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Switzerland

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1 Overview

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

The recovery and insolvency of companies incorporated in Switzerland is governed by the Swiss Code of Obligations (**CO**) and the Swiss Debt Enforcement and Bankruptcy Act (**DEBA**). The CO and the DEBA provide for a fair balance of rights and obligations of both debtors and creditors.

In 2014, the DEBA was amended to make in-court restructuring options more appealing to debtors. Based on our experience so far, this has slightly shifted the balance. In turn, the trigger events set forth in the CO to initiate insolvency proceedings are currently under review and it is to be expected that the focus will shift from balance sheet triggers to liquidity triggers.

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*). Whereas in bankruptcy proceedings a company is eventually wound up, 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) result in a debt restructuring (be it through a debt-rescheduling or a dividend agreement or a combination thereof); or (iii) be used as a mere restructuring moratorium, which may be terminated without the need to reach a composition agreement or to open bankruptcy liquidation proceedings if the debtor can be successfully restructured during the moratorium. Further, Swiss law provides for the possibility of an informal work-out; please see question 3.1 below for more details. Special insolvency regimes exist for certain types of companies, most notably banks, securities dealers, insurance companies and other players in the financial industry.

It is fair to say that although both types of formal proceedings are used in practice, bankruptcy proceedings are opened significantly more frequently than composition proceedings. Due to the higher costs linked to the latter, they are primarily (albeit not exclusively) used by major companies in financial distress.

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

2.1 What duties 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 that specifically apply in financial distress. The regime is identical for the corporate forms most frequently used in practice, i.e., corporations (*Aktiengesellschaften/sociétés anonymes*) and limited liability companies (*Gesellschaften mit beschränkter Haftung/sociétés à résponsabilité limitée*).

If, based on the last financial statements, half of the share capital and the legal reserves of the company are no longer covered by its assets (article 725 par. 1 CO, *Kapitalverlust/perte de capital*) the directors, *inter alia*, have to convene an extraordinary shareholders' meeting and to propose appropriate restructuring measures. If a Swiss company is over-indebted (*überschuldet/surendetté*) within the meaning of article 725 par. 2 CO, i.e., if its assets no longer cover its liabilities, the board of directors must notify the court without delay unless certain creditors are willing to subordinate their claims to those of all other company creditors in an amount sufficient to cover the capital deficit and any losses anticipated to be incurred in the next 12 months. Notification of the court will typically lead to the opening of bankruptcy proceedings. Furthermore, bankruptcy proceedings have to be initiated if a shareholders' meeting resolves on the dissolution of the corporation as a result of its illiquidity (*zahlungsunfähig/insolvable*) pursuant to article 191 DEBA.

As an alternative to filing for bankruptcy, a company (or a creditor entitled to request the opening of bankruptcy proceedings) may apply for the postponement of bankruptcy (*Konkursaufschub/ajournement de faillite*) or the opening of composition proceedings. However, it is not required for the admissibility of composition proceedings and the grant of a moratorium that the company is over-indebted within the meaning of article 725 CO, i.e. if its assets no longer cover its liabilities, or that it is unable to pay its debts within the meaning of article 190 par. 1 section 2 DEBA. Still, the debtor must make it plausible to the court that over-indebtedness and/or illiquidity are likely to occur in the near or more distant future unless a restructuring is pursued under the protection of a moratorium. Furthermore, court

precedents hold that a company which is over-indebted may continue to trade if there are good prospects that the company can be restructured within a short period of time. The timeframe available to the directors is typically viewed to be in the range of four to six weeks from the determination of over-indebtedness.

Directors' liability typically arises in bankruptcy. The general legal basis as regards the civil liability of directors (*Haftung für Geschäftsführung/responsabilité dans la gestion*) is article 754 CO, pursuant to which the members of the board of directors and any person entrusted with the management or the liquidation of a corporation shall be liable for damages "caused by wilful or negligent violation of their duties". Accordingly, the liability of a director requires: (i) a breach of the director's duties; (ii) damages caused to the corporation or a particular creditor; (iii) a wilful or negligent conduct (fault); and (iv) a causal link between the breach and the damage. According to the above, courts have held directors who failed to take the steps required by law by not notifying the court about the over-indebtedness of the company liable. In such scenarios, damages typically cover the increase of loss that occurred between the moment the directors should have known of the corporation's distressed situation and failed to take appropriate actions and the moment the bankruptcy was actually declared (*Konkursverschleppung/retard de la prononcé de la faillite*). Further liability risks may arise in case of a mismanagement or the context of transactions that are at risk of being challenged (see question 2.3).

Several provisions of the Swiss Criminal Code (**CrimC**) may also apply in the context of the activity undertaken by a director. Article 165 CrimC punishes debtors whose acts of mismanagement have caused the company's bankruptcy (*Misswirtschaft/gestion fautive*). This criminal provision expressly refers to the case of the debtor who, by means of an insufficient capital endowment, causes or aggravates its over-indebtedness before being declared bankrupt. Special attention must also be paid to article 167 CrimC, which deals with the issue of the advantages granted to certain creditors by an insolvent debtor who is subsequently declared bankrupt (*Bevorzugung eines Gläubigers/avantages accordés à certains créanciers*). As for disqualification (*Berufsverbot/interdiction d'exercer une profession*) issues, article 67 par. 1 CrimC (which is in fact very rarely implemented) provides that the court may prevent a convicted person from exercising their profession for a period extending from six months to five years if this person has been punished either by an imprisonment sanction exceeding six months or a fine exceeding 180 day rates for an offence committed within the exercise of a profession when the circumstances give reason to fear new abuses from the convicted person.

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 which 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 laws, as outlined in detail in question 1.2 above and questions 3.2 *et seq*. below. They would not, however, prevent foreclosure in all types of collateral. Most importantly, foreclosure in assets where legal title has been transferred for security purposes may still occur despite a composition moratorium and certain types of intermediated securities may also be realised during a stay.

As to the possibility of using other stakeholders to influence the company's situation, firstly it should be noted that the company's statutory auditors (*Revisionsstelle/organe de révision*) must notify the court if the company is over-indebted and the board of directors fails to notify the court itself. In addition, creditors may petition the court to open bankruptcy proceedings or composition proceedings in respect of the company under certain circumstances. As long as no such proceedings have been opened by the court, creditors may take the same debt enforcement actions against a company in financial distress as they may against a company in good standing. Also, there are no special rules and regimes applicable to particular types of unsecured creditors as far as the enforcement of their claims is concerned, i.e. the available enforcement actions under the DEBA are the same for all unsecured creditors. This notwithstanding, the claims of certain creditor categories such as employees or social security insurances are privileged in the context of insolvency proceedings (see also question 4.6 below) and some creditors may have additional contractual rights *vis-à-vis* the debtor under Swiss substantive laws (e.g. the right of termination of the landlord in case of non-payment of the rent). A particular constellation in this context consists of the so-called lien of the landlord (*Retentionsrechts des Vermieters*) which, under certain circumstances, provides that the inventory kept in the premises leased under a commercial lease shall secure outstanding rent payments for a period of up to a year-and-a-half. If the lessee is declared bankrupt or otherwise liquidated by means of formal insolvency proceedings, the landlord would need to register its claims and the pertaining lien – subject to a number of limitations and requirements – in the course of such proceedings. Whether or not such claims and the lien would then be admitted to the schedule of claims is decided by the receiver in bankruptcy, with other creditors being able to contest both the existence and amount of the claim itself as well as the lien.

Finally, with regard to retention of title arrangements in general, it should be noted that while Swiss law in theory allows for such arrangements to be established, the pertaining formal requirements are rather cumbersome and the retention of title does not protect against the *bona fide* acquisition of title by a third party. Consequently, such constellations are of very little relevance and do not confer any additional creditor rights in insolvency proceedings.

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 acts made by the debtor within certain suspect periods may become subject to challenge. The avoidance regime set forth in articles 285 *et seq*. DEBA provides for three different avoidance actions (*Anfechtungsklage/action révocatoire*), i.e.: (i) the action to avoid gratuitous transactions (*Schenkungsanfechtung/révocation des libéralités*) which targets, in particular, all gifts and all dispositions made by the debtor without any, or without adequate, consideration during the year prior to 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 prior to 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 for existing debts without being, by prior agreement, contractually obligated to create the relevant security interest, the settlement of a monetary claim in a manner other than by usual means of payment, or 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 (iii) the avoidance for intent (*Absichtsanfechtung/révocation pour dol*) which targets dispositions and other acts made by 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 intent to disadvantage its creditors or to prefer certain creditors to the detriment of other creditors and if the privileged creditor knew or should have known of such intent. For all challenges, it is further required that the challenged transaction has caused damages to other creditors of the debtor. 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). Accordingly, in such cases the benefiting party 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 prerequisites are met, the court orders 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. In recent case law, the Swiss Federal Supreme Court has shown a tendency to apply rather low standards for a successful avoidance for intent.

3 Restructuring Options

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

In case of a loss of capital (*Kapitalverlust/perte de capital*), the board of directors must convene an extraordinary shareholders' meeting and propose appropriate restructuring measures (article 725 par. 1 CO, see question 2.1). No court needs to be involved for the proposition or implementation of such measures.

While, according to article 725 par. 2 CO, there is a general obligation to notify the court in case of over-indebtedness (*Überschuldung/surendettement*), court precedents hold that, during a short window of a few weeks, an informal work-out may be carried out without court involvement in case of good prospects of success (see question 2.1). Furthermore, the court may, at the request of the board of directors or a creditor, postpone the adjudication of bankruptcy, provided that there is the prospect of a financial reorganisation (*Konkursaufschub/ajournement de la faillite*). Such reorganisation may occur under the supervision of an administrator, which is instated by the court. That said, the opening of composition proceedings (see question 3.2 below) is requested more frequently in such instances.

3.2 What formal rescue procedures are available in your jurisdiction to restructure the liabilities of distressed companies? Are debt-for-equity swaps and pre-packaged sales possible? 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?

Formal rescue procedures are available in the form of composition proceedings. The restructuring of liabilities may be achieved in two ways, with or without a cram-down element:

First, composition proceedings may be used as a mere restructuring moratorium (article 296a DEBA). A termination is only possible if it can be established before the court that the debtor is restructured (without the need for a debt rescheduling or a dividend agreement). An individual agreement must be reached with each single creditor who is expected to make a concession.

Second, where it is not possible to receive consent from each single creditor, 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 time schedule and, hence, the contractual terms and conditions of the credits are modified. 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. The debtor is not wound-up as a consequence of such debt-rescheduling or dividend agreement and once such agreement has been adopted by the required quorum of creditors and the competent court, the debtor would have full power to manage the company's affairs. The composition agreement must be approved by a majority of creditors. These are rarely used to restructure large companies.

Debt-for-equity swaps and/or composition agreements with incorporation of a company (*Nachlassvertrag mit Gesellschaftsgründung/concordat avec constitution de société*) are admissible in Switzerland. In a typical debt-for-equity swap, creditors receive interests in the debtor in proportion to their recognised claims. Under a composition agreement with incorporation of a company, the debtor undertakes to assign its assets to a newly created company in which the creditors obtain interests in proportion to their recognised claims. Furthermore, pre-packaged sales are possible under Swiss law. Such sales may require the consent of the court-appointed administrator (*Sachwalter/commissaire*) and the court.

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

During the moratorium, creditors of claims 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 who are, however, 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 claims in time are given the right to vote in the creditors' meeting. Other than 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 by 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. Creditors with privileged claims and secured creditors (to the extent that their claims are covered by the estimated liquidation proceeds of the collateral) will not be entitled to vote on the composition agreement. After approval by the creditors, the composition agreement requires confirmation by the composition court. With the court's confirmation, the composition agreement becomes valid and binding upon all creditors of claims 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, thus, possible to cram-down dissenting creditors in such proceedings. In turn, Swiss law does not provide for different classes of creditors which are subject to a composition agreement and, hence, no cram-down of dissenting classes of creditors is available.

As opposed to the creditors, shareholders have no voting rights over court-adjudicated composition agreements. The DEBA, however, provides that in order for an ordinary composition agreement to be approved by the court, the equity holders must make an appropriate contribution to the restructuring efforts.

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

Composition proceedings are typically initiated by the debtor. No specific trigger event exists which must have occurred for the debtor to be entitled to request the opening of composition proceedings. 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.

Upon receipt of a request to this effect, the court grants a provisional moratorium (*provisorische Nachlassstundung/sursis provisoire*) of up to four months. Furthermore, a provisional administrator (*provisorischer Sachwalter/commissaire provisoire*) may be appointed by the court to permit an assessment of the prospects of a successful reorganisation or of a composition agreement.

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 grant a definitive moratorium (*definitive Nachlassstundung/sursis concordataire*) for a period of four to six months and appoint an administrator (*Sachwalter/commissaire*). Upon application by the administrator, the duration of the moratorium may be extended to up to 12, and in particularly complex cases, 24 months.

3.4 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 during the provisional moratorium. 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. The composition court may, however, direct that certain acts shall require the administrator's participation in order to be legally valid, or authorise the administrator to take over the management from the debtor. Without the authorisation of the composition court or the creditors' committee (if appointed), the debtor is prohibited from divesting, encumbering or pledging certain assets and to grant guarantees or to make gifts.

Major steps in the composition proceedings require the involvement of the court. This holds true for 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.

3.5 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 continue to be 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 *vis-à-vis* the Swiss debtor and the administrator from a Swiss insolvency law perspective. Notwithstanding the foregoing, there are certain restrictions (see question 3.4) which may prohibit the debtor from disposing of its assets or continuing its business.

If, in contrast, a contract is not terminated, while the contracting party would generally have to perform its obligations in kind, it may demand that security be provided if the debtor's restructuring has an adverse effect on the counterparty's claim (which would typically be the case). In the event that no security is provided in due course – with the applicable time period depending on the underlying circumstances – the counterparty is entitled to unilaterally rescind the relevant agreement. In case of long-term contracts (*Dauerschuldverhältnisse/contrats de durée*), to the extent 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 have to be paid as a matter of priority (prior to all other non-secured creditors).

Further, the administrator has the authority to order conversion of a performance owed by the debtor in kind into a monetary claim of corresponding value, which will then become subject to the terms of the composition agreement. Set-off rights are modified upon the grant of a moratorium in much the same way as upon the opening of bankruptcy proceedings (see question 4.5 below).

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

3.6 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 have to be paid with priority from funds available at the outset of the proceedings, trading results or realisation proceeds. External funding is possible. An administrator will carefully analyse whether external funding is appropriate.

As to rescue financing, whether or not the provision of such financing is given protection depends on the individual circumstances of the restructuring context. In particular, a distinction needs to be made between rescue financings made available prior to the opening of insolvency proceedings and loans granted in the context of composition proceedings. As a result of the most recent revision of the DEBA, transactions made during composition proceedings with the approval of the competent court or – if applicable – the creditors' committee are explicitly exempted from the scope of avoidance actions as described in question 2.3 above and, thus, benefit from claw-back protection. In addition, any claims arising out of such transactions qualify as debts of the estate (*Masseverbindlichkeiten/dettes de la masse*) which are paid with priority before any distributions are made to other creditors.

In light of the most recent court precedents, it is not clear if – and on what conditions – rescue financing granted prior to the opening of insolvency proceedings (so-called *Sanierungsdarlehen/prêt accordés*

dans un but d'assainissement) may benefit from claw-back protection. As a consequence of such unclear and ambiguous case law, pre-insolvency rescue financing presents a rather high risk for potential lenders.

4 Insolvency Procedures

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

The key insolvency procedure which leads 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., winding up of the company.

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

A company may be placed into bankruptcy proceedings by the competent court: (i) if a creditor whose claim has not been settled but upheld within the course of debt enforcement proceedings has successfully requested the opening of bankruptcy proceedings (*Konkursbegehren/réquisition de faillite*); (ii) upon a debtor's request by declaring to the court that it is insolvent; (iii) upon a creditor's request if the company has committed certain acts to the disfavour of its creditors or if it has ceased payments or if certain events have happened during composition proceedings; or (iv) upon a notification of the court by the board of directors (or the statutory auditors) of the company that the company is over-indebted within the meaning of article 725 par. 2 CO. As to the opening of composition proceedings with the intention of concluding a composition agreement with assignment of assets, see question 3.3 above.

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

Bankruptcy proceedings are opened by the competent court and, within the course of bankruptcy proceedings, the insolvent company is represented exclusively by the bankruptcy administration. If the rules for ordinary bankruptcy proceedings apply (summary proceedings are ordered if the proceeds of the bankrupt's assets are unlikely to cover the costs of ordinary proceedings or in non-complex circumstances), the bankruptcy estate is administered as follows: the bankruptcy administration publishes a notice of bankruptcy instructing all creditors and debtors to file their claims and debts within one month and inviting creditors to a first creditors' meeting. The first creditors' meeting may appoint a private bankruptcy administration acting instead of the state bankruptcy office as well as a creditors' committee which has certain supervisory (and limited decisive) competencies. A second creditors' meeting is convened to pass resolutions as to all important matters, including the commencement or continuation of claims against third parties and the method of realisation of the assets belonging to the bankruptcy estate (the actual realisation, however, is reserved for the bankruptcy administrator). Following distribution of the proceeds (according to 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 completely carried out, it declares them closed. For composition proceedings with assignment of assets please refer to question 3.4 above. Once a composition agreement with assignment of assets has been approved and confirmed by the creditors and the court, the liquidator would take over the realisation of the assets.

4.4 How are the creditors and/or shareholders able to influence each winding up 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 come to an end and creditors may not 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 have to (i) notify the bankruptcy administrator if they are holding assets owned by the debtor within 30 days as from the public announcement of the opening of bankruptcy proceedings, and (ii) hand in the collateral to the bankruptcy administrator. As a rule, contractual or statutory rights to privately realise such collateral are no longer enforceable in bankruptcy. Notable exceptions exist with respect to individual assets, most importantly for certain intermediated securities. Furthermore, the restrictions do not apply to certain types of security interests involving an outright transfer of title. In any event, the secured creditors keep their preferential rights with respect to the collateral and will be satisfied out of the net proceeds of the sale of such collateral in priority to any other creditors. Real estate mortgages are only realised and proceeds paid out to creditors if their claims against the debtor are due; claims secured by real estate mortgages that are not yet due are transferred to the acquirer of the real property.

For composition proceedings with assignment of assets, please refer to question 3.5 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 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 is primarily governed by substantive contract law and the specific terms of a contract, which are generally upheld in a Swiss winding up proceeding. Under Swiss contract law, certain types of contracts are terminated *ex lege*, whereas others can be terminated immediately by one party in case of bankruptcy of the other.

If contracts are not terminated, the contracting party would generally have to perform its obligations in kind but it would be bound to accept a dividend rather than full payment or specific performance. However, should the bankruptcy administration elect in its sole discretion to pursue the performance of a contract which was not or was only partially fulfilled at the time of the opening of the bankruptcy proceedings, the counterparty may demand that security be provided, and it may further expect full performance by the bankruptcy administration. The right of the bankruptcy administration to elect performance of the contract 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 the bankruptcy. The bankruptcy administration and the contractual partner 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 the bankruptcy proceedings.

Special insolvency rules apply to long-term contracts. 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. If the bankruptcy estate has made use of performances under the long-term contracts, article 211a DEBA provides for the indemnification thereof to be a claim against the bankruptcy estate (*Masseverbindlichkeiten/dettes de la masse*) and, thus, to be paid with priority.

Set-off rights are also available in bankruptcy but the substantive set-off rules are subject to certain modifications in bankruptcy. First, a distinction needs to be made between (i) claims of the insolvent party forming 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 out of the proceeds of the insolvency estate on the one hand, 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, 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, respectively, or (ii) the creditor of the insolvent party did not become a debtor of the insolvent party or the insolvency estate until after the opening of the bankruptcy proceedings or the grant of a moratorium, respectively. 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, respectively, but in awareness of the insolvency in order to gain an advantage for himself or a third party to the detriment of the insolvency estate.

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 proceeds from the realisation of the collateral. Should the proceeds not be sufficient to satisfy the claim of a secured creditor, such creditor shall rank as an unsecured and non-privileged creditor for the outstanding amount of its claim.

Unsecured claims are ranked within three classes of claims. Leaving aside claims which are irrelevant in a corporate context, the classes are composed as follows: the first class consists of claims of employees (i) derived from the employment relationship which arose during the six months prior to the opening of bankruptcy proceedings and which do not exceed the maximum insurable annual salary as defined by the Federal Ordinance on Accident Insurance (which is currently CHF 148,200), (ii) in relation to the restitution of deposited security, and (iii) derived from social compensation plans which arose during the six months prior to the opening of the bankruptcy proceedings. The first class also includes claims of the assured derived from the Federal Statute on Accident Insurance and from facultative pension schemes, as well as claims of pension funds against employers. The second class includes claims of various contributions to social insurances. 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. 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 have to be paid with priority; i.e., before any other creditor is paid.

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

Once the bankruptcy proceedings have been terminated, this is generally not possible. In this scenario, following distribution of 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 completely carried out. As a consequence, the company ceases to exist and will be removed from the commercial register. However, in case previously unknown assets of the insolvent are discovered after the bankruptcy proceedings have been closed, the bankruptcy administration distributes the proceeds of such assets without further formalities.

In contrast, there are limited options for the debtor to have bankruptcy proceedings revoked during the course of proceedings. At the outset of bankruptcy proceedings, the debtor has the possibility to appeal the declaration of bankruptcy ordered by the competent court within 10 days. To this effect, the debtor must (i) make it plausible that it is able 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 renounces that such proceedings be carried out. Alternatively, at a later stage, as from the expiration of the deadline for the creditors' call (*Schuldenruf/appel aux créanciers*) until the closure of proceedings, the debtor may request the competent court to revoke bankruptcy (*Widerruf des Konkurses/revocation de la faillite*), provided that the debtor (i) is able to evidence that all claims have been settled, (ii) submits a written statement of all creditors having requested the opening of bankruptcy proceedings that such request is withdrawn, or (iii) a composition agreement has been achieved.

5 Tax

5.1 What are the tax risks which 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, companies in financial difficulties have generally incurred losses in previous years that can be set-off against these profits. In this context, one must note that Swiss tax law enables set-off with reported losses of the seven 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 or the contribution for no remuneration ("*Harmonika*"). 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 upon the opening of insolvency proceedings of the employer. In case the employer becomes insolvent, though, an employee may terminate the employment relationship without notice unless such employee is provided security for claims arising from the employment relationship. Subject to such termination rights, the bankruptcy administration may decide to maintain some employment contracts. The administration may also, as it happens in the majority of cases, cease the business and therefore decide to terminate the work contracts. When doing so, it has to comply with the applicable notice period. Unpaid salaries have to be claimed and scheduled. Composition proceedings generally have a legal effect that is similar to bankruptcy with respect to employment contracts. That said, it is much more common to maintain employment contracts than in bankruptcy.

Employee claims' are privileged claims and rank in the first class of creditors. They comprise (i) claims having their basis in the employment relationship which arose during a period of six months prior to the opening of insolvency proceedings, up to a maximum amount determined by Swiss accident insurance legislation which is currently equivalent to CHF 148,200 (see also question 4.6 above) as well as employee claims for (ii) return of deposits, and (iii) social compensation plans (*Sozialplan/plan social*) that came into existence or fell 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 in relation to social insurance 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 may only be opened in respect of companies incorporated in Switzerland, meaning that such company must be registered with the Swiss commercial register (*Handelsregister/register du commerce*). A Swiss court is not competent to order the bankruptcy or composition of a company with a registered seat outside of Switzerland, even if such company has substantial trade and business activities in Switzerland. A company incorporated outside of Switzerland may, thus, only restructure or enter into insolvency proceedings in Switzerland after such company has re-domiciled to Switzerland. For the sake of completeness, it should be noted that Swiss legal doctrine discusses the availability of main Swiss proceedings for a non-Swiss incorporated entity in exceptional circumstances where main insolvency proceedings in the jurisdiction at the registered seat are either unavailable or impracticable (high requirements) and that there is a close nexus to Switzerland (which may be satisfied through a debtor's main centre of interest (**COMI**) in Switzerland). We are, however, not aware of a precedent which would have opened main proceedings in Switzerland on the basis of this theory. This notwithstanding, in case 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*). Such proceedings, however, are limited to obligations incurred by the branch (article 50 DEBA).

In particular, it should be noted that Switzerland is not an EU Member State and, thus, the centre of main interest (**COMI**) principle laid down in EU Regulation 2015/848 on insolvency proceedings is not applicable in cross-border cases involving Switzerland.

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

In bankruptcy matters, Switzerland follows 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 decree must have been rendered in the state of the debtor's domicile or where the debtor has its centre of main interest (**COMI**) outside of Switzerland; (ii) the petition for recognition has been introduced by the bankruptcy's administrator, by the debtor itself or by a creditor; (iii) the bankruptcy decree must be enforceable in the state where it was rendered; and (iv) the bankruptcy must not be inconsistent with Swiss public policy and the fundamental principles of Swiss procedural law. As from 1 January 2019, reciprocity is no longer a requirement. As soon as the petition for recognition has been filed, the court may, on application of the petitioner, order conservatory measures. In principle, once the recognition is granted, the foreign bankruptcy decree has the same effects as a Swiss bankruptcy decree with regard to the debtor's assets located in Switzerland.

The provisions relating to the recognition of foreign insolvency proceedings of the PILA have been revised with effect as of 1 January 2019 (see question 9.1 below). Prior to such revision, the opening of Swiss ancillary proceedings in case of bankruptcy was mandatory whereas, under certain circumstances, such ancillary proceedings were not necessary in case of the restructuring-type of proceedings (*Nachlass- oder ähnliches Verfahren/concordat ou procedure analogue*). Under the revised PILA, it is now possible for the Swiss courts to waive the opening of ancillary proceedings also in case of a recognition of a foreign bankruptcy decree, provided that (i) a request to this effect is made by the foreign bankruptcy administration, (ii) there are no creditors in Switzerland the claims of which 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 were granted an opportunity to be heard. In case no ancillary proceedings are opened, the foreign insolvency administration may carry out all actions to which it is authorised pursuant to the applicable foreign law in Switzerland, including, most notably, the transfer of assets of the foreign debtor located in Switzerland to the foreign insolvency estate. In this context, the foreign insolvency administration must ensure that it is at all times compliant with all applicable Swiss laws. In particular, it must not perform any official acts, use any means of coercion or adjudicate on any disputes.

If, by contrast, ancillary insolvency proceedings are opened, pursuant to article 172 par. 1 PILA, only certain claims may be included in the schedule of admitted debts, i.e. (i) the claims secured by pledged assets located in Switzerland according to article 219 pars. 1 to 3 DEBA, (ii) the unsecured but privileged claims of creditors having their domicile in Switzerland according to article 219 par. 4 DEBA (first and second classes), and (iii) claims for liabilities on account of a branch (*Zweigniederlassung/succursale*) of the debtor registered in the commercial register in Switzerland. After the satisfaction of these creditors, any remaining balance is remitted to the foreign bankruptcy estate (article 173 par. 1 PILA). This transfer, which represents the result of the Swiss ancillary bankruptcy, requires, however, the prior recognition of the foreign schedule of claims, whereby the Swiss courts review, in particular, whether the creditors domiciled in Switzerland were fairly treated in the procedure and were granted an opportunity to be heard.

Special provisions exist for 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 on companies registered in Switzerland for the opening of insolvency proceedings. 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 outside of Switzerland in such instances. Accordingly, companies domiciled in Switzerland and registered with the Swiss commercial register do not, in practice, restructure or enter into insolvency proceedings in other jurisdictions.

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, in case multiple members of the same corporate group request the opening of insolvency proceedings, there will be separate insolvency proceedings for each group member. The group itself is not subject to insolvency. This principle notwithstanding, pursuant to article 4a DEBA, Swiss bankruptcy authorities have to coordinate their actions to the extent possible in a group insolvency scenario. In particular, based on article 4a DEBA it would be possible to appoint one sole administrator in the insolvency proceedings of affiliate entities within the same group or to decide on the exclusive jurisdiction of the insolvency courts and authorities which are competent for one group entity for all affected group entities, subject to prior agreement of all involved authorities. However, as this provision was introduced only recently, there is little guidance available with regards to how such coordination is handled in practice.

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

9 Reform

9.1 Are there any other governmental proposals for reform of the corporate rescue and insolvency regime in your jurisdiction?

A change to articles 725 *et seq*. CO, currently dealing, *inter alia*, with the issue of loss of capital and over-indebtedness (see question 3.1 above), is being contemplated. It is intended to lower the current triggering threshold of loss of capital and define additional circumstances which would trigger certain additional obligations of the directors of a Swiss company at an earlier stage of financial distress. The purpose of this reform is to induce the directors to take countermeasures as early as possible in times of financial difficulties. In this context, it is also proposed to extend the maximum term of a silent moratorium from four to eight months. These amendments are subject to parliamentary discussion and may still change or be discarded entirely.

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