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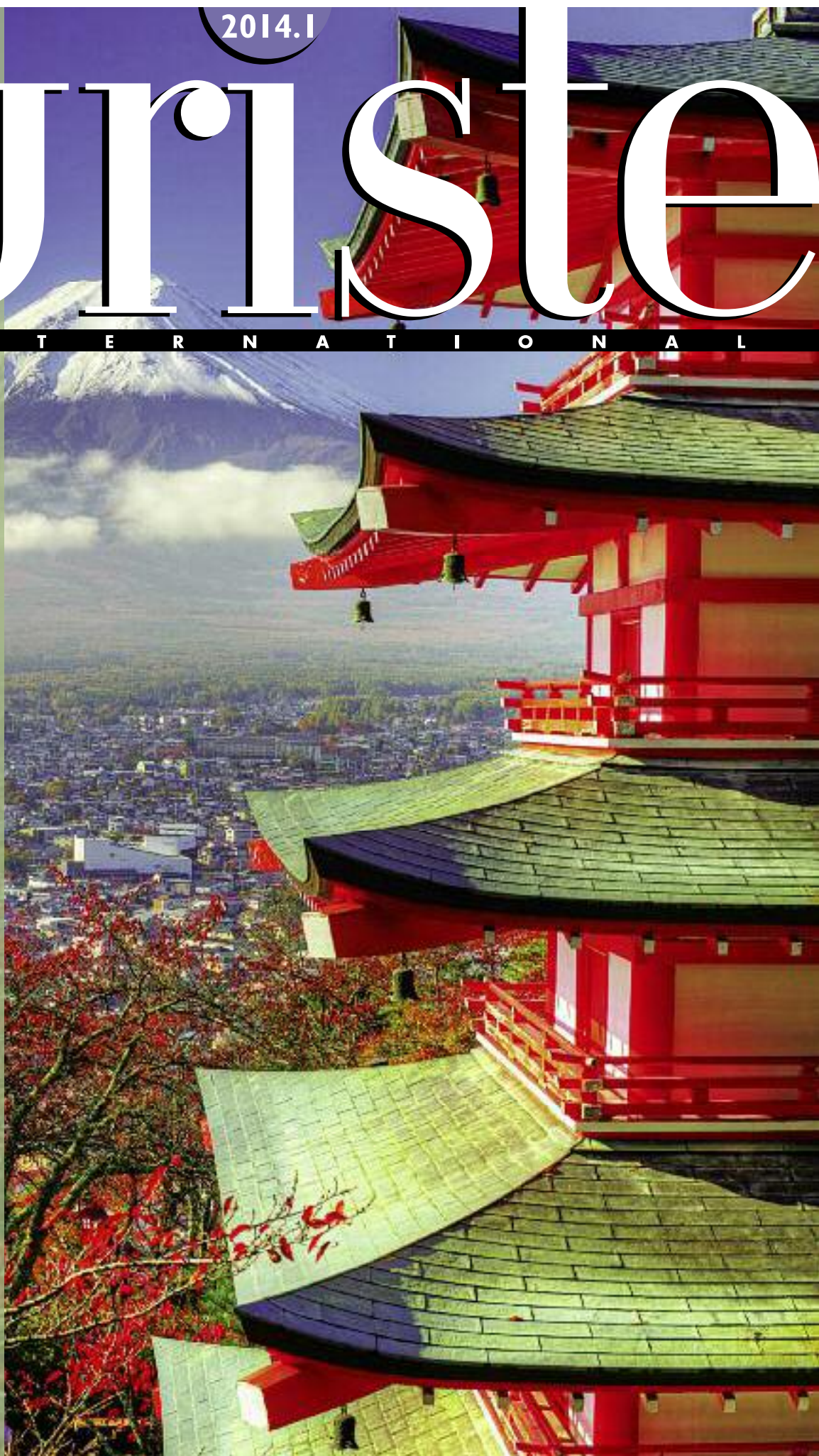
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# Encouraging Early Restructuring Measures in Switzerland

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On January 1, 2014, a revision of the Swiss Debt Enforcement and Bankruptcy Act (DEBA) entered into force, shaping and adjusting its Chapter II on Composition Proceeding into a more restructuring oriented tool.<sup>1,2</sup>

This change shall certainly have an impact on cross-border insolvencies as well.

A Composition Proceeding can be defined as a proceeding pursuant to which a debtor and its creditors seek to agree on a modification of the terms and conditions relating to the performance of the debtor's obligations, subject to the approval of the creditors and to the Court's homologation. It is divided into three stages: a "Moratorium Phase" (provisional and definitive stay), followed by the creditors' examination and approval of the suggested Composition Agreement, and the Court Homologation.

In the aftermath of Swissair's grounding on October 2, 2001, that led the Swiss national carrier to file for composition proceeding, various parliamentary interventions urged the Swiss authorities to assess the need for a revision of restructuring law. The group of experts concluded that the system was generally effective yet improvable.

A decade later, the amendments - inspired by the US Chapter 11 - reinforce the Moratorium Phase and, thereby, create space and time for the debtor and its creditors to initiate a constructive process of debt restructuring.

As experience shows in today's globalized environment, the creditors and/or the assets of a distressed debtor are often located outside national boundaries. The new legislation is due to have a cross-border impact by improving the early implementation of a debt restructuring process, allowing for a better allocation of assets and reducing the need for time – and money – consuming domestic or ancillary bankruptcy proceedings, for the benefit of Swiss and foreign creditors.

This contribution presents the main features of the Swiss revised restructuring law.

## ■ I. Reinforcement of the Moratorium Phase

The Moratorium becomes an **authentic stay, dedicated to exploring and implementing restructuring measures while being protected from enforcement actions.**

### a. Simplified access to the Composition Proceeding and immediate Provisional Stay

The proceeding can be initiated by the debtor, by a creditor or by the competent court upon notification of overindebtedness or bankruptcy filing. However, the **requirements for the debtor's request have been simplified**: the latter shall submit evidences regarding its current and future assets and returns (up-to-date balance sheet, profit-and-loss account, liquidity plan) as well as a provisional restructuring plan, but a draft Composition Agreement is no longer necessary.

Enabling the debtor to submit a petition for a Stay without being obliged to have preliminary disclosed its financial situation to its creditors will encourage early restructuring measures, for the benefit of the creditors and the debtor.

The **Provisional Stay is granted, immediately**

**upon filing**, by the Court for a maximum duration of four months, **without the creditors being heard.**

### b. Appointment of a Provisional Commissioner

A Provisional Commissioner is appointed by the Court and is entrusted with the duty to perform an in-depth analysis of the chances of restructuring the debtor or of homologating a Composition Agreement, and to safeguard third-parties' interests.

If the aim is to restructure the debtor during the Stay, the Provisional Commissioner's task is to supervise the preparation of the restructuring measures and their implementation. If the Provisional Stay should result in a Composition Agreement, its duty is to assess if the conclusion thereof seems feasible and to prepare a draft.

Under specific conditions, for instance, if third-party interests are not at stake or if the appointment of a Commissioner would substantially reduce the assets available, **the Court can even decide not to appoint a Provisional Commissioner.**

### c. (Non-) disclosure of the Provisional Stay

**Upon filing of a reasoned application**, the Court can decide **not to disclose the Provisional Stay** (which, as a rule, is published), **the appointment of a Provisional Commissioner becoming then mandatory.**

This option is of significance, as the disclosure of the Provisional Stay could negatively impact the debtor, by weakening its creditworthiness and jeopardizing the continuation of the business and, thus, its restructuring. As an important check and balance, the mandatory appointment of a Commissioner in case of non-disclosure ensures proper protection of third-party interests.

## 2. Involvement of the creditors during the Definitive Stay reinforced

Before the Provisional Stay has expired, the Composition Court has to decide, considering the chances of restructuring the debtor or of homologating a Composition Agreement, if a **Definitive Stay of four to six months** should be granted or if a Bankruptcy should be opened.

**The provisions regarding the Definitive Stay allow for an earlier and larger involvement of the creditors in the restructuring process.**

### a. Appointment of a Commissioner and its duties

While granting a Definitive Stay, the Composition Court appoints one Commissioner or more, who can be the former provisional Commissioner(s).

The Commissioner(s) will continue the Restructuring Process conducted during the Provisional Stay (or, if appropriate, prepare a draft Composition Agreement), supervise the activities of the debtor; update the creditors about the status of the stay, and, upon request of the Composition Court, issue interim reports.

The Definitive Stay can be extended to 12 months and, in complex matters, up to 24 months. If it is to exceed one year, an extraordinary Creditors' Meeting is to be convened, in order to inform the creditors about the status of the proceeding and the grounds for an extension.

### b. Appointment of a Creditors' Committee and its duties

If required by the circumstances, the **Composition Court can appoint a Creditors' Committee and designate its Members**, all the categories of creditors having to be evenly represented (such as employees, suppliers, banks, financial creditors, representative of noteholders etc).

The **Creditors' Committee is entrusted with the duty to supervise the activity of the Commissioner(s)**, is entitled to give recommendations to the Commissioner(s),

and is empowered to **approve, in place of the Court, a series of transactions which the debtor is prohibited to perform by himself during the Definitive Stay.**

## 3. Effects of the Provisional Stay and of the Definitive Stay reinforced

**The effects of the Provisional and of the Definitive Stay are broadened, which improves the chances of restructuring the debtor and allows for an authentic moratorium.**

### a. Effects on the creditors' rights

The effects can be summarised as follows:

- **Enforcement actions against the debtor can neither be initiated nor continued**, this even for privileged claims; in the specific case of a non-disclosed Provisional Stay, enforcement proceedings can be introduced against the debtor but not continued.
- **The period of limitation ceases to run and interests stop to accrue.** In addition, **neither protective measures nor**

**value**, to be subject to the Composition Agreement.

### b. Effects on ongoing contractual relationship

**Upon approval of the Commissioner, and provided it is necessary for conducting the restructuring, the debtor is entitled to terminate at any time an ongoing contractual relationship** (except for employment contracts<sup>3</sup>), **for the term of its choice.**

### c. Effects on the debtor's rights

The capacity of the debtor to dispose of its assets is impacted, as he is **prohibited to dispose of long-term assets, to grant security interests thereon, to pledge liens on property, to grant sureties or to make gifts without the approval of the Composition Court or of the Creditors' Committee**, such transactions being otherwise void and null.

Conversely, the transactions conducted during the Stay with the approval of the Composition Court or of the Creditors' Committee cannot be avoided.

Enabling the debtor to submit a petition for a Stay without being obliged to have preliminary disclosed its financial situation to its creditors will encourage early restructuring measures, for the benefit of the creditors and the debtor.

**attachment proceedings can be initiated.**

And, except for urgent matters, civil and administrative pending proceedings are stayed.

- The **assignment of a future claim** agreed upon before the Stay **has no effects if the assigned claim arises after the Stay was granted**; in the specific case of a non-disclosed Provisional Stay, this provision does not apply as long as the Stay has not been communicated to the assignee.
- As to **non-monetary claims**, the Commissioner can **decide whether they should be performed as such or converted into a monetary claim of corresponding**

## 4. Homologation of the Composition Agreement

### a. Dividend for unsecured non-privileged creditors no longer required

A Composition Agreement can only be homologated if it provides for full compensation of privileged claims. Under the previous legislation, it was also required that its implementation be guaranteed, which implied that the satisfaction of unsecured and non-privileged claims had to be adequately protected.

This requirement has been removed, in order to increase the chances of restructuring the debtor, by **allocating assets to early restructuring measures**. Consequently, a distribution on unsecured and non-privileged claims is not to be guaranteed anymore.

#### b. Owners' contribution

The homologation of an Ordinary Composition Agreement has become subject to the **payment of an equitable contribution by the shareholders and other holders of ownership rights in the company**. Given that such a composition agreement implies a partial waiver of claims, this amendment levels the imbalance otherwise induced and ensures that the restructuring of the company is jointly financed by the creditors and the owners.

Should the creditors' rights be better protected by the Ordinary Composition Agreement without the owners' contribution than they would be in case of bankruptcy, then the contribution can be disregarded.

#### c. Transfer of assets to a newly founded company

Formalizing the commonly developed restructuring practice of transferring the assets of the restructured company to a newly founded subsidiary and of distributing the shares of the same amongst the creditors, **the composition dividend can, entirely or in part, consist of ownership or participation rights in the debtor or in a newly founded company**.

### 5. Changes to avoidance provisions for groups of companies

While Swiss law does not provide for specific rules for restructuring group of companies, **a reverse onus of proof provision is introduced for certain types of avoidance actions in order to prevent the transfer of assets from financially distressed companies to other group companies**.

**Accordingly, the burden of proof is shifted to the defendant when the beneficiary of the possibly avoidable**

**transaction is closely related to the debtor**. A natural or legal person (including companies of a group) close to the debtor which has received assets during the *période suspecte* has to prove that the assets received and the related consideration are not disproportionate or that the fraudulent intention of the debtor was not recognizable to him. **If the person closely related to the debtor is unable to provide the required evidence, the respective assets will have to be transferred back**.

### 6. Conclusion

The revised legislation brings significant improvements and is restructuring friendly.

First, the **composition proceeding and its commencement are enhanced**, since the requirements for the granting of a Stay have been simplified. Moreover, **the Stay and its effects are strengthened and broadened, which, combined with the possible non-disclosure of the provisional Stay, makes it an authentic moratorium allowing for an early exploration and implementation of efficient restructuring measures between the debtor and its creditors**.

Secondly, with the possibility to terminate ongoing contractual relationship that could prove burdensome for the debtor, **more assets are made available for restructuring purposes**, and the restructuring process can be faster and more efficient.

Lastly, the possible appointment of a Creditors' Committee during the moratorium phase reinforces the involvement of the creditors, having in mind that a series of transactions are void if not approved by the Court or by the Creditors' Committee.

Nevertheless, **in order to ensure the sustainability of the various measures to be possibly taken and of the transactions related thereto, the creditors, the debtor as well as the Commissioners have to be properly assisted and advised**.

Whether in reorganisations or in liquidations, the use of mediation<sup>4</sup> and interests based negotiation strongly enhances the ability to

achieve a successful outcome by assisting the Commissioners and the parties to clarify the interests at stake and to make a reasonable risk assessment of their positions through a facilitated communication within a safe and confidential process<sup>5</sup>.

Preventing the conflict to escalate and aiming at solutions which shall fulfill the needs of all Parties though creative options can be best performed by a third party Neutral, as the Commissioners, even independent, will always be seen as fighting for the cause of the distressed debtor; inevitably drawn to his side.

**Thus, combined with an efficient dispute prevention and resolution strategy, the amendments of the Swiss law shall facilitate and encourage the restructuring of distressed companies and help the debtor and its creditors to turn financial crisis into business opportunities.**

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<sup>1</sup> [www.admin.ch/opc/fr/official-compilation/2013/4111.pdf](http://www.admin.ch/opc/fr/official-compilation/2013/4111.pdf)

<sup>2</sup> As per the provisions on transitional law, the former rules on composition proceedings apply when a petition for a Stay has been filed before the amended legislation entered into force; other transitional provisions are missing, notably regarding changes to avoidance claims.

<sup>3</sup> Specific amendments to employment law (including new provisions on social plans) were introduced by the amended legislation but will not be treated in this article.

<sup>4</sup> All types of disputes within the insolvency field are suitable to settle through mediation. According to the World Bank, in 2007 already, 41% of the legislations worldwide allowed the use of mediation to facilitate insolvency proceedings.

<sup>5</sup> See "Necessity of facilitated communication and creative dispute resolution in the context of cross border insolvencies. To restructure or to liquidate? How can mediation make the difference", Birgit Sambeth Glasner, UIA Congress 2013 Macao, [www.altenburger.ch/fileadmin/user\\_upload/presentations/Birgit\\_Sambeth\\_Glasner\\_UIA\\_Congress\\_Macao\\_2013\\_To\\_restructure\\_or\\_to\\_liquidate\\_How\\_can\\_mediation\\_make\\_the\\_difference.pdf](http://www.altenburger.ch/fileadmin/user_upload/presentations/Birgit_Sambeth_Glasner_UIA_Congress_Macao_2013_To_restructure_or_to_liquidate_How_can_mediation_make_the_difference.pdf)