

Restructuring Q&A



1.1 What formal insolvency proceedings are available in Switzerland?

The ordinary insolvency proceeding in Switzerland is bankruptcy, i.e., the liquidation proceeding.

In addition, the so-called composition agreement with assignment of assets (*Nachlassvertrag mit Vermögensabtretung/concordat par abandon d'actif*) is an alternative to liquidate the debtor's assets. This composition agreement allows for more flexibility than bankruptcy by assigning of all or part of the debtor's assets to the creditors or a third party followed by a liquidation of the assets and a distribution of the proceeds.

1.2 Who can initiate bankruptcy proceedings?

To initiate bankruptcy proceedings, an application must be submitted to the competent court by:

- a creditor of the debtor whose claim successfully went through prior debt enforcement proceedings without settlement. There are limited exceptions that allow a creditor to request the opening of bankruptcy directly without prior debt enforcement proceedings, e.g., if the debtor defrauded or is attempting to defraud its creditors or if the debtor has permanently stopped all payments to its creditors.
- the debtor that declares to the court that it is insolvent; or
- the board of directors (or the statutory auditors) of the debtor by filing a notification with the court declaring that the debtor is over-indebted according to art. 725 para. 2 CO.

1.3 What formal forms composition agreements are available in Switzerland?

It is possible to initiate composition proceedings and use such proceedings as a mere restructuring moratorium (art. 296a DEBA). In such case, individual agreements between the debtor and the creditors have to be made and if the debtor manages to financially recover, the composition court may terminate the moratorium.

However, if the consent of all creditors cannot be obtained or the financial recovery can otherwise not be achieved by individual agreements, a composition agreement can be proposed. This can either be in the form of a debt-rescheduling agreement (*Stundungsvergleich/concordat*

moratoire) where the debtor offers the creditors payment of all their claims according to a fixed time schedule, or in the form of a dividend agreement (*Dividendenvergleich/concordat dividende*), where the debtor offers the creditors only a partial payment of their claims and the remainder is waived. The two forms can also be combined.

There is a third option available, namely the composition agreement with assignment of assets (*Nachlassvertrag mit Vermögensabtretung/concordat par abandon d'actif*). Since this is an insolvency rather than a restructuring proceeding, it has been discussed in 1.1 above.

A composition agreement needs to be approved by (i) a majority of creditors representing two-thirds of the total debt, or (ii) one-quarter of the creditors representing three-quarters of the total debt. Privileged and secured creditors have no vote on the composition agreement. In addition to the creditors' approval, the agreement needs to be confirmed by the composition court to become valid and binding upon all creditors irrespective of how they voted and whether they participated in the composition proceedings or not. It is therefore possible to cram-down dissenting creditors in such proceedings.

The result of a successful composition agreement is that the debtor is not wound-up and has again full power to manage its affairs.

1.4 What are the criteria to enter into composition proceedings?

Usually, the debtor will initiate such proceedings, but certain creditors and the court may also request the opening of composition proceedings. The composition court will grant the debtor a provisional debt moratorium of a maximum of 4 months and usually appoints a provisional administrator to assess whether there is a chance to rescue the company. If this is the case, the composition court may grant a definitive debt moratorium of a maximum of two years, appoint the administrator and, if necessary, a creditors' committee. During such moratorium the company must either be successfully restructured or reach a composition agreement with the creditors with approval of a required quorum of creditors and the composition court. During the debt moratorium, the corporate bodies remain in charge of the company but are subject to supervision by the administrator.

Informal workouts also exist in Switzerland. This will be discussed in a separate publication.

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