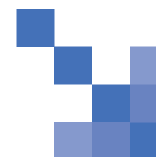
Switzerland



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SECURITY AND PRIORITIES

1. What are the most common forms of security taken in relation to immovable and movable property? Are any specific formalities required for the creation of security by companies?

Immovable property

The most common types of security taken over immovable property are:

- **Conventional mortgage (*Grundpfandverschreibung*).** This is a form of security interest taken over real property, which can be used to secure any kind of debt. If a debtor defaults on payment, the creditor can, if necessary with the court's assistance, sell the secured property at an auction and recover the debt from the proceeds. The creditor does not acquire full title to the property. Disposal of the property does not affect the validity of the mortgage.

- **Mortgage instrument (*Schuldbrief*).** This secures a personal debt by creating a security interest over real property. A mortgage instrument mobilises the value of the property as it can be issued as a tradable bond. If a debtor defaults on payment, the creditor can, if necessary with the court's assistance, sell the title or sell the secured property at an auction and recover the debt from the proceeds.

Movable property

The most common types of security taken over movable property are:

- **Pledge.** A pledge is created by delivering a pledged asset to a creditor, the legal title of which remains with the debtor. If the debtor defaults on payment, the creditor can take legal action against the debtor and sell the secured property at an auction or (if agreed between the parties) sell it directly to a third party and recover the debt from the proceeds.

- **Assignment.** A debtor's claim against a third party can be assigned to the creditor. If the debtor defaults, the creditor can assert the claim against the third party to recover the debt. Sometimes all the debtor's claims (this can include existing and future debts) are assigned to a creditor, especially when a bank is acting as the lender (*Globalzession*). Instead of assigning a debtor's claim, the claim can be pledged only. In the latter case, the creditor can sell the debtor's claim only in order to recover the debt from the proceeds.

- **Right of retention (lien).** A lien gives the creditor the right to retain possession of an asset until the debt is paid. If the debtor defaults on payment, the creditor can take legal action against the debtor and sell the secured property at an auction or (if agreed between the parties) sell it directly to a third party and recover the debt from the proceeds. This type of security can be created by contract or, for certain types of creditors such as repairers and landlords, automatically under statute.

Formalities

Security interests in immovable property are generally created in a deed executed before a notary public. In order to create a pledge or lien, a creditor usually has to take possession of the assets to be secured. The assignment of claims must be done in writing and must fulfil certain formal requirements.

A conventional mortgage as well as a mortgage instrument must be registered at the real estate register to be legally established.

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

The order of priority is usually as follows:

- **Secured claims.** Secured claims are paid from the sale proceeds of the property subject to the security. Different mortgages of the same security interest are satisfied according to their rank, which is usually determined by contracts between the mortgagees and the debtor.

- **Costs of the insolvency proceedings.** These include debts incurred by the insolvency practitioner, such as:
  - wages or salaries due under employment contracts (these take first priority); and
  - the fees and expenses of the insolvency practitioner (these take second priority).

- **Unsecured claims.** Unsecured claims are ranked into the following classes:
  - **Claims ranked first.** These include claims of employees arising from an employment relationship that existed six months before the opening of insolvency proceedings and claims arising from premature termination of the employment contract due to the opening of the insolvency proceedings against the employer;

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- **Claims ranked second.** These include claims relating to a social security scheme arising from an accident or old-age, premium claims of pension insurance institutions against employers, premium claims of certain other social security systems, and certain family law maintenance and assistance claims;
- **Claims ranked third.** All other claims rank in the third class and include those claims of secured creditors, which could not be paid from the sale proceeds of the relevant secured property.

- **Shareholders' equity.** Any sums remaining after all creditors have been paid in full is returned to shareholders.

Each class of creditors must be paid in full before creditors in the class below can be paid. Creditors in the same class rank equally among themselves. A company can also make a contractual agreement with its creditors to subordinate certain debts (for example loans payable to shareholders).

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

Trade creditors may have the benefit of a lien over assets in their possession (*see Question 1, Movable property: Right of retention (lien)*).

Purchase agreements can include retention of title clauses (*Eigentumsvorbehalt*) in favour of the buyer (trade creditor). Where a retention of title clause operates, the title of goods does not pass to the buyer until it has paid the full purchase price. If a creditor has retained title of the goods in this way, he can separate those goods from the bankruptcy administrator in bankruptcy proceedings or from the trustee in a composition proceeding, without paying any fees to the insolvency administrator and take the goods back.

Retention of title clauses must be signed by both parties and entered into a public register maintained by a debt enforcement official at the buyer's current domicile in Switzerland.

Where a chattel arrives in Switzerland subject to retention of title validly established abroad, but does not satisfy the requirements of Swiss law, the retention of title remains effective in Switzerland for three months.

4. Are there any procedures (other than the formal rescue or insolvency procedures described in *Question 5*) that can be invoked by creditors to recover their debt?

A common remedy for creditors to secure the payment of a debt is a freezing order. A creditor can apply for a freezing order over an unsecured, matured debt claim if one of the following conditions is fulfilled:

- The debtor has no fixed domicile.
- The debtor is concealing his assets, absconding or preparing to abscond to evade his obligations.
- The debtor is passing through Switzerland or belongs to the category of persons who visit fairs and markets (for claims which by their nature must be fulfilled immediately).
- The debtor does not live in Switzerland, provided the claim has a sufficient connection with Switzerland or is based on an enforceable (Swiss or foreign) court judgment, or on a qualified recognition of the debt by the debtor.
- The creditor suffered a loss in a former insolvency procedure against the debtor (either in a special execution procedure or in a bankruptcy procedure or in composition proceedings with assignment of the assets to the creditors (*see Question 5*)) having a provisional or definitive certificate of shortfall against the debtor at hand (*see Question 5, Bankruptcy: Effect and Composition proceedings*).

The court at the place where the assets are located grants a freezing order if the creditor shows, prima facie, all the following:

- It has a valid claim.
- There exists a ground for a freezing order (*see above*).
- The debtor's assets are located in Switzerland.

Once a freezing order is granted, the assets of the debtor are immediately frozen by an enforcement officer. The debtor can continue to dispose freely of the frozen assets if he provides sufficient security for those assets. Anyone whose rights are affected by the freezing order (including the debtor) can object to the order through an application to the court. The creditor is liable to the debtor and to third parties for damage suffered as a result of an unjustified freezing order. The judge can also, at his discretion, order the creditor to provide security before granting a freezing order.

Once a freezing order is granted by the court, it must be validated by the creditor within ten days by starting, or continuing, special enforcement proceedings or a court action. If the enforcement proceedings or the court action ends in favour of the creditor, the creditor can liquidate the frozen assets and pay his claim (including costs) from the sale proceeds of the frozen assets. However, the frozen assets remain with the bankruptcy estate and the creditor has no privileged position against the other creditors, if:

- The debtor is in bankruptcy as a result of special enforcement proceedings.
- The debtor has gone bankrupt for other reasons (*see Question 5*).
- Composition proceedings (*see Question 5, Composition proceedings*) are opened against the debtor.

RESCUE AND INSOLVENCY PROCEDURES

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

- **The objective of the procedure and, where relevant, prospects for recovery.**
- **Companies to which it can potentially apply.**

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- **How it is initiated, when and by whom.**
- **Substantive tests that apply (where relevant).**
- **How long it takes.**
- **The consents and approvals that are required.**
- **The effect on the company, shareholders and creditors.**
- **How the procedure is formally concluded.**

Bankruptcy

- **Objective.** The purpose of bankruptcy proceedings is to liquidate all the debtor's seizable assets and to distribute the sale proceeds among all known creditors according to their legal position (*see Question 2*). Occasionally, a debtor's business is continued for a certain period during bankruptcy proceedings to allow it to raise the creditor's liquidation profit. However, in almost all bankruptcy proceedings, the debtor's business is stopped when proceedings are opened and all the debtor's assets are immediately sealed or recorded in an inventory.

  If the claims of the company's creditors are not covered as the assets are appraised at on-going business values or at liquidation values (known as overindebtedness) the debtor's board of directors (board) must notify the bankruptcy judge. If the board fails to do so, the auditor must notify the bankruptcy judge.

- **Companies.** Bankruptcy proceedings can generally be used against any company registered on the commercial register. Bankruptcy proceedings also apply to any debtor (regardless of whether it is registered in the commercial register) that declares itself bankrupt with the court (*see below, How when and by whom*).

- **How, when and by whom.** Any debtor can declare itself bankrupt (a declaration of insolvency) regardless of whether it is subject to bankruptcy proceedings. However, for debtors that are not subject to bankruptcy proceedings as a result of special enforcement proceedings (*see below*), bankruptcy proceedings are only opened if there is no possibility of an amicable private settlement of debts (a special composition proceeding for individuals).

  Creditors can force a debtor into bankruptcy proceedings either by:

  - initiating special enforcement proceedings against a debtor which can lead to the opening of bankruptcy proceedings if the debtor does not pay his debt;
  - opening bankruptcy proceedings without prior enforcement proceedings, under certain specified legal grounds such as (*Article 190, Bankruptcy Code*):
    - the debtor acted fraudulently and to the detriment of the creditors;
    - the debtor's place of residence is unknown;
    - the debtor might flee to escape paying his debts.

  In all cases, bankruptcy proceedings are opened by the competent bankruptcy judge.

- **Substantive tests.** When requested by a debtor, the bankruptcy judge almost always grants bankruptcy. Bankruptcy can be granted either on the basis of insolvency or overindebtedness (*see above, How, when and by whom*). However, the bankruptcy judge does not order bankruptcy if:

  - the debtor is obviously not insolvent;
  - there is a possibility of an amicable settlement with the creditors; or
  - overindebtedness has not been proven by the debtor.

  On request of a creditor, where special enforcement proceedings apply, the bankruptcy judge almost always opens bankruptcy proceedings, unless the debtor can provide documentary evidence that the debt has been paid (including interest and costs), or that the creditor has granted a deferral. If a creditor is relying on one of the specified grounds (*see above, How, when and by whom*), it must prove that ground.

- **How long.** There is no compulsory period in which bankruptcy proceedings must be terminated. However, bankruptcy proceedings by law should be finished within one year after the beginning of the proceedings. The supervisory authorities, if necessary, can extend this deadline. In practice, the deadline is often extended, particularly in complex cases.

- **Consents and approvals.** Creditors make important decisions in bankruptcy proceedings either by circular resolutions or in a creditors' meeting. Each creditor has one vote regardless of the amount or the nature of its claim. Creditors can also elect a special bankruptcy administration acting instead of the state-run bankruptcy administration and/or a creditor's committee acting instead of the creditors as a whole. However, this is possible only with more complex cases or with bankruptcy proceedings having enough assets of the estate. A creditor's committee is not required by law. Creditors can appeal with the court or with (other) supervisory authorities against decisions of the:

  - bankruptcy administration;
  - creditors' meetings; and
  - creditors' committee.

- **Effect.** Bankruptcy affects all the debtor's seizeable assets. The bankruptcy estate is administrated, liquidated and distributed by a bankruptcy administrator. The debtor and the debtor's management have no power to dispose of the estate.

  The bankruptcy administrator admits or rejects the creditor's claim in a schedule of claims. Once the schedule of claims is finalised and on receipt of the proceeds of the entire estate, the bankruptcy administrator prepares the distribution plan and the final account.

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With the distribution, each creditor receives a certificate for the uncovered portion of his claim. As companies are removed from the commercial register by the end of bankruptcy proceedings, the certificate is generally of no value to the creditors. However, if the debtor is an individual, creditors can obtain a freezing order (*see Question 4*) and/or can start new enforcement proceedings against the debtor based on the certificate if the debtor accumulates a new fortune within the next 20 years. A new fortune includes assets of which the debtor is the beneficial owner.

- **Conclusion.** Bankruptcy is formally concluded by a final report submitted to the bankruptcy court by the bankruptcy administrator and by an order of the latter declaring the bankruptcy proceeding closed.

Composition proceedings

- **Objective.** In a composition proceeding, the debtor enters into agreements (*Nachlassvertrag*) with a qualified number of creditors and obtains the consent of the court on the payment of all debts. If confirmed by the court, the agreements are binding on all creditors.

  In a composition proceeding, the debtor can continue his business activities during a moratorium period (*Nachlassstundung*), under the supervision of a court-appointed trustee. Creditors often get a higher dividend in a composition proceeding than in bankruptcy proceedings.

  Composition proceedings take the form of either:

  - an ordinary composition agreement (*ordentlicher Nachlassvertrag*), where the debtor's business continues;
  - a composition agreement with assignment of assets (*Nachlassvertrag mit Vermögensabtretung*) where the debtor's assets are assigned to the creditors in order to sell the debtor's business (or part of it) or to liquidate the assets by a creditor-elected and court-appointed liquidator.

- **Companies.** Any debtor, whether an individual or a company, can apply to open a composition proceeding. However, for many individuals composition proceedings are too expensive and too complicated. Also individuals can alternatively opt to petition for an amicable private settlement of debts (a special composition proceeding for individuals).

- **How, when and by whom.** A debtor seeking to make a composition agreement with his creditors must submit an application with reasons and a draft agreement to the competent court. The application must also include a:

  - balance sheet;
  - the operating accounts or equivalent documents indicating assets and income;
  - a list of business records if appropriate.

  The debtor can essentially file a petition at any time.

- **Substantive tests.** Proceedings are opened by the court if there are reasonable prospects of a composition agreement being reached. In addition, it must be likely that the procedures can be financed and that financial solvency is guaranteed during the moratorium period (*see below, How long*) in order to keep the debtor's business running.

- **How long.** A moratorium period is granted by the court for four to six months and can be extended to a maximum of 24 months in complex cases. If the debtor's assets are assigned to the creditors, there are no compulsory deadlines for the sale and liquidation of the debtor's assets. In more complex cases, it can take years for the assets to be liquidated and the dividend to be distributed among creditors.

  The court usually does not need too much time to approve a composition agreement.

- **Consents and approvals.** The composition agreement is deemed ratified if the following give their consent:

  - the majority of the creditors, representing two-thirds of the total of the claims; or
  - one-quarter of the creditors, representing at least three-quarters of the claims.

  Privileged creditors (unsecured creditors that rank in the first or second classes (*see Question 2*)) are counted neither with their vote nor with their claim, and are not regarded as creditors whose claims arose after the opening of the composition proceedings. Secured claims are only counted to the extent of the part which, in the trustee's estimation, is not covered. The court decides whether and to what extent conditional claims and claims with uncertain maturity should be counted.

  The composition is also subject to a confirmation by the court. This confirmation is only given if:

  - the agreement is executed properly;
  - the privileged creditors are satisfied;
  - all the obligations incurred with the consent of the trustee during the moratorium are sufficiently secured (unless individual creditors waive security for their claims).

- **Effect.** The composition agreement is binding on all creditors whose claims either arose before the publication of the moratorium or have arisen since without the trustee's consent, with the exception of secured creditors for the amount covered by the realisation of the collateral.

  All enforcement proceedings commenced against the debtor before the moratorium, except those for the realisation of the collateral, are terminated.

  Any promise made by the debtor to a creditor for more than is due under the composition agreement is void. Each creditor can apply to the court to revoke a composition agreement obtained by dishonest means.

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- ❑ **Ordinary composition agreements.** Once a composition agreement has been finalised, the debtor either:
  - recovers full control over its assets; or
  - continues running its business and pays the dividends provided in the composition agreement to its creditors.

  Supervisory, management and liquidation powers regarding the implementation and compliance of the composition agreement is conferred on the former trustee or another person approved by the court. By payment of the dividends, the debtor is effectively rehabilitated. No certificates are provided to the creditors. If the composition agreement is not fulfilled with regard to a creditor, the creditor can apply to the court to have the agreement revoked to the extent of its claim, without prejudice to its rights;

- ❑ **A composition agreement with the assignment of assets.** In these composition agreements the debtor's assets are assigned to the creditors to be sold or liquidated. The liquidator's activities are supervised by a creditor's committee. As in bankruptcy proceedings, the liquidator admits or rejects the creditor's claims in a schedule of claims and prepares a distribution plan and a final account (*see above, Bankruptcy: Effect*). Liquidation allows more freedom than bankruptcy proceedings (for example, with regard to the statutory time limits to be considered in liquidating assets or the possibilities for selling assets outside of an auction). Companies are removed from the commercial register by the end of the proceedings and certificates are not issued to creditors.

- **Conclusion.** Proceedings leading to a composition agreement with assignment of assets are formally concluded by a final report submitted by the liquidator to the composition court and by an order of the court declaring the composition proceedings closed. In proceedings leading to an ordinary composition agreement, there is no formal conclusion of the procedure (other than confirmation of the composition agreement by the court).

Voluntary liquidation

- **Objective.** The objective of a voluntary liquidation is to wind up a company without involving the court.
- **Companies.** Any company (general partnership, limited partnership, corporation or limited liability company) or co-operative can be subject to a voluntary liquidation.
- **How, when and by whom.** The liquidation procedure can be initiated by the debtor's members (for example, the shareholders of a corporation) and by a resolution of the shareholders at any time or in accordance with the articles of incorporation.
- **Substantive tests.** There are no substantive tests for voluntary liquidation.
- **How long.** Generally, the liquidation of a corporation or limited liability company takes more than one year as the distribution of net assets cannot take place earlier than a year after the third publication of the call for filing claims. However, in some cases it can take several months.
- **Consent and approvals.** The members must resolve to dissolve the company. For corporations and limited liability companies the resolution taken by the shareholders or the partners must be made in a notarised deed.
- **Effect.** Once in liquidation, the company keeps its legal identity and its company name, with the addition "in liquidation" (this is included on the commercial register). The powers of corporate bodies are restricted to acts necessary for liquidation, and which, by their nature, cannot be carried out by the appointed liquidators.
- **Conclusion.** Termination of the liquidation is published in the commercial register.

LIABILITY AND TRANSACTIONS

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

The board of directors (board) and all persons (including, for example, a parent company) engaged in the management or liquidation of a company are liable to the company, to each shareholder and to the company's creditors for any damage caused by an intentional or negligent violation of their duties.

In practice it is often difficult to determine and to prove the existence of a negligent violation of duties, and liability of the board or the management depends on various factors that must be proven by claimants. The outcome of liability actions against members of the board or the management is often difficult to predict. Currently, there are several publicised court proceedings dealing with the issue of whether the members of the board and management of the former national airline Swissair are liable for the insolvency of the company.

Anyone engaged in the audit of the annual accounts and the consolidated financial statements, a capital increase, or a capital reduction can also be liable in the same way as directors.

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

Actions to avoid transactions (known as *actiones pauliane*) enable assets to be realised in favour of the insolvency estate and can be brought by the bankruptcy administration or by the liquidator in a composition proceeding with assignment of assets to creditors. If the bankruptcy administration or liquidator fails to bring an action, individual creditors can do so.

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Avoidance actions include:

- **Action to avoid a gift.** All gifts and voluntary settlements which the debtor made during the year before the opening of insolvency proceedings are voidable.
- **Voidability due to insolvency.** Certain acts are voidable if they were carried out by the debtor during the year before the opening of insolvency proceedings, including:
  - granting collateral for existing obligations which the debtor was not bound to secure before;
  - settlement of a money debt by means other than cash or by normal means of payment;
  - payment of a debt that has not matured.
- **Voidability for intent.** All transactions which the debtor carried out during the five years before the opening of insolvency proceedings with the intention, apparent to the other party, to disadvantage his creditors or to favour certain creditors over others are voidable.

  These transaction are not void if the recipient proves that he was unaware, and need not have been aware, of the debtor's insolvency.

An application to void a transaction must be filed before the court at the respondent's domicile. If the respondent is not domiciled in Switzerland, the action can be brought before the court of the place of bankruptcy. The respondents are those that concluded the transactions with the debtor or that had been favoured by the debtor's transactions. The effect of a successful application is that the assets received by the debtor are returned to the bankruptcy estate.

8. Please set out any conditions under 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?**

Bankruptcy

A debtor's business has been allowed to continue in order to raise the creditor's liquidation profit in only a few cases (*see Question 5, Bankruptcy proceedings: Objective*). The decision to continue a debtor's business is made by the bankruptcy administration and is then confirmed by the creditors.

Composition proceedings

A debtor in composition proceedings can continue its business activities during a moratorium period under the supervision of a court appointed trustee. However, the bankruptcy court can order that certain acts require the participation of trustee's to be legally valid (for example, the conclusion of new working contracts), or authorise the trustee to take over the management from the debtor. Certain acts require specific authorisation of the court such as divesting, encumbering or pledging assets or giving guarantees.

INTERNATIONAL CASES

9. 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 and concurrent proceedings.** Bankruptcy procedures in other jurisdictions are generally recognised under certain conditions (*The Swiss Federal Act on International Private Law (18 December 1987)*). A foreign bankruptcy order that was issued at a debtor's domicile is recognised on request of the foreign bankruptcy administration or of one of the creditors in bankruptcy proceedings, if:
  - the order is enforceable in the country in which it was issued;
  - recognition is not obviously incompatible with Swiss public policy;
  - the decision was not rendered in violation of fundamental principles of Swiss procedural law;
  - reciprocity is granted by the country in which the order was granted.

  A request for recognition of a foreign bankruptcy order must be filed with the competent court in Switzerland at the place where the debtor's assets are located. The applicant must submit documents to the court including:
  - a complete and certified copy of the decision;
  - confirmation that no ordinary judicial remedy is available against the decision or that the decision is final; and
  - in cases of a judgment by default, a document evidencing that the debtor was duly summoned early enough to defend himself.

  The court can order protective measures as soon as a request for recognition of the foreign bankruptcy order has been published.

  As a consequence of recognition, the debtor's assets are subject to ancillary proceedings under Swiss law. In these proceedings, the rules for Swiss bankruptcy proceedings apply with certain exceptions; neither a creditors' meeting nor a creditors' committee is constituted. The trustee appointed under Swiss law only includes secured claims and unsecured privileged claims of creditors (*see Question*

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