Switzerland

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SECURITY AND PRIORITIES

1. What are the most common forms of security granted in relation to immovable and movable property? Are any specific formalities required for their creation and perfection (that is, made valid and enforceable)?

Immovable property

There are three forms of real estate security interest (*Civil Code*):

- **Conventional mortgage (*Grundpfandverschreibung*).** This form of security interest can be used to secure any kind of claim (actual, future or possible).
- **Mortgage instrument (*Schuldbrief*).** A mortgage instrument constitutes a personal claim guaranteed by a security interest over real estate.
- **Real estate bond (*Gülf*).** A real estate bond can only be established on agricultural land, residential buildings or building zones. The debtor does not have any personal liability under this bond.

All three security interests can only be created to secure a specified amount of the creditor's claim, denominated in Swiss currency. If the amount of the claim is not yet determined or determinable, the parties can set a maximum amount up to which the creditor can claim.

Claims which are secured by a real estate security interest are not subject to a limitation period.

Movable property

The most common types of security for movable property are:

- **Pledge.** A pledge is established over tangible and realisable objects by both:
  - agreement between the creditor and the debtor (or a third party proprietor); and
  - transferring possession of the object to the creditor.

  The security interest generally ends when the creditor is no longer in possession of the pledged object (and is not able to reclaim it from a third party possessor) due to receiving full payment of the debt or through depreciation and loss of the asset.

  Any forfeiture agreement authorising the creditor to appropriate the pledged object in case of non-satisfaction of the secured claim on the maturity date is prohibited and deemed void.

  If the object is encumbered by several security interests, creditors are satisfied in the order of ranking, which is determined by the date of the establishment of each security interest.
- **Right of retention.** A retention right does not require the debtor's (or third party proprietor's) consent or approval to come into existence. A creditor who, with the consent of the debtor, is in possession of objects or securities belonging to the debtor can retain them until its claim is satisfied. The claim must be due and have a natural connection to the retained objects or securities. Among business partners, a natural connection is deemed to exist if possession of the retained assets and the claim originate from their business operations. If the debtor fails to fulfil its obligation, the creditor can, following prior notification, realise the retained asset.
- **Retention of title.** The buyer and seller of goods can agree on a contractual retention of title clause. This provides that the property title in the transferred goods does not pass to the buyer until the seller has received full payment for the goods. Retention of title must be entered in the Retention of Title Register maintained by the debt enforcement office at the buyer's current domicile. However, registration does not prevent a transfer of property title to a third party acting in good faith.
- **Fiduciary transfer of property title.** Full property title is transferred to the creditor as security for a debt. The taking of possession of the property by the creditor is a condition precedent. The creditor assumes the (implicit or explicit) contractual obligation to restore property title to the former proprietor once the secured claim is satisfied.
- **Claims and other rights.** Claims and other rights (which are legally considered as movable property) can also serve as security if they are assignable. A security for this claim or right can be created either:
  - by a written pledge agreement with a promissory note transferred to the creditor;
  - by a written fiduciary assignment based on the mutual understanding that the claim serves as security only;
  - in the case of intermediated securities, in accordance with the provisions of the Federal Statute on Intermediated Securities 2008, effective from January 2010.

  To secure a claim, sometimes all the debtor's actual and future claims are assigned to the creditor (*Globalzession*).

A pledge over movable property is subject to a limitation period. However, the expiration of the limitation period does not prevent the creditor from exercising its right of foreclosure.

Formalities

The following formalities must be followed:

- **Immovable property.** A real estate security interest must be in writing and executed as a public deed, and then registered in the Real Estate Register (Register). Its rank against other security interests is set out in the Register. Generally, a real estate security interest ends when it is deleted from the Register or with the total loss of the real estate.
- **Movable property.** The formality requirements for a security interest for movable property depend on the specific type of security (*see above, Movable property*).

There are no special formality requirements for companies.

2. Where do creditors and shareholders rank on the insolvency of a company?

The order of distribution to the creditors is as follows:

- **Secured claims.** Secured claims are satisfied directly from the proceeds from the realisation of the security interest. If several security interests exist in the same property, they are ranked in the chronological order of establishment, or in the case of immovable property, as indicated in the Register.
- **Debts incurred during the proceedings.** These are debts incurred by a company during a debt restructuring moratorium with the court-appointed administrator's consent or by the bankruptcy or liquidation estate.
- **Unsecured claims.** Unsecured claims and the uncovered part of secured claims are satisfied in the following order, out of the proceeds of the entire remainder of the bankruptcy or liquidation estate. The creditors are allocated to three separate categories (classes):
  - **First class.** These are claims:
    - of employees which arose or became due during the six months before the opening of liquidation proceedings;
    - which arose from the premature termination of an employment contract due to the opening of insolvency proceedings against the employer;
    - concerning accident insurance, non-compulsory pension schemes and claims of pension funds against employers; and
    - for maintenance and assistance derived from family law.
  - **Second class.** These are:
    - claims for social security contributions;
    - tax demands concerning value added tax (VAT); and
    - certain claims of persons whose assets were entrusted to the debtor in parental care.
  - **Third class.** This class encompasses all other claims.

Claims in the first and second classes are considered privileged claims.

Apart from VAT, tax claims are not privileged and rank in the third class.

Creditors of the same class rank equally among themselves and they only receive proceeds once all creditors of that class have been satisfied.

If all claims (including interests for the duration of the insolvency proceedings) are fully met, any surplus is distributed to the shareholders according to the number and face values of their shares.

3. Are there any mechanisms used by trade creditors to secure unpaid debts?

As well as the security interests taken in relation to movable and immovable property (*see Question 1*), the following securities are used by trade creditors to secure unpaid debts:

- **Additional assumption of debts.** A third party can be made jointly and severally liable with the debtor to the creditor for the performance of the whole obligation. This requires an agreement between the third party and the creditor.
- **Guarantee agreement.** A third party which guarantees that the debtor can meet its obligation to the creditor must compensate the creditor for any damages arising if the debtor is unable to fulfil that obligation.
- **Suretyship.** A suretyship is similar to a guarantee agreement except that strict formalities must be observed. To be valid, the suretyship must:
  - always be executed as a written declaration specifying the maximum liability of the surety;
  - generally be executed as a public deed if issued by a natural person (as opposed to a company).

4. Are there any procedures (other than the formal rescue or insolvency procedures described in *Question 6*) that can be invoked by creditors to recover their debt?

Common procedures for creditors to secure the payment of a debt are as follows:

- **Debt enforcement proceedings.** An unpaid secured or unsecured creditor can start debt enforcement proceedings by submitting a petition to the competent debt enforcement office. No enforceable title is required at this procedural stage. On receipt of the petition, the debt enforcement office serves on the debtor a formal summons to pay. The debtor can object within ten days of service of the order and bring the proceedings to a temporary stay. Therefore, to continue with proceedings, the creditor must obtain an enforceable judgment by initiating court proceedings against the debtor. If the creditor can prove the claim by producing written documents duly signed by the debtor (such as contracts, promissory notes or a notarised public deed) which evidence the claim, it can also seek summary judgment. If summary proceedings lead to the provisional setting aside of the debtor's objection, the debtor can resort to ordinary legal proceedings on the merits of the claim (as a claimant) to rescind the summary judgement.

- **Freezing order.** Creditors can seek a freezing order if one of the exclusive statutory grounds is met, including where the debtor:
  - does not live in Switzerland but one of the following applies:
    - the claim has a sufficient connection with Switzerland;
    - the claim is based on an enforceable judgement (Swiss or foreign); or
    - the debtor has given a qualified recognition of the debt (this is the most commonly invoked).
  - has no fixed domicile;
  - is concealing its assets;
  - is passing through Switzerland (for claims which by their nature must be fulfilled at once).

  Freezing orders are not available if the claim is secured by a security interest. To initiate freezing proceedings, the creditor must file a petition with the competent court. The court decides in summary proceedings whether the prima facie evidence for the claim, the invoked statutory ground and the assets to be attached are sufficient. The debtor is not notified of these proceedings. If the court allows the petition, it issues a freezing order which is directed to the debt enforcement office competent at the place where the assets are located. This office executes the order. After execution, the debt enforcement office issues a freezing certificate to the creditor which lists the attached assets and gives an estimate of the value of each item. The freezing order must be pursued by the creditor within ten days of receiving the freezing certificate, generally by either initiating debt enforcement proceedings or bringing a claim on the merits of the claim against the debtor.
- **Private sale.** If provided for in the pledge agreement, movable property can be realised by private sale without formal debt enforcement proceedings or obtaining a prior enforceable judgment. If the debtor objects, it must start legal proceedings against the creditor.
- **Realisation of intermediated securities.** These securities can be realised without formal enforcement or court proceedings (*Federal Statute on Intermediated Securities*).

STATE SUPPORT

5. Please give brief details of the availability of state support for distressed businesses (if any).

There are no statutory regulations on state support for distressed businesses in the Federal Statute on Debt Enforcement and Bankruptcy. State support is only provided on a case-by-case basis in very exceptional cases (in particular concerning businesses with systemic risks).

RESCUE AND INSOLVENCY PROCEDURES

6. Please briefly describe rescue and insolvency procedures available in your jurisdiction. In each case, please state:

- **The objective of the procedure and, where relevant, prospects for recovery.**
- **How it is initiated, when, by whom and the companies it can be applied to.**
- **Substantive tests that apply (where relevant).**
- **How long it takes.**
- **The consents and approvals required.**
- **The effect on the company, shareholders and creditors.**
- **How the procedure is formally concluded.**

The enforcement proceedings described in *Question 4* generally do not prejudice the following rescue or insolvency proceedings. Whether debt restructuring or bankruptcy proceedings are opened depends on various factors and is often only determined during the course or as a result of enforcement proceedings.

Debt restructuring moratorium

- **Objective.** Debt restructuring proceedings are generally initiated by granting a debt restructuring moratorium. The moratorium's objective is to guarantee the preservation of assets and to give the debtor a limited period of time, without the threat of enforcement proceedings, to find ways to restructure the company and to conclude the debt restructuring agreement.
- **How, when, by whom and to which companies.** The debt restructuring moratorium is generally initiated by the debtor seeking to reach a debt restructuring agreement (*see below, Ordinary debt restructuring agreement*) with its creditors. The debtor must submit to the competent court:
  - a reasoned application for a moratorium;
  - a draft debt restructuring agreement;
  - a balance sheet and the operating accounts, or an equivalent document indicating assets and income; and
  - a list of business records, if the debtor is bound to keep them.

  Any creditor who is entitled to file for bankruptcy against the debtor can also file a request for a debt restructuring moratorium. A debt restructuring moratorium can be requested at any time and without prior enforcement proceedings.

  In addition, the bankruptcy court can stay judgment on the opening of bankruptcy proceedings at its own discretion, if it appears that a debt restructuring agreement will be reached with creditors. In this case, the bankruptcy court requests a debt restructuring moratorium and transfers the file to the competent court.

Any entity which is subject to seizure or bankruptcy proceedings has a right to a debt restructuring moratorium, provided the entity has a place of enforcement in Switzerland.

- **Substantive tests.** The court grants a debt restructuring moratorium if there are prospects of recovery (that is, it seems possible that a debt restructuring agreement will be concluded). The debtor must also be able to remain financially solvent during the moratorium.
- **How long.** The competent court grants the debtor a debt restructuring moratorium of four to six months. At the request of the court-appointed administrator, the moratorium can be extended to 12 months, or in particularly complex cases 24 months.
- **Consents and approvals.** The debt restructuring moratorium is granted by the competent court, which also appoints an administrator for the duration of the moratorium. If the moratorium is extended to more than 12 months, creditors must be heard.
- **Effect.** During the moratorium, enforcement proceedings cannot be initiated or continued. Periods of limitation and pre-emptory deadlines do not run. With the granting of the moratorium, interest ceases to accrue for all unsecured claims. The debtor can continue its business activities under the supervision of the administrator. Without the authorisation of the competent court, the debtor cannot divest, encumber or pledge fixed assets, give guarantees or make gifts (these transactions are void).
- **Conclusion.** If the debtor does not succeed in fully satisfying all creditors, the debt restructuring moratorium ends with the conclusion of:
  - an ordinary debt restructuring agreement (*see below, Ordinary debt restructuring agreement*); or
  - a debt restructuring agreement with assignment of assets (*see below, Debt restructuring agreement with assignment of assets (debt restructuring liquidation)*).

  If the debt restructuring agreement is rejected and the moratorium therefore ends, or if the moratorium is revoked by the competent court, every creditor can ask for the opening of bankruptcy proceedings.

Ordinary debt restructuring agreement

- **Objective.** An ordinary debt restructuring agreement enables the debtor to continue doing business by proportionally satisfying its existing creditors for their claims. These proceedings give the debtor the opportunity for a new start, practically free of previous debts, except for those agreed in the debt restructuring agreement.
- **How, when, by whom and to which companies.** The debt restructuring agreement is proposed by the debtor and concluded between the debtor and its creditors. The agreement must then be approved by the competent court. The agreement must be concluded during the debt restructuring moratorium.

  Any debtor who has been the subject of a debt restructuring moratorium can conclude an ordinary debt restructuring agreement.
- **Substantive tests.** A debt restructuring agreement can only be approved by the competent court if both:
  - the sum offered is in proportion to the debtor's means; and
  - the execution of the agreement, complete satisfaction of the filed privileged claims (*see Question 2*) and fulfilment of all the debtor's obligations incurred during the debt restructuring moratorium are sufficiently secured.
- **How long.** Once the agreement is concluded and approved by the competent court, it can be executed without time limits unless these are included in the agreement.
- **Consents and approvals.** The agreement is deemed ratified if, before its confirmation by the court, either of the following consents are given:
  - a majority of creditors representing at least two-thirds of the total claims; or
  - at least one-quarter of the creditors representing at least three-quarters of the claims.

  The votes of claims of privileged creditors and the debtor's spouse are not counted. Secured creditors are only counted to the extent to which the administrator deems that their claims are not covered. Once the debt restructuring agreement is ratified, the competent court at the debtor's domicile must confirm the agreement for it to become legally binding.
- **Effect.** The confirmed debt restructuring agreement is binding on all creditors whose claims either:
  - arose before the publication of the debt restructuring moratorium; or
  - arose after publication without the administrator's consent.

  On confirmation of the debt restructuring agreement and with the exception of enforcement proceedings for the realisation of collateral, all enforcement proceedings initiated against the debtor before the moratorium are terminated.
- **Conclusion.** The proceedings end when the debtor fulfils its obligations under the agreement.

Debt restructuring agreement with assignment of assets (debt restructuring liquidation)

- **Objective.** In a debt restructuring agreement with assignment of assets, creditors can be given the power to dispose of the debtor's assets or the assets can be assigned in whole or in part to a third party. Eventually, the debtor company is liquidated and creditors are satisfied in whole (privileged claims) or in part (unprivileged claims). The extent of satisfaction of unprivileged claims depends on the size of the debtor's estate.
- **How, when, by whom and to which companies.** The same rules for ordinary debt restructuring agreements apply (*see above, Ordinary debt restructuring agreement: How, when, by whom and to which companies*).
- **Substantive tests.** The same rules for ordinary debt restructuring agreements apply (*see above, Ordinary debt restructuring agreement: Substantive tests*). In addition, the proceeds or the sum offered by a third party must appear to exceed the proceeds which would probably be yielded in bankruptcy proceedings.

- **How long.** The liquidation of the debtor's estate can take up to several years, depending on the complexity of the debtor's estate.
- **Consents and approvals.** The same rules for ordinary debt restructuring agreements apply (*see above, Ordinary debt restructuring agreement: Consents and approvals*).
- **Effect.** Once the debt restructuring agreement with assignment of assets has become legally enforceable and binding on all creditors, the debtor's capacity to dispose of its assets and its signing authority ends. If the debtor is entered in the Commercial Register, the words "in debt restructuring liquidation" are added to the company name. At that stage, the elected and court-confirmed liquidator concludes all transactions necessary for the conservation and realisation of the estate, and if applicable, for the transfer of the assigned assets.
- **Conclusion.** The proceedings are concluded once all assets are liquidated and the creditors are satisfied from the debtor's estate. On conclusion of the proceedings, the liquidator prepares a final report, which must be ratified by the creditors' committee, submitted to the competent court and made available for inspection by creditors.

Bankruptcy

- **Objective.** The main objective of bankruptcy proceedings is the dissolution and liquidation of the debtor company to eventually enable a proportional distribution of the debtor's assets to its creditors.
- **How, when, by whom and to which companies.** Bankruptcy proceedings may be initiated by a creditor with or without prior enforcement proceedings (the debtor can also request the opening of bankruptcy proceedings by declaring to the court that it is insolvent):
  - **With prior enforcement proceedings.** A creditor files an enforcement request with the competent debt enforcement authority (*see Question 4*).

    If the enforcement proceedings are not stayed by the filing of an objection or by a court judgment, the creditor can apply for continuation of the enforcement proceedings from 20 days after the summons to pay has been served. On receipt of the request for continuation of the proceedings, the enforcement office issues a bankruptcy warning to the creditor. Within 20 days after service of the bankruptcy warning the creditor can request the opening of bankruptcy proceedings from the competent bankruptcy court. This right lapses 15 months after the service of the summons to pay. The ordinary place of debt enforcement is the debtor's domicile. Under certain circumstances, special places of debt enforcement apply;
  - **Without prior enforcement proceedings.** Bankruptcy proceedings can be opened without prior enforcement proceedings if:
    - the debtor's place of residence is unknown;
    - the debtor has taken flight to avoid fulfilling its obligations;
    - the debtor has or is attempting to act fraudulently;
    - the debtor has concealed assets in enforcement proceedings for seizure of assets;
    - the debtor, who is already subject to enforcement proceedings, has ceased payments; or
    - a debt restructuring agreement is rejected or a debt restructuring moratorium is revoked.

    Bankruptcy proceedings may be initiated against:
    - a partnership (*Kollektivgesellschaft*);
    - a limited partnership (*Kommanditgesellschaft*);
    - a company limited by shares;
    - a partnership limited by shares;
    - a partnership with limited liability;
    - a co-operative;
    - an association;
    - a foundation.

    In addition, the following persons may be subject to bankruptcy proceedings, if registered with the commercial register):
    - business owners;
    - members of a partnership;
    - members of a limited partnership with unlimited liability;
    - members of the board of a partnership limited by shares;
    - managing partners of a partnership with limited liability.
- **Substantive tests.** The debtor must be subject to bankruptcy proceedings. If the debtor requests the opening of bankruptcy proceedings, the court only opens proceedings if there is no possibility of an amicable private settlement of debts.
- **How long.** Bankruptcy proceedings should be carried out within a year of being opened. However, this deadline can be extended several times by the supervisory authority if necessary. Complex bankruptcy proceedings can take several years.
- **Consents and approvals.** The competent bankruptcy court opens bankruptcy proceedings over the debtor.
- **Effect.** With the opening of bankruptcy proceedings all obligations of the debtor become due against the bankrupt estate, except those secured by mortgages on its real estate. The debtor can no longer dispose of its assets and generally all business operations come to an immediate and final standstill. With the exception of urgent matters, civil court actions to which the debtor is a party and which affect the composition of the bankrupt estate are stayed.
- **Conclusion.** Once all known assets are realised and distributed to creditors, the bankruptcy administrator(s) submits its final report to the bankruptcy court. The court can then declare the proceedings to be closed.

Debt restructuring agreement in bankruptcy proceedings

- **Objective.** The objective of these rarely used proceedings is to obtain a better result in the liquidation of assets than the yield from continuing bankruptcy proceedings.
- **How, when, by whom and to which companies.** The debtor in bankruptcy presents a debt restructuring agreement to the bankruptcy administrator(s) which assesses the proposal for the attention of the second meeting of creditors. The second meeting of creditors decides on the debt restructuring agreement.

  Any debtor subject to bankruptcy proceedings can conclude a debt restructuring agreement.
- **Substantive tests.** This same rules for ordinary debt restructuring agreements apply (*see above, Ordinary debt restructuring agreement: Substantive tests*).
- **How long.** These proceedings end with the conclusion of a debt restructuring agreement. There are no other time limits.
- **Consents and approvals.** This is the same as for ordinary debt restructuring agreements (*see above, Ordinary debt restructuring agreement: Consents and approvals*).
- **Effect.** Creditors are satisfied under the agreement and not the bankruptcy provisions.
- **Conclusion.** If a debt restructuring agreement is concluded, the court revokes the bankruptcy on the request of the bankruptcy administrator(s). The proceedings are concluded when the debtor has fulfilled its obligations under the agreement.

7. What type of stakeholder has the most significant role in the outcome of the restructuring?

It is generally the creditors (particularly the financial creditors) who have the greatest influence in restructuring procedures concerning voting rights, right to be heard and so on. Shareholders can also play a significant role, as they can contribute to a successful restructuring by raising capital for a distressed company. However, shareholders have no voting rights over court-adjudicated restructuring agreements.

LIABILITY AND TRANSACTIONS

8. Are there any circumstances in which a director, parent company (domestic or foreign) or other party can be held liable for the debts of an insolvent company?

Generally, the liabilities of legal entities are restricted to and must be satisfied by their own assets. In addition, even though corporate groups of several companies are often managed as a single economic entity, in debt restructuring and insolvency proceedings each legal entity must be treated separately.

Directors and managers can be personally liable for damage caused to a company through intentional or negligent violation of their statutory and legal duties. Liability extends to the company, shareholders and the creditors.

Any individual engaged in an audit or liquidation can be liable in the same way as a director. In addition, a person who rightfully delegates these tasks to another corporate body is liable for any damage caused by it, unless he can prove that the necessary care in selection, instruction and supervision was applied.

Personal liability also applies to formally appointed representatives and de facto or quasi-directors (that is, persons who actually and decisively influence the company's decision-making process). This can include a parent company dispatching its representatives to a subsidiary's corporate body.

In debt restructuring or insolvency proceedings, corporate liability claims against directors and other individuals must generally be asserted by the competent bankruptcy administration or the court-appointed liquidator. This is because these liability claims constitute an asset of the estate to be realised for the benefit of all creditors of the insolvent company.

9. Can transactions that are effected by a company that subsequently becomes insolvent be set aside?

Actions to avoid (that is, set aside) transactions which took place before the opening of insolvency proceedings can be brought by:

- Any creditor who holds a certificate of shortfall.
- The bankruptcy administrator, debt restructuring administrator or liquidator on behalf of the estate.
- Any individual creditor who has successfully requested the assignment of the right to pursue an avoidance action after the bankruptcy administrator or the debt restructuring administrator or liquidator waived that right on behalf of the estate.

Voidability of a gift or similar transaction

Except for customary occasional presents, all gifts and voluntary settlements which the company made during the vulnerable period (*see below*) are voidable. The following transactions are deemed equivalent to a gift:

- The company accepted a counter performance out of proportion to its own.
- The company obtained for itself or a third party a life annuity, an endowment, a usufruct or a right of habitation.

The vulnerable period is the year before one of the following takes place:

- The seizure of assets.
- The opening of bankruptcy proceedings.
- The granting of a debt restructuring moratorium.

Voidability due to insolvency

The following acts are voidable if the company carried them out during the vulnerable period and while it was already insolvent:

- Granting collateral for existing obligations which the company was not bound to secure.
- Settling a money debt other than by cash or other normal means of payment.
- Paying an unmatured debt.

However, the transaction is not voidable if the recipient proves that it was unaware of, and need not have been aware of, the company's insolvency.

The vulnerable period is the year before one of the following takes place:

- The seizure of assets.
- The opening of bankruptcy proceedings.
- The granting of a debt restructuring moratorium.

Voidability for intent

A transaction is voidable if the company carried it out, during the vulnerable period, with the intention (apparent to the other party) of either:

- Disadvantaging its creditors.
- Favouring certain of its creditors to the disadvantage of others.

The intention of the company and the recognisability of this intention by the other party is determined based on objective criteria.

The vulnerable period is five years before one of the following takes place:

- The seizure of assets.
- The opening of bankruptcy proceedings.
- The granting of a debt restructuring moratorium.

The underlying claim of a voidable transaction revives if the avoidance action is successful. The creditor of the claim has the same rights as any other creditor in the insolvency proceedings (that is, to participate in the proportional distribution of the assets).

The right to file an avoidance action is forfeited two years after:

- The service of the certificate of shortfall.
- The opening of bankruptcy proceedings.
- Court approval of a debt restructuring agreement with assignment of assets.

10. Please set out any conditions in which a company can continue to carry on business during insolvency or rescue proceedings. In particular:

- **Who has the authority to supervise or carry on the company's business?**
- **What restrictions apply?**

Debt restructuring moratorium

During a debt restructuring moratorium, the debtor can only continue its business activities under the supervision of the court-appointed administrator. The main principle regulating the actions of an administrator is the protection of existing creditors' rights.

Ordinary debt restructuring agreement (dividend settlement)

If, at the end of a debt restructuring moratorium, a debt restructuring agreement is concluded and confirmed by the competent court, the debtor can again freely dispose of its assets.

Debt restructuring agreement with assignment of assets (debt restructuring liquidation)

On the court's final confirmation of a debt restructuring agreement with assignment of assets, the debtor is no longer entitled to carry on its business. The creditors are vested with the power to dispose of the debtor's assets or the assets can be assigned to a third party. The creditors exercise their rights through the liquidator and a creditors' committee which are elected at or after the meeting which votes on the agreement. The liquidator concludes all transactions necessary for the conservation and realisation of the estate, and if applicable, for the transfer of the assigned assets. Under certain exceptional circumstances, the liquidator can continue to run the debtor's business for a limited time, if this leads to a better preservation of assets, and therefore to a better result for creditors. If the liquidator continues to run the debtor's business for a longer period of time, the creditors' committee must give its approval.

Bankruptcy

On the court's declaration of bankruptcy, the debtor cannot undertake any actions. Any acts by the debtor concerning assets belonging to the bankrupt estate are invalid. The bankruptcy administration does everything necessary for the maintenance and realisation of the bankrupt estate and represents the estate in court proceedings.

Under certain exceptional circumstances, the bankruptcy administration can continue to run the debtor's business for a limited time, if this leads to a better preservation of assets, and therefore to a better result for creditors. If the bankruptcy trustee continues to run the debtor's business for a longer period of time, the creditors and the creditors' committee respectively must give their prior approval. The bankruptcy court is the ultimate supervisory authority of the bankruptcy administration.

INTERNATIONAL CASES

11. Please state whether:

- **Courts in your jurisdiction recognise insolvency and rescue procedures in other jurisdictions.**
- **Courts co-operate where there are concurrent proceedings in other jurisdictions.**
- **There are any international treaties relating to insolvency to which your jurisdiction is a signatory.**
- **There are any special procedures that apply to foreign creditors.**

- **Recognition.** Swiss courts will recognise a foreign bankruptcy order delivered to the debtor's domicile, on request of the foreign bankruptcy administrator or of one of the creditors, provided that (*Private International Law Statute (PILS)*):

- the order is enforceable in the state in which it was given;
- there is no ground for non-recognition under the PILS (for example public policy); and
- reciprocity is granted by the state in which the order was made.

Special provisions apply if the bankrupt debtor has a branch in Switzerland.

An order based on a debt restructuring agreement or on a similar procedure, if made by the foreign authority having jurisdiction, is recognised in Switzerland under the conditions which apply to the recognition of a foreign bankruptcy order.

- **Concurrent proceedings.** Generally, the recognition of a foreign bankruptcy order only applies to the debtor's assets which are located in Switzerland. The recognition has the same legal consequences as bankruptcy under Swiss law for these assets. However, only the following claims are included in the schedule of admitted claims in Switzerland:
  - claims secured by pledge according to the Federal Statute on Debt Enforcement and Bankruptcy;
  - privileged claims of creditors domiciled in Switzerland and not secured by pledge.

  Generally, any surplus remaining after the satisfaction of these creditors is made available to the foreign bankruptcy administrator or to the creditors in bankruptcy. The surplus may only be made available after the foreign schedule of claims has been recognised by the competent Swiss court. The court must examine whether the claims of creditors domiciled in Switzerland were adequately considered in the foreign schedule of admitted claims.
- **International treaties.** Switzerland is not party to any international treaties at national level.
- **Procedures for foreign creditors**. There are no special procedures that apply to foreign creditors. Swiss and foreign creditors are treated equally.

PROPOSED REFORMS

12. Please summarise any proposals for reform and state whether they are likely to come into force and, if so, when.

In 2003, the Federal Council appointed an expert group to analyse regulatory requirements and to draft proposals for the reform of debt restructuring and insolvency law. In its report and preliminary draft of June 2008, the expert group set out a moderate approach to reform by suggesting only a partial revision of the current law. The expert group's conclusions included that:

- Some procedural rules in restructuring law should be amended.
- In relation to groups of companies the present "atomistic" approach should be retained (that is, substantive consolidation by pooling of assets and administrative consolidation in debt restructuring and insolvency proceedings were not suggested).

In January 2009, the Federal Council submitted its proposal for a partial revision of the current law for consultation (*Vernehmlassung*). This proposal is largely based on the preliminary draft by the expert group. However, it is not currently foreseeable if and when the Federal Statute on Debt Enforcement and Bankruptcy will be revised by Parliament.

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Among other areas of law, WENGER PLATTNER has a particular focus on restructuring and insolvency law and advises Swiss and international clients in these matters. WENGER PLATTNER is very experienced in cross-border insolvency matters (e.g. liquidation of Swissair) and is able to provide outstanding advice even in large and complex restructuring and insolvency situations.

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