question 3.4 above. Once a composition agreement with assignment of assets has been approved and confirmed by the creditors and the court, private realisation of collateral is available for movable assets on the basis of article 324 DEBA.

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

Whether existing contracts are terminated upon the initiation of winding up procedures depends primarily on statutory contract law and the specific terms of a contract, which are generally upheld in Swiss liquidation proceedings. Under Swiss contract law, certain types of contracts are terminated *ex lege*, while others can be terminated by one party upon the bankruptcy of the other.

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

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

Set-off rights are also available in cases of bankruptcy; however, the substantive set-off rules are subject to certain modifications. First, a distinction must made between: (i) claims of the insolvent party that are part of the insolvency estate, and claims against the insolvent party (*Konkurs- oder*

Nachlassforderungen/créances dans la faillite ou le concordat) to be satisfied with a dividend payment from the proceeds of the insolvency estate; and (ii) claims of, and against, the insolvency estate (*Masseforderungen und -verbindlichkeiten/créances et dettes de la masse*), which are mainly characterised by the fact that they have come into existence only after the opening of insolvency proceedings with the consent of the insolvency administration. As a rule, set-off is only possible between claims of the same category. In addition, the set-off of claims of the first category is not admissible if: (i) the debtor of the insolvent party became a creditor of the latter only after the opening of bankruptcy proceedings or the grant of a moratorium; or (ii) the creditor of the insolvent party became a debtor of the insolvent party or the insolvency estate only after the opening of the bankruptcy proceedings or the grant of a moratorium. Furthermore, set-off is voidable if a debtor of the insolvent party acquires a claim against the latter prior to the opening of bankruptcy proceedings or the grant of a moratorium, but in awareness of the insolvency, in order to obtain an advantage for himself or a third party to the detriment of the insolvency estate. For the impact of composition proceedings on existing contracts, see question 3.7 above.

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

Secured claims (*pfandgesicherte Forderungen/créances garanties par gage*) are satisfied directly out of the net proceeds of the realisation of the collateral. If the proceeds are insufficient to satisfy the claim of a secured creditor, such creditor ranks as an unsecured and non-privileged creditor for the outstanding amount of its claim.

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

The first class consists of employees' claims: (i) resulting from the employment relationship that arose during the six months prior to the opening of bankruptcy proceedings, and which do not exceed the maximum insurable annual salary as defined in the Federal Ordinance on Accident Insurance (currently CHF 148,200); (ii) relating to the restitution of deposited securities; and (iii) resulting from social compensation plans that arose during the six months prior to the opening of the bankruptcy proceedings. The first class also includes insured persons' claims based on the Federal Statute on Accident Insurance and facultative pension schemes, as well as claims of pension funds against employers.

The second class includes claims for various social security contributions.

All other claims fall in the third class. Claims in a lower ranking class will not receive dividend payments until all claims in a higher-ranking class have been satisfied in full. Claims within a class are treated on a *pari passu* basis.

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

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

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

In contrast, there are limited possibilities for the debtor to revoke the bankruptcy proceedings during the course of the proceedings. At the beginning of bankruptcy proceedings, the debtor has the possibility to appeal the declaration of bankruptcy issued by the competent court within 10 days. To do so, the debtor must: (i) demonstrate its ability to pay its debts (*zahlungsfähig/solvable*); and (ii) provide evidence that the relevant claim has been settled or deposited with the court on behalf of the respective creditor, or that the creditor, having requested the opening of bankruptcy proceedings, waives such proceedings. Alternatively, the debtor may, at a later stage, from the expiration of the deadline for the creditors' call (*Schuldenruf/appel aux créanciers*) until the closure of the proceedings, request the competent court to revoke the bankruptcy (*Widerruf des Konkurses/révocation de la faillite*), provided that: (i) the debtor is able to prove that all claims have been paid; (ii) the debtor submits a written statement of all creditors who have requested the opening of bankruptcy proceedings that such request is withdrawn; or (iii) a composition agreement has been reached.

5 Tax

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

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

6 Employees

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

Employment agreements are not automatically terminated if the employer is declared bankrupt. However, an employee may terminate the employment relationship without notice unless the employee is provided with security for claims arising from the employment relationship. Subject to such termination rights, the bankruptcy administration may decide to maintain some employment contracts, in which case salary payments become obligations of the estate. The administration may also, as happens in most cases, decide to close down the business and therefore decide to terminate the employment contracts. In this case, it must comply with applicable notice periods. Unpaid salaries must be filed and ranked in the schedule of claims. Composition proceedings generally have a legal effect similar to bankruptcy with respect to employment contracts. However, it is much more common for employment contracts to be upheld in composition proceedings than in bankruptcy.

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

7 Cross-Border Issues

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

Pursuant to the DEBA, bankruptcy and composition proceedings can only be opened in respect of companies incorporated in Switzerland, which means that such companies must be registered in the Swiss commercial register (*Handelsregister/register du commerce*). A Swiss court has no jurisdiction to order the bankruptcy or composition of a company incorporated outside of Switzerland, even if such a company has substantial commercial activities in Switzerland. Therefore, a company incorporated outside of Switzerland can only restructure or enter into insolvency proceedings in Switzerland if it has re-domiciled in Switzerland.

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

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

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

(i) the insolvency order must have been issued in the debtor's country of domicile or where the debtor has its COMI;
(ii) the petition for recognition must have been submitted by the bankruptcy administrator, the debtor, or a creditor;
(iii) the bankruptcy order must be enforceable in the country where it was issued; and
(iv) the bankruptcy is not contrary to Swiss public policy and the fundamental principles of Swiss procedural law.

Since 2019, reciprocity is no longer a requirement. Once the petition for recognition has been filed, the court may order conservatory measures at the request of the petitioner. In principle, following recognition, the foreign bankruptcy order has the same effects as a Swiss bankruptcy order with regard to the debtor's assets located in Switzerland.

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

In turn, if ancillary insolvency proceedings are opened, pursuant to article 172, par. 1 PILA, only certain claims may be included in the schedule of claims, i.e.: (i) claims secured by pledged assets located in Switzerland according to article 219, pars 1 to 3 DEBA; (ii) unsecured but privileged claims of creditors domiciled in Switzerland according to article 219, par. 4 DEBA (first and second classes); and (iii) claims for liabilities of a branch (*Zweigniederlassung/succursale*) of the debtor registered in the commercial register in Switzerland. After these creditors have been satisfied, any remaining balance is transferred to the foreign bankruptcy estate (article 173, par. 1 PILA). This transfer, which is the result of the Swiss ancillary bankruptcy, requires prior recognition of the foreign schedule of claims, with the Swiss courts assessing whether the creditors domiciled in Switzerland were treated fairly in the proceedings and given an opportunity to be heard, among other things.

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

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

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

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

8 Groups

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

Swiss insolvency law is based on the principle of "one company, one proceeding". Hence, if multiple members of the same corporate group file for insolvency, there will be separate insolvency proceedings for each group member. The group itself is not subject to insolvency proceedings. Despite this principle, article 4a DEBA requires the Swiss bankruptcy authorities to coordinate their actions as far as possible in the event of a group insolvency. In particular, based on article 4a DEBA, it would be possible to appoint one sole administrator in the insolvency proceedings of affiliated entities within the same group or to decide on the exclusive jurisdiction of the insolvency courts and authorities competent for one group entity for all affected group entities, subject to prior agreement of all authorities involved. However, since the provision was introduced in 2014, there has been little practical guidance as to how such coordination is handled.

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

9 The Future

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

On 1 January 2025, new rules were introduced in the CO, DEBA and CrimC to combat the misuse of bankruptcy proceedings. The aim is to prevent debtors from abusing bankruptcy proceedings to discharge their obligations, thereby damaging their creditors and competing unfairly with other companies.

In addition, the Swiss legislator intends to further modernise debt enforcement proceedings. To this end, it proposes to introduce a nationwide debt collection register extract and to create a legal basis for electronic services such as the use of electronic loss certificates and auctions via online platforms. The Federal Council conducted a public consultation process in 2022 and submitted a draft of the revised law to the Swiss Parliament in Summer 2024, which is currently considering the proposed amendments.

9.2 What, in your opinion, is the outlook for the restructuring and insolvency market in your jurisdiction over the next year? Are there any specific macroeconomic factors expected to cause, or any particular sectors expected to be impacted by, financial distress?

Macroeconomic developments, in particular geopolitical tensions, ongoing conflicts and a tense economic situation, make it difficult to anticipate developments in the insolvency and restructuring landscape in Switzerland this year. Based on our experience in 2024, we expect the restructuring and insolvency market to continue to be characterised by a high number of insolvency cases from different sectors and for diverse reasons, leading to financial distress for individual market participants. In addition, certain sectors are at risk of being indirectly affected by the market situation in other jurisdictions (e.g. the automotive industry in Germany).

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