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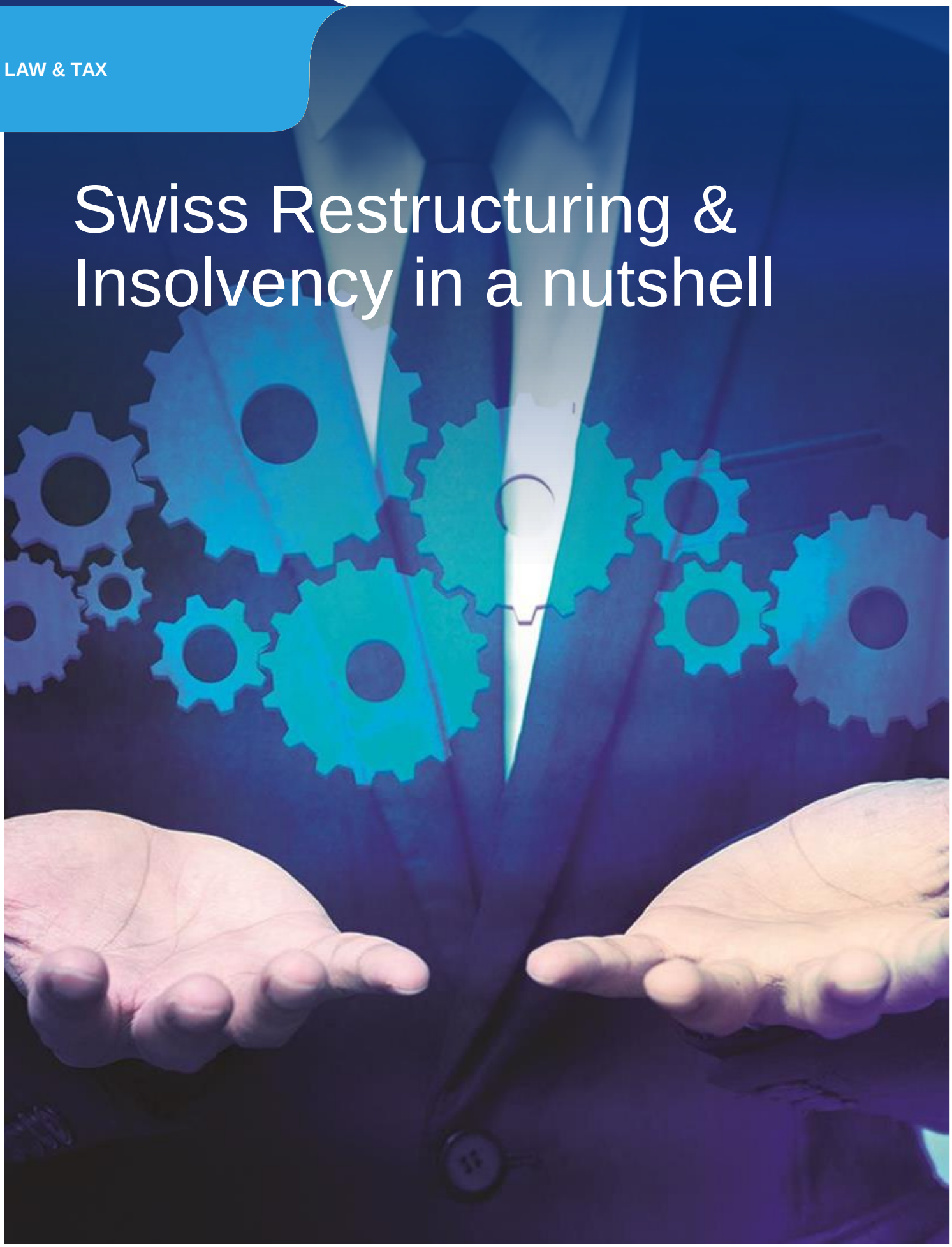
Swiss Restructuring & Insolvency in a nutshell



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What are the main Swiss Restructuring & Insolvency questions

Introduction

Ever-changing market conditions require businesses to continuously monitor their earnings and liquidity situation as well as their debt structure. In addition, the overall economic situation remains uncertain and asks for continued operational flexibility and resilience. Thus, it is not surprising that companies need to rethink their organisational obligations in restructuring and insolvency situations.

What we can do for you

You can count on us to deal with all issues related to debt restructuring and distressed financing, whether through equity cures, waiver preparations, enforcement of security rights by lenders, or otherwise. We guide and assist bondholders, lenders, investors, debtors, shareholders, creditors, distressed companies, their management and principal stakeholders by providing customised advice in restructuring and insolvency situations.

To adequately address your questions, we have put together a team with specialists from our Banking & Finance, Corporate and M&A, Litigation & Risk Management, Employment & Benefits and Tax practices in Switzerland.

In international restructurings, we work closely with our colleagues from The Netherlands, Luxembourg and Belgium by providing our clients with a unique combination of knowledge and experience in an integrated manner.

1. What actions are required in case of capital loss or over-indebtedness?

In case of a capital loss or over-indebtedness, the board of directors is required to take immediate action

- **Capital loss:** if half of the share capital and the legal reserves are no longer covered, the board of directors must immediately convene a shareholders' meeting, inform the shareholders of the capital loss and propose restructuring measures.
- **Over-indebtedness:** if the assets of the company no longer cover its liabilities, the board of directors must immediately notify the competent court, unless:
  - creditors of the company have agreed to subordinate "sufficient" amounts of their claims; or
  - there is realistic possibility of a successful restructuring and the interests of creditors are safeguarded.

2. What are the duties and potential liabilities of the board of directors in restructurings?

The board of directors is responsible for the ultimate management of the company

In out of court restructuring situations, the responsibilities of the board include the organisation and supervision of any restructuring measures. In particular, the board of directors will have to ensure that:

- appropriate restructuring measures are implemented;
- all measures implemented are in the best interest of the company (and not in the interest of any third parties);
- the financial situation of the company is closely monitored;
- creditors are treated equally;
- communication with all relevant stakeholders occurs; and
- any filings with the competent courts for bankruptcy (or similar measures) are not delayed but made at the required time.

Potential liability of board members in restructurings

Board members are liable to the company, its shareholders and (in bankruptcy situations) its creditors for damages caused by an intentional or negligent violation of their duties. They may also be subject to criminal liability in case of fraudulent bankruptcy, intentional reduction of assets to the prejudice of creditors or granting of preferences to certain creditors. To safeguard its own interests and to protect against potential liability in restructurings, the board of directors will have to ensure an appropriate decision-making process and keep a record thereof.

3. Which corporate measures are available to the company?

Most available corporate measures may lead to tax liabilities

Corporate measures available include capital increases, decreases or a combination thereof. Typical corporate measures available to strengthen a company's capital may trigger a 1% stamp tax on equity. Making use of certain available exemptions may mitigate such a tax exposure. Taxes may also be triggered in case of debt waivers by shareholders where the company can be exposed not only to stamp taxes but also corporate income taxes. Shareholders should thus pay attention to the proper structuring of corporate measures in order to avoid tax pitfalls.

4. What needs to be considered in case of bankruptcy proceedings?

The ultimate goal of bankruptcy proceedings is the winding-up of the company

In bankruptcy proceedings, the business is immediately stopped and the company's assets are liquidated. The creditors participate in the liquidation proceeds depending on the nature and rank of their claims.

5. Are there alternatives to bankruptcy proceedings?

As alternative to bankruptcy filing, a postponement of bankruptcy or the opening of composition proceedings may be applied for

- The postponement of bankruptcy is possible if there are valid reasons to believe that a restructuring will be successful. The postponement will only be made public if this is required for the protection of third parties.
- Composition proceedings allow for a restructuring of the company that is more flexible and beneficial than bankruptcy. The main point is the composition agreement between the company and the creditors providing for a stay, haircut, liquidation or combination thereof.

6. What needs to be considered in case of a group insolvency?

Principle of one company, one proceeding

The group itself is not subject to insolvency but each group entity will be subject to separate insolvency proceedings. However, bankruptcy authorities have to coordinate their actions to the extent possible in a group insolvency.

7. Are foreign bankruptcy decrees recognised in Switzerland?

Foreign bankruptcy decrees have to be recognised by the competent Swiss court

There is no automatic recognition, but a foreign decree must be recognised by the competent Swiss court before it has any effects. In principle, foreign bankruptcy decrees are recognised if (i) they have been rendered in the country of the bankrupt's seat or where the bankrupt has its centre of main interest (COMI), (ii) the decree is enforceable in the country in which it has been rendered and (iii) the decree does not violate certain basic principles of Swiss law.

8. Are Chapter 11 proceedings recognised in Switzerland?

In principle, the requirements mentioned above also apply

In order for Chapter 11 proceedings to be recognised in Switzerland, the group company in question must have had its seat or COMI in the state in which the decree was rendered, be named as a party or concerned entity in the Chapter 11 decree, process must have been served and a right to be heard must have been granted.

9. What needs to be considered in case of up- and cross-stream transactions?

Up- and cross-stream transactions are subject to certain requirements and restrictions

If a transaction is not based on at arm's length terms, it may be re-qualified as dividend distribution which triggers certain legal requirements and restrictions and may have tax implications. Amongst other things, the amount to be up-streamed needs to be limited to the freely distributable equity, the transaction must fall within the object clause of the company and the company must derive sufficient benefit from such transaction.

Financial assistance is not prohibited in Switzerland

There are no specific restrictions on a Swiss target with regard to the assistance in an acquisition of its own shares other than the up- and cross-stream limitations.

10. Is an M&A transaction still possible in restructuring situations?

In restructuring situations, the sale of a part of the business is often exposed to challenge, with the directors being exposed to potential breach of fiduciary duty

In principle yes, but there are certain pitfalls that must be avoided and requirements that must be fulfilled. A relatively new instrument in Switzerland is the so-called "pre-packaged transaction". In such a transaction, a company in a restructuring situation may enter into an agreement for the sale of a part of its business which is conditional on the filing for a provisional moratorium and court approval of the contemplated sale. Such court approval can be obtained within a short period of time (typically within a couple of working days) and will protect

(i) the purchaser from challenges of the acquisition and

(ii) the directors from claims for a breach of fiduciary duty.

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Loyens & Loeff is a leading law firm providing comprehensive and fully integrated legal and tax assistance in the Netherlands, Belgium, Luxembourg and Switzerland. You can count on any of our 900 advisers based in our offices in the Benelux and Switzerland and in key financial centres around the world. We assist our clients on the full array of capital markets work taking into account the changing regulatory environment and finding practical solutions.

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