Global Restructuring and Insolvency Guide - Switzerland

| Contents |
| --- |
| To generate table of contents, right-click here and select **Update Field.** |

Please select a topic from the menu.

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# Initial Considerations

## Can you take security over all types of assets, including accounts receivable?

**Bankruptcy**

In Switzerland, security packages typically consist of share pledges, security assignments of trade receivables, insurance claims and intragroup claims, bank account pledges and security over real property. Not all-asset security or floating charges are available under Swiss law.

In general, the creation of a security interest over movable assets requires possession of those assets to pass from the security provider to the secured party. Further, no security over movable assets can be created by registration into a public register except for assets that define ownership based on a register entry, such as ships and aircraft. Due to the requirement that possession of the security object must pass from the security provider to the secured party, Swiss security packages will, in very rare cases, include security over working capital as this may not only lead to a disruption of the daily business of the security provider but also be hardly manageable for the secured party.

A security assignment or pledge of receivables will only comprise receivables that arose before the opening of bankruptcy. Proceeds of receivables arising after the opening of bankruptcy belong to the bankruptcy estate.

**Composition Proceedings**

Within the composition proceedings, the same fundamental principles of Swiss law apply. During the composition moratorium, however, the debtor may only grant security with the prior consent of the composition court or, if appointed, the creditor committee.

A security assignment or pledge of receivables will only comprise receivables that arose before granting the moratorium. Proceeds of receivables arising after the opening of bankruptcy belong to the estate.

## What is the solvency requirement for a company to file a case in this jurisdiction?

**Bankruptcy**

The relevant insolvency trigger is overindebtedness (Überschuldung).

If a corporation's board of directors has (or should have) reason to believe that the corporation's liabilities exceed its assets, it is obliged to immediately prepare interim accounts at going-concern values (if there is still a going-concern scenario). If the interim balance sheet shows an overindebtedness (i.e., its liabilities exceed its assets) or if there is no longer a going-concern scenario, interim accounts must also be prepared at liquidation values. The interim accounts must be audited by the company's auditors or, in case of an opting-out, by a certified auditor. If the interim balance sheet at liquidation values (also) shows that the company is over-indebted, the board of directors is obliged to file for bankruptcy with the competent court unless (i) creditors with claims in an aggregate amount no lower than the amount of the corporation's overindebtedness subordinate their claims against the claims of all other creditors, or (ii) there is a substantiated likelihood for an informal (i.e., out-of-court) restructuring within a short time. Whereas it is not settled in the Swiss case law as to how long such a period is supposed to be, the forthcoming new corporate law limits it to 90 days. As an alternative to filing for bankruptcy, the corporation's board of directors may apply for the opening of composition proceedings.

While the criterion of overindebtedness is based on a balance sheet test (rather than a liquidity test), it is important to note that a corporation's inability to pay its debts as and when they fall due within the next 12 months will cause the corporation to lose the going-concern assumption for accounting purposes and lead to an obligation to account for liquidation values only. This, in turn, will typically result in over-indebtedness.On 25 March 2020, the Swiss government implemented emergency measures to support businesses impacted by the consequences of the COVID-19 pandemic. Fully state-backed loans of up to CHF 500,000 granted under these emergency measures will not be considered as a liability for the purpose of calculating the coverage of capital and reserves and for calculating overindebtedness (see Article 24 of the Federal Act on Loans with Joint Guarantees as a Consequence of the Coronavirus dated 19 December 2020.

**Composition Proceedings**

Generally speaking, the requirements for the availability of composition proceedings are rather low and there is no particular solvency requirement. Courts may only refuse to grant a provisional composition moratorium if there are obviously no prospects for rehabilitation or for the confirmation of a composition agreement.

## Is there a requirement to demonstrate COMI ("centre of main interests") for a company to file a case in this country?

**Bankruptcy**

Bankruptcy proceedings are only available to debtors with a registered office in Switzerland. COMI is not a relevant factor for the initiation of primary proceedings in Switzerland.

**Composition Proceedings**

Composition proceedings are only available to debtors with a registered office in Switzerland. COMI is not a relevant factor for the initiation of primary proceedings in Switzerland.

## Are the claims of creditors and shareholders put into separate classes for purposes of voting and treatment under the plan or scheme?

**Bankruptcy**

Once the estate content is clarified, all assets are realized by way of a public auction unless the creditors decide to sell assets privately. Costs and expenses of the proceedings are paid with priority over other claims. The preferential treatment of costs and expenses extends to any agreements the debtor entered into or prolonged after the opening of bankruptcy proceedings, such as rental agreements for offices or storage facilities, as well as the claims of employees who continued to work after the opening of bankruptcy proceedings.

With respect to all other claims, Swiss mandatory law distinguishes between the following categories of creditors: (i) secured creditors; (ii) two classes of statutorily preferred creditors; (iii) general unsecured, unsubordinated creditors; and (iv) subordinated creditors. Statutorily preferred creditors are mainly employees in respect of various claims (e.g., a capped amount of claims under the employment agreement to the extent they have arisen or fallen due within six months prior to the opening of bankruptcy) and various social insurance schemes in respect of the debtor's contributions.

Given the nature of the bankruptcy proceedings, shareholders do not participate in such proceedings with their equity claims.

**Compositions proceedings**

The classification of creditors and shareholders is the same as in bankruptcy proceedings. It is a prerequisite for the court's confirmation of the composition agreement that the satisfaction of the claims of all privileged creditors be secured (unless individual creditors waive their right to such security).

## Is shareholder approval needed to commence a case? Are shareholders entitled to vote on a plan?

**Bankruptcy**

There is no shareholder vote required.

In general, the claims of shareholders' creditors (e.g., under shareholder loans) are treated equally to the claims of all other creditors, subject to and in accordance with the statutory classification of creditors. This means that shareholder creditors have the same voting rights as the other creditors in the same class.

**Bankruptcy**

There is no shareholder vote required except that the shareholders have to make an "adequate restructuring contribution in an ordinary composition agreement."

In general, the claims of shareholders' creditors (e.g., under shareholder loans) are treated equally to the claims of all other creditors, subject to and in accordance with the statutory classification of creditors. This means that shareholder creditors have the same voting rights as the other creditors in the same class.

## Is there an ability to bind minority dissenting creditors (i.e., cramdown)?

**Bankruptcy**

N/A.

**Composition Proceedings**

Yes. Dissenting unsecured and nonprivileged creditors may be crammed down if the creditors have approved the composition agreement. Such approval requires either (i) the majority of the unsecured and nonprivileged creditors whose claims amount to at least two-thirds of all unsecured and nonprivileged claims, or (ii) one-quarter of the unsecured and nonprivileged creditors whose claims amount to at least three-quarters of the unsecured and nonprivileged claims.

Secured and privileged creditors may not be crammed down.

# Commencing the Process

## Who can commence?

**Bankruptcy**

A corporation may file for its own bankruptcy upon determination of illiquidity or overindebtedness if the directors do not succeed in negotiating private restructuring measures or composition agreements.

Any individual creditor may also initiate bankruptcy proceedings by applying to the competent bankruptcy court for an order to declare the corporation's bankruptcy after going through the statutory debt enforcement procedure with respect to any financial claim (even of nominal value) against the corporation. During the course of the statutory debt enforcement procedure, the corporation may raise various legal defenses with respect to the financial claim asserted by the applicant. Limited defenses are available with respect to financial claims asserted in connection with promissory notes or bills of exchange drawn on the corporation.

In addition, any individual creditor may apply to the competent bankruptcy court for an order to declare the corporation's bankruptcy without first having to go through the statutory debt enforcement procedure if the creditor can demonstrate that the debtor has ceased to make payments.

The debtor's right to manage its affairs ceases with the bankruptcy decree. The bankruptcy court can (i) postpone the issuance of the bankruptcy decree if there is a prospect of debt restructuring or (ii) order a composition moratorium if there is a prospect of a composition agreement.

**Composition Proceedings**

The debtor, certain creditors and the bankruptcy court may commence composition proceedings.

## Is shareholder's consent required to commence proceeding?

**Bankruptcy**

No, unless the proceeding is initiated based on the corporation's declaration of its inability to pay.

**Composition Proceedings**

No, unless the proceeding is initiated based on the corporation's declaration of its inability to pay.

## Is there an ability to consolidate group estates?

**Bankruptcy**

No. Each legal entity will be treated separately. However, in the case of multiple proceedings in Switzerland with an intrinsic connection (such as in the case of bankruptcy proceedings over several entities of the same group), the competent Swiss courts are bound to coordinate their activities and may agree on one uniform place of jurisdiction.

**Composition Proceedings**

No. Each legal entity will be treated separately. However, in the case of multiple proceedings in Switzerland with an intrinsic connection (such as in the case of composition proceedings over several entities of the same group), the competent Swiss courts are bound to coordinate their activities and may agree on one uniform place of jurisdiction.

## Is there any court involvement?

**Bankruptcy**

Yes

**Composition Proceedings**

Yes

## Who manages the debtor?

**Bankruptcy**

The debtor's right to manage its affairs ceases with the bankruptcy decree. The bankrupt estate is deemed a legal entity whose rights are represented by the bankruptcy administrator.

**Composition Proceedings**

As a rule, during the composition moratorium, the debtor may continue to manage its affairs under the supervision of the court-appointed composition commissioner. However, the court may order that (i) certain actions require the approval of the composition commissioner or (ii) the composition commissioner manages the debtor's affairs on the debtor's behalf. Certain actions (such as the sale of fixed assets or the granting of security over the debtor's assets) require the prior consent of the composition court or, if appointed, the creditor committee.

In the case of a composition agreement with the assignment of assets, the debtor's right to manage its affairs ceases with the court's confirmation of the composition agreement. A liquidator then represents the estate.

## What is level of disclosure of process to voting creditors?

**Bankruptcy**

In case of bankruptcy, the creditors can, in principle, request disclosure of all documents that are in possession of the bankruptcy administrator.

**Composition Proceedings**

The composition commissioner makes available the relevant files to all creditors during a period of at least 20 days prior to the creditors' meeting relating to the approval of the composition agreement. During the creditors' meeting, the composition commissioner reports on the status of the debtor's financial affairs. In addition, the debtor must be present or represented at the creditors' meeting and must answer the creditors' questions.

## What entities are excluded from customary insolvency or reorganisation proceedings, and what legislation applies to them?

**Bankruptcy**

All entities registered in the Swiss commercial register are subject to bankruptcy proceedings. Trusts are subject to bankruptcy proceedings, but only in relation to the trust's assets.

Banks, insurance companies, collective investment schemes, securities dealers, portfolio managers, managers of collective assets and financial market infrastructures (such as stock exchanges) are subject to separate insolvency regimes based on prudential regulation (in particular, the Swiss Banking Act, the Swiss Collective Investment Schemes Act, the Swiss Insurance Supervision Act and the Swiss Financial Market Infrastructure Act).

Furthermore, municipalities and other bodies of cantonal public law are subject to insolvency regimes pursuant to the Swiss Act on Debt Enforcement and Bankruptcy against municipalities and other bodies of cantonal public law.

**Composition Proceedings**

All entities subject to ordinary debt enforcement and bankruptcy proceedings may be subject to composition proceedings.

Banks, insurance companies, collective investment schemes, securities dealers portfolio managers, managers of collective assets and financial market infrastructures (such as stock exchanges) are subject to separate insolvency regimes based on prudential regulation (in particular, the Swiss Banking Act, the Swiss Collective Investment Schemes Act, the Swiss Insurance Supervision Act and the Swiss Financial Market Infrastructure Act).

Furthermore, municipalities and other bodies of cantonal public law are subject to insolvency regimes pursuant to the Swiss Act on Debt Enforcement and Bankruptcy against municipalities and other bodies of cantonal public law.

## How long does it generally take for a creditor to commence the procedure?

**Bankruptcy**

In order to commence bankruptcy proceedings, a creditor may have to go through lengthy debt enforcement proceedings. Once the creditor has reached that stage, it may commence bankruptcy proceedings easily and quickly by application to the competent court. In certain exceptional circumstances (e.g., concealment of assets, fraudulent action or suspension of payments), the creditor can apply for bankruptcy proceedings directly at the bankruptcy court without first going through debt enforcement proceedings.

**Composition Proceedings**

A creditor may only commence composition proceedings if it is entitled to request the debtor's bankruptcy. In order to get to that stage, a creditor may have to go through lengthy debt enforcement proceedings. Once the creditor has reached that stage, it may commence composition proceedings easily and quickly by application to the competent court for a provisional composition moratorium. The court is bound to decide immediately (i.e., within a couple of days) on whether or not to grant the provisional composition moratorium.

# Effect of Process

## Does debtor remain in possession with continuation of incumbent management control?

**Bankruptcy**

No. The debtor's right to manage its affairs ceases with the bankruptcy decree.

**Composition Proceedings**

As a rule, during the composition moratorium, the debtor may continue to manage its affairs under the supervision of the court-appointed composition commissioner. However, the court may order that (i) certain actions require the approval of the composition commissioner or (ii) the composition commissioner manages the debtor's affairs on the debtor's behalf. Certain actions (such as the sale of fixed assets or the granting of security over the debtor's assets) require the prior consent of the composition court or, if appointed, the creditor committee.

In the case of a composition agreement with the assignment of assets, the debtor's right to manage its affairs ceases with the court's confirmation of the composition agreement.

## What is the stay/moratorium regime (if any)? Is the stay or moratorium worldwide?

**Bankruptcy**

N/A.

Bankruptcy leads to the liquidation of the debtor's assets. From a Swiss perspective, this is worldwide.

**Composition Proceedings**

Composition proceedings begin with a provisional composition moratorium as the first instrument of creditor protection. The total duration of the provisional composition moratorium may, in any case, not exceed eight months. The provisional composition moratorium is not granted automatically but only by a court decision. After determining that there are prospects for rehabilitation, the court will set a fixed composition moratorium for a period of four to six months (which can be extended to a maximum period of up to two years in complex cases) to allow for the negotiation of the composition agreement.

Enforcement proceedings against the debtor may neither be continued nor initiated during the composition moratorium. In addition, any interest on unsecured claims ceases to accrue.

## Is there a provision for debtor in possession or rescuer financing or superpriority or priming financing?

**Bankruptcy**

Whereas the bankrupt estate is able to enter into contracts even after the issuance of the bankruptcy decree, the financing of a bankrupt estate is not relevant in practice.

**Composition Proceedings**

Yes. During the composition moratorium with the consent of the composition commissioner, Liabilities incurred by the debtor will be satisfied in priority over claims of other creditors in an ensuing liquidation or bankruptcy of the debtor.

## Can procedure be used to implement a debt-to-equity swap?

**Bankruptcy**

No.

**Composition Proceedings**

Yes. In a composition agreement with partial waiver of claims, the creditors may agree that some or all of the creditors' remaining claims (i.e., remaining after the partial waiver) may be settled by way of transfer of ownership of shares in the debtor or in a special purpose vehicle (typically being a newly incorporated wholly owned subsidiary of the debtor that is the transferee of the debtor's viable assets). To the extent that the composition agreement may be declared binding on non-consenting creditors, this mechanism may be considered a mandatory debt-to-equity swap.

## Are third party releases available?

**Bankruptcy**

No

**Composition Proceedings**

No

## Are the proceedings recognised abroad?

**Bankruptcy**

Yes, subject to and in accordance with applicable (foreign) conflict of laws rules and international treaties.

**Composition Proceedings**

Yes, subject to and in accordance with applicable (foreign) conflict of laws rules and international treaties.

## Has the UNCITRAL Model Law been adopted?

**Bankruptcy**

No

**Composition Proceedings**

No

## How long, complex and expensive is the process?

**Bankruptcy**

Timeframe, complexity and costs will vary on a case-by-case basis.

**Composition Proceedings**

Timeframe, complexity and costs will vary on a case-by-case basis. In general, the procedure is more costly than a bankruptcy.

## Is there a mandatory set-off of mutual debts on insolvency?

**Bankruptcy**

No

**Composition Proceedings**

No

## Can a debtor continue to carry on business during insolvency proceedings?

**Bankruptcy**

No

**Composition Proceedings**

As a rule, during the composition moratorium, the debtor may continue to carry on business under the supervision of the court-appointed composition commissioner. However, the court may order that (i) certain actions require the approval of the composition commissioner or (ii) the composition commissioner manages the debtor's affairs on the debtor's behalf. Certain actions (such as the sale of fixed assets or the granting of security over the debtor's assets) require the prior consent of the composition court or, if appointed, the creditor committee.

In the case of a composition agreement with an assignment of assets, the debtor's right to manage its affairs ceases with the court's confirmation of the composition agreement.

# Other Factors

## Are there any wrongful or insolvent trading restrictions and what is the directors' liability?

**Bankruptcy**

Under Swiss law, insolvent trading is the act of a corporation continuing to trade in circumstances where its board of directors has failed to file for bankruptcy or apply for a composition moratorium despite being obliged to do so.

Directors are subject to personal civil liability for damages for any losses caused by insolvent trading. In order to determine damages, a court will typically compare the hypothetical amount of the corporation's overindebtedness at the time when its board of directors should have filed for bankruptcy or applied for a composition moratorium, with the (higher) amount of its overindebtedness, at the time when the board of directors actually filed for bankruptcy or applied for a composition moratorium. In severe cases, directors may even be subject to criminal sanctions.

**Composition Proceedings**

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## What is the order of priority of claims?

**Bankruptcy**

Once the content of the estate is clarified, all assets are realized by way of a public auction unless the creditors decide to sell assets privately. Costs and expenses of the proceedings are paid with priority over other claims. The preferential treatment of costs and expenses extends to any agreements the debtor entered into or prolonged after the opening of bankruptcy proceedings, such as rental agreements for offices or storage facilities, as well as the claims of employees who continued to work after the opening of bankruptcy proceedings.

With respect to all other claims, Swiss mandatory law distinguishes between the following categories of creditors: (i) secured creditors; (ii) two classes of statutorily preferred creditors; (iii) general unsecured, unsubordinated creditors; and (iv) subordinated creditors. Statutorily preferred creditors are mainly employees in respect of various claims (e.g., a capped amount of claims under the employment agreement to the extent they have arisen or fallen due within six months prior to the opening of bankruptcy) and various social insurance schemes in respect of the debtor's contributions.

**Composition Proceedings**

In the liquidation of the debtor, which is conducted as a result of the confirmation of a composition agreement with the assignment of assets, the order of priority of claims is the same as in bankruptcy.

## Do pension liabilities have any priority over other unsecured claims?

**Bankruptcy**

In the Swiss pension system, pension funds are legally separated entities from employers. Therefore, employees' claims for pension payments are *vis-à-vis* the respective pension fund rather than the employer. Employers are liable *vis-à-vis* pension funds for certain contribution payments, and such contribution claims constitute priority claims in the employer's insolvency.

**Composition proceedings**

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## Is it possible to challenge prior transactions?

**Bankruptcy**

Yes. The bankruptcy administration and — under certain conditions — individual creditors can sue for the avoidance of actions by the debtor that (i) were taken during a certain period prior to the opening of the debtor's bankruptcy (so-called *période suspecte*), (ii) were to the disadvantage of the debtor's creditors, and (iii) fulfil the requirements of one of the avoidance provisions set out in the Bankruptcy Act. These provisions relate to (a) voidability of a gift (with a *période suspecte* of one year), (b) voidability due to over-indebtedness (with a *période suspecte* of one year), and (c) voidability for intent (with a *période suspecte* of five years).

In addition, the set-off by a third-party debtor of a bankrupt corporation is voidable if that third-party debtor acquired a claim against the corporation prior to the opening of the corporation's bankruptcy, but in awareness of the corporation's illiquidity, in order to gain, by way of set-off, an advantage for itself or a third party to the detriment of the bankrupt estate.

**Composition Proceedings**

Yes. Avoidance actions that are available in the debtor's bankruptcy are also available after the court's confirmation of a composition agreement with assignment of assets.

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