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as well as any insolvency-related litigation. The firm regularly represents debtor companies and their boards, banks, funds and other creditors, as well as local and foreign administrators and bankruptcy trustees, in insolvency-related proceedings. The firm also provides comprehensive advice in all legal areas relevant to out-of-court reorganisations and restructurings. Courts and other authorities, notably the Swiss Financial Market Supervisory Authority (FINMA), regularly appoint various team members as administrative receivers, administrators and liquidators.

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1. Overview of Legal and Regulatory System for Insolvency/Restructuring/Liquidation

1.1 Legal Framework

Insolvency and restructuring proceedings of Swiss companies and other legal entities (partnerships, associations, foundations, etc), as well as debt enforcement proceedings against them, are all regulated by the Swiss Federal Debt Enforcement and Bankruptcy Act (DEBA). In addition, numerous other Swiss laws contain provisions relating to insolvency, restructuring and liquidation, such as the Civil Code (CC), the Code of Obligations (CO), the Private International Law Act (PILA) and the Banking Act. The CO is particularly relevant with regard to triggering the obligation of corporate bodies to initiate restructuring measures or to report over-indebtedness to the insolvency court.

Swiss insolvency proceedings are initiated either by the creditors or by the debtor itself. In both cases, the insolvency proceedings must be opened by the competent court, which is normally the court at the debtor's domicile.

Unlike legal entities, individuals (except for sole proprietorships or members of a partnership) cannot be forced into insolvency proceedings by a creditor. They can, however, apply for insolvency proceedings to be opened against themselves, thereby allowing their liabilities to be restructured and/or their entire assets to be liquidated. If they do not do so, individual assets will instead be seized and liquidated to pay the relevant debts.

In addition, the Commercial Register must take action if a company has organisational deficiencies (eg, it lacks the required corporate bodies). If the deficiencies are not remedied, the company will ultimately be dissolved and, in the event of over-indebtedness, bankruptcy proceedings will be initiated.

Regarding voluntary liquidation, see **5.1 The Different Types of Liquidation Procedure**.

1.2 Types of Insolvency

Insolvency of a Swiss legal entity leads to either bankruptcy (*Konkurs*), which will end with the liquidation of the entity, or composition proceedings (*Nachlassverfahren*), which start with a composition moratorium (*Nachlassstundung*) and will end either with the restructuring of the entity (lifting of moratorium), with a composition agreement (*Nachlassvertrag*) or with bankruptcy.

The proceedings can be initiated either voluntarily by the debtor himself or involuntarily by a creditor of the debtor.

1.3 Statutory Officers

In Swiss insolvency proceedings, depending on whether it is a bankruptcy or composition procedure, different statutory officers and bodies are involved, each with different roles in the various proceedings.

1. Courts and Judges

The judges responsible for opening bankruptcy or composition proceedings and for further decisions in these two types of proceedings are part of the bankruptcy court (*Konkursgericht*) or composition court

(*Nachlassgericht*), respectively. Formally, these are different courts, but they are part of the same courts of first instance and often the same judges assume both roles. In general, there will be single judges.

Appeals against decisions of the bankruptcy and composition courts may be lodged with the higher cantonal court and subsequently with the Swiss Supreme Court (SSC).

2. Supervisory Authorities

A complaint may be lodged against any decision of the bankruptcy administration and the administrator and liquidator in composition proceedings with the supervisory authorities, which are lower or higher cantonal courts. An appeal can then be made to the SSC.

3. Bankruptcy Office

Bankruptcy proceedings are always administered by the bankruptcy office, a state authority. It acts as the legal representative of the bankruptcy estate/debtor, ie, it handles all matters relating to the preservation and liquidation of the bankruptcy estate and represents the bankruptcy estate in court. The head of the bankruptcy office, their deputy, and other officials and employees are subject to the supervision and disciplinary authority of the cantonal supervisory authority, and the canton is responsible for their actions (state liability).

4. Non-Official Bankruptcy Administration

In ordinary bankruptcy proceedings, the creditors decide at the first creditors' meeting whether they want to retain the bankruptcy office as the bankruptcy administration or appoint a so-called non-official bankruptcy administration, ie, a private individual or company. The non-official bankruptcy administration is subject to the same regulations as the bankruptcy office.

If bankruptcy is carried out in summary proceedings, the appointment of a non-official bankruptcy administration is not possible. However, the office may appoint private auxiliary persons to assist it.

The law does not require any specific qualifications to perform the duties of a non-official bankruptcy administration; ie, creditors are free to choose, eg, lawyers,

notaries, fiduciary companies, etc. Accordingly, there is no regulated professional group of private bankruptcy administrators.

5. Creditors' Meetings

Creditors' meetings are mandatory in ordinary bankruptcy proceedings but are only called exceptionally in summary bankruptcy proceedings. The law provides for two creditors' meetings, but additional meetings may also be convened: the first shortly after the opening of bankruptcy proceedings, at which the creditors may elect a private bankruptcy administration and a creditors' committee and pass resolutions on urgent matters, and the second after the publication of the schedule of claims.

Regarding composition proceedings, see **4.3 The End of the Restructuring, Rehabilitation and Reorganisation Procedure**.

6. Creditors' Committee

In ordinary bankruptcy proceedings, creditors may elect a creditors' committee. It acts as an auxiliary and supervisory body for the bankruptcy administration. The creditors' committee generally has the following tasks:

- monitoring the management of the bankruptcy administration, assessing the issues submitted by the bankruptcy administration and, if necessary, objecting to measures and decisions of the bankruptcy administration that are contrary to the interests of the creditors;
- authorising the continuation of the bankrupt party's business operations;
- approving invoices, and authorising the conduct of legal proceedings and the conclusion of settlements;
- approval of the schedule of claims;
- ordering interim payments on the dividend to creditors; and
- convening of additional creditors' meetings.

A creditors' committee usually consists of three to five members and should have representatives from the various interest groups (employees, financial creditors, etc).

In composition proceedings, depending on the stage of the proceedings, a creditors' committee may or must be appointed by the creditors. See **4.3 The End of the Restructuring, Rehabilitation and Reorganisation Procedure** and **4.6 The Position of Shareholders and Creditors in Restructuring, Rehabilitation and Reorganisation**.

7. Administrator and Liquidator in Composition Proceedings

The court-appointed administrator (*Sachwalter*) monitors the debtor's actions during the composition moratorium and has numerous other specific tasks. A liquidator is elected by the creditors if a composition agreement with assignment of assets is reached (see **4. Statutory Restructuring, Rehabilitation and Reorganisation Proceedings**). Although the law does not require any specific qualifications to act as administrator, usually specialised lawyers are chosen.

2. Creditors

2.1 Types of Creditors

Swiss insolvency law makes a basic distinction between claims that already existed at the moment when the insolvency proceedings were opened (pre-filing claims or bankruptcy/composition claims), and claims that arise during the insolvency proceedings with the approval of the bankruptcy administration or the administrator in composition proceedings (post-filing claims or liabilities of the estate or mass liabilities).

Liabilities of the Estate

The estate is liable for claims that arise during the bankruptcy or composition proceedings. The liabilities of the estate must be asserted through ordinary legal proceedings and are not subject to the schedule of claims procedure. In bankruptcy proceedings, problems with distinguishing between post- and pre-filing claims rarely arise, as the business operations are usually discontinued. However, in composition proceedings, the continuation of the insolvent debtor's business or part thereof is the standard case, so liabilities of the estate will normally arise. Notably, liabilities incurred with the administrator's consent during composition proceedings are liabilities of the estate.

The costs of the proceedings, including the costs of the bankruptcy administration and the administrator or liquidator in composition proceedings, also constitute liabilities of the estate.

Bankruptcy/Composition Liabilities

Claims that arose prior to the insolvency proceedings are generally treated equally, meaning that each creditor must bear its share of the loss proportionally (ie, same percentage of approved claim as dividend). However, the law does provide for three different classes of creditors. Only when the creditors in a higher class have been fully satisfied are those in a lower class entitled to the (remaining) proceeds, which are then to be shared equally among them again. The three classes and the most relevant claim types are as follows:

- First class: Claims of employees derived from the employment relationship which arose during the six months prior to the opening of bankruptcy proceedings but not exceeding the amount corresponding to one year's earnings of CHF148,200. Claims by pension funds against the employer.
- Second class: Claims by the social insurance bodies for the contributions.
- Third class: All other claims.

The claims of the first two classes are referred to as privileged claims, and those in the third class as ordinary claims.

Subordinated Claims

Swiss insolvency law does not specifically govern subordinated claims. Claims for which creditors agreed or unilaterally declared that they shall be subordinated form a separate class below the third class. The concept of equitable subordination is recognised by the SSC based on the abuse of rights doctrine. Notably, shareholder loans are generally not subordinate or recharacterised as equity.

Secured Claims

Secured claims do not initially fall within these categories. They are satisfied directly out of the proceeds from realisation of the collateral. The uncovered part of secured claims will be allocated to the classes set out above.

2.2 Priority Claims in Restructuring and Insolvency Proceedings

In Swiss insolvency proceedings, there are priority orders for the ranking of the claims and thus of the dividend payments to the creditors (see **2.1 Types of Creditors**). The ranking is determined by the bankruptcy administration or liquidator in the composition proceedings and set out in the schedule of claims, which creditors can challenge.

Before distribution to creditors takes place, the costs of insolvency proceedings and the liabilities entered into by the estate or during the composition (including fees of the administrator) are paid out of the estate (see also **2.1 Types of Creditors**).

2.3 Secured Creditors

Types of Security

Swiss law recognises personal and real securities. Securities constituted under foreign law are recognised to the extent permitted by the provisions of the PILA.

Real securities include the following:

- Security over movable property: Secured creditors typically obtain liens or security interests in movable property through a pledge. A pledge requires a written agreement and the transfer of possession or control of the pledged assets to the pledgee. It is thus common to pledge shares and intellectual property rights, but not other movable goods (eg, machinery), as the debtor cannot relinquish their use and thus their possession.
- Security over receivables: Creditors generally take liens or security interests by way of a security assignment of receivables. The debtor's counterparties may be or may not immediately be informed of the assignment, which usually only takes effect if the debtor does not perform according to the agreement with the secured creditor. An assignment of receivables must be in writing to be valid. The assignment of a future claim no longer has any effect after the opening of insolvency proceedings; ie, the usual global assignments end with the opening of insolvency proceedings.

- Security over immovable property (real estate): Creditors may obtain security interest in immovable property through a mortgage.

Enforcement of Security Outside Insolvency Proceedings

A secured party may realise its security if the secured obligation is not paid when due. The realisation of a collateral may occur by way of official enforcement proceedings or by private enforcement. Private enforcement is only permissible if agreed between the parties.

If the parties have not agreed on private enforcement, a secured creditor wanting to enforce a mortgage or a pledge must seek enforcement in the form of the realisation of the collateral in accordance with the DEBA (*Betreibung auf Pfandverwertung*). The scope of this special proceeding is limited; only the collateral (and not all other assets of the debtor) is realised and only the pledgee (and not all other creditors of the debtor) benefits from such realisation. The debt collection office (DCO; *Betreibungsamt*) rather than the bankruptcy administration or liquidator is entrusted with taking the requisite enforcement actions.

There is no general obligation for the creditor to first realise the security. However, the pledgor faced with a request for the opening of ordinary enforcement proceedings is entitled to invoke the priority of the realisation of the collateral (*beneficium excussionis realis*), but this objection may be waived by the debtor. It is standard for Swiss law security agreements to explicitly include such a waiver.

The proceeds from the realisation of the collateral (after deduction of the costs) are disbursed to the secured creditor. Any surplus must be returned to the pledgor. Should the proceeds (less costs) be insufficient to satisfy the creditor in full, the creditor may instigate, as an unsecured creditor, ordinary debt enforcement proceedings to recover the remaining outstanding claim (see **2.4 Unsecured Creditors**).

2.4 Unsecured Creditors

Enforcement of Claim

There are different ways to enforce an unsecured claim in Switzerland outside of insolvency proceedings:

- The unsecured creditor can initiate an ordinary payment action against the debtor, beginning with the filing of a statement of claim with the competent conciliation authority or, if applicable, directly with the competent court.
- The creditor can request the competent DCO to issue a payment summons, against which the debtor usually lodges an objection. The creditor can then, if the necessary conditions are met (eg, existence of a signed acknowledgement of debt) request its setting aside in summary proceedings. Should the creditor not be successful, it could initiate an ordinary action. If the creditor is successful in summary proceedings, the debtor can initiate an action for a declaratory judgment of non-indebtedness (in ordinary proceedings).
- The combination of debt collection and ordinary proceedings is possible insofar as the creditor can have the debtor's objection to the payment summons set aside in the ordinary court proceedings.
- Once the creditor has an enforceable judgment, it may (a) obtain a payment summons against the debtor, and, if the debtor has filed an objection, apply in summary proceedings to set aside the objection and (b) request an attachment of the debtor's assets located in Switzerland.

Attachment (and Enforcement of Foreign Judgments)

There are two ways for creditors to enforce a foreign court decision (or arbitration award) against a Swiss debtor:

- The creditor can first request an attachment order (as a preliminary step), which freezes identified assets of the debtor.
- The creditor can immediately request enforcement by means of ordinary debt enforcement proceedings. If the debtor raises an objection, the creditor must apply for its setting aside in summary proceedings. The court will examine as a preliminary question whether the foreign judgment is enforceable in Switzerland.

The attachment is a provisional measure. To have the attachment validated, the creditor must initiate debt enforcement proceedings by requesting the issuance of a payment summons and then proceed with the

necessary subsequent steps (see above). The attachment proceedings against a Swiss corporate debtor will end with its bankruptcy. In a bankruptcy, there is no privilege for the attachment creditor.

Forced Bankruptcy Opening With Prior Debt Enforcement Proceedings

If a debtor has suspended its payments, then a creditor may file a request with the bankruptcy court for immediate bankruptcy without prior debt enforcement proceedings. The creditors must provide the court with sufficient evidence that the debtor is insolvent, which, in general, is not easily acknowledged by the courts.

Retention of Title

Retention of title under Swiss law is only valid if entered in a public register (maintained by the DCO) at the debtor's registered office, which the purchaser must have agreed to. As a result of a valid retention of title, the seller, while having transferred possession to the purchaser, remains the legal owner of the relevant asset for as long as its claim resulting from the transaction has not been satisfied.

If retention of title has been established over an asset outside Switzerland and the asset is then transferred to Switzerland, the foreign retention of title remains valid in Switzerland for three months. In order to maintain these rights, it must be entered in the public register in Switzerland within this timeframe.

Even if the retention of title has been duly registered, third parties are not required to consult the public register and may acquire valid legal title to the assets in good faith.

In case of bankruptcy proceedings, the seller is entitled to a release of the asset from the bankruptcy estate.

Set-Off

From a Swiss law point of view, set-off is a method of extinguishing claims provided for by substantive law. In the event of extinction of a claim by set-off, the law governing the claim against which set-off is asserted is applicable. Set-off remains possible in bankruptcy, where it is even facilitated to some extent due to all

the bankrupt party's claims falling due at the opening of bankruptcy proceedings and their conversion into monetary claims (Article 211 DEBA).

3. Out-of-Court Restructuring

3.1 Out-of-Court Restructuring Process

No Statutory Process

In Switzerland, there is no general statutory process for out-of-court restructurings (consensual workouts), except for bonds (see below).

Out-of-court restructurings are voluntary negotiations between the debtor company and its creditors, usually with a focus on its financial creditors. While often preferred for their flexibility and confidentiality, they lack key features of formal insolvency proceedings (eg, automatic stay or cram-down mechanism). Hence, agreements on all material aspects must be reached with each relevant creditor. Any securities provided by new lenders must be approved by all existing secured creditors. Agreements reached and arrangements made in out-of-court restructurings may be subject to claw-back if formal insolvency proceedings are subsequently opened (see **8.1 Circumstances for Setting Aside a Transaction or Transfer**).

Under Swiss law, companies and creditors are not required to negotiate before initiating insolvency proceedings. However, Swiss corporate law requires the board of a company in financial distress to proactively restructure, though it does not prescribe any specific processes or measures. Lenders expect an informal restructuring attempt. In the absence of specific contractual undertakings, however, creditors have no duty to participate in out-of-court restructurings, except for the general statutory duty to act in good faith. There is also no legal instrument to compel non-consenting parties to accept any out-of-court restructuring arrangements.

Bond Restructurings

Bonds issued by Swiss companies are subject to specific restructuring provisions under Swiss law, which allow for certain cram-downs (Articles 1170 et seq CO). However, relevant decisions require the approval of two-thirds of the outstanding nominal capital and

a court must approve a bond restructuring before it can take effect. Due to the high approval threshold, successful bond restructurings are rare.

3.2 Legal Status

Out-of-court restructurings are purely contractual agreements between the debtor and participating creditors. These agreements are only enforceable among those who consent and cannot bind non-consenting or dissenting creditors, which remain free to pursue their claims independently and generally cannot be held liable merely for opposing or obstructing a workout.

4. Statutory Restructuring, Rehabilitation and Reorganisation Proceedings

4.1 Opening of Statutory Restructuring, Rehabilitation and Reorganisation

Scope of Statutory Restructuring Proceedings

The Swiss court-supervised restructuring proceeding is the composition proceeding (*Nachlassverfahren*), which always starts with a composition moratorium (*Nachlassstundung*, also translated as debt-restructuring moratorium or administration). Composition proceedings mainly apply to incorporated entities. Certain types of financial institutions (banks, securities firms, insurance companies) are subject to sector-specific rules. Swiss law does not provide a consolidated framework for restructuring corporate groups.

Opening of Composition Proceedings

Composition proceedings are typically initiated by the debtor. According to corporate law, the board must monitor the company's solvency and its balance sheet (see **7.1 Duties of Directors**). In cases of imminent insolvency or capital loss, the board must consider composition proceedings but has no obligation to attempt such. If the financial situation is dire, filing for bankruptcy may be more appropriate. Creditors may request the opening of composition proceedings, though this is rare in practice.

To initiate a composition proceeding, a petition must be filed with the composition court (see **1.3 Statutory Officers**) at the debtor's domicile. The petition

must be accompanied by key financial documents, including accounts, a liquidity plan and a provisional restructuring plan.

Initially, the court grants a provisional moratorium, often within days or even hours, and without a hearing, although court practices may vary. The provisional moratorium results in an automatic stay.

If there are no prospects for restructuring, the court denies the petition and opens bankruptcy. The debtor company and creditors may appeal relevant court decisions.

4.2 Statutory Restructuring, Rehabilitation and Reorganisation Procedure

Any composition proceedings begin with a provisional moratorium (lasting up to eight months in total), allowing for an analysis of the debtor's financial situation and its restructuring options. The granting of the provisional moratorium is published (except upon request in justified cases, so-called silent moratorium). Usually, the court appoints an administrator (this is compulsory in the case of a silent moratorium).

If the prospects of recovery are confirmed during the provisional moratorium, the court grants a definitive moratorium of four to six months (prolongable to a maximum of 24 months). The definitive moratorium is always published and an administrator must be appointed.

During the moratorium, no debt enforcement proceedings may be instituted or continued (with some exceptions). Periods of limitation and peremptory deadlines do not run, and interest ceases to accrue against the debtor for all unsecured claims. All in all, the effects of the granting of a moratorium on the assets and liabilities of the debtor are similar to the opening of bankruptcy proceedings, although less far-reaching.

In general, the debtor's business is continued during the moratorium under the supervision of the administrator (see 4.4 **The Position of the Debtor in Restructuring, Rehabilitation and Reorganisation**). With respect to the position of the shareholders and the creditors during the proceedings, see 4.6 **The Position of Shareholders and Creditors in Restructuring,**

Rehabilitation and Reorganisation. There is no specific financing instrument for a moratorium. Considering that liabilities incurred with the administrator's consent are liabilities of the estate (see 2.1 **Types of Creditors**) and new security may be granted with the composition court's approval (see 4.4 **The Position of the Debtor in Restructuring, Rehabilitation and Reorganisation**), it is possible to raise specific financing, subject to the aforementioned conditions.

A composition proceeding may end either (a) in the release of the restructured company from composition proceedings, (b) with the conclusion of a composition agreement (restructuring plan) or (c) with the opening of bankruptcy proceedings if no restructuring can be achieved.

Unless the debtor is fully restructured during the moratorium without a composition agreement, a composition agreement is prepared during the moratorium, which must then be accepted by a qualified majority of creditors and confirmed by the court. Swiss law provides for two main types of composition agreement:

- An ordinary composition agreement, where the debtor and the creditors agree on the terms and conditions of the repayment of the debts, allows the debtor to continue to exist. Usually, the agreement provides for a hair-cut/dividend settlement and/or deferred repayment.
- A composition agreement with assignment of assets leads to the liquidation of the debtor (see 5. **Statutory Insolvency and Liquidation Procedures**). It is a kind of "softer" bankruptcy with more flexible rules. A composition agreement is only possible if there are sufficient assets to fully pay all privileged creditors. The proceeds from the liquidation constitute the estate, which is distributed among the creditors as in bankruptcy. In practice, the assets constituting the business of the debtor are often already sold during the composition moratorium, and the proceeds from the sale together with the remaining assets constitute the estate which is then assigned to the creditors.

The restructuring may also be implemented as a pre-pack deal. Such a prepack, for example, may involve

the sale of the business in an asset deal or share deal (after the relevant business has been carved-out into a new entity) or, in the case of a financially distressed holding company, the sale of subsidiaries. Such transactions are subject to specific authorisation by the composition court or, if applicable, the creditors' committee (see 4.4 **The Position of the Debtor in Restructuring, Rehabilitation and Reorganisation**).

4.3 The End of the Restructuring, Rehabilitation and Reorganisation Procedure

The administrator calls a creditors' meeting to inform them about the proposed composition agreement. In a written ballot, the creditors decide whether the proposed agreement should be accepted or rejected. A composition agreement must be approved with a qualified majority of the following two alternative voting quorums:

- the majority of creditors with voting rights who together hold claims worth at least two-thirds of the total amount of claims (ie, more than 50% of votes and at least 66.66% of claims); or
- one-quarter of creditors with voting rights who together hold claims worth at least three-quarters of the total amount of claims (ie, at least 25% of votes and at least 75% of claims).

In the case of a composition agreement with assignment of assets, the creditors elect the liquidator (who may be, and often is, the previous administrator) and a creditors' committee.

The administrator must submit to the court a final report informing about received creditor approvals and recommending approval or rejection of the composition agreement. The court will assess whether the necessary quorum has been met, whether the offered amount is in proper proportion to the debtor's means, whether the payment of the liabilities of the estate is sufficiently secured and whether the privileged claims are covered. In the case of an ordinary composition agreement, the court must also ascertain that the shareholders have contributed to the restructuring (see 4.2 **Statutory Restructuring, Rehabilitation and Reorganisation Procedure**). The court has discretion only in assessing whether the aforementioned statutory requirements are met (no overall fairness test)

and can only either approve or reject the composition agreement. In practice, most courts heavily rely on the opinion of the administrator. If the composition agreement is rejected, bankruptcy is opened.

An approved composition agreement is binding on the debtor and all the creditors, including those who did not consent to it (cram-down mechanism, but no cross-class cram-down). In the case of an ordinary composition agreement, the execution of the composition agreement is, in principle, the responsibility of the debtor. It is possible, however, for the former administrator or a third party to be appointed by the composition court to implement and monitor the performance of the composition agreement.

4.4 The Position of the Debtor in Restructuring, Rehabilitation and Reorganisation

In general, during composition proceedings, the debtor may normally continue its business activities under the supervision of the administrator. In other terms, the company as such and its corporate bodies (general assembly, board of directors, management) remain in place and keep their competences (to the extent they are not restricted or suspended by law or the court's specific dispositions).

The court may, however, withdraw the powers of the debtor to manage its business and delegate this power to the administrator, or it may reserve certain acts and decisions to the administrator.

Without authorisation from the composition court, the debtor is prohibited by law from disposing or encumbering fixed assets (*Anlagevermögen*), providing security (eg, to secure new funding) or making gifts (including transactions without adequate consideration) during the moratorium. If such a transaction is considered necessary or in the creditors' best interest, the debtor must apply for specific authorisation from the composition court or, if applicable, the creditors' committee (Article 298 DEBA). If approved, these transactions are not subject to any claw-back actions (see 8.1 **Circumstances for Setting Aside a Transaction or Transfer**).

4.5 The Position of Office Holders in Restructuring, Rehabilitation and Reorganisation

The court may, at its discretion, appoint an administrator (*Sachwalter*) upon granting a provisional moratorium or only at the granting of the definitive moratorium. The creditors may elect a different administrator at the extraordinary creditors' meeting.

The administrator's role is generally to monitor the debtor's actions and report to the court on the progress of the moratorium. Further specific responsibilities include drafting the composition agreement, approving the termination of continuing agreements, making the creditors' call, drawing up an inventory and convening creditors' meetings.

The administrator is not responsible for managing the business, unless expressly authorised to do so by the composition court.

In practice, the administrator's level of involvement in planning and implementing the actual restructuring and the management of the ongoing business depends on the specific case, but also on the relevant administrator's approach and style.

4.6 The Position of Shareholders and Creditors in Restructuring, Rehabilitation and Reorganisation

Involvement of Shareholders

Shareholders (that are not also creditors) have a limited role and are usually only indirectly involved if corporate actions are required to implement a restructuring (eg, capital increase). They may generally not prevent or delay composition proceedings. Shareholders must make a reasonable contribution for an ordinary composition agreement to be approved by the court. However, such contribution cannot be forced against the shareholders' will.

Involvement of Creditors

Creditors do not play a specific role during the provisional moratorium (which may even be silent and thus unknown to the creditors). When granting the definitive moratorium, the composition court may appoint a creditors' committee. The creditors themselves may appoint a creditors' committee at the extraordinary

creditors' meeting. This meeting must take place during the definitive moratorium before the end of the ninth month if the definitive moratorium is to be extended beyond one year. The creditors' committee supervises the administrator and may issue recommendations. It also takes the role of the court in approving the divestment of fixed assets etc (see 1.2 Types of Insolvency and 4.2 Statutory Restructuring, Rehabilitation and Reorganisation Procedure).

Creditors may appeal against the granting of the definitive moratorium, against the appointment of a specific person as administrator, and against the confirmation of the composition agreement. The creditors will be called to submit their claims at the beginning of the definitive moratorium and to vote on the composition agreement. They may also consult the files of the composition proceedings prior to the creditors' meeting(s).

In the case of a composition agreement with assignment of assets, the creditors must appoint the liquidator and a creditors' committee.

5. Statutory Insolvency and Liquidation Procedures

5.1 The Different Types of Liquidation Procedure

Liquidation procedures primarily apply to corporate entities. Certain regulated entities, such as banks, insurance companies and securities firms, are subject to additional liquidation rules specific to their sector under financial market legislation.

Liquidation can be either voluntary or involuntary.

- Voluntary liquidation occurs when a financially solvent company's shareholders decide to dissolve the entity. They do so by passing a corresponding resolution with a qualified majority (usually two-thirds of votes represented) and appointing liquidators (then current board members or another party). Upon resolving on a liquidation, the company's purpose is restricted to actions required to complete the liquidation. A company must be solvent and meet its obligations to creditors throughout

the process; otherwise, the liquidator must initiate bankruptcy, a form of involuntary liquidation.

- Involuntary liquidation, on the other hand, can be initiated by various actors (the debtor's board or shareholders, its auditor, the creditors or the commercial register), but is always declared or confirmed by a court. Typically, it leads to bankruptcy due to insufficient assets to cover all debts or to a composition moratorium for the purpose of restructuring.

5.2 Course of the Liquidation Procedure

Solvent Liquidation

When a company initiates a voluntary (solvent) liquidation procedure, the management authority is transferred to the liquidators appointed by the shareholders (which may or may not be the directors). The liquidators handle the winding-up phase focused solely on settling debts and distributing remaining assets (eg, all decisions related to operations, asset realisation and creditor settlement). Throughout the process, the liquidators must act primarily in the interests of creditors. If assets are insufficient to cover liabilities, they must initiate bankruptcy.

Generally, contracts that existed before the liquidation remain valid unless they are terminated in accordance with their terms or statutory provisions. Liquidators may choose not to renew agreements or terminate contracts that conflict with the purpose of the liquidation to ensure the winding-up process proceeds efficiently.

A voluntary liquidation process typically follows these stages:

- shareholders resolve to liquidate the company and appoint liquidators;
- registration of the resolution and the liquidators with the commercial register;
- creditors' call;
- preparation of an initial balance sheet, completion of ongoing transactions and realisation of assets;
- settlement of debts, followed by distribution of any surplus to shareholders; and
- deletion from the commercial register (generally no earlier than one year after the creditors' call).

Insolvent Liquidation (Bankruptcy)

Once bankruptcy has been opened, the debtor is prohibited from continuing its business activities unless the bankruptcy administration decides otherwise. The bankruptcy estate encompasses all of the debtor's assets, in Switzerland or abroad, although access to foreign assets may be limited.

An inventory of all of the debtor's assets is prepared, and the winding-up process determined. If the liquid funds available in the estate are insufficient to cover the estimated costs of the proceedings and if no creditor advances the funds, the proceedings will be suspended for lack of assets. Otherwise, bankruptcy proceedings are conducted in summary proceedings or, in large-scale cases, in ordinary proceedings.

Based on a creditors' call, a schedule of claims is then drawn up according to the order of priority provided in the DEBA (see 2.1 **Types of Creditors** and 2.2 **Priority Claims in Restructuring and Insolvency Proceedings**).

The remaining assets are then liquidated. A decision must be made on whether to initiate legal action for claw-back (see 8.1 **Circumstances for Setting Aside a Transaction or Transfer**) and directors' and officers' liability (see 7.2 **Personal Liability of Directors**). These claims are often not enforced by the bankruptcy administration itself, but instead assigned to interested creditors.

5.3 The End of the Liquidation Procedure(s)

Solvent Liquidation

A solvent liquidation procedure is formally completed once the liquidators have realised all assets, settled all liabilities and distributed any remaining surplus to shareholders. The final step is deleting the company from the commercial register, which requires the company to have filed for and settled all its Swiss taxes.

Insolvent Liquidation (Bankruptcy)

Once all proceeds have been realised and the schedule of claims has become definitive, the bankruptcy administration/liquidator prepares the distribution plan and the final account of the proceedings. Once the costs of the proceedings have been paid, the

remaining proceeds will be distributed to the admitted creditors in accordance with their ranking.

5.4 The Position of Shareholders and Creditors in Liquidation

Shareholders

In a liquidation, shareholders have limited rights. Shareholders are not involved in any insolvent liquidation. Their main role in a solvent liquidation is to approve the final liquidation accounts and any accounts prepared during the liquidation process, as well as to resolve any interim distributions. Notably, shareholders may revoke a voluntary liquidation if asset distribution has not yet begun.

Creditors

In a solvent liquidation, creditors retain their rights and can assert their claims as before the liquidation. The liquidation cannot be completed until all liabilities have been settled, but amounts for liabilities that are not due yet or are disputed can be deposited.

When bankruptcy proceedings are opened, creditors' rights to enforce their claims against the debtor through debt collection or legal proceedings are suspended or restricted. However, there are exceptions for claims secured by mortgages. Depending on the proceeding and its status, ongoing debt collection and legal proceedings are either suspended or discontinued. Suspended legal proceedings may resume later unless they have become moot (eg, due to the claim being admitted in the schedule of claims).

6. Cross-Border Issues in Insolvency

6.1 Sources of International Insolvency Law

The Swiss legal provisions dealing with foreign insolvency proceedings are contained in Chapter 11 of the PILA (Articles 166–175).

Switzerland has not entered into any international treaties applicable in this regard, except for some very old and geographically limited treaties linking certain Swiss cantons to certain German federal states.

6.2 Jurisdiction

Switzerland claims exclusive jurisdiction over insolvency proceedings for companies based in Switzerland. Insolvency proceedings opened abroad against Swiss companies are not recognised in Switzerland. For a company registered in Switzerland, the court at its registered office will always have exclusive jurisdiction, and Swiss insolvency law will apply. Switzerland will not open main insolvency proceedings over a company that has only its centre of main interests (COMI) in Switzerland. Furthermore, Swiss law does not permit an entire group of companies to be subject to one comprehensive insolvency proceeding. Instead, each entity must be dealt with on a standalone basis.

However, when it comes to recognising insolvency proceedings opened over non-Swiss companies, Switzerland permits the recognition of insolvency proceedings opened at a company's COMI rather than its registered seat.

6.3 Applicable Law

The PILA and any applicable international treaties determine the jurisdiction of Swiss courts and authorities, the applicable law, and the requirements for the recognition and enforcement of foreign judgments and the recognition of foreign bankruptcy and restructuring proceedings (see 6.1 **Sources of International Insolvency Law**).

Articles 166–175 of the PILA also contain some specific provisions regarding the conduct of ancillary bankruptcy proceedings in Switzerland. Otherwise, ancillary bankruptcy proceedings are governed by the provisions on Swiss bankruptcy proceedings in the DEBA. These proceedings are handled by the bankruptcy office.

6.4 Recognition and Enforceability Recognition of Foreign Restructuring or Insolvency Procedures

Swiss insolvency law is based on the principle of territoriality, meaning that Switzerland does not automatically recognise foreign insolvency decrees or their associated effects. In general, the recognition of a foreign insolvency decree requires a formal request

to the competent Swiss court from either the foreign insolvency administrator or a creditor.

The requirements for the recognition of a foreign bankruptcy decree are set out in Article 166 of the PILA:

- The foreign decision amounts to a bankruptcy decree that qualifies as an order initiating an authoritative procedure in which the assets of an insolvent debtor are divided equally among all creditors.
- The bankruptcy decree to be recognised must have been issued (a) in the debtor's state of domicile or (b) in the state of the debtor's COMI, provided that the debtor was not domiciled in Switzerland when the foreign proceedings were opened.
- The bankruptcy decree must be enforceable.
- The recognition of the foreign bankruptcy decree must not be manifestly incompatible with Swiss public policy.
- The debtor must have had the opportunity to express its viewpoint in the proceedings leading to the bankruptcy declaration or it must be shown that the debtor had been summoned accordingly.

The petition for recognition must be filed where the debtor's assets are located in Switzerland. The petitioner must provide evidence of the existence and location of these assets.

Since 2019, recognition no longer necessarily entails the opening of ancillary bankruptcy proceedings. Ancillary bankruptcy proceedings may be waived under the following conditions:

- the foreign bankruptcy administration requests so;
- no secured or privileged Swiss creditors have announced any claims following the call to the creditors published after the recognition of the foreign bankruptcy decree; or
- the Swiss court is of the view that the claims of ordinary Swiss creditors are adequately considered in the foreign proceedings.

If no ancillary bankruptcy proceedings are opened, the foreign bankruptcy administration has the power to transfer assets out of Switzerland and to conduct

legal proceedings there, but cannot exercise acts of public authority or adjudicate claims.

Recognition of Foreign Insolvency-Related Judgments

(See 2.4 Unsecured Creditors concerning the recognition of ordinary judgments prior to the opening of insolvency proceedings.)

Since 2019, the recognition of foreign insolvency-related judgments in Switzerland is in principle possible if (1) the foreign insolvency decree has been recognised in Switzerland, (2) such judgments have been rendered or are recognised in the state of origin of the foreign insolvency decree and (3) the defendant was not domiciled in Switzerland.

Regarding the qualification of foreign decisions to be recognised in Switzerland as insolvency-related, Article 174c of the PILA refers to "judgments on avoidance claims or otherwise relating to acts prejudicial to creditors, which are closely connected with" the insolvency proceedings. Liability claims against directors and officers (see 7. Duties and Liability of Officers and Directors) are generally considered as falling under this definition.

However, this possibility of recognising insolvency-related judgments in Switzerland only applies to judgments against foreign persons. If an insolvency-related claim is to be enforced against a person domiciled in Switzerland, the substantive proceedings must be conducted in Switzerland.

6.5 Co-Ordination in Cross-Border Cases

Since 2019, Switzerland has a legal basis for the co-ordination of Swiss authorities with their foreign counterparts.

Co-ordination is supposed to include all forms of co-operation mentioned in Articles 25 et seq. of the UNCITRAL Model Law on Cross-Border Insolvency (1997) such as the co-ordination of concurrent proceedings and of the administration and supervision of the debtor's assets and transactions, and direct communication between the authorities.

6.6 Foreign Creditors

Swiss insolvency law makes no distinction between domestic and foreign creditors or claims that are subject to foreign or Swiss substantive law (principle of equal treatment of creditors). There are certain factual differences (eg, notices of the Swiss insolvency authorities may not reach foreign creditor or any language barriers).

However, foreign public law claims, ie, claims of a sovereign nature such as tax claims, are not enforced in Switzerland and not considered in Swiss insolvency proceedings, unless this is expressly provided for in an international treaty.

7. Duties and Liability of Directors and Officers

7.1 Duties of Directors

Directors' Duties in Financial Distress in General

The duties of company directors are codified in the CO and apply to both stock corporations (*Aktiengesellschaft*) and limited liability companies (*Gesellschaft mit beschränkter Haftung*). While the 2023 corporate law reform further clarified directors' responsibilities in cases of financial distress, they are still derived from a combination of statutory law, case law and established best practices.

When a company is financially sound, its directors are expected to manage the business with due care and in good faith. According to the general fiduciary duty (Article 717 CO), directors must act in the company's overall long-term interests, which generally means promoting long-term shareholder value.

As financial difficulties arise, directors' responsibilities intensify, and their focus gradually shifts from shareholders to protecting creditor interests, depending on the type and severity of the distress. This includes ensuring equal treatment of creditors and avoiding transactions that could benefit or harm specific creditors.

Duties in Case of Capital Loss (*Kapitalverlust*; Article 725a CO)

If the company's latest annual financial statements show that its assets no longer cover at least half of its share capital and statutory reserves (balance sheet test), the board must take steps to remedy the capital loss. The board is free to decide on the relevant measures, but certain measures require shareholder approval (eg, share capital increase, unless the board has pre-authorisation to implement such).

If there is no auditor in place, the relevant annual financial statements must be audited by a board-appointed auditor. The board and the auditor must act promptly. An audit can be waived if the company applies for a composition moratorium.

Duties in Case of Over-Indebtedness (*Überschuldung*; Article 725b CO)

When there are reasonable concerns that the company's debts exceed its assets, the board must immediately prepare interim financial statements indicating going-concern and liquidation values, unless the company is expected to continue as a going concern and there is no over-indebtedness (in which case liquidation values can be waived). These interim financial statements must be audited. If there is no auditor in place, the board must appoint one. The board and the auditor must act promptly.

If over-indebtedness at going-concern and liquidation values is confirmed, the directors are required to notify the court without delay, which usually results in bankruptcy being opened. If the board does not act, the auditor is required to notify the court. An over-indebted company may delay filing for bankruptcy and continue out-of-court restructuring efforts for a maximum of 90 days (no safe harbour) if there are reasonable prospects for restructuring and creditor claims are not jeopardised. Furthermore, an over-indebted company may continue trading even beyond the 90-day deadline if creditors subordinate their claims to those of all other creditors to the extent of insufficient coverage of the debt. Such subordinations must also cover interest payments and must be formalised in writing following specific best practices to be accepted by auditors.

Imminent Insolvency (drohende Zahlungsunfähigkeit; Article 725 CO)

The board is required to continually monitor the company's solvency. Although not required by law, best practices recommend a liquidity plan with a 12-month forward window.

If the risk of insolvency is imminent, the board must take the necessary steps to ensure solvency with the appropriate level of urgency. The law does not prescribe specific deadlines, so the time allotted for action depends on the severity of the distress and the complexity of the situation. While the board must consider a court-supervised restructuring, there is no obligation to attempt it.

7.2 Personal Liability of Directors

Personal Liability

Members of the board of directors, management and liquidators can be held personally liable to the company, its shareholders and its creditors for damages resulting from intentional or negligent breaches of their duties. They can be held liable for direct misconduct and for delegating a task to another person, unless they can demonstrate that they exercised appropriate care in selecting, instructing and supervising that person. Directors cannot be exempted from liability for certain specific core duties (Article 716a CO), notably including financial oversight. Although the board acts collectively, each director is held individually liable based on their personal conduct and oversight responsibilities.

In addition to formal directors, de facto directors – individuals or entities that assume board-level responsibilities without formal appointment – can be held liable. This is particularly relevant in the case of a group of companies in which a group entity is acting on the instructions of its parent.

Liability Towards Company and Creditors

Primary liability is owed to the company. Besides the company, shareholders may initiate liability claims, but they are rare because any resulting benefits would go to the company, not the shareholder who filed the claim. In the absence of bankruptcy or a composition agreement resulting in liquidation as a result of a court-supervised restructuring, independent actions

by creditors are also rare because they must prove direct damage. Indirect harm, or when the company suffers a loss that diminishes the value of creditor claims, does not provide grounds for a creditor claim.

In the event of bankruptcy or a composition agreement leading to liquidation, creditor claims from directors' liability are more common. However, creditors may only act if the bankruptcy estate itself does not pursue the relevant claims. Certain creditors may demand assignment of the relevant claims. In this case, recovery is first allocated to the pursuing creditor. Any surplus funds then revert to the estate.

Common Scenarios of Liability

Frequent scenarios for cases of director liability are:

- wrongful delay of bankruptcy in the event of delayed notification to the court in case of the company's over-indebtedness;
- preferential treatment of certain creditors;
- unlawful distributions to shareholders or related parties;
- entering into transactions that could be subject to claw-back (see **8.1 Circumstances for Setting Aside a Transaction or Transfer**);
- general mismanagement that worsened the company's financial position; and

These scenarios may lead not only to civil but also criminal liability.

7.3 Duties and Personal Liability of Officers

Generally, officers (management) must comply with the same statutory duties of care and loyalty as directors (Article 717 CO) and may incur personal liability if they breach their duties through negligence or intent. They are required to act diligently within their delegated responsibilities and keep the board fully informed. In financial distress, they must escalate issues so the board can comply with its duties and, if required, implement measures. Officers may incur personal liability if they breach their duties through negligence or intent.

7.4 Other Consequences for Directors and Officers

Directors face strict civil and criminal liability if they fail to pay certain Swiss social security contributions.

Directors may also face criminal penalties under the Swiss Criminal Code (SCC), particularly under Article 165 of the SCC for mismanagement leading to bankruptcy and under Article 167 of the SCC for granting preferential treatment to certain creditors. Criminal convictions typically result in monetary fines, though imprisonment is technically possible. The same applies to professional disqualification, which is possible only in the event of a criminal conviction.

Notably, the Swiss Financial Market Supervisory Authority (FINMA) may consider a director's business history when assessing the fitness and propriety of individuals applying for certain corporate functions at supervised financial institutions.

8. Setting Aside or Annuling a Transaction

8.1 Circumstances for Setting Aside a Transaction or Transfer

Under Swiss insolvency law, transactions or legal acts involving the debtor can be challenged with a claw-back/avoidance action (*actio Pauliana*). However, acts that were performed by a third party without the debtor's participation or on its behalf cannot be challenged. Claw-back actions are subject to two substantive conditions: (a) the creditors or the bankruptcy estate must suffer damage as a result of the transaction or legal act; ie, the debtor's assets must be diminished and the inability to satisfy all creditors increased, and (b) the debtor's transaction must be challengeable.

There are three different categories of challengeable transactions and thus of claw-back actions:

- Gifts, including any transactions without adequate consideration (Article 286 DEBA).
- Specific transactions listed in the law made even though the debtor was over-indebted (Article 287 DEBA).

- Transactions made with the intention, apparent to the beneficiary, to disadvantage the creditors or favour certain creditors to the disadvantage of others (Article 288 DEBA).

In addition, Swiss law also provides for the voidability of a set-off if a debtor of the insolvent debtor acquires a claim against that debtor, creating thereby the mutuality of the claims, allowing the set-off at that time even if the acquiring debtor knew or should have known of the impending insolvency (Article 214 DEBA). Notably, certain transactions approved by the court or, if applicable, the creditors' committee during composition proceedings (see 4.4 **The Position of the Debtor in Restructuring, Rehabilitation and Reorganisation**) are not subject to claw-back.

Challenge of Gifts

Any gifts and transactions made by the debtor without adequate consideration, ie, transactions not at market value, within a one-year period prior to the opening of insolvency proceedings (look-back period) are subject to claw-back. The opening of a bankruptcy or a composition moratorium, if followed by the opening of bankruptcy proceedings or a composition agreement with assignment of assets, is considered as the starting date for the lookback period.

Challenge Due to Over-Indebtedness

Under this challenge, the claimant may claw back a transaction that was entered into during a one-year lookback period (see above for details of the starting point of this period) if the debtor was already over-indebted at the time. Notably, such transactions include the posting of collateral by the debtor for pre-existing unsecured obligations without a pre-existing obligation to do so, any settlement of obligations by means other than cash or other customary means of payment, and any payments made despite not being due. However, the counterparty can avoid a successful claw-back if it can prove that it was unaware of (and was not supposed to know about) the debtor's over-indebtedness.

Challenge for Intent

Any transactions entered into during a five-year look-back period are subject to claw-back, provided that the transaction impaired the creditors, the debtor act-

ed with the intention of impairing the creditors, and the counterparty to the transaction either noticed or should have noticed this bad intent.

For related parties, the law reverses the burden of proof, meaning the related party that benefited must prove that it was unaware of the debtor's intention to grant the preference and that this intention was not recognisable to a bona fide party. Notably, companies within a group are considered related parties.

8.2 Claims to Set Aside or Annul a Transaction or a Transfer

The bankruptcy administration or the liquidator in composition proceedings can bring an action to have a transaction or transfer undertaken by the debtor prior to the insolvency proceedings declared null and void and to recover the assets for the benefit of the estate. However, such claw-back actions cannot be brought during the composition moratorium or if the composition process ends as a result of restructuring (with or without the conclusion of an ordinary composition agreement).

If the creditors decide that the action should not be pursued by the estate itself, one or more individual creditors can request authorisation to pursue the claim on behalf of the bankruptcy estate, enjoying certain privileges regarding the proceeds (Article 260 DEBA).

Claw-back actions must be filed within three years from the opening of the bankruptcy proceedings or the confirmation of a composition agreement with the assignment of assets.

A claw-back action can be brought against the direct counterparties to a transaction, as well as against third parties that were indirect beneficiaries. If the action succeeds, the debtor must return the relevant assets in exchange for any consideration received (if the debtor is still enriched thereby). A creditor that has repaid a payment received in a voidable transaction regains its original rights.

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