FROEIEP

ZURICH | GENEVA | ZUG | LAUSANNE | LONDON | MADRID

February 2014

INSOLVENCY & EMPLOYMENT BRIEFING

REVISION OF INSOLVENCY LAW ENTERS INTO FORCE AS OF 1 JANUARY 2014

Sabina Schellenberg / Sanna Maas

Drawing 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 measures in this regard.

An important novelty of the new insolvency law is that insolvency proceedings should no longer lead to liquidation of the company but facilitate a restructuring. Similar to US law (Chapter 11) – although in a less extensive form – the amended law provides for a stay without a special insolvency ground (moratorium) if a proposed restructuring plan has a reasonable chance of success. The new law follows the principle of a provisional stay for a maximum four-month period (extendable up to four other months). The hurdles for being granted a provisional moratorium are rather low and a provisional stay can be obtained already if the chances for a restructuring do not appear impossible.

During this provisional stay, 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, or whether liquidation (composition agreement with assignment of assets or bankruptcy proceedings) is the more suitable course of action. This procedure should create the space and time to take restructuring measures. Therefore, a provisional stay need not necessarily be published.

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 in order to continue the restructuring measures or to draft an in court-composition agreement. The court then 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. 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 time 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 (voidablity 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 obligation to transfer all employment relations to the acquiring party 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 have been transferred to the acquiring party, the acquirer will be jointly and severally liable with the previous employer for employees' claims which have become due prior to the transfer or which will later become due until the date on which the employment relationship could have been terminated validly. The acquiring party thus has to make reservations for such liabilities in the transfer agreement. For claims of employees that have not been transferred, the acquiring party has no liability whatsoever. These employees will have to submit their claims in the insolvency proceeding. This revision thus brings about an important and welcome clarification and simplification for restructuring in case of an insolvency proceeding. Therefore, the revision will bring 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 therefore can also limit their liability for claims of the employees from the transferred enterprise. 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.

On the other hand, outside an insolvency proceeding, in case of a mass dismissal, a general duty to adopt a social compensation plan is incorporated. This 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.

Sabina Schellenberg
sschellenberg@froriep.ch
Tel. +41 44 386 60 00

Sanna Maas
smaas@froriep.ch
Tel. +41 44 386 60 00

OUR INSOLVENCY AND EMPLOYMENT SPECIALISTS

Marcel Steinegger, Zurich
msteinegger@froriep.ch
Tel. +41 44 386 60 00

Roland Kaufmann, Geneva
rkaufmann@froriep.ch
Tel. +41 22 839 63 00

Dunja Koch, London
dkoch@froriep.ch
Tel. +44 20 7236 6000

WHO IS FRORIEP?

Founded in Zurich in 1966, Froriep is one of the leading law firms in Switzerland, with around 90 lawyers and offices in Zurich, Geneva, Lausanne and Zug, as well as foreign offices in both London and Madrid, serving clients seeking Swiss law advice.

We have grown a domestic and international client base ranging from large international corporations to private clients. Our unique, truly integrated, international structure mirrors our strong cross-border focus. We value and promote continuity and strong client relationships. Our teams are tailor-made, assembled from every practice area and across our network of offices.

Many of our lawyers are recognised as leaders in their practice areas, and our clients benefit from our in-depth knowledge and the rich diversity of talents, languages and cultures that makes our lawyers particularly versatile and adaptive.

GENEVA
4 Rue Charles-Bonnet
CH-1211 Geneva 12
Tel. +41 22 839 63 00
Fax +41 22 347 71 59
geneva@froriep.ch

ZURICH
Bellerivestrasse 201
CH-8034 Zurich
Tel. +41 44 386 60 00
Fax +41 44 383 60 50
zurich@froriep.ch

ZUG
Grafenaustrasse 5
CH-6304 Zug
Tel. +41 41 710 60 00
Fax +41 41 710 60 01
zug@froriep.ch

LAUSANNE
9a Place de la Gare
CH-1003 Lausanne
Tel. +41 21 863 63 00
Fax +41 21 863 63 01
lausanne@froriep.ch

LONDON
17 Godliman Street
GB-London EC4V 5BD
Tel. +44 20 7236 6000
Fax +44 20 7248 0209
london@froriep.ch

MADRID
Antonio Maura 10
ES-28014 Madrid
Tel. +34 91 523 77 90
Fax +34 91 531 36 62
madrid@froriep.ch