



## SUBORDINATION – WHAT HAS TO BE CONSIDERED

**Subordination is a useful approach in the short term to avoid going to court in the event of over-indebtedness. But what is behind this provision and what should be considered?**

### General information concerning subordination

If a company is over-indebted pursuant to article 725 of the Code of Obligations, this over-indebtedness can be eliminated in the short term by subordination. In the case of insolvency or liquidation, the creditor withdraws priority or declares a deferral of the capital claim.

Subordination is a written, unconditional, indefinite and irrevocable contract. The contract is clearly regulated and must be complied with otherwise the subordination is invalid. The main elements of the agreement are the ban on securing (no preferential treatment to other creditors), standstill agreement (see below) and credit rating clause (the creditor must ensure that it is able to waive its claim, i.e. that it does not become over-indebted itself by waiving the claim).

### Main aspects that must be considered

If debt has been recognised in subordination, the following must be noted:

- The amount of the subordination can be determined as follows:  
Amount of over-indebtedness at going concern values plus a reserve for future losses already foreseeable.
- Debts in subordination may not be repaid in full or in part, be redeemed through settlement or renewal or be newly secured (part of the standstill agreement).
- It must be clearly defined whether any existing and future interest should be included in the subordination.
- The debts in subordination are to be shown in the balance sheet, in the appendix and in the audit report.
- The validity of the subordination begins with the signing of the agreement. Backdating is not possible.
- Subordination may only be revoked by means of a report from the statutory auditors confirming that all liabilities are covered by assets. This also applies to companies that are not subject to auditing or have chosen to opt out.
- However, if the over-indebtedness has been eliminated, the Board of Directors may cancel the subordination by means of a resolution protocol.
- Loans in subordination are considered as deemed equity. Therefore, interest paid on the loan is not tax deductible and is treated as concealed profit distribution and therefore as dividends. The repayment of the loans after the over-indebtedness has been eliminated is tax free.



#### Alternatives to subordination

To forgo a subordination, there are the following alternatives:

- Capital increases
- Conversion of loan capital into equity
- Waiver of claims by the creditor
- à fund perdu contribution (non-repayable loan)
- Granting of a new loan with simultaneous subordination

These are long term measures to eliminate the over-indebtedness, by way of eliminating subordination.

Subordination does not eradicate the over-indebtedness, rather represents a short term bridging in order to refrain from going to court. We will be pleased to advise you on possible over-indebtedness, the creation of a subordination agreement or alternatives to subordination.

For questions or queries, please contact the author.

#### **Our locations**

Mandaris Ltd.  
St. Alban-Anlage 46  
CH-4052 Basel  
Tel. +41 61 285 17 17  
Fax +41 61 285 17 77

Mandaris Ltd.  
Beethovenstrasse 49  
CH-8002 Zurich  
Tel. +41 43 344 33 55  
Fax +41 43 344 33 66

Mandaris Ltd.  
Bahnhofstrasse 23  
CH-6300 Zug  
Tel. +41 41 500 01 15  
Fax +41 41 500 01 16

Mandaris Group  
(Malta) Ltd.  
Forni Complex 1E, Level 2,  
Pinto Wharf,  
Valletta Waterfront  
Floriana, FRN 1913  
Malta  
Tel. +356 2779 1900  
Fax +356 2713 2410



#### **The author:**

##### **Susann Schaffter**

Swiss Certified Public Accountant  
Head Accounting and Quality Control  
[susann.schaffter@mandaris.com](mailto:susann.schaffter@mandaris.com)  
Phone: +41 (0)61 285 17 17