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SWISS DEBT RESTRUCTURING MORATORIUM

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ABOUT SWISS TURNAROUND ASSOCIATION

The Swiss Turnaround Association (STA), which is the local chapter of the Turnaround Management Association (TMA), aims to promote the interdisciplinary field of corporate restructuring and reorganization in Switzerland, and to promote national and international cooperation and networking between those working in this field.

Its Members are experienced turnaround and restructuring experts of all expertise areas, which can add significant value in tough times. They work both outside and within the context of insolvency and debt moratorium proceedings.

STA intends to promote the professional exchange among its members through lectures and training events, publications, and webinars. It also aims to contribute to further improving the economic and legal framework for corporate restructuring in Switzerland, as well to foster their international harmonization.

To learn more, visit: www.swiss-turnaround.ch

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Swiss Turnaround Association

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Abstract

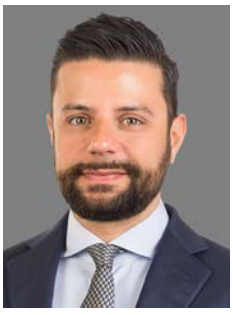
COVID-19 continues to severely impact international trade, investment and the health of the global economy. In this context, the Swiss legal framework provides tools that are valuable. The Debt Enforcement & Bankruptcy Act (DEBA) allows companies and creditors to file for debt moratoria, which provides a tool for distressed companies to potentially improve outcomes in tough financial situations.

According to a study of the World Bank Switzerland ranks 46th out of 190 countries when it comes to resolving insolvencies. It is clear that during recent years of relative economic prosperity, Swiss businesses did not make use of the full potential of debt restructuring legislation. In the current economic context, a perspective encompassing all possible options may help to protect businesses entering distressed situations.

Alvarez and Marsal (A&M) and the Swiss Turnaround Association (STA) have analysed and commented on the outcomes of Swiss debt moratorium cases between January 2019 and September 2020. We retrieved data from the Swiss Official Gazette of Commerce (SOGC), information obtained from more than 70% of Swiss composition courts and from administrators that were engaged in Swiss debt moratorium cases during the period of the study.

In the months and years ahead, Swiss businesses will need to consider all available options to deal with distressed situations responsibly, preserving value for creditors and other stakeholders an increasing the probability of more successful turnarounds. Our analysis highlights the range of paths that are available to business executives, stakeholders and investors involved in complex situations of distress.

About the authors



Alessandro Farsaci, CFA

Alessandro Farsaci is Managing Director and heads Alvarez & Marsal's Restructuring & Turnaround practice in Switzerland and is a Board Member of the Swiss Turnaround Association. He has 18 years of restructuring experience, specialising in advising companies, lenders and other stakeholders in (di-)stressed situations. He has extensive experience in distressed M&A transactions as part of restructurings executed under Swiss debt moratorium or bankruptcy procedures. He led numerous advisory mandates in which he advised executives, lenders and investors in special situations.

Tobias Fritsche

Tobias Fritsche is an Associate Director and member of Alvarez & Marsal's Restructuring & Turnaround team in Switzerland. He advises companies and its stakeholders in stressed and distressed situations. Tobias Fritsche's comprehensive experience includes complex restructuring assignments, which include diagnostics reviews restructuring option analysis and their implementation, stabilisation and crisis management, developing contingency plans and negotiating with stakeholders. He has worked on large and mid-sized debt moratorium cases.

In summary...

The Swiss debt moratorium remains an underutilised restructuring tool with high potential

Having implemented several important improvements in 2014 and very recent in October 2020, the Swiss debt moratorium today provides companies a range of restructuring options in a robust in-court procedure that is supervised by independent administrators. As well as helping companies buy time by protecting them against creditors' actions, the moratorium also improves the probability of finding in-court or even out-of-court solutions to reorganise and restructure businesses.

Despite the improvements in the framework, the number of debt moratoria represent only 1.4% of the total number of 2019 bankruptcies. For a total of c.4,700 bankruptcies in 2019, for example, the moratorium was used just 66 times. Compared to other developed economies this figure is very low: as an example benchmark, in the United States (U.S.), Chapter 11 proceedings account for 14% of the bankruptcies.

The trend has not yet improved this year, despite the sudden and heavy impact of the COVID-19 pandemic. Between January and September 2020 the "ordinary" moratorium was applied 34 times, representing approximately 1.2% of all bankruptcy cases in the same period. In addition, 22 "COVID-19 light" moratoria (temporarily available until 19 October 2020) were applied in total – a simplified procedure for small companies as a measure against the COVID-19 shock. Apparently, for many companies, the COVID-19 loans together with short-term work successfully absorbed the first economic shocks.

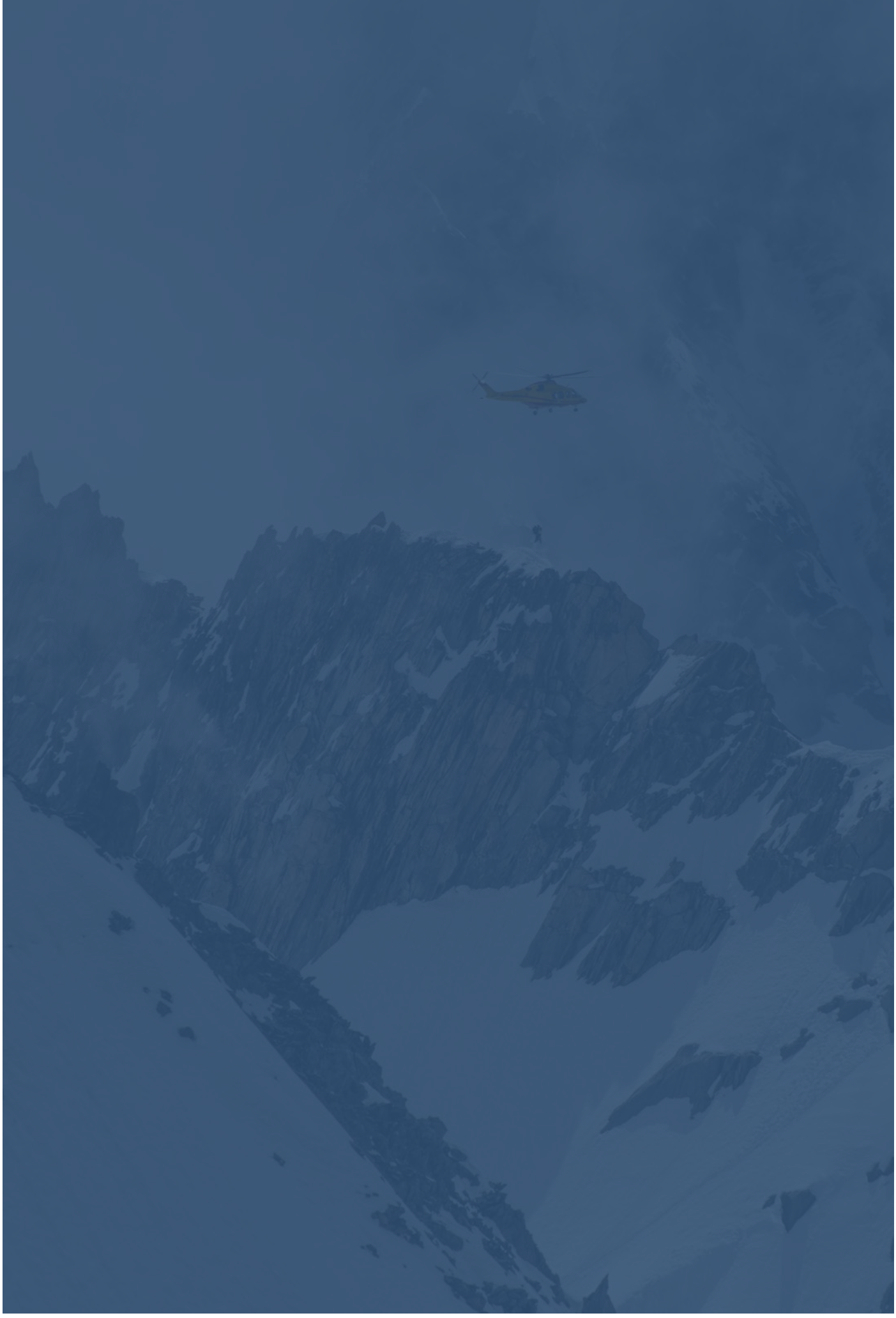
A&M point of view

- The Swiss legal environment provides overall sufficient tools for restructuring procedures
- Three major reasons are the cause for a low utilisation as compared to comparable tools in the US and Germany: stigma of bankruptcy, scarce market education and challenges around financing of the procedure
- Evidence shows that moratoriums lead overall to better economic outcomes for creditors and employees as compared to bankruptcy

STA point of view

- The Swiss debt moratorium is a great tool for companies needing some extra time to pay their liabilities, and review their capital structure.
- It helps to rescue viable businesses and preserve value and jobs otherwise destroyed in a liquidation.
- Our joint study shows that it is nevertheless sparsely used in practice. Awareness of the debt moratorium procedure among the Swiss business community, and pedagogy to fight the perceived stigma of using it, should also both be increased to avoid unnecessary bankruptcies.

Swiss Turnaround Association



Introduction

Market contractions are economic realities. Financial stress or distress can come from internal or external factors. COVID-19 is a perfect example of an external 'black swan' event that is severely affecting even companies that were highly successful and stable pre-pandemic.

Crisis symptoms are not always obvious, especially at the early stages. Strategies, business and operating models need continuous monitoring and often transformations are required to avoid entering into situations of financial distress. Once a serious situation arises, the key question is whether company executives are prepared to take necessary measures in a rigorous and decisive way in order to protect value for stakeholders.

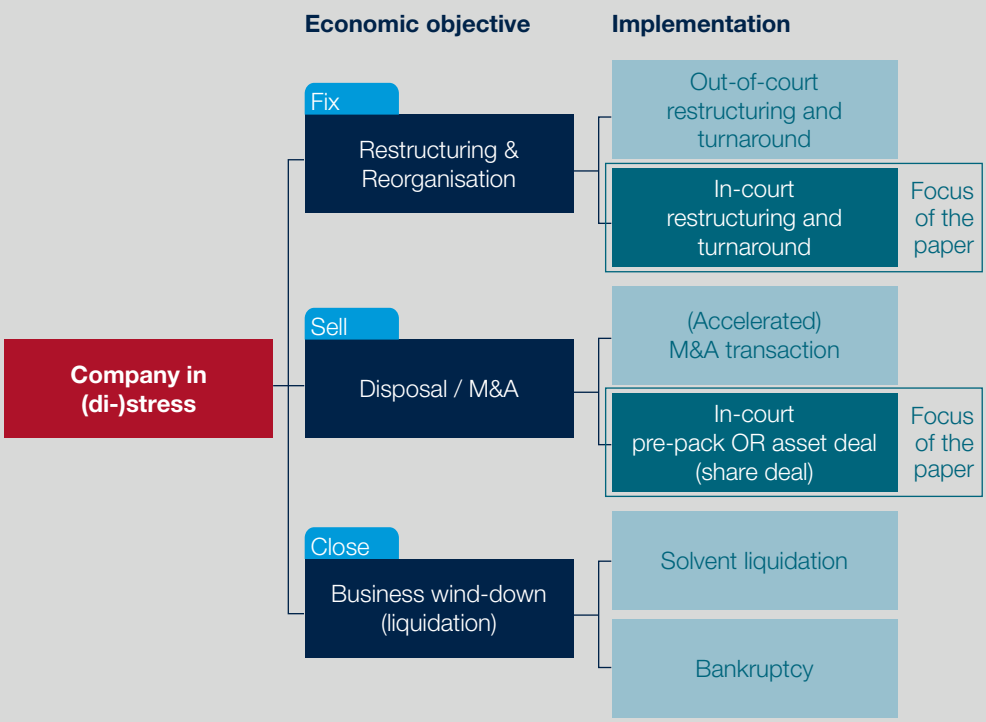
This paper provides an overview of the legal restructuring frameworks available in Switzerland. In particular, the focus is on the Swiss debt moratorium ("Nachlassstundung") governed by the DEBA and its practical application. Knowing what tools and options are available in distressed situations can buy precious time for corporate executives and major creditors in order to achieve the best possible outcome.

Which instruments for restructurings and reorganisations are available under Swiss law?

Swiss law provides out-of-court and in-court solutions to implement the general restructuring options of fixing, selling or closing a business.

Distressed companies generally base their restructuring/reorganisation plans on one of the following options:

Figure 1. Restructuring options



Directors duties

Board of directors have the duty to file for bankruptcy if the balance-sheet is over-indebted according to Art. 725 Swiss Code of Obligations (SCO) or to apply for a moratorium procedure.

Under the current revision of the framework "Aktienrechtsrevision" (expected to enter in force in 2022), filing for a debt moratorium under DEBA will be explicitly stated as sufficient fulfillment of executive bodies' duties.

Source: A&M, Swiss Code of Obligations (SCO), The Federal Office of Justice (FOJ), Debt Enforcement Act (DEBA)

What is a debt moratorium and what is the aim of the procedure?

A debt moratorium is an in-court procedure providing legal protection to companies in liquidity shortfalls or in over-indebtedness in order to gain time to restructure the business through different options.

DEBA established the debt moratorium as a tool that allows companies to undertake restructuring and reorganisation measures under an in-court procedure, with the aim of increasing the prospects of recovery and protecting stakeholder value by avoiding the often more value destructive bankruptcy liquidations. Alternatively, a settlement can be achieved between the debtor (company in distress) and all creditors, a so called “composition agreement”.[1]

The different possible outcomes of a debt moratorium are shown in Figure 2. The outcome for the legal entity is not necessarily the same as for the business itself.

"Even in cases where the original entity is being liquidated through CAAA or bankruptcy as a consequence of a successful pre-pack, the solution for the business and the related jobs has great value to the overall economy."

Alessandro Farsaci, Alvarez & Marsal

1 S. Kramer, G. Naegeli, J. Schwaller; Chambers Global Practice Guides: Insolvency 2019 2nd edition. URL

Figure 2. Possible outcomes of the moratorium procedure

Outcome and description	Effect on entity in procedure (view of legal entity/debtor)	Effect on business (business view)
Restructuring and reorganisation No need to reach a composition agreement if the debtor can be successfully restructured/reorganised during the moratorium.	Legal entity in procedure exits the moratorium and continues to exist.	Business continues under the existing legal entity. ✓
Ordinary composition agreement (OCA) Art. 314 et seq. DEBA Moratorium agreement providing either full payment of creditors' claims at a later stage, a dividend agreement or a mix of dividend agreement combined with a earn-out clause, whereby the creditors' claims are partially waived ("hair-cut").	Legal entity in procedure exits the moratorium and continues to exist.	Business or parts of it continues under the existing entity. ✓
Composition agreement with assignment of assets (CAAA) Art. 317 et seq. DEBA Debtor assigns its assets to the creditors for liquidation purposes. Creditors will then be satisfied out of the liquidation proceeds. In this regard, the aim is not to restructure the company but rather to achieve the highest possible recovery rate for the creditors.	Legal entity in procedure ceases to exist.	Business or parts of it are transferred to a new entity ("hive-off") or third party and legal entity is liquidated. ✓ OR Business is discontinued. ✗
Bankruptcy Art. 166 et seq. DEBA Liquidation of the company assets under bankruptcy procedure.	Legal entity in procedure ceases to exist.	Assets are disposed through liquidation procedure, proceeds distributed to creditors and entity is dissolved. ✗

Source: A&M, Debt Enforcement Act (DEBA)

Figure 2 shows both the effect on the legal entity (debtor) in procedure as well as the effect on the business itself. An example could be the application of the debt moratorium procedure to transfer the viable parts of the business to a hive-off vehicle or to a third party, for example in the form of a pre-pack transaction. From a purely legal perspective the outcome of the old company ("OldCo") could either be a CAAA or bankruptcy liquidation. However, the viable parts of the business would continue to operate under a new company ("NewCo" / "Hive-off") or be operated by a third party. Hence, the successful and competitive parts of the business, including its workforce, can continue to exist.

Pre-pack

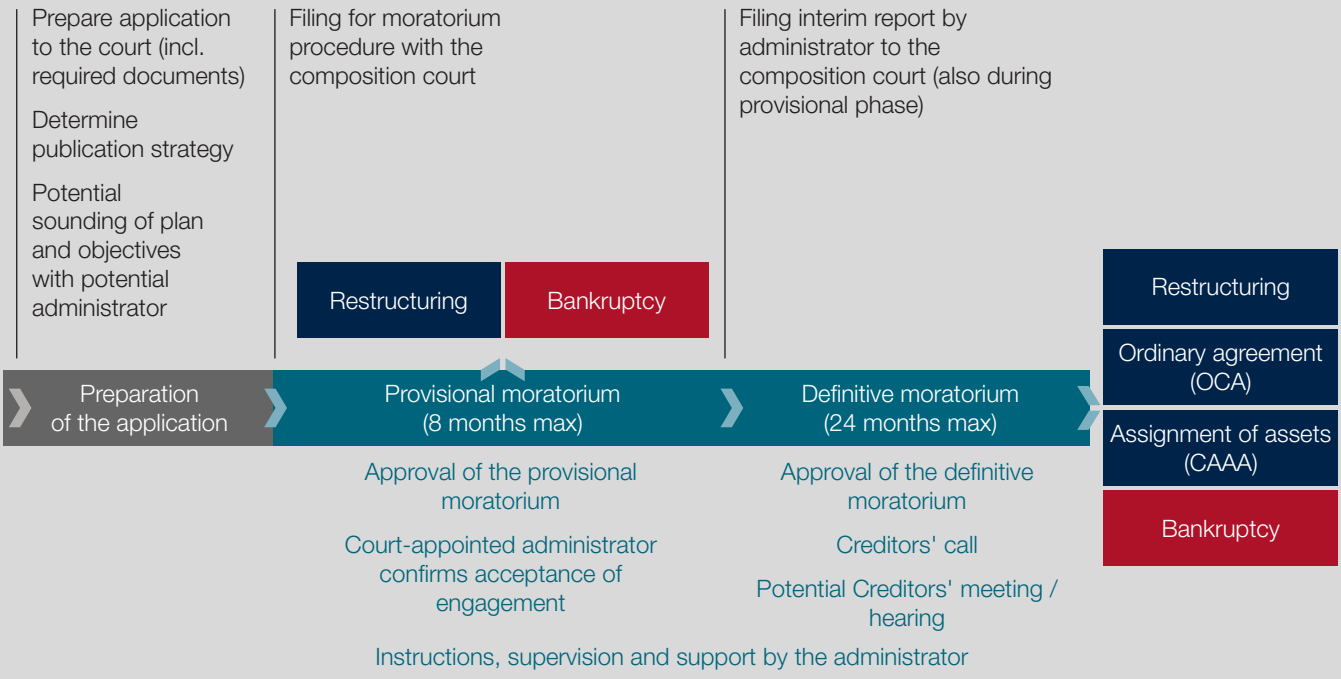
In essence, the term pre-pack refers to a two phased distressed M&A deal. In the first phase, a restructuring concept is negotiated and agreed with requisite stakeholders before entering into a debt moratorium. In the second phase, the disposal transaction is implemented through a formal debt moratorium procedure providing a legally robust execution of the transaction. A court decision in favour of a pre-pack taken in May 2020 of the court in Bülach (ZH) provides increased legal guidance to such transactions.

How does a Swiss debt moratorium work?

A moratorium is a court approved procedure for a predetermined period of time. The formal requirements to enter into the procedure are very low. An independent administrator supervises the company's executives, who remain in charge of managing the company.

In order to enter into a debt moratorium, the debtor (company in distress) has to apply to the competent court. Although individual creditors also have the right to apply in the name of the company, most applications are done by the debtor. The initial provisional phase of the moratorium has a maximum duration of 8 months (which was extended as of 20 October 2020). In exceptional cases, the debtor can apply for a non-public procedure in order to protect short-term liquidity and the value of the assets, as well as to control communication. After the initial provisional phase the procedure can be exited if a restructuring was achieved or it is switched into a definitive moratorium which will be published in any case.

Figure 3. How does the procedure work?



Key points

Procedure can be triggered by debtor or by creditor (e.g. lenders). The administrator can be proposed by the applicant (debtor or creditor).

Outcome in the provisional moratorium will either be a restructuring, bankruptcy or filing for a definitive moratorium. A composition agreement can only be achieved in a definitive moratorium.

Requirements to obtain approval for composition agreement are either:

- Consent of majority creditors who represent ⅔ of claims, or
- Consent of ¼ of creditors who represent ¾ of claims

Source: A&M, Swiss Debt Enforcement and Bankruptcy Act (DEBA)

Filing requirements

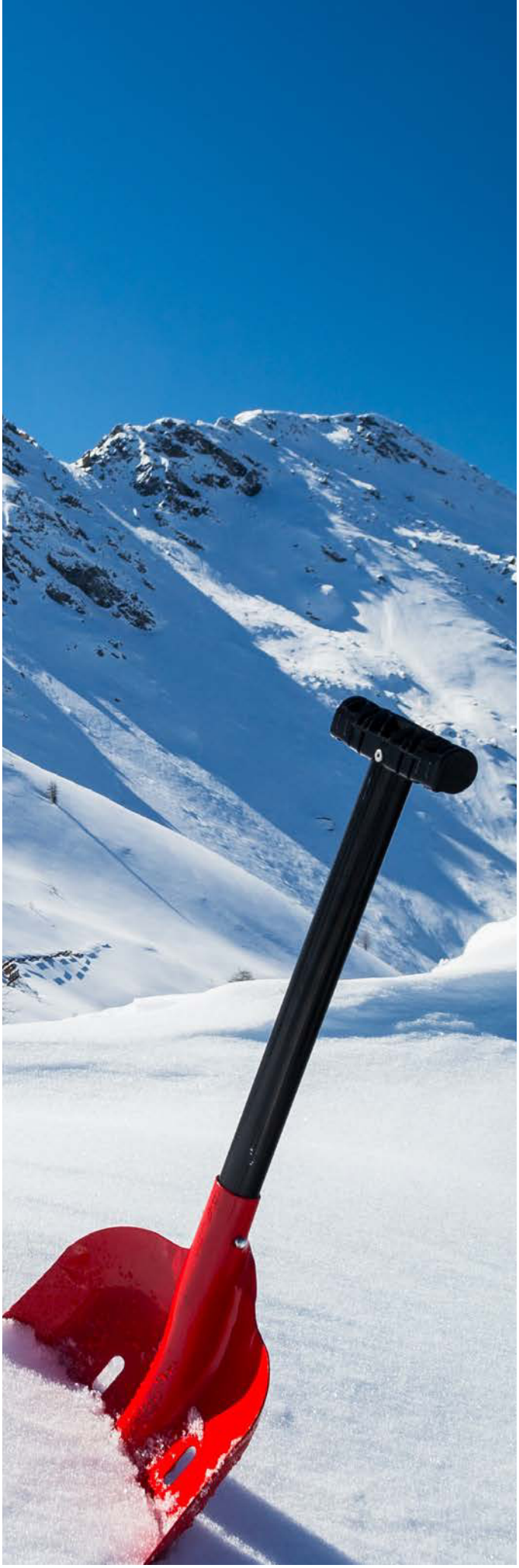
The formal and material entry burdens for the provisional moratorium are low. The law does not contain any provisions as to what the content of a restructuring plan should be. In practice, the plan should provide the court with an overview of the measures and objectives under the procedure. An application can only be denied if there are obviously no prospects for restructuring. In such case the composition court ex officio opens bankruptcy proceedings (Art. 293a DEBA). In practice, the actual challenge of a debt moratorium is the funding of the overall costs that a procedure entails. However, these costs must be considered in relation to the total creditors' claims exposed to risk and jobs at loss given default.

Company and management supervision

If the debt moratorium proceeding is approved, the debtor remains in principle in control of the ongoing business. However, a court-appointed administrator supervises day-to-day management and releases binding instructions to the executive bodies, acting on behalf of the court. In certain cases the administrator can apply to the court to replace the management.

Interim reporting and decision

Towards the end of the provisional moratorium the administrator submits his interim report to the court providing his opinion regarding the situation and the probability of a successful restructuring, based on which the court takes its decisions. The company or administrator can issue requests at this stage, such as extending the moratorium. In practice, in most cases the courts follow the recommendations of the administrators. The definitive moratorium may be granted for a period of up to 12 months and can (in particularly complex cases) be extended to up to 24 months. A composition agreement can only be executed with a definitive moratorium. The disposal of fixed assets usually requires the approval of the composition judge or of the creditors' committee.



What are the effects of a Swiss debt moratorium procedure?[2]

Debt collection and court proceedings are suspended, long-term contracts can be terminated and material transactions require court approval to name some effects helpful for restructuring.

- Suspension of debt collection proceedings and court proceedings
- Preventing the eradication / cessation of pre-moratorium claims
- Prevention of debtor's assets sequestration (and other protective measures)
- Suspension of statute of limitations / peremptory deadlines
- Assignments of claims against third parties entered into prior to moratorium are ineffective if claims come into existence after the moratorium
- With consent of the administrator, long-term agreements can be terminated if restructuring would otherwise be at risk
- No social plan obligation for mass redundancies that occur during a moratorium that are concluded with a composition agreement
- Certain material transactions, including the disposal of fixed assets or raising debt capital, etc., require approval by court or by a creditors' committee
- Stopping interest accrual on unsecured claims with effect as of the grant of the moratorium (unless the composition agreement provides otherwise)
- Administrator has the authority to order conversion of non-monetary claims owned by the debtor into monetary claims of corresponding value

2 cf. Art 297 et seq. DEBA, Art. 335k SCO

When is the Swiss debt moratorium used?

Companies in distressed situations and/or with over-indebted balance sheets that can be restructured with measures such as the termination of certain contracts or the disposals of assets including so-called pre-pack transactions.

- Restructurings involving complex groups of stakeholders, where consensual, out-of-court negotiations are not feasible or have not led to the desired result. A debt moratorium scenario as a threat can significantly help to successfully negotiate consensual solutions.
- Restructurings that require operating model changes. This might involve the discontinuation of several plants, locations, long-term rent, lease, supplier, client or employment contracts, etc.
- Enabling distressed M&A transactions and pre-pack solutions.
- Transfer of the viable parts of the business into a newly incorporated entity (no claw-back risk for buyer and seller once court approves transaction).
- Facilitating wind-down of businesses in a way that preserves value (e.g. for businesses with asset values that would implode in a bankruptcy procedure such as retail).

"A Swiss Debt Moratorium can be a very powerful tool, if used in conjunction and under the guidance of seasoned Turnaround Managers and Restructuring Professionals"

Alain Le Berre, Board Member Swiss Turnaround Association

Examining use of the debt moratorium in Switzerland

Methodology

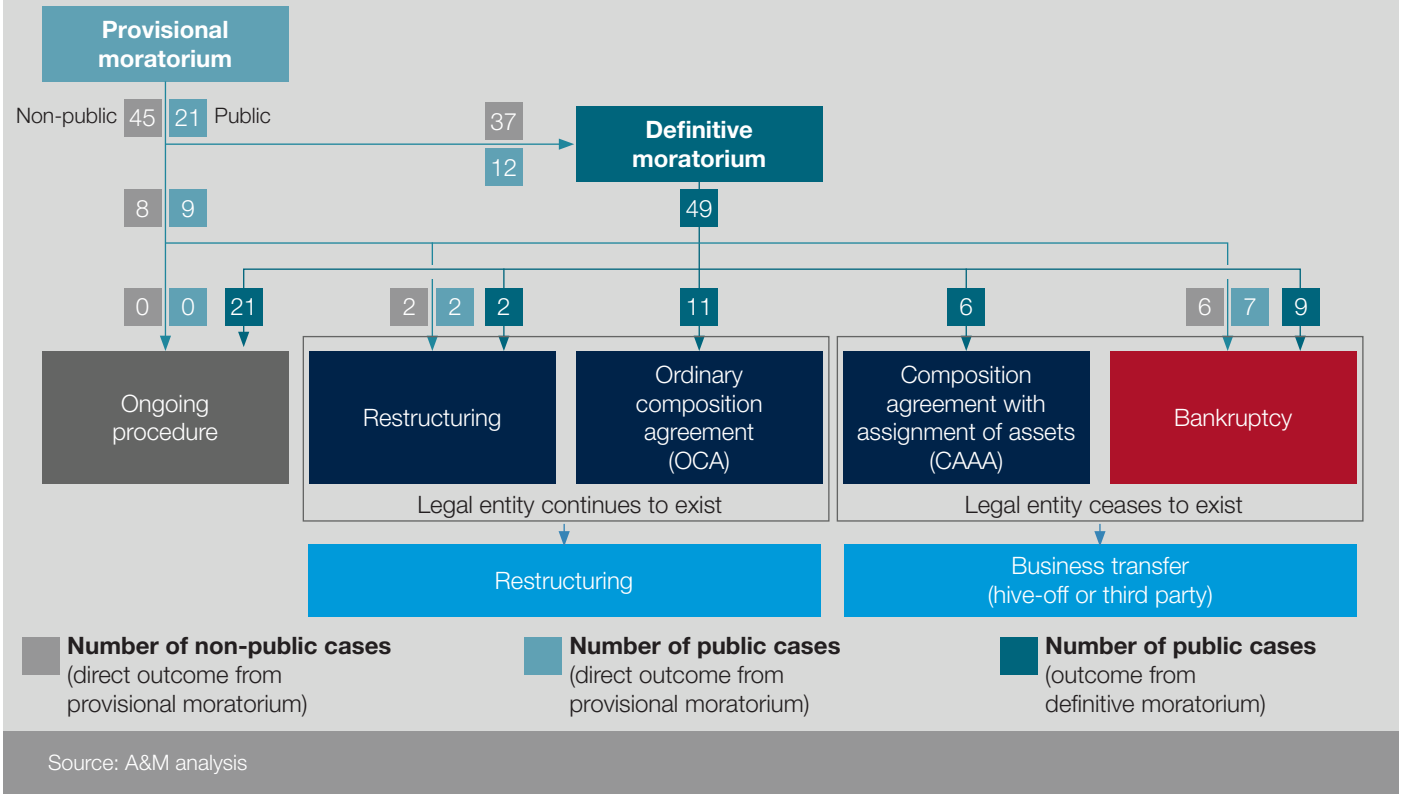
Data collection of this study is based on the official publications in the Swiss Official Gazette of Commerce (SOGC) and is limited to legal entities (no sole proprietorships or private persons). In order to evaluate non-public procedures we have conducted a survey with the composition courts in Switzerland. 78 of the 110 composition courts responded to our survey, which gives a response rate of over 70%. Furthermore, we have discussed and evaluated the data with a large majority of Swiss administrators.

The allocation of a moratorium to a specific year was determined by the date of the opening of the provisional moratorium (e.g. if the provisional moratorium is granted in 2019 and a definitive moratorium is granted in 2020, the case was only counted in the 2019 period).

Debt moratorium cases in 2019

Throughout the year 2019 a total of 66 companies were granted the provisional debt-restructuring moratorium. Compared to the total number of bankruptcies of (4,691[3]) in the same period, the number of debt moratorium procedures was only around 1.4% of the number of bankruptcy cases. For comparison, the commercial Chapter 11 filing in the US represented approximately 14% of the commercial bankruptcies[4].

Figure 4. Debt moratorium cases in 2019



Source: A&M analysis

3 Bisnode, Firmenkonkurse und Neugründungen in der Schweiz | 15.1.2020; URL
4 C. M. Oellermann, M. Douglas; United States: The Year in Bankruptcy: 2019; URL

Non-public moratoria

Of the provisional cases granted, 45 were approved as silent (non-public) procedures and 21 were granted as public procedures. The silent moratorium option was implemented with the last DEBA revision in 2014. Although the intention was that the non-public option would be an exception, in practice silent moratoria represented the clear majority with c.68% of total moratoria.

Result of procedures

From a legal perspective, in 17 or 38% of the completed procedures the debtor was successfully restructured, either through a pure restructuring (6) or via an Ordinary Composition Agreement (OCA) (11) with its creditors. In 28 or 62% of the completed cases the legal entity ceased to exist.

Based on the data received, in 5 cases a solution was found via business transfer into a hive-off or third party.

Debt moratorium cases in 2020 (until September 2020)

Between January 2020 and end-September 2020, 34 companies were granted the provisional debt-restructuring moratorium. The annualised number of cases corresponds to 45 cases. On an annualised basis this corresponds to a 30% decrease compared to 2019. Our view is that the lower total can be explained by enhanced financial support and other measures of the Swiss government as measures against the COVID-19 pandemic.

Non-public moratoria

Of 2020's procedures, 22 (or 65%) were non-public and 12 (or 35%) were public during the provisional phase. In comparison to the number of bankruptcies of 2,760[5] in the same time period, the instrument of the debt moratorium was only used in c.1.2% as many cases[6].

Result of procedures

Of the 34 debt restructuring cases, in one case a business transfer could be organised wherein the creditors agreed on a CAAA. Bankruptcy was declared in another 9 cases, whereas based on information by administrators for two a business transfer could be completed before that.

23 procedures are still ongoing, representing the large majority of all 2020 moratoria. One of the companies has been successfully restructured through the moratorium and was released from the procedure.

COVID-19 light moratorium

As a measure against increasing bankruptcies triggered by the COVID-19 pandemic, the Swiss Federal Council implemented a simplified moratorium for smaller companies with effect as of 20 April 2020. The simplified procedure was implemented in order to provide a practical, cost-effective tool to protect smaller companies and also to mitigate the impact of newly limited legal, administrative and advisory resources. This simplified COVID-19 light moratorium was only a temporary tool and it was only valid until 19 October 2020. It is no longer in force.

Only a total of 11 companies made use of that instrument until the end of September 2020 and 22[7] in total, which appears to be far below expectations. The other measures taken by the Federal Council (COVID-19 loans, short-term-work etc.) to secure short-term liquidity appear to have had a strong effect, with total bankruptcies being 21% lower than in the previous year[5].

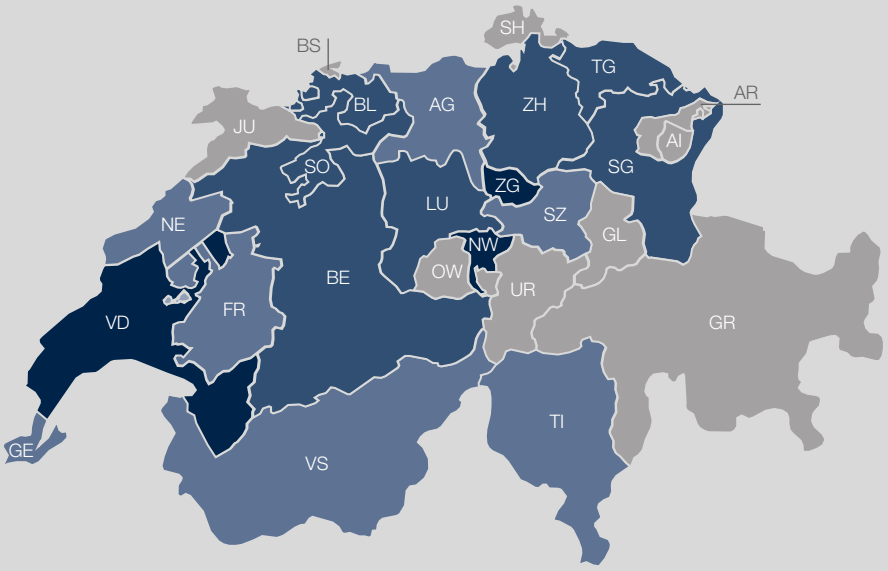
5 Bisnode, Firmenkonkurse und Neugründungen in der Schweiz | 19.10.2020; URL
6 With the ordinance of 16 April 2020, the Swiss Federal Council had put together a package of measures to deal with the corona crisis. Among other things, the temporary suspension of the notification of overindebtedness pursuant to Art. 725 of the Swiss Code of Obligations (CO) lead to comparable low bankruptcy numbers in the period April to September 2020.
7 Out of the additional ten procedures in October 2020, seven entities appear to belong to the same group.

Debt moratorium cases by canton in the period January 2019 to September 2020

The use of debt restructuring moratoria varies dramatically across cantons, particularly in comparison to corresponding bankruptcies.

Figure 5. Results on a cantonal basis (aggregated numbers January 2019 to September 2020)[8]

AG 4 / 464	**AI** – / 13	**AR** – / 54	**BE** 10 / 511	**BL** 3 / 192	**BS** – / 210
ZH 21 / 1,205					**FR** 1 / 228
ZG 9 / 345					**GE** 6 / 710
VS 3 / 355					**GL** – / 36
VD 21 / 831					**GR** – / 110
UR – / 12					**JU** – / 66
TI 1 / 638					**LU** 5 / 260
TG 4 / 218					**NE** 1 / 132
SZ 1 / 172	**SO** 2 / 183	**SH** – / 48	**SG** 5 / 395	**OW** – / 17	**NW** 1 / 46



Debt moratorium procedure
Bankruptcy

Moratoria procedures as a % of bankruptcies: 0% | 0-1% | 1-2% | 2-3%

Source: A&M analysis

"Increasing the awareness of the debt moratorium procedure among the business community may help to reduce unnecessary bankruptcies and preserve value for all stakeholders."

Simon Roth, Board Member Swiss Turnaround Association

8 Note that we received answers on silent moratoria from 78 out of 110 composition courts. We are missing data on some larger courts in the cantons of Zurich, St. Gallen and Geneva. This study may be updated if numbers to be further obtained would unexpectedly lead to a significant other outcome.

Reasons for the relatively low usage of the debt moratorium

In the view of the authors, the procedure is still little used compared to bankruptcy filings for the following three major reasons:

1. **Stigma of bankruptcy**

   The composition proceeding is often characterised as a failure, which attracts significant stigma in Switzerland compared to, for example, a Chapter 11 proceeding in the U.S. In addition, certain investors sometimes are not aware of the risks involved with distressed sellers and do not objectively evaluate the advantages of in-court transactions mainly for reputational reasons.

2. **Unknown advantages of the procedure to executives and investors**

   The procedure itself is still quite unknown to company executives, investors and lenders. In fact, we find that non-restructuring practitioners do not differentiate between a composition moratorium and a bankruptcy procedure. Based on their experience, restructurings are foremost implemented through out-of-court agreements.

3. **Financing the procedure as consequence of late reactions**

   In distressed situations, executives often wait too long to take decisive action, perhaps fearing for their reputations or holding out in the hope of a fortuitous upturn in business. Preparing restructuring plans and evaluating the most efficient way of implementation (e.g. out-of-court vs. in-court) is often seen as not necessary. Delaying has additional negative consequences, as if the liquidity position becomes heavily distressed the financing of the moratorium procedure itself can become a major obstacle.

What could be improved in the Swiss framework?

In a study conducted by the World Bank in 2019 Switzerland ranked 46th out of 190 countries examined in regard to resolving insolvency[9]. According to the study the recovery rate[10] in Switzerland lies at 46.8%, far below Germany as an example, which ranks 2nd with a recovery rate of 80.4%.

With the upcoming revisions to corporate law, the Swiss legal framework does not introduce the explicit duty for executives of companies in financial distress to prepare a **short-term liquidity forecast** in order to early identify the timing and magnitude of any liquidity shortfall. Executives' duties become explicit only at an advanced stage of the liquidity crisis when the balance sheet must be drawn at liquidation values, by which point it may seem too late to enter into a moratorium.

Also, in many cases of over-indebtedness the duty to notify a court can be avoided via subordinations and without the legal need of new liquidity / capital injection. The ongoing revision of the Corporate Law, "Aktienrechtsrevision", is expected to enter into force in 2022. With the upcoming revision of the Swiss corporate law a duty to monitor the solvency will be introduced. This duty was somehow already existing according to Art. 716a of the SCO. However, the revision does not explicitly stipulated how that solvency shall be monitored (e.g. through a short term liquidity forecast). Also, no specific mechanism was introduced to prevent that a company gets into a situation of not being able to pay an excessive amount of (overdue) accounts payable, as it is the case in Germany and Austria.

9 Doing Business 2019, Training for Reform, World Bank Group.
(Note: The ranking is made up of the strength of the insolvency framework (50%) and the recovery rate (50%)) URL
10 Recovery rate is recorded as cents on the dollar recovered by secured creditors through judicial reorganisation, liquidation or debt enforcement

"Given the underlying complexity for the competent courts, a specialised competence center per canton to handle moratorium procedures might make sense."

Roger Bischof, Chairman Swiss Turnaround Association

As mentioned above, **financing** this procedure remains nonetheless a significant challenge. In a situation where liquidity is already too tight, the procedure simply cannot be financed and bankruptcy proceedings can usually no longer be avoided. The financing aspect is another main difference between the Swiss debt moratorium ("Nachlassstundung") and the German ("Schutzschirmverfahren"). Within the framework of the German "Schutzschirm"[11] procedure, it is possible to receive "Insolvenzgeld" from the state, which covers the salaries for up to three months. In supporting companies to avoid such costs, the German legislator effectively provides liquidity helping to secure the continuation of operations during the procedure. A similar concept as in Germany to provide for the necessary liquidity to finance the debt moratorium would be desirable in Switzerland as well. This is also because the concept of debtor-in-possession (DIP) financing is not established in the Swiss market.

11 § 270b InsO

A&M's point of view

In company crises, too many decision makers tend to hope for uncontrollable positive developments to resolve issues, while also underestimating the severity of the situation from a financial and legal point of view. Instead of taking immediate actions, any evaluation of restructuring options and preparation of restructuring plans are instead postponed – often until it's too late. Distressed situations often lack an objective evaluation and assessment of how such plans are implemented (in- and out-of-court) in the most efficient and legally robust way in order to protect value for creditors.

It does not have to be this way. Switzerland's debt moratorium gives Swiss businesses an instrument similar to the popular Chapter 11 framework in the US. However, today the moratorium does not yet play a significant role in Swiss bankruptcies.

The current total of just under 70 cases per year (or 1.4% of all annual bankruptcies), compared to leading benchmarks, reflects a weak application of the tool in practice. Practice shows that the procedure and its advantages are still little-known at board level. Almost 130 years of the procedure being seen as 'de facto bankruptcy' have left a deep mark on the procedure's reputation. Overall, the fear of such proceedings dominates. In addition, businesses may find it unnecessary to engage restructuring and legal advisors.

In the current economic context, and based on the experiences of practitioners and composition courts of the past years, this situation may change to the benefit of the economy.

"The Swiss insolvency toolbox is mostly used as a defence mechanism. In contrast, the Chapter 11 procedure has been used by US companies for years as an offensive tool that preserves value."

Tobias Fritsche, Alvarez & Marsal

The financing aspect of the procedure remains a key challenge. In our view, adjustment towards the German model in regard to advancing insolvency funds would significantly help resolving the funding challenge.

Creditors often do not have the required experience in initiating debt moratoria, relying instead on company executives to drive restructurings in- or out-of-court. This may be counterintuitive: Our and others' estimates show that unsecured 3rd class creditors can receive 20 cents on the dollar in liquidation scenarios under a debt moratoria, compared to the upper range of estimates of 5 cents on the dollar in bankruptcies[12,13]. The positive economic effects of a successful hive-off solution that safeguards jobs should also be considered.

The most recent revision to Swiss company law did not specify any duty for executives to accurately forecast cash flow in crisis situations. Therefore, it is up to the restructuring practitioners and stakeholders like lenders to promote measures for adequate crisis management, prioritising early decision-making and an objective evaluation of all restructuring options.

12 F. Lorandi, Aktuelle Juristische Praxis, AJP/PJA 11/2020
13 M. Jakob, R. Hunsperger, Restructuring and insolvency law in Switzerland, URL

STA's point of view

Many Swiss companies currently face unprecedented challenges and uncertainties. This has initially been particularly true for certain sectors such as retail, hospitality and tourism, but is now spreading fast to a number of other industries, in particular export-orientated ones.

The Swiss debt moratorium is a very useful tool which can be used by companies needing temporary breathing space to allow more time to repay their liabilities, as well as for wholesale changes to their capital structure. It helps to rescue viable companies and preserve value rather than putting them into liquidation and destroying value.

Our joint study shows that both the ordinary composition moratorium but also the temporary COVID-19 moratorium were sparely used in practice. The reason for that might be the other government support measures which were available (COVID-19 bridge loans, short time working etc.) but also some inherent weaknesses of the regime, as well as a general lack of awareness of this tool in the business community combined with a still prevailing cultural bias in Switzerland against the perceived stigma of restructuring.

"When a company is in distress, the earlier the Swiss debt moratorium procedure is initiated, the higher the chances of a successful turnaround."

Nicolas Véron, Board Member Swiss Turnaround Association

Therefore, in order to prevent mass insolvencies and to stabilise the Swiss economy, there may still be a need for the Swiss Federal Council to issue new and amended insolvency measures in the future based on Art. 9 of the new COVID-19 Act.

Even though the reorganization tools generally exist, it may also be worthwhile to take a look at foreign jurisdictions (e.g. Netherlands, UK, Germany, Singapore) which have recently enacted innovative new restructuring legislation as a result of COVID-19.

Awareness of the debt moratorium procedure among the Swiss business community, and pedagogy to fight the perceived stigma of using it, should also both be increased to avoid unnecessary bankruptcies.

Swiss Turnaround Association

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Appendix

Figure 6. Results on a cantonal basis

Canton	Debt moratorium procedures (Jan 19-Sep 20)	Bankruptcies (Jan 19-Sep 20)	
AG	4	464	0.90%
AI	.	13	0.00%
AR	.	54	0.00%
BE	10	511	2.0%
BL	4	192	2.10%
BS	-	210	0.00%
FR	2	228	0.90%
GE	6	710	0.80%
GL	.	36	0.00%
GR	.	110	0.00%
JU	-	66	0.00%
LU	5	260	1.90%
NE	1	132	0.80%
NW	1	46	2.20%
OW	-	17	0.00%
SG	5	395	1.30%
SH	-	48	0.00%
SO	2	183	1.10%
SZ	1	172	0.60%
TG	4	218	1.80%
TI	1	638	0.20%
UR	-	12	0.00%
VD	22	831	2.60%
VS	3	355	0.80%
ZG	8	345	2.30%
ZH	21	1,205	1.70%
TOTAL	**100**	**7,451**	**1.30%**

Source: Bisnode, Firmenkonkurse und Neugründungen in der Schweiz | 15.1.2020
Bisnode, Firmenkonkurse und Neugründungen in der Schweiz | 19.10.2020
A&M analysis