International Corporate Rescue

ChaseCambria
SOUTH SQUARE
Centre for Commercial Law
UCL LAWS

Published by:
Chase Cambria Company (Publishing) Ltd
4 Winifred Close
Barnet, Arkley
Hertfordshire EN5 3LR
United Kingdom

www.chasecambria.com

Annual Subscriptions:
Subscription prices 2014 (6 issues)
Print or electronic access:
EUR 695.00 / USD 845.00 / GBP 495.00
VAT will be charged on online subscriptions.
For 'electronic and print' prices or prices for single issues, please contact our sales department at:
+ 44 (0) 207 014 3061 / +44 (0) 7977 003627 or sales@chasecambria.com

International Corporate Rescue is published bimonthly.

ISSN: 1572-4638

ARTICLE

Revision of Swiss Insolvency Law Entered into Force 1 January 2014

Sabina Schellenberg, Senior Associate, and **Sanna Maas**, Senior Associate, FRORIEP, Zurich, Switzerland

Based on the experiences gained from the Swissair grounding in 2001, many critical voices have been raised that Swiss insolvency law should be revised and should focus more on the restructuring of companies rather than their liquidation. Now, 12 years after the commencement of the Swissair insolvency proceedings and after various discussions and negotiations in the Swiss parliament, the revised Swiss insolvency law finally entered into force as of 1 January 2014. The revisions focus on facilitated corporate restructuring, and the new legislation thus contains a number of novelties in this regard.

An important change of the new insolvency law is the principle that insolvency proceedings should no longer lead to liquidation of the company but facilitate a restructuring with the same legal entity. Modelled after US Chapter 11 – although in a less extensive form – with the amended law the new instrument of a provisional stay without a special insolvency ground (*provisorische Nachlassstundung*) was created. If a proposed restructuring plan has a reasonable chance of success, a company can file a request with the court and apply for a provisional stay for a maximum four-month period (extendable up to four other months). The hurdles for being granted a provisional stay are rather low. The applicant has to submit to the court a restructuring plan in summary form together with a liquidity plan and current balance sheet and income statement. The provisional stay should be granted in the majority of the cases and already if the chances for a restructuring do not appear impossible. The court decides without delay and can order the measures necessary for preserving the debtor's assets.

A provisional stay should create the space and time to take restructuring measures. Therefore, it need not necessarily be published. The debtor is in possession of the business assets but the court can assign a provisional administrator. However, the latter's tasks are mainly limited to assess the possibilities of a restructuring. During this moratorium phase, enforcement proceedings can neither be initiated nor continued (except proceedings for the realisation of mortgages) and litigations regarding claims against the debtor will be stayed. Periods of limitation and peremptory deadlines do not run and interest cease to accrue for all unsecured claims. In this phase it will be assessed whether the debtor's financial situation would allow for an out of court-restructuring or a composition agreement with dividend payments (*Nachlassvertrag mit Dividendenvergleich*), or whether liquidation by means of composition agreement with assignment of assets (*Nachlassvertrag mit Vermögensabtretung*) or bankruptcy proceedings (*Konkursverfahren*) is the more suitable course of action.

If it was possible to implement a restructuring of the distressed company in this phase of a provisional stay, the debtor may require that the moratorium is lifted and continue business. Otherwise, once the provisional stay has expired, the court either declares the company bankrupt or grants a definitive stay (*definitive Nachlassstundung*) in order to continue the restructuring measures or to draft an in court-composition agreement. The effects of a definitive stay are the same as those of a provisional stay. But here, the court decides on the appointment of an administrator to supervise the debtor. However, as under the previous law, the debtor can continue to manage its business, monitored by the administrator. With regard to fixed assets only, the 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 gift. In this respect, the new law provides a crucial implementation for a restructuring. As restructurings often include sales of single parts of the business in order to generate cash, the law now provides that such sales should not be challenged by way of claw back actions if the administrator's consents is given.

A further crucial amendment of the new insolvency law deals with the extraordinary termination of long-term agreements during the moratorium phase. For the purpose of restructuring, a debtor shall be given the option whether or not to continue a long-term agreement and in particular is 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.

Although all this facilitations for a restructuring of distressed companies have a debtor-friendly focus, it was also an aim of the revision to strengthen creditors' participation rights in the early stage of a restructuring proceeding. Unlike under the previous law, there is now the possibility to appoint a creditors' committee already at the stage of a definitive stay. The decision as to whether a creditors' committee should be appointed is, however, at the full discretion of the court. The court's decision will depend mainly on the complexity of the case and the specific circumstances. On the other hand, the legislator refused to incorporate a provision that would allow the creditors' committee to issue instructions or orders to the administrator. Also under the regime of the revised insolvency law, the creditors' committee's competence is limited to the supervision of the administrator and to make recommendations only.

Finally, there are some important novelties regarding claw-back actions. While the grounds for challenging transactions within a certain hardening period prior to insolvency proceedings remain the same, there are some procedural changes, the main goal of which was to facilitate claw back actions against transactions between related parties. The new law stipulates that in related parties' transactions the related party shall bear the burden of proof that there was no disproportion between the transfer and the consideration paid (voidability of transactions at an undervalue). Also, the related party has to present evidence that it did not know the debtor's intention of disadvantaging its creditors, or that such intention was not recognisable (voidability of transactions with the intent to disadvantaging creditors).

Impact of the insolvency revision on employment law

The revision brings about a real novelty regarding the transfer of an enterprise or parts thereof in an insolvency proceeding, as the obligations to transfer all employment relations to the acquiring party and the joint and several liability of the acquiring party for claims of the employees that have become due prior to the transfer does no longer exist. Whether and to what extend the employment agreements are transferred to the acquiring party has now to be agreed upon by the transacting parties. The acquiring party therefore can decide which employees it wants to take on board.

With regard to the employees that the acquirer agrees to take over the employment agreements are transferred to the acquiring party with all rights and obligations. The employees still have the right to decline the transfer. As a real novelty the acquirer will no longer be jointly and severally liable with the previous employer for employees' claims which have become due prior to the transfer. This important part of the revision has been inserted at the last moment by the Swiss parliament even after the Swiss Federal Council had already officially communicated on the proposed changes. Thus, the acquiring party no longer has to make reservations for claims by the employees for the time before the transfer has taken place. All Employees whether transferred to the acquiring party or not will have to submit their claims against their former employer in the insolvency proceeding of the employer.

Furthermore, the revision brought clarification to the question whether the legal provisions of a mass dismissal will be applicable in an insolvency proceeding. It is now clear that the provisions of mass dismissal are not applicable to a bankruptcy proceeding and to a composition agreement with assignment of assets. The provisions are however applicable in a provisional and also definitive stay with the creditors and before the court has approved such moratorium, if a bankruptcy proceeding has been deferred (*Konkursaufschub*) and with an ordinary assignment of assets.

Under the until the end of 2013 existing law, all employment agreements had to be transferred to the acquiring party, unless the employee himself declined the transfer. The acquirer had no right to refuse the transfer of certain employees and they were jointly and severally liable for all claims that have become due before the transfer. The situation was unsatisfactory as this provisions could not guarantee the continued employment as the acquirer was free to terminate the employment agreements after the transfer as long as he observed the notice period. Furthermore, there were various open questions in case of a restructuring. The Swiss Federal Court held for example that the joint and several liability for the claims of the transferred employees is not applicable for the acquiring party if the transfer occurs in a bankruptcy proceeding. On the other hand, the Swiss Federal Court held that the acquirer was jointly and severally liable in a moratorium with the creditors and it was unclear what the situation was in a composition agreement with assignment of assets. Open questions also remained with regard to the applicability of the provisions on mass dismissal in an insolvency proceeding. This uncertainty on the legal consequences of a transfer of an enterprise impeded restructurings.

The revision brings about an important and welcome clarification and simplification for restructuring in case of an insolvency proceeding and, therefore, also more predictability of legal decisions in a reorganisation situation. Furthermore, transfers of enterprises or parts thereof in insolvency proceedings have become easier and more feasible as the parties have gained flexibility in deciding which employment agreements will need to be transferred to the acquiring party and as the liability of the acquiring party for claims of the employees from the transferred enterprise has been abandoned. The revision is thus an important step towards an effective financial restructuring law and in consequence a welcome mean to save workplaces as it has become easier to acquire enterprises or parts thereof in a restructuring proceeding.

To find a political consensus the employees' rights in case of a mass dismissal outside an insolvency proceeding have been strengthened with the revision. The employers now not only have to consult with their employees, but to observe a general duty to adopt a social compensation plan if they want to let go more than 30 employees.

The duty to adopt a social compensation plan is new to Swiss employment law. All enterprises with more than 250 employees, who want to let go more than 30 employees, have to observe the duty to adopt a social compensation plan. It is remarkable that the employers do not only have a duty to negotiate such a social compensation plan but will in fact have to agree on such a plan. If the involved parties cannot find an agreement, an arbitral tribunal has to hand down a binding decision on a social compensation plan. In a subsequent insolvency proceeding, the binding decision of the arbitral tribunal prevents that the social compensation plan can be challenged (*res iudicata*). Such compensation plan shall define means to avoid a dismissal or reduce its numbers or mitigate its impact. The plan can foresee for example shorter notice periods for the employees only, paid professional trainings, outplacement services, compensatory wage increases if the employee is offered another position, compensatory payments, early retirements, payments in case of hardship or bonus payments. As there are no detailed rules on the content of such a social compensation plan, it is difficult to predict what concessions are in fact to be made towards the employees. To prevent exaggerated claims by the employees and to narrow the discretion of an arbitral tribunal the law foresees that the social compensation plan shall not compromise the existence of the enterprise.

Outlook

The new insolvency law and in particular the related revisions in employment law have created a wide range of options for action for a distressed company. It remains to be seen how these various restructuring means will be used and how the new legislation works in practice.

International Corporate Rescue

International Corporate Rescue addresses the most relevant issues in the topical area of insolvency and corporate rescue law and practice. The journal encompasses within its scope banking and financial services, company and insolvency law from an international perspective. It is broad enough to cover industry perspectives, yet specialized enough to provide in-depth analysis to practitioners facing these issues on a day-to-day basis. The coverage and analysis published in the journal is truly international and reaches the key jurisdictions where there is corporate rescue activity within core regions of North and South America, UK, Europe Austral Asia and Asia.

Alongside its regular features – Editorial, The US Corner, Economists' Outlook and Case Review section – each issue of *International Corporate Rescue* brings superbly authoritative articles on the most pertinent international business issues written by the leading experts in the field.

International Corporate Rescue has been relied on by practitioners and lawyers throughout the world and is designed to help:

- Better understanding of the practical implications of insolvency and business failure – and the risk of operating in certain markets.
- Keeping the reader up to date with relevant developments in international business and trade, legislation, regulation and litigation.
- Identify and assess potential problems and avoid costly mistakes.

For more information about *International Corporate Rescue*, please visit www.chasecambria.com