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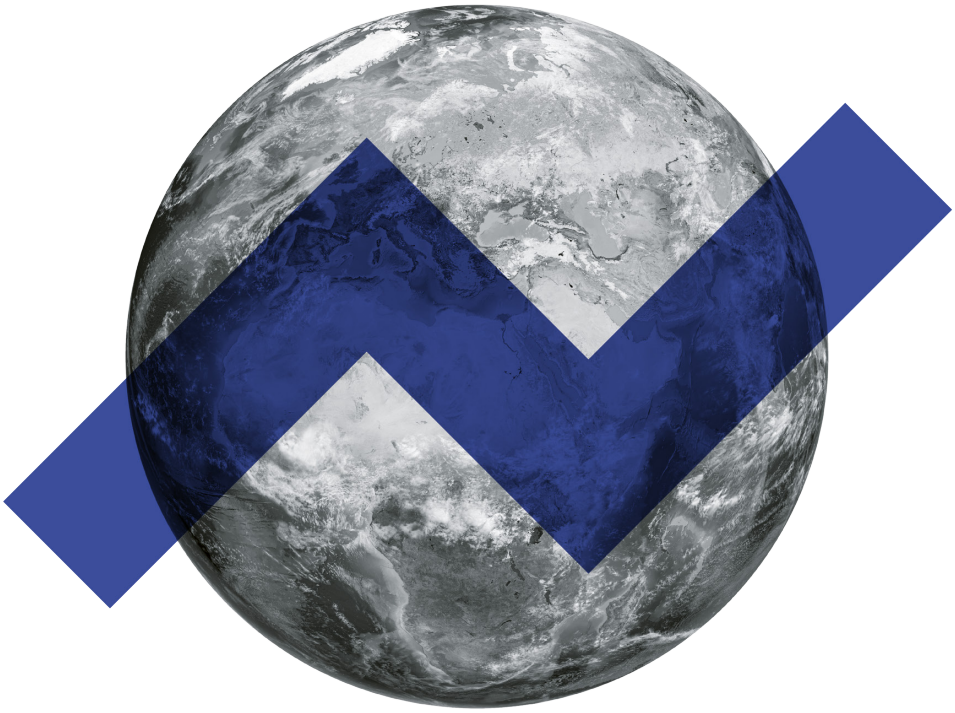

Insolvency and Restructuring Proceedings for Financial Institutions

Olivier Favre, Dominic Wälchli

Key Take-aways

1.
The draft Ordinance on Insolvency and Reorganisation Proceedings applicable to Financial Institutions updates the secondary legislation applicable to such proceedings after the entry into force of the revised primary legislation for banks and insurance companies.

2.
Such proceedings are distinct from general insolvency and reorganisation proceedings and apply to banks, securities firms, fund management companies, FINMA regulated collective investment schemes in corporate form, mortgage bond institutions, financial market infrastructures and insurance companies.

3.
While the draft Ordinance does not introduce material changes to the substance of the rules in place previously, it clarifies the scope of the FINMA competences for the insolvency and reorganisation proceedings applicable to FINMA regulated entities.

1 Introduction

After the reform of **the bank insolvency and reorganisation proceedings** under the Swiss Banking Act of 8 November 1934 **(Banking Act)**, which entered into force on 1 January 2023, and the reform of the Swiss Federal Insurance Supervision Act of 17 December 2004 **(ISA),** which introduced **reorganisation proceedings applicable to direct insurance and reinsurance companies** and entered into force on 1 January 2024, the secondary legislation governing such proceedings had to be updated. FINMA initiated this process with the publication of the draft Ordinance on **Insolvency and Reorganisation Proceedings applicable to Financial Institutions (D-InsO-FINMA)** on 9 October 2024. This new Ordinance will **consolidate insolvency and restructuring proceedings** for banks, insurance companies, collective investment schemes and other financial institutions and financial market infrastructures in one single act and thereby replace the **FINMA Banking Insolvency Ordinance** of 30 August 2012 **(BIO-FINMA),** the **FINMA Insurance Bankruptcy Ordinance (IBO-FINMA)** and the **FINMA Collective Investment Schemes Bankruptcy Ordinance (CISBO-FINMA).**

2 Bank Insolvency and Reorganisation Proceedings

2.1. Scope

A **bank licensed by FINMA** is not subject to debt enforcement actions under the Swiss Debt Enforcement and Bankruptcy Act **(DEBA)**, but to the proceedings FINMA may order under the Banking Act. According to Articles 25 et seq of the Banking Act, where FINMA has reason to believe that a bank either is **over-indebted** or has incurred **serious liquidity problems,** or does not fulfil the **capital requirements,** FINMA may, as appropriate, (i) take **protective measures;** (ii) initiate **bank reorganisation proceedings;** or (iii) order the **liquidation of the bank (bankruptcy proceedings)** under the Banking Act. This regime applies to Swiss banks with a full bank license and to holders of a fintech license under the Banking Act.

Protective measures under the Banking Act may be ordered on a **stand-alone basis** or **in combination with bank reorganisation proceedings.** Such protective measure may include for instance, as the most far-reaching measures, a prohibition on making or receiving payments or entering into securities transactions, the closure of the bank or a stay or postponement of maturity of bank debt. In any event, the rules of the D-InsO-FINMA do not apply in the event that FINMA only orders such protective measures on a stand-alone basis.

As a result of a cross-reference to the Banking Act in the Financial Institutions Act of 15 June 2018 **(FinIA)** and the Swiss Financial Market Infrastructure Act of 19 June 2019 **(FinMIA)**, all of these proceedings under Articles 25 et seq of the Banking Act also apply to **securities firms** and to f**und management companies** licensed by FINMA (i.e. the fund management companies holding the assets and liabilities of a contractual collective investment scheme) as well as to **Swiss financial market infrastructures** licensed by FINMA under the FinMIA (including stock exchanges, multilateral trading facilities, trading facilities for distributed ledger technology (DLT) assets, central counterparties, trade repositories for the reporting of derivatives transactions and payment systems).

The scope of such proceedings under the Banking Act also includes (i) **Swiss holding companies** of Swiss banks, securities firms, fund management companies or financial market infrastructures and (ii) **Swiss group companies incorporated in Switzerland** that are classified by FINMA as fulfilling a **material function in the group,** such as liquidity, treasury or risk-management, accounting, IT or HR-services or the performance of the legal and compliance functions for group companies (FINMA publishes a list of such material group companies).

As regards **foreign entities,** the Swiss Banking Act provides for a process for the recognition of foreign insolvency proceedings, to the extent that the foreign entity has a **Swiss presence (e.g. a Swiss branch office) or assets located in Switzerland.** Upon the recognition of such foreign proceedings, the proceedings pursuant to the Banking Act, as implemented by the new D-InsO-FINMA, will apply.

As regards **mortgage bond institutions** pursuant to the Mortgage Bond Act of 25 June 1930, this act does not cross-refer to the proceedings of the Banking Act, so insolvency and restructuring proceedings will be governed by the D-InsO-FINMA directly.

The D-InsO-FINMA consolidates the rules governing the insolvency of banks, fund vehicles and insurers.

2.2. Key changes to the rules due to the transition to the D-InsO-FINMA

To a large extent, the new rules of the D-InsO-FINMA **consolidate those previously scattered between the BIO-FINMA, IBO-FINMA and CISBO-FINMA.** However, in some places, the D-InsO-FINMA **updates the previous rules** to take into account the current status of the Banking Act. For instance, as regards assets provided by a bank as security interests, further to the **safe harbour provisions of article 27 of the Banking Act regarding the recognition of rights of set-off, netting, porting and private sale collateral arrangements that are not changed,** the proposed article 24 para. 2 D-InsO-FINMA tracks article 27 para. 1 Banking Act by providing that the obligation to hand over the pledged assets to the insolvent bank is not only disapplied regarding pledged securities and financial instruments, but also for cash held in book-entry form and DLT-assets, provided that all such assets have a value that can be determined on an objective basis.

In the context of the reform of the Banking Act, which entered into force on 1 January 2023, some key provisions governing bank reorganisation proceedings **previously included in the BIO-FINMA were moved to the Banking Act** (e.g. (i) those on the restructuring plan and the approval of the restructuring plan, and (ii) those on the **continuation of certain banking services).** These provisions will no longer be included in the D-InsO-FINMA.

3 Insolvency Proceedings applicable to Collective Investment Vehicles

3.1. Swiss Contractual Funds

A **contractual fund approved by FINMA** according to the Swiss Collective Investment Schemes Act of 23 June 2006 **(CISA)** does not have legal personality, but is merely **an agreement between the fund management company, the investors and the custodian according to which a fund management company holds the pooled assets on a fiduciary basis for the investors.** Because the contractual fund itself does not have legal personality, insolvency proceedings sought against a contractual fund are not possible. Bankruptcy proceedings should thus be directed against the fund management company holding the assets of the contractual fund. Fund management companies are in principle subject to the same insolvency rules as banks and securities firms (see under 2 above). However, a contractual fund may be **transferred upon order or approval by FINMA to a solvent fund management company** with all its rights and obligations, provided the continuation of the contractual fund is in the interest of its investors.

In a bankruptcy of a fund management company, the contractual fund's assets, other than the assets required to cover claims of the fund management company for the due performance of its duties, are **segregated from the fund management company's bankruptcy estate** in favour of the investors of the contractual fund. The same applies for units of collective investment schemes that are credited to unit accounts with the fund management company. **Debts of the fund management company that do not arise from the fund contract cannot be offset** against claims belonging to the relevant contractual fund to which the fund contract relates.

These principles also apply to **limited qualified investor funds according to CISA (L-QIFs)** that are set-up as a contractual fund.

Market participants failing to be duly licensed shall no longer be liquidated by FINMA under insolvency rules.

3.2. Collective investment scheme in Corporate Form

A **Swiss Collective investment scheme in corporate form** may be licensed by FINMA as an investment company with variable capital **(SICAV),** as a limited partnership for collective investments **(LPCI)** or as an investment company with fixed capital **(SICAF)** under the CISA. Contrary to a contractual fund, such vehicles have a legal personality of their own. As a consequence, the SICAV, LPCI or SICAF itself holds the license according to CISA and may be subject to i**nsolvency proceedings ordered by FINMA under the special regime of Articles 137 et seqq. CISA.** The DEBA applies only to the extent that the CISA and the CISBO-FINMA, respectively, do not provide for special rules. D-InsO-FINMA will replace the CISBO-FINMA in respect of such vehicles.

In the event (i) there are **grounds for concern that a license holder is over-indebted or has serious liquidity problems** and (ii) there is **no prospect of restructuring** or if such restructuring has failed, FINMA may declare such license holder bankrupt with the same effect as the start of bankruptcy proceedings pursuant to the DEBA.

L-QIFs that are set-up in corporate form either as a SICAV or LPCI are not licensed by FINMA as such. As a result, they **are not subject to FINMA insolvency proceedings** and the DEBA alone governs their bankruptcy and insolvency.

4 Insolvency and Reorganisation Proceedings applicable to other Financial Institutions

Asset managers of collective investment schemes and other asset managers licensed by FINMA under the FinIA **are not subject to insolvency proceedings that may be ordered by FINMA** under the FinIA, the CISA or the Banking Act. Therefore, the DEBA alone governs the bankruptcy and insolvency and the reorganisation of such financial institutions.

5 Insolvency and Reorganisation Proceedings applicable to Insurers and Reinsurers

The revised ISA and the respective Insurance Supervision Ordinance of 9 November 2005 introduced an **insolvency and reorganisation regime applicable to insurance and reinsurance companies.** These proceedings are conceptually modelled on those applicable to banks and securities firms pursuant to the Banking Act. If there is a **founded concern that an insurance or reinsurance company is over-indebted or has serious liquidity problems, FINMA may order protective measures, commence reorganization proceedings or** – if there is no prospect of restructuring at least for part of the insurance business – order the bankruptcy.

The D-InsO-FINMA applies to insurance and reinsurance companies subject to FINMA licenses, holding companies of insurance groups and to material group companies domiciled in Switzerland performing key functions for the activities requiring a license as insurance company pursuant to the ISA.

In an insolvency of a direct insurance company, a unique feature is the **allocation of the tied assets to the insureds.** Such process is newly governed by a provision of the ISA. For this reason, such rules are no longer included in the secondary legislation of the D-InsO-FINMA as opposed to the previous rules of the IBO-FINMA.

6 Insolvency of Market Participants without Authorisation

Market participants **conducting a business activity subject to a FINMA license without being duly licensed** may no longer be liquidated by FINMA according to the rules of the Banking Act and the D-InsO-FINMA. They are subject to ordinary bankruptcy proceedings according to the DEBA.

7 Rules on Resolution of Stay

The new **rules of the D-InsO-FINMA do not impact** the framework governing **stay powers of FINMA** in the context of reorganisation proceedings.

Article 30a of the Banking Act, which entered into effect on 1 January 2016, empowers FINMA to order, in connection with protective measures or reorganization proceedings under the Banking Act, a **temporary stay** of (i) any **contractual termination right of a counterparty or the exercise of any rights of set-off,** (ii) the **enforcement of collatera**l or (iii) the **"porting" of derivatives transactions,** in any case for up to two business days, if such contractual termination or other right would otherwise be triggered by such protective measures or reorganisation proceedings.

These powers apply by way of **cross-reference to such powers to the FINMA regulated financial institutions that are subject to the reorganisation proceedings under the Banking Act** (see under 2 above). For insurers, the equivalent stay powers are specified in the ISA.

According to Art. 12 para. 2bis Swiss Banking Ordinance, a bank must, when entering into new agreements or amending existing agreements, agree with the counterparty the application of the **resolution stay powers of FINMA** according to article 30a Banking Act, provided that the agreement is subject to a law other than Swiss law or provides for the jurisdiction of courts other than Swiss courts. While the scope of such obligation was specified in the BIO-FINMA, this rule is now carried across into the D-InsO-FINMA without any material changes. As a result of the cross-reference in Art. 67 FINIA, this obligation also applies to securities firms and fund management companies.

Olivier Favre
Partner
Olivier.Favre@swlegal.ch

Philippe Borens
Partner
Philippe.Borens@swlegal.ch

Caroline Clemetson
Partner
Caroline.Clemetson@swlegal.ch

Olivier Hari
of Counsel
olivier.hari@swlegal.ch

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Schellenberg Wittmer Ltd
Attorneys at Law

Zurich
Löwenstrasse 19
P.O. Box 2201
8021 Zurich / Switzerland
T +41 44 215 5252
www.swlegal.com

Geneva
15bis, rue des Alpes
P.O. Box 2088
1211 Geneva 1 / Switzerland
T +41 22 707 8000
www.swlegal.com

Singapore
Schellenberg Wittmer Pte Ltd
6 Battery Road, #37-02
Singapore 049909
T +65 6580 2240
www.swlegal.sg