The Legal 500 & The In-House Lawyer
Comparative Legal Guide
Switzerland: Restructuring & Insolvency

This country-specific Q&A provides an overview of the legal framework and key issues surrounding restructuring and insolvency in Switzerland.

This Q&A is part of the global guide to Restructuring & Insolvency.

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1. **What forms of security can be granted over immovable and movable property? What formalities are required and what is the impact if such formalities are not complied with?**

The main types of security interests for movable property are pledges and transfers or assignments for security purposes. Pledges come in two forms, i.e. regular pledges with no transfer of ownership and irregular pledges with a transfer of ownership and an obligation to return collateral of the same amount and quality. An irregular pledge is assumed where a secured creditor benefits from a right of rehypothecation or similar right of use. Security over immovable property is taken in the form of mortgages and, more often, by way of a pledge or transfer for security purposes of mortgage certificates. Pledges and mortgages are so-called accessory security interests which implies, inter alia, that (i) the valid existence of the pledge or mortgage is dependent on the continuing valid existence of the secured obligations and (ii) the holder of the secured obligations must be identical with the holder of the relevant security interest. In turn, a transfer or assignment for security purposes is a non-accessory security interest where the aforementioned principles do not apply.

The concept of a pledge is frequently used for the following asset categories:

Certificated shares: The valid creation requires a written pledge agreement and the transfer of possession of the share certificate (with an endorsement for registered shares). The articles of association of the pledged company may establish additional requirements for the creation and/or perfection of a right of pledge.

Other securities: Uncertificated securities are pledged by way of a written pledge agreement. If the securities are in the form of book entry / intermediated securities either of the following must occur for the creation of a valid security interest: (i) a transfer to an account of the pledgee or (ii) an irrevocable instruction from the pledgor to the intermediary regarding adherence of the intermediary to instructions from the pledgee without consent or cooperation from the pledgor.

Bank accounts: The valid creation requires a written pledge agreement. Enforceability of the pledge vis-à-vis the account bank further requires notification of the pledge to the account bank.

Intellectual property rights: The valid creation requires a written pledge agreement. Registration of the pledge in the relevant registers for patents, trademarks and designs is not required for the valid creation but for perfection of the right of pledge.

Movable assets: In addition to a pledge agreement (for which the written form is not required but strongly recommended) the creation of the security interest requires the depossession of the pledgor. A security interest is not validly created as long as the pledgor has unrestricted access to the relevant assets. This makes the security unattractive in many instances.

A transfer for security purposes is regularly chosen for the creation of a security interest with respect to mortgage certificates over real estate. The creation of the mortgage certificate requires an act in the form of a public deed. In addition to a transfer agreement (for which the written form is generally not required but strongly recommended) the valid creation of the security interest requires the transfer of the relevant mortgage certificate (if it is issued in certificated form) or an application to the land registry to record the secured party as a holder of the mortgage certificate (if the mortgage certificate is a register mortgage certificate). If the mortgage certificate is issued in certificated form in the name of a specific creditor and not to the bearer, an endorsement is required. The endorsement must not be in blank.

Failure to comply with the aforementioned requirements to create a valid right of pledge will result in the security not having been validly created and, therefore, not being enforceable. In turn, non-compliance with perfection requirements may have the effect that security may not be fully enforceable with respect to certain specific third parties only or that such security may have limited effects.

2. What practical issues do secured creditors face in enforcing their security (e.g. timing issues, requirement for court involvement)?

If security is enforced outside of formal proceedings on the basis of a relevant contractual authorization, Swiss law does not establish major obstacles for secured creditors. A robust and clear authorization language is particularly important for enforcement by way of appropriation, though. In any event, appropriation without proper accounting of the value of the relevant collateral against the secured obligations is prohibited under Swiss law. Secured creditors could become liable to the provider of the security if the security is not being enforced in good faith. To our knowledge, such proceedings are very exceptional, though.

Enforcing security through debt enforcement proceedings is only available for pledge type of security interests and requires the involvement of the authorities. This may significantly slow down the enforcement process. Also, the statutory default enforcement route of a public auction does often yield a depressed result below the fair value of the collateral. Secured creditors, thus, have a preference for sales outside of an auction process which generally requires the consent of all relevant parties.

In a bankruptcy context, secured creditors benefitting from a regular pledge type of security interest are under a general obligation to hand in the collateral to the insolvency practitioner who would then sell the relevant asset. This results in a significant delay. Exceptions apply (i) for book-entry / intermediated securities with a value which may be determined objectively and (ii) under insolvency regimes for certain regulated entities. Again, the standard enforcement route is a public auction but sales outside of an auction process are permissible with the consent of the relevant parties. No obligation to hand in the collateral exists for secured parties benefitting from a transfer or assignment for security purposes or from an irregular pledge.

In a composition proceeding, there would not be an obligation to hand in the collateral to the insolvency practitioner. However, during the moratorium phase enforcement in the collateral would generally not be permissible. Again, the exceptions referred to above apply.

3. What is the test for insolvency? Is there any obligation on directors or officers of the debtor to open insolvency procedures upon the debtor becoming distressed or insolvent? Are there any consequences for failure to do so?

Under Swiss law, the following terms must be distinguished:

- Illiquidity (Zahlungsunfähigkeit): A Swiss corporate is illiquid pursuant to Art. 191 of the Swiss Federal Act on Debt Enforcement and Bankruptcy (DEBA) if it is no longer in a position to pay its debts as and when they fall due. Hence, this test focuses on the solvency of the corporation.
- Over-indebtedness (Überschuldung): A Swiss corporate is over-indebted within the meaning of Art. 725 par. 2 (CO) if its assets are no longer sufficient to cover its liabilities. This test is balance sheet based. That said, over-indebtedness may result from illiquidity where, as a result, the going concern assumption is no longer sustainable and, thus, accounting will have to be made at liquidation values.

The highest executive body of a Swiss corporate is generally obliged to file for bankruptcy proceedings in case of over-indebtedness within the meaning of Art. 725 DEBA. Certain exceptions apply where a deep subordination exists (cf. section 5 below) or where a restructuring can be implemented without delay. The general assembly of a Swiss corporate may further resolve to apply for the liquidation of the Swiss corporate through a bankruptcy proceeding if the company is illiquid pursuant to Art. 191 DEBA but no general obligation to initiate such proceedings in case of illiquidity currently exists under Swiss corporate law. Furthermore, a creditor may directly apply for the opening of bankruptcy proceedings if the corporation has ceased to make payments pursuant to article 190 DEBA.

There is no specific trigger event for a debtor to request the opening of composition proceedings although (looming) illiquidity and/or over-indebtedness will often exist. In addition, both creditors entitled to request the opening of bankruptcy proceedings and the bankruptcy court may request the opening of composition instead of bankruptcy proceedings.

It is currently being proposed within the context of a general revision of Swiss corporate law to extend the duties of the highest executive bodies of a Swiss corporate in case of (looming) illiquidity. Such rules are not currently expected to enter into force before 2019. It is not proposed to make (looming) illiquidity an automatic trigger for insolvency proceedings.

Please refer to section 11 below for the consequences of a breach of obligations by the highest executive body of a Swiss corporate.

4. What insolvency procedures are available in the jurisdiction? Does management continue to operate the business and / or is the debtor subject to supervision? What roles do the court and other stakeholders play? How long does the process usually take to complete?

There are two main types of formal insolvency and restructuring proceedings in Switzerland: bankruptcy (i.e., liquidation) proceedings (Konkursverfahren) and composition proceedings (Nachlassverfahren).

In bankruptcy proceedings, all business activities of the insolvent debtor are generally discontinued and the management can no longer validly act on behalf of such debtor. All acts necessary in the context of the bankruptcy proceedings are subsequently carried out by the competent bankruptcy authorities and the receiver in bankruptcy. In contrast, an insolvent debtor may generally continue its business in the context of composition proceedings. While the executive bodies continue to be in charge of business operations, the insolvent debtor is typically placed under supervision by an administrator who needs to approve certain transactions and can issue instructions of both general and specific nature. The court can further limit the management rights of the insolvent debtor.

The opening of both proceedings must be ordered by the court. The court's further involvement in bankruptcy proceedings is generally limited whereas its role is more prominent in composition proceedings where a number of actions and procedural steps must be approved or granted by the court. Creditors benefit from various rights in both types of proceedings, including inspection rights, rights to challenge certain acts of the insolvency practitioner and participation rights at court hearings.

The duration of insolvency proceedings largely depends on the complexity of the case. Composition moratoria which are terminated due to a successful restructuring will typically take considerably less time (anywhere between a few months and two years) than bankruptcy proceedings in relation to large companies which involve numerous jurisdictions and entail a variety of complex legal issues (which may easily last up to five years or longer).

Where a debtor is over-indebted, restructuring may also be pursued by way of a corporate moratorium or postponement of bankruptcy (Konkursaufschub) which will also have to be granted by a court. An administrator may be appointed by the court but existing executive bodies generally remain in control of the management of the debtor. The statutory framework for a postponement of bankruptcy is fragmentary. In view of inherent uncertainties, it is not used very often in the German speaking part of Switzerland to restructure corporate debtors. The postponement of bankruptcy is proposed of being abolished within the context of the more general revision of Swiss corporate law referred to under section 3 above.

5. How do creditors and other stakeholders rank on an insolvency

of a debtor? Do any stakeholders enjoy particular priority (e.g. employees, pension liabilities)? Could the claims of any class of creditor be subordinated (e.g. equitable subordination)?

Secured claims are satisfied directly out of the net proceeds from the realisation of the collateral. Should the proceeds not be sufficient to satisfy the claim of the secured creditor, the remainder of the claim ranks as an unsecured and non-privileged claim.

Unsecured claims are divided into three classes. Insofar as corporate debtors are concerned, the first class consists of certain employee claims up to a maximum amount of currently CHF 148,200 per employee as well as certain pension related social security claims, the second class includes claims of various contributions to social insurances and all other claims are comprised in the third class. Claims in a lower ranking class will only receive dividend payments once all claims in a higher ranking class have been satisfied in full and claims within a class are treated on a pari passu basis.

Subordination may result from a contractual subordination or an equitable subordination:

- Contractual subordination comes in two forms, i.e. (i) in the form of a deep subordination within the meaning of Art. 725 para. 2 of the Swiss Code of Obligations (CO) where the creditor has agreed to come 'last in row' and (ii) in the form of a bilateral subordination (Nachrang) which only benefits selected creditors. The treatment of the former category is well established under Swiss law whereas the treatment of the latter category is disputed in an insolvency context.
- The concept of equitable subordination is being discussed primarily for shareholder and certain other affiliated parties' loans where funds were made available to a corporate debtor in a financial distress situation where no other third party financing would have been available. If admitted, an equitable subordinated claim would be treated in the same way as a claim subject to deep subordination.

6. Can a debtor’s pre-insolvency transactions be challenged? If so, by whom, when and on what grounds? What is the effect of a successful challenge and how are the rights of third parties impacted?

The following avoidance actions are available to the relevant insolvency practitioner or a creditor (if the relevant rights have been assigned to it):

- Avoidance of gratuitous transactions targets, in particular, all gifts and all dispositions made by the debtor without any or without adequate consideration;
- avoidance for over-indebtedness targets the granting of a security interest for existing debts without a prior contractual obligation, the settlement of a monetary claim in a manner other than by usual means of payment and the payment of a debt which was not yet due, in each case provided that the recipient is unable to prove that it was unaware and must not have been aware of the debtor's over-indebtedness; and
- avoidance for intent targets dispositions and other acts made by the debtor if the disposition was made by the insolvent with the intent to disadvantage its creditors or to prefer certain of its creditors to the detriment of other creditors and if the privileged creditor knew or should have known of such intent.

Targeted transactions must have occurred during certain look-back periods: Avoidance of gratuitous transactions and avoidance for over-indebtedness is available where a relevant act has occurred during the year prior to the opening of bankruptcy proceedings, the granting of a moratorium or the seizure of assets. A five years period applies to avoidance for intent. Following the opening of bankruptcy proceedings or the conclusion of a composition agreement with assignment of assets, the avoidance claims must be pursued within two years (statute of limitations).

For all challenges, it is further required that the challenged transaction has caused damages to other creditors of the debtor. In addition, it is noteworthy that the rules regarding avoidance for intent as well as avoidance of gratuitous transactions provide for an inversion of the burden of proof whenever these transactions are entered into by related parties (including affiliated entities).

If all requirements are met, the court orders the defendant to return the specific assets to the estate. If this is no longer possible, the court may order the defendant to compensate the estate in cash. The defendant has a return claim for its own performance which is to be performed in kind as an obligation of the estate or, if no longer possible, by admittance of an unsecured and non-privileged insolvency claim.

7. **What restructuring and rescue procedures are available in the jurisdiction, what are the entry requirements and how is a restructuring plan approved and implemented? Does management continue to operate the business and/or is the debtor subject to supervision? What roles do the court and other stakeholders play?**

Composition proceedings may be used to restructure a creditor as follows:

- Composition proceedings may be used as a mere restructuring moratorium which can be terminated with the approval of the court once the debtor is financially recovered. There is no cram-down element to this procedure. An individual agreement must be reached with each single creditor who is expected to make a concession.
- Where a mere restructuring moratorium is not sufficient, a debtor may choose to offer a composition agreement to its creditors which may take the form of (i) a debt-rescheduling agreement where the debtor offers the creditors full discharge of claims according to a fixed time schedule or (ii) a dividend agreement where the debtor offers the creditors only a partial payment of their claims. A combination of both elements is possible. A composition agreement must be approved by the creditors which requires the affirmative vote by a quorum of either a majority of creditors representing two-thirds of the total debt, or one-fourth of the creditors representing three-fourths of the total debt. Creditors with privileged claims and secured creditors will not be entitled to vote on the composition agreement (and will not be subject to its terms). After approval by the creditors, the composition agreement requires confirmation by the composition court and, with such approval, becomes valid and enforceable on all (approving, rejecting and non-participating) creditors.

The competent court initiates composition proceedings based on a request typically brought forward by the debtor. First, a provisional moratorium of up to four months will be granted. In this context, the court can also appoint a provisional administrator. If the court finds that there are reasonable prospects for a successful reorganisation or that a composition agreement is likely to be concluded, it must thereafter grant the definitive moratorium for a period of four to six months (which can be extended to a maximum of 24 months) and appoint an administrator. See section 4 above for the continuing management of the debtor by existing management and the restructuring by means of a corporate moratorium or postponement of bankruptcy.

8. Can a debtor in restructuring proceedings obtain new financing and are any special priorities afforded to such financing (if available)?

Yes, this is possible. The administrator's consent and in case of posting of collateral, court approval will have to be sought and, if granted, the claim for repayment of the financing party is granted a super-priority in the form of an obligation of the estate which will be satisfied ahead of all other claims. Administrators in Switzerland are generally rather reluctant to take out new financing, though.

9. How are existing contracts treated in restructuring and insolvency processes? Are the parties obliged to continue to perform their obligations? Will termination, retention of title and set-off provisions in these contracts remain enforceable? Is there any an ability for either party to disclaim the contract?

In case of bankruptcy proceedings, there are certain types of contracts that are terminated automatically under applicable substantive contract law (e.g. mandates governed by Swiss law). For other types of agreements, the applicable substantive contract law or the specific contract may provide for a termination right in case of bankruptcy. Automatic termination or termination rights are generally upheld in a Swiss bankruptcy. A contract which has not been terminated continues to exist as a matter of Swiss bankruptcy laws. If so, the receiver in bankruptcy may choose to perform the bankrupt's obligations under a so-called synallagmatic agreement (so called cherry-picking right). If the receiver in bankruptcy decides to perform the bankrupt party's obligations to secure performance by the other party, these obligations qualify as so-called estate obligations which are satisfied in advance and in full prior to all other creditors. Special rules apply to long-term contracts. In case no cherry-picking right has been exercised by the receiver in bankruptcy, even if they are not terminated upon the opening of bankruptcy procedures, future claims arising under such long-term contracts will only be admitted to the schedule of claims if they cover the period until the next possible termination date (calculated from the opening of bankruptcy) or until the end of the fixed duration of a contract. In addition, the cherry-picking right can be exercised for future obligations only. It is heavily debated under Swiss law whether an obligation of the non-affected party to perform agreements which have not been terminated and where no cherry-picking right has been exercised continues to exist.

In composition proceedings, contractual relationships between the debtor and its counterparties generally continue to be effective during the moratorium unless terminated ex lege or based on a contractual termination right (which, again, would generally be upheld). For contracts which have not been terminated, the administrator has the authority to order conversion of a performance owed by the debtor into a monetary claim of corresponding value which will then become subject to the terms of the composition agreement. Furthermore, the debtor may terminate long-term contracts without respecting the contractual notice periods during the moratorium against full indemnification of the counterparty (but only as an unsecured and non-privileged insolvency claim) if the continuing existence of these contracts would jeopardise the restructuring as a whole. The administrator's consent is required for such a termination.

Set-off rights generally continue to be available in insolvency proceedings, subject, however, to certain restrictions which may, in particular, prohibit set-off of pre-insolvency with post-insolvency claims. Retention of title arrangements are not typically effective in an insolvency scenario of a Swiss debtor unless the very strict rules, including registration requirements for retention of title arrangements under Swiss law have been properly followed (which is the exception rather than the rule).

10. What conditions apply to the sale of assets/the entire business in a restructuring or insolvency process? Does the purchaser acquire the assets “free and clear” of claims and liabilities? Can security be released without creditor consent? Is credit bidding permitted?

In bankruptcy proceedings, the requirements for the sale of assets depend on the type of proceedings. While in ordinary proceedings the receiver in bankruptcy must generally follow more strict rules with regard to the realization of assets, in particular where it is envisaged to realize an asset of the insolvent debtor by means of a bilateral sale outside of an auction process, there is larger discretion in case of summary bankruptcy proceedings. In each case, the secured creditors must consent to such asset not being sold by public auction and all creditors must be given the possibility to submit a higher offer for real estate property or other assets of high value. Sales generally occur on an 'as is where is' basis and, thus, the acquired asset would not necessarily be free of claims and liabilities. No representations and warranties are typically given by the receiver in bankruptcy. Upon completion of the sale, the security will be released. Credit-bidding is available to a secured creditor only.

In composition proceedings, the insolvent debtor typically requires both the consent from the administrator and the competent court if it wishes to sell its assets or even the entire business during the moratorium phase. Administrator's consent is sufficient for the sale of current assets, though. Court approval can also be sought at the outset of the proceedings which would allow a pre-packaged restructuring under Swiss law. The consent of a secured creditor will be required for a release of a security interest. The terms of the disposal, including representations and warranties, will have to be negotiated between the seller and the purchaser. Again, credit-bidding is only available to a secured creditor and subject to contract.

11. What duties and liabilities should directors and officers be mindful of when managing a distressed debtor? What are the consequences of breach of duty?

Under Swiss corporate law the highest executive body of a company is responsible for, inter alia, the overall management and strategic positioning of the company, the financial accounting and control, the overall supervision of the management and compliance with laws and regulations generally. Such duties become particularly relevant in a distress scenario in which case a certain shift of responsibilities from management to the highest executive body occurs. Duties and obligations will have to be interpreted in the light of the financial status of the company. In addition, the overarching duties (duty of care, fiduciary duty, equal treatment of shareholders) and certain specific obligations apply in a distress situation:

- If the latest annual financial statement shows that half of the share capital and the legal reserves of a company are no longer covered by its assets, the directors, inter alia, have to convene an extraordinary shareholders' meeting to which adequate restructuring measures must be proposed.
- If the board of directors of a Swiss corporate has reason to believe that the company is over-indebted, it must draw up an interim balance sheet without delay,

which must be audited by the company's statutory auditors. Such interim balance sheet will have to be prepared on a stand-alone basis and the statutory accounting rules are pertinent. If such interim balance sheet shows that the company is over-indebted at both going concern values and liquidation values, the board of directors of the company must, as a rule, file for bankruptcy without delay.

Sound management may require the initiation of composition proceedings before an over-indebtedness situation exists in case the company is in the state of (looming) illiquidity. Such action may be warranted where an out-of-court restructuring does not appear to be viable and/or where creditor action is expected which may frustrate the attempts for an out-of-court restructuring.

If such duties are not complied with, executive bodies may be exposed to civil law director's liability where the wilful or negligent breach of the director's duties has caused damages to the company or, in certain constellations, the creditors and where there was a causal nexus between the breach and the damage. Where executive bodies failed to notify the court of an over-indebtedness situation, damages typically cover the increase of loss that occurred between the date the executive bodies failed to act and submit a notification of over-indebtedness with the competent court and the date bankruptcy proceedings were effectively opened. Further liability risks may arise in the context of transactions that are subject to avoidance (see section 6 above).

In addition, executive bodies may be exposed to the risk of criminal liability if they fail to adhere to their statutory duties and obligations. In particular, such risks exist in case of failure to properly keep corporate books and accounts, mismanagement, where bankruptcy proceedings were caused fraudulently, in case of a fraudulent reduction of assets to the detriment of creditors or in case of creditor preference.

12. Is there any scope for other parties (e.g. director, partner, parent entity, lender) to incur liability for the debts of an insolvent debtor?

Executive bodies of a Swiss corporate may become liable for certain social security contributions and withholding tax obligations which were not paid prior to the initiation of insolvency proceedings. Furthermore, the parent company of an insolvent corporate debtor may become liable for claims of creditors of the latter in exceptional circumstances, namely under the theories of piercing the corporate veil and/or based on a trust based liability. Requirements established in court precedents and legal doctrine are fairly strict, though.

Partners and lenders are not typically exposed to the risk of incurring a liability for the debts of an insolvent debtor unless they have assumed the role of a de facto shadow executive of a Swiss corporate in which case they may become exposed to the risk of director's liability (see section 11 above). That said, recent court precedents hold that it is generally not sufficient to be qualified as a shadow director where a contracting party or lender merely acts to protect its contractual position.

While they do not directly incur a liability for the debts of an insolvent debtor, the company's statutory auditors may become liable for damages similar to a company's director if they do not notify the court if the company is over-indebted and the board of directors fails to notify the court itself (see section 11 above).

13. Do restructuring or insolvency proceedings have the effect of releasing directors and other stakeholders from liability for previous actions and decisions?

No. Quite to the contrary, there is an increased likelihood that director's liability claims are scrutinized in an insolvency context. That said, such claims will typically not be pursued where a restructuring has been achieved although no formal release will occur.

14. Will a local court recognise concurrent foreign restructuring or insolvency proceedings over a local debtor? What is the process and test for achieving such recognition?

Swiss insolvency proceedings are intended to apply universally for local debtors. Swiss authorities would, thus, not recognize and give effect to any foreign main insolvency proceedings opened outside of Switzerland. That said, certain foreign restructuring proceedings (including a UK scheme of arrangement) may not be viewed as insolvency type of proceedings from a Swiss perspective but rather as court rulings or contractual matters where recognition may be available. This will have to be looked at on a case by case basis.

15. Can debtors incorporated elsewhere enter into restructuring or insolvency proceedings in the jurisdiction?

Main Swiss restructuring or insolvency proceedings would not be available to a debtor incorporated elsewhere. Where a foreign debtor is undergoing restructuring or insolvency proceedings outside of Switzerland, a foreign insolvency official would not be authorized to take possession of, or otherwise seek enforcement in, any Swiss assets of the debtor. Rather, Swiss ancillary proceedings will have to be applied for with respect to such assets which leads to a parallel proceeding for Swiss located assets pursuant to the rules for Swiss insolvency proceedings. Requirements for recognition in Switzerland are fairly strict and include, in particular, the requirement that the main proceeding has been initiated at the registered seat of the corporate (rather than its centre of main interests) and the requirement of reciprocity. These rules are currently proposed of being amended. In particular, it is proposed to abolish the requirement of reciprocity, to allow recognition of proceedings which have been initiated at the centre of main interests (rather than the registered seat) and to waive the requirement of ancillary proceedings under certain circumstances. The proposed amendments would align the general regime to the special provisions which are already in force for banks and other financial institutions.

16. How are groups of companies treated on the restructuring or insolvency of one of more members of that group? Is there scope for cooperation between office holders?

Swiss insolvency law does not recognize the concept of substantive consolidation. Hence, separate insolvency or restructuring proceedings will have to be initiated for each member of a corporate group. That said and pursuant to Art. 4a DEBA, Swiss insolvency authorities are held to coordinate their actions to the extent possible in a group insolvency. A similar obligation is currently proposed for international group insolvencies where the Swiss authorities would have to coordinate and cooperate with foreign office holders.

17. Is it a debtor or creditor friendly jurisdiction?

On balance, recent amendments to the DEBA have strengthened the role of the debtor and have made composition proceedings a more attractive tool for restructurings from a debtor's perspective. In particular, the availability of a silent (not published) provisional moratorium and the new statutory rule regarding an exit from a composition moratorium without the need for a composition agreement are aimed at facilitating in-court restructurings. That said, creditors are still adequately protected in various ways so that, from an overall perspective, the DEBA strikes a fair balance between the interests of the involved parties. Active creditors may exercise a significant influence on the proceedings (broad information access rights, consent requirements, participation rights at court hearings etc.) and passive creditors are protected by the supervision of the proceedings by an administrator (which is regularly appointed although not mandatory for all types of proceedings) and the court. Still, in our perception, the majority of restructurings is being pursued outside of formal restructuring proceedings. This route is typically faster but involves additional risks, namely for executive bodies of the debtor.

18. Do sociopolitical factors give additional influence to certain stakeholders in restructurings or insolvencies in the jurisdiction (e.g. pressure around employees or pensions)? What role does the state play in relation to a distressed business (e.g. availability of state support)?

Unlike in other jurisdictions, pension authorities do not typically play an important role in restructuring or insolvency proceedings in Switzerland. Unions may play a more active role, namely where a restructuring requires a (mass) dismissal of employees. That said, employment laws in Switzerland are fairly liberal when compared to other jurisdictions.

Leaving aside the TBTF discussion for financial institutions, Swiss governmental authorities do not play a relevant role in relation to distressed businesses and state support would not generally be available. State creditors may, however, be willing to discuss payment terms etc. as any other creditor.

19. What are the greatest barriers to efficient and effective restructurings and insolvencies in the jurisdiction? Are there any proposals for reform to counter any such barriers?

A silent (non-public) moratorium is currently only available for four months. This is a rather short window to achieve a consensual restructuring. It is proposed to extend the maximum duration of a silent moratorium to eight months in the context of the more general amendment to Swiss corporate law referred to above (cf. section 3).

For out-of-court restructurings, there has been much debate (and uncertainty) for how long a debtor may attempt to restructure in the state of over-indebtedness on the basis of a viable restructuring plan. This is an uncomfortable situation for the members of the highest executive body of a Swiss corporate in view of the daunting liability risks (cf. section 11). It is currently proposed to set the relevant period to ninety days and to clarify the starting point.

Finally, some scholars hold that the mandatory equal treatment of the disparate and large group of third class creditors (cf. section 5) creates a meaningful barrier to successful restructurings in Switzerland as no tailored cram-down is available. There is some truth to this but we consider it unrealistic that this fundamental principle of Swiss insolvency laws will be changed in the near future. Also, experience shows that a further distinction may be achieved contractually (although, of course, without the cram-down feature).