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Revision of Federal Debt Collection and Bankruptcy Act

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Introduction

Apart from specific restructuring provisions which apply in the financial sector (ie, the financial market acts), the Federal Debt Collection and Bankruptcy Act governs restructuring in Switzerland, together with the restructuring provisions of the Company Law, as integrated in the Code of Obligations. Drawing on the experiences gained from the Swissair grounding in 2001, the law aims to promote the restructuring of companies rather than their liquidation.

Crucial points of revision

On September 8 2010 the Federal Council revised the act and submitted its statement on the revision to Parliament, consisting of the National Council and the Council of State. In 2011 the National Council refused to deal with the revisions. By contrast, the Council of State accepted the proposed revisions after adding several amendments and modifications. In Spring 2013 the National Council finally decided to address this issue and has now begun detailed consultation on the revisions.

The revisions focus on facilitated corporate restructuring, and suggest a number of measures in this regard.

Restructuring proceedings should no longer lead mandatorily to liquidation of the company. In line with US law (Chapter 11) - although in a less extensive form - the amended law provides for a stay (moratorium) if a proposed restructuring plan has a reasonable chance of success, not only in view of a composition agreement. The law has accepted the principle of a provisional stay for a maximum four-month period in any given case. During this provisional stay, it will be assessed whether the debtor's financial situation would allow for a restructuring or composition agreement with dividend payments, or whether liquidation (composition agreement with assignment of assets or bankruptcy proceedings) is the more suitable course of action. The provisional stay need not necessarily be published. This procedure should create the space and time to take restructuring measures. During this phase, the court can assign a provisional administrator, mainly in order to assess the possibilities of a restructuring.

Once the provisional stay has expired, the court can grant a definitive stay in order to continue the restructuring measures or to draft a composition agreement with payment of dividends. The court then decides on the appointment of an administrator to supervise the debtor. However, as under the existing law, the debtor can continue to manage its business, monitored by the administrator. With regard to fixed assets only, the proposed law provides that court authorisation is needed if the debtor wants to divest or pledge respective assets. The same requirement applies if the debtor gives guarantees or makes gifts.

In this phase of the proceedings, the creditors' participation rights are strengthened. Unlike under the existing law, during a moratorium, there is the possibility to appoint a creditors' committee. The decision as to whether a creditors' committee should be appointed is at the full discretion of the court. The court's decision will depend mainly on the complexity of the case and the specific circumstances. During the provisional moratorium, there is no appointment of a creditors' committee, because the provisional stay has not been publicly announced and the court will not have an overview of the number and identity of creditors.

On the other hand, the legislator refused to incorporate the Federal Council's proposal to extend the competence of the creditors' committee. Although the creditors' committee is responsible for supervising the administrator, it is competent to make recommendations only, and cannot issue instructions or orders to the administrator. In addition, both the Council of State and the National Council opposed the Federal Council's proposal that the creditors' committee – instead of the court – be authorised to decide on the debtor's capacity to dispose of its fixed assets.

A further crucial amendment to the existing law deals with the extraordinary termination of long-term agreements. For the purpose of restructuring, the debtor shall be given the right to extraordinary termination, subject to the administrator's consent and provided that the opposing party is compensated. There are some exceptions to this rule; in particular, employment contracts have been explicitly exempted from the right to extraordinary termination.

Another innovation concerns the treatment of labour contracts in the event of a takeover or acquisition of business units. In order to facilitate restructuring, the obligation under the existing law to take over all labour contracts shall be removed in the context of a restructuring. In return for this limitation of employee rights, the law has established an obligation to adopt a social plan in which employers and employees define together *ad hoc* measures to:

- avoid dismissals;
- lower the number of dismissals; and
- mitigate the affects of dismissals.

The proposal does not include substantive provisions, but stipulates the obligation of the employing company to negotiate a social plan and, in case of disagreement between the employer and employees about the arrangement of a social plan, the binding force of arbitration decisions. Although both councils have approved this provision, it has been hotly debated in Parliament and among the general public. According to some commentators, the introduction of this obligation undermines the liberal tradition of Swiss labour law.

The proposed novelty regarding claw-back actions is set to ease restructuring proceedings. Both councils have agreed that transactions executed during the moratorium phase are not actionable insofar as they have been approved by the court.

Harmonisation of restructuring law

The Federal Council's proposed revision provides that any other restructuring provision as stipulated in the Company Law should be integrated into the act. Unfortunately, this proposal failed before both councils. It is now envisaged that these provisions will also be amended and address the phase before a moratorium. It is argued that once a moratorium has begun, there are too many restrictions of both board and management powers. Further, some members of Parliament contend that a moratorium would lead to a loss of public confidence.

Restructuring law in financial sector

In the financial sector, according to the financial market acts, the Financial Market Supervisory Authority is responsible exclusively for bankruptcy proceedings involving banks, securities dealers, insurance companies, mortgage bond institutions, fund management companies, investment companies with variable and fixed capital, asset managers of collective investment schemes and limited partnership for collective investments. Recently, the restructuring law in the financial sector has been subject to several amendments.

Outlook

It is expected that the revision of the act will conclude in the next few months. However, some of the amendments – in particular, the social plan obligation – will likely lead to numerous discussions, which may again delay the revision.

Further, as Parliament has demanded that the existing provisions of the Company Law be comprehensively expanded, the Federal Council will have to provide a supplementary report on pre-moratorium restructuring provisions in the Company Law. The goal will be to strengthen the responsibility of board and management before the initiation of any restructuring or insolvency proceedings. These additional amendments may result in further delays.

For further information on this topic please contact Sabina Schellenberg at Froriep Renggli by telephone (+41 44 386 6000), fax (+41 44 383 6050) or email (sschellenberg@froriep.ch).

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