GLOBAL FORUM ON LAW, JUSTICE AND DEVELOPMENT (GFLJD)
COMMUNITY OF PRACTICE
QUESTIONNAIRE ON INSOLVENCY LAW AND COMPANY LAW

Answers regarding the legal situation in Switzerland

I. Introductory questions on the insolvency procedures available in the relevant jurisdiction

1. What insolvency procedures – either liquidation or reorganization procedures – are available for distressed or insolvent companies?

There is one liquidation procedure (“Konkurs”/“faillite”/“fallimento”) leading to the liquidation of an overindebted company in accordance with the principles of equal treatment of creditors (certain priorities reserved) and under the administration of a public office or an external liquidator mandated by the public office.¹

There is a restructuring procedure (“Nachlassstundung”/“sursis concordataire”/“moratoria concordataria”) that protects the debtor from creditors’ seizure measures and establishes a procedure to obtain a creditors and court approved restructuring plan.²

There is, ultimately, the possibility for the court to suspend the declaration of bankruptcy for an undetermined period (“Konkursaufschub”/“ajournement de la faillite”/“aggiornamento del fallimento”).³ During this period, the debtor may look to obtain an agreed restructuring plan or otherwise financing allowing him to overcome his overindebtedness without entering into formal insolvency proceedings. He will act under judicial supervision which discharges him from his duty to open insolvencies. However, the suspension – unlike the restructuring procedure - has no effect on creditors’ rights to pursue their debts.

¹ Articles 197 ff. of the Swiss Law on Debt Recovery and Bankruptcy of 11 April 1889, official versions (German, French and Italian) under <http://www.admin.ch/opc/de/classified-compilation/18890002/index.html>.
² Articles 293 ff. of the Swiss Law on Debt Recovery and Bankruptcy (Fn 1).
³ This procedure will probably be eliminated in future law reforms.
2. Are there special insolvency procedures available for financial institutions or for other special classes of companies?

Yes, particular provisions apply to financial institutions, namely banks and insurance undertakings. These specific provisions are contained in the Swiss Federal Act of 8 November 1934 on Banks and Savings Banks (Banking Act, BA) and, more specifically, in the Swiss Federal Ordinance of 17 May 1972 on Banks and Savings Banks (Banking Ordinance, BO, articles 25 ff.). Furthermore, they are supplemented by the provisions of the (general) Insolvency Code.

Under these provisions, the Swiss Financial Market Supervisory Authority FINMA is responsible for both opening and conducting restructuring and bankruptcy proceedings in relation to individuals and legal entities carrying on business as a bank or as a securities dealer (for which a licence is required). Where FINMA is responsible for opening bankruptcy or restructuring proceedings, it does not merely perform the function of a judge and supervisory authority in relation to the appointed liquidators, committees of creditors and restructuring agents, but also executes the duties of an insolvency administrator in various areas. Depositors of banks and securities dealers benefit from special protective provisions (cf. also: Depositor protection at banks and securities dealers).

As is the case with bankruptcy proceedings falling within FINMA's remit, the proceedings required for the restructuring of banks and securities dealers are distinct and separate and geared to the specific needs of the financial sector. The purpose of restructuring is to enable ailing financial institutions to continue carrying on the business (for which they have a required licence) or to ensure that specific services can still be provided. However, restructuring proceedings are not available if a licence has already been revoked and it is not possible to grant a retrospective licence to entities engaging in unauthorised activity.

In regards to insurance companies and collective investment schemes (fund management companies, SICAVs, SICAFs, limited partnerships for collective investment and asset managers of collective investment schemes), FINMA is responsible for opening and conducting bankruptcy proceedings if it is not possible to restructure the company. Bankruptcy proceedings are essentially conducted on the basis of the principles set out in bank bankruptcy legislation.

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4 Both documents can be consulted under <http://www.finma.ch/e/regulierung/gesetze/Pages/banken.aspx> (18.03.2014), they are also available in French and Italian.
5 See the references in article 34 of the Banking Act.
6 Source: http://www.finma.ch/e/sanktionen/insolvenz1/insolvenzverfahren/Pages/default.aspx (18.3.2014)
Effective since 2012, the Liquidity Ordinance (LiqO)\(^7\) requires banks to manage and monitor liquidity risks appropriately. It transposes part of the international liquidity standards of the Basel Committee on Banking Supervision (Basel Committee) into Swiss law. In a second step, the quantitative liquidity requirements will now be adopted as well in accordance with the international liquidity standards. These standards were not defined by the Basel Committee until January 2013. Specifically, a Liquidity Coverage Ratio (LCR) will be introduced for short-term liquidity, requiring banks to have sufficient high-quality liquid assets. A bank should thus be able to survive for at least 30 days in the event of a liquidity stress scenario with client deposits being withdrawn or difficulties with securing refinancing on the capital market. The amendments will enter into force on 1 January 2015. Failure to comply with the LiqO triggers the mechanisms provided for in the Banking Law (see above), allowing for FIMNA to take measures way ahead of formal insolvency.

3. **Are there any specific legal provisions that apply to debt restructurings achieved without a full formal insolvency process?**

A restructuring is obtained either through an out-of-court restructuring agreement in accordance with the provisions of corporate and contract law, or by means of a restructuring agreement in insolvency approved in accordance with the provisions on restructuring proceedings of insolvency law (majorities of creditors, court approval). Since January 1\(^{st}\), 2014, however, insolvency proceedings may be initiated for purposes other than achieving a formal restructuring agreement, for instance, for obtaining court approval for a financing agreement or in order to gain time (though a stay) to negotiate an out-of-court agreement.

4. **What are the commencement criteria for insolvency procedures?**

Since the Reform entered into force on January 1\(^{st}\), 2014, there are no formal requirements for the debtor to commence restructuring proceedings, however, severe financial difficulties are considered to be an implied condition for their commencement.

In regards to liquidation proceedings a debtor can declare himself insolvent at court and thus open liquidation proceedings.

A creditor can request commencement of insolvency procedures after the debtor has refused or failed to pay a debt filed within the corresponding debt recovery proceedings within due time, or after providing proof that the debtor has generally stopped any payments or cannot be located.

\(^7\) http://www.admin.ch/opc/de/classified-compilation/20122528/index.html (9.9.2014), also available in French and Italian.
The debtor (in the case of a company) has (i.e. is obliged by law) to request commencement upon balance-sheet overindebtedness.

Except in the case of voluntary declaration by a company, commencement is subject to advance of costs by the party requesting commencement.

In the financial institutions sector, special provisions provide for early detection of financial difficulties and for a wide range of powers of FINMA to intervene (see above Q. 2).

5. Who can propose a restructuring plan? (e.g. corporate bodies, insolvency representatives, creditors)

The debtor, a creditor or the insolvency representatives may propose a restructuring plan. Formally, it is the insolvency representative’s task to submit the plan (proposed by any of the parties mentioned) for approval to the creditors.

6. Please describe whether and to what extent shareholders’ rights can be affected by a situation of distress/insolvency of a company before and/or irrespective of the opening of a formal insolvency proceeding (e.g., are there any fiduciary duties of the shareholders to approve corrective measures/plans proposed by the board?)

No, only the board has a duty to propose measures. Shareholders are under no duty or liability to approve the proposed measures (however, refusal may discharge the board).

II. Shareholders’ Rights in Companies Subject to Insolvency Proceedings

7. Are shareholders notified of the initiation of an insolvency process? If notification is individualized, what are the mechanisms used to identify shareholders?

The opening of proceedings is, as a general rule published in the official gazette (no individual notification at this time). However, the insolvency court can, if so requested, renounce to the publication during a limited period of time (the so-called “provisional restructuring moratorium”), if doing so is beneficial to the prospects of restructuring and provided that an insolvency representative is named (since January 1st, 2014). In the case of a suspension of the declaration of insolvency (see
question 1), the court may renounce to a publication with no limitation in time and even if no insolvency representative is named, however, such cases are rare.

At a later stage (when the opening of formal insolvency proceedings is confirmed, i.e. at the latest four months after the opening of the “provisional moratorium”), the insolvency representative will publish the opening of the proceeding and send individual communications to all creditors whose address is known.

8. **Are shareholders required to file claims in the insolvency proceeding? What are the consequences of not filing a claim?**

Shareholders will normally not have a claim in insolvency proceedings of the respective company, except, for instance, a responsibility claim against directors for wrongful trading. Such a claim would have to be filed like any other claim. Non-filing of a claim results in non-participation in the schedule of claim and in any possible recovery.

9. **Can shareholders continue to trade and transfer shares after the initiation of an insolvency proceeding affecting the company?**

Yes, except where limitations in accordance with stock trading regulations of publicly traded shares in their respective stock exchange market apply.

10. **Do shareholders have the right to request that a shareholders’ meeting is held, even if the company is insolvent? (If there are separate reorganization and liquidation procedures, does this affect the response?)**

Not in liquidation proceedings, as the debtor is fully divested. However, in restructuring proceedings, where the debtor retains certain powers, the shareholders may request such a meeting in accordance with the companies’ statutes of incorporation or company law. However, certain decisions may be subject to the insolvency administrator’s approval.

Furthermore, in restructuring proceedings, the shareholder's participation will still be required for all measures that, under corporate law, require their agreement (i.e. to authorize new share capital if not previously authorized, change the company purpose or any other change in the statutes of incorporation, etc.). It will be up to the insolvency administrator to convene the meetings (only ex-
ceptionally the debtor in possession, under concurrence or supervision of the insolvency administrator).

11. **Do shareholders have the right to request information in an insolvent company? Do they have information rights as to the progress of a reorganization procedure? Can they exercise that right vis-à-vis the directors of the company -if they remain in charge of the company-or vis-à-vis the insolvency representative?**

During restructuring proceedings, shareholders can continue to exercise their (very limited) right to access to information in the capacity as shareholders, including the right to request information. To whom they direct their request will depend upon the degree of powers retained by the directors (which is determined by the court). As a general rule though, they will direct their request to the administrator. The administrator will inform on the progress of the insolvency proceedings in accordance with the instructions of the court and with a high degree of discretion, as he is not accountable to the shareholders, but only to the creditors and the court.

12. **Can shareholders make proposals for nomination of directors, if the directors continue managing the company?**

No, only the insolvency administrator or the creditor’s committee could take such a decision. Nothing precludes the shareholders to submit them a recommendation, but there is no provision on a right to do so or on a duty to take any proposal into consideration.

13. **If special categories of shares exist whose holders are granted additional governance rights, are these additional rights affected by the opening of an insolvency procedure? (If there are separate reorganization and liquidation procedures, does this affect the response?)**

No. Particular provisions apply in the banking sector to specific “convertible” or “contingent” bondholders (so called “CoCo”s, see Q. 2 and art. 13 of the Banking Act8).

14. **Can shareholders challenge the decisions of the shareholder meeting, if it is still active? Do they retain the possibility of taking action against the acts of the directors? And against the acts of an insolvency representative? Is any authorization by a judicial or administrative body required to do so or, more generally, to exercise corporate rights? (If there are separate reorganization and liquidation procedures, does this affect the response?)**

Yes, but only as long as there is still a factual interest in doing so. However this is generally not given in insolvency as the decision power goes to the insolvency administrator.

The shareholders’ legitimation to act against the insolvency representative is subordinated to the companies’ claim against the director, the company being represented by its insolvency representative. The proceeds from any such claim will go into the insolvency estate. The shareholders can only act against the directors for torts committed directly against them i.e. harming primarily or even exclusively their position as individuals and not that of the company.

The insolvency representative acts on behalf of a public authority. As such, his actions entail (only) the state’s direct responsibility. Claims against the representative are excluded, except for the state’s claim for restitution of payments it had to make on the basis of the state’s responsibility cited before. Cantons are free to determine the degree of such responsibility.

15. **Do shareholders have the right to call a special investigation of the affairs of the insolvent company?**

No. The special investigation is aimed at providing information to the shareholders “in order to exercise their rights”. However, in insolvency proceedings (both restructuring or liquidation) the shareholders lose those rights and the special investigation could not serve that purpose.

16. **Does the law provide for the establishment of a shareholders’ committee (or several committees, in case of different share classes)? What are their powers? Who bears the related costs?**

No.

17. **Can shareholders voluntarily transfer shares of the company undergoing insolvency proceedings against any provisions in the articles/bylaws restricting transfers of shares?**

No.

18. **Can outstanding shares of the company undergoing insolvency proceedings be assigned to third parties without the consent of the relevant shareholders? If yes, under what conditions? Are existing shareholders entitled to compensation? What other safeguards are provided? (e.g., does**
the law include a principle according to which the affected shareholders should not receive less than in a liquidation procedure?)

No.

19. Can outstanding shares of the company undergoing insolvency proceedings be cancelled without the consent of the relevant shareholders? If yes, under what conditions? Are existing shareholders entitled to compensation? What other safeguards are provided? (e.g. does the law include a principle according to which the affected shareholders should not receive less than in a liquidation procedure?)

No.

20. Do shareholders of the company undergoing insolvency proceedings have pre-emption rights over new issues of shares? (2) Are there special conditions for the suppression of pre-emption rights if the company is insolvent (if there are separate reorganization and liquidation procedures, does this affect the response?).

They have the same rights as if there were no insolvency proceedings ongoing. As a consequence, shareholders generally have pre-emption rights over new issues of shares (except in certain cases of pre-authorized new shares and convertible options issued). There are no special conditions for the suppression of pre-emption rights in insolvency.

21. Can shareholders retain a participation in the company that has emerged from an insolvency process (or in the company to which the insolvent company’s assets have been transferred) even if the company was insolvent according to a balance-sheet test? (i.e., where the value of its liabilities exceeds the value of its assets) If yes, under what conditions? (If there are separate reorganization and liquidation procedures, does this affect the response?)

Yes. There are no particular conditions. If only the debts of the company are restructured, the shareholder will remain the same, provided no other agreement is made. In all other cases, the participation of the shareholders will depend on the terms of the restructuring agreement.

22. Are the ranking of classes of shares and the preferential rights of classes of shares affected (and if yes, to what extent) by the fact that the company is undergoing an insolvency process? (If there are separate reorganization and liquidation procedures, does this affect the response?)
23. **Can shareholders, in the course of an insolvency procedure, supply goods, services or financial resources to the company? If yes, under what conditions (e.g., judicial authorization)? What would their ranking position be towards other creditors?**

Yes, under the same conditions as any other providers. However, payments of the company to them will be under particular scrutiny in terms of possible avoidance actions. The ranking of their claims will be essentially the same. A subordination of a claim for repayment of a “financing instead of equity” is advocated by a part of doctrine, but has only been applied in very exceptional (abuse-related) cases.

24. **Can shareholders, in their capacity as counterparties, be under a duty to continue a contractual relationship with the insolvent company during an insolvency procedure? (If there are separate reorganization and liquidation procedures, does this affect the response?).**

No, any counterparty may refuse to continue the contractual relationship (under the conditions of the contract or in case of non-performance of the debtor under the law), irrespective of its capacity as shareholder.

25. **Can shareholders (or companies of the same group) holding credit claims against the company under insolvency procedure participate in the creditors’ meeting and vote on the insolvency plan without restrictions? (If there are separate reorganization and liquidation procedures, does this affect the response?)**

Yes.

26. **If shareholders (or companies of the same group) do not hold credit claims against the company under insolvency procedure, must/can they participate in the creditors’ meeting? If that is the case, what rights or duties do they have in that meeting? (If there are separate reorganization and liquidation procedures, does this affect the response?)**

No.
27. **Do shareholders in an individual company have information rights as to the filing of insolvency proceedings by the parent or other related companies?**

No.

### III. The Role of the Shareholders’ Meeting in Companies Subject to Insolvency Proceedings

28. **Does the shareholders’ meeting continue to exist in insolvency proceedings? (If there are separate reorganization and liquidation procedures, does this affect the response?)**

In both cases, the organs of the company still exist, however divested. In theory, it is possible to convene a shareholder’s meeting in the case of reorganization proceedings (for instance, to elect a new board if the board is not fully divested). In practice, it very rarely happens. It is up to the insolvency administrator to call for a shareholder’s meeting.

29. **Does the shareholders’ meeting preserve all of its competences, generally? (If there are separate reorganization and liquidation procedures, does this affect the response?)**

Only in the case of a reorganization could the administrator call for a shareholder’s meeting to assist him, which would only be required in very specific cases (see Question 28). In the case of a liquidation the debtor is completely divested and the insolvency administration has all powers to dispose of the company.

30. **Does the shareholders’ meeting need to approve the accounts of the distressed/insolvent company?**

No.

31. **Does the shareholders’ meeting have the power to dismiss directors – if directors are still in charge of the insolvent company? Can the shareholders’ meeting request the removal of the insolvency representative? (If there are separate reorganization and liquidation procedures, does this affect the response?)**

The shareholders’ meeting would only have the power to do so in the context of reorganization procedures and in the (rare) cases where the directors retain (at least partly) the management of
the company. The shareholders’ meeting cannot request the removal of the insolvency representative.

32. **Is a shareholders’ meeting authorization required to start an insolvency procedure? (If there are separate reorganization and liquidation procedures, does this affect the response?)**

No.

33. **Does the shareholders’ meeting need to approve an insolvency or reorganization plan? Can shareholders, even individually, challenge an insolvency or reorganization plan?**

No. No.

34. **Is a shareholders’ meeting decision required to issue new shares of the company undergoing insolvency proceeding? Can a new share issue be decided by the board? Can a new share issue be decided by the insolvency representative? (3) If a capital increase has to take place through the conversion of claims into new shares, does this affect the response?**

Not necessarily. The shareholders’ meeting can authorize the directors to issue new shares in advance (pre-authorized new shares), for instance in order to raise capital or exchange shares for the purposes of a takeover, or in the case of financial difficulties at short notice. Such authorization will generally have taken place before the insolvency proceedings. If such pre-authorized capital exists, the insolvency representative, in the shoes of the directors, will be authorized to decide on the new issue. The fact that the new shares are issued against conversion of claims does not affect the response. 

All possibilities mentioned apply only to restructuring proceedings.

35. **Can an insolvency/reorganization plan affect the structure of the corporate entity (e.g., by merger, spin-off, or change of the legal form)? Is a shareholders’ meeting authorization required for this?**

Yes, and whenever the existing corporate entity is to be continued but to be altered, the shareholder’s meeting approval will be required.
36. On what conditions can the company carry on business during an insolvency procedure? (If there are separate reorganization and liquidation procedures, does this affect the response?) Is a shareholders’ meeting authorisation required?

This is only possible in the case of reorganization proceedings and provided that and as long as a reasonable prospect of successful reorganization exists. A shareholders’ meeting authorization is not required.

37. In the course of an insolvency procedure, what provisions apply to the sale of specific assets out of the ordinary course of business and to the sale of the entire business operation of the company? Is a shareholders’ meeting authorisation required? (If there are separate reorganization and liquidation procedures, does this affect the response?)

Any important transaction out of ordinary (and, in certain cases even within ordinary course of business) will be generally subject to the approval of the insolvency administrator, and, if the transaction involves the sale of part of or the whole business, of the competent insolvency court. In liquidation proceedings involving the sale of the business as a whole to the body of or to part of the creditors, the insolvency court will also have to approve the plan proposed by the insolvency administrator. In any event, no shareholders’ meeting authorization is required.

38. Does the shareholders’ meeting have any power in relation to a decision of the board or the insolvency representative to continue or reject any favourable, unfavourable or essential contract during an insolvency procedure? (If there are separate reorganization and liquidation procedures, does this affect the response?).

No.

39. If an insolvency plan can be presented for a whole corporate group, must that plan be approved by the shareholders’ meetings of each company of the group, including of those that are balance-sheet insolvent? How are the different meetings’ decisions coordinated? Are there specific safeguards (e.g., any veto power or other remedy) for the minority shareholders of the companies that are not insolvent?

n/a (as there is no possibility for a plan to be presented for a whole group).
40. If companies belonging to the same group file separate insolvency proceedings, are there specific requirements/mechanisms to provide for coordination of those proceedings? Are shareholders’ meetings of the relevant companies involved in the coordination mechanisms, if any?

The revision entered into force on January 1\textsuperscript{st}, 2014 provides for a general duty of the courts and administrators involved to coordinate the proceedings. It contains, however, no guidance as through what means such coordination shall take place in practice. Shareholders’ meetings are not involved.

IV. Other Obstacles for Insolvency Procedures Found in Company Law

41. Please list any other legal provision in company law that, in your opinion or in your experience, may interfere with the insolvency procedure of a company in your jurisdiction.

The Swiss Merger Statute provides for a period of co-liability of the seller of a business and the acquirer in regards to certain debts. This deters possible investors from buying; however, practice “solves” the problem by avoiding the applicability of the merger law.