INSOLVENCY & RESTRUCTURING - SWITZERLAND

New rules for reorganising financially distressed companies

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Introduction

On 23 November 2016 the Federal Council presented a bill to modernise Swiss company law, including a reform of the corporate restructuring rules which sought to create incentives for financially distressed companies to take necessary actions at an early stage and thus avoid insolvency and bankruptcy proceedings.

In the course of parliamentary discussions, the bill was criticised for being "overloaded". In a recent vote, the Senate rejected calls to reopen the debate on the bill. Underpinning this decision was the so-called 'Responsible Business Initiative', which seeks to introduce new obligations for Swiss-based companies to assess the impact of their activities and those of subsidiaries on human rights and the environment in Switzerland and abroad.

However, in June 2018 the House of Representatives narrowly voted to support the bill. While, the next steps in the legislative process are unclear, the House of Representatives will likely reopen the debate on this bill in its next session in Summer 2019.

The new bill proposes additional protection from claw-back actions for creditors which grant loans that are pre-approved by an insolvency administrator.

Composition proceedings

Composition proceedings are generally used to avoid bankruptcy proceedings and facilitate the restructuring of a company that is in financial distress by implementing certain measures to preserve its assets, such as appointing an insolvency administrator and granting a debt moratorium (ie, no interest can accrue during the composition proceedings and no new debt enforcement proceedings can be initiated against the company).

Composition proceedings are usually initiated at a company's request (Article 293 of the Debt Enforcement Bankruptcy Act). The court will grant a provisional debt moratorium unless there is no realistic prospect of restructuring the company. During a provisional debt moratorium, which could last up to eight months under the new bill (subject to a proposed amendment to Article 293a(2) of the Debt Enforcement Bankruptcy Act), the court-appointed insolvency administrator must assess the chances of restructuring or reaching a composition agreement with the company's creditors. If a successful restructuring or the conclusion of a composition agreement seems likely, the court will grant a definitive debt moratorium (Article 294 of the act).

During the provisional or definitive debt moratorium, the company may continue with its daily business operations. However, the company will be supervised by the court-appointed insolvency administrator and certain transactions will require the administrator's prior approval.

New bill

The novelty that the new bill would introduce to debt moratorium proceedings under Article 285(4) of the Debt Enforcement Bankruptcy Act is the additional powers granted to insolvency administrators. Under the existing act, loans or similar restructuring efforts made by creditors may be exempted from claw-back actions only if such efforts have been pre-approved by the court. The new bill would give the administrator similar powers, and loans or similar restructuring efforts that have been pre-approved by the administrator would also be exempted from claw-back actions. Pre-approved creditors would benefit from a strong preferential position in case of bankruptcy, which in turn should make it easier for financially distressed companies to obtain additional liquidity for their ongoing business operations.

However, the proposed bill would not affect or improve the legal situation for creditors which:

- have granted loans or made similar restructuring efforts; or
- have taken part in a transaction that was executed before the opening of any official debt moratorium or other insolvency proceedings (such transactions would continue carrying the risk of claw-back actions in case of bankruptcy).

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