

Corporate Finance/M&A - Switzerland

Acquisitions facilitated by revised restructuring provisions

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On January 1 2014 selective amendments to the Debt Enforcement and Bankruptcy Act and the Code of Obligations entered into force. The revised law increases the attractiveness of acquisitions of distressed businesses and facilitates restructurings.

Employment agreements

Under previous employment law, a potential acquirer of a business or part of a business in an insolvency proceeding was obliged to take over all employment agreements, unless the employees did not accept the transfer. Moreover, the acquirer was jointly and severally liable for all claims of employees that fell due before the acquisition, irrespective of whether the acquisition was structured as an asset deal or share deal. Consequently, under the old law, a clean start for the acquirer with reduced manpower and new employment terms and conditions was impossible, and therefore in the past distressed sale transactions and related restructurings were often doomed to fail.

In comparison, under the revised employment law, a potential acquirer can now take over only selected employment agreements. Further, if the target is already in insolvency proceedings, the acquirer's joint and several liability has been abolished; a potential acquirer can thus take over the business with less burden and fewer risks. In addition, the newly introduced requirement to provide for a severance scheme for businesses with more than 250 employees does not apply to mass dismissals occurring during bankruptcy or composition proceedings that end up with a composition agreement.

Non-avoidability regime

The revised law clarifies that transactions during a composition proceeding between the debtor and an acquirer may no longer be challenged under the avoidance regime of the Bankruptcy Code if they have been approved by a composition court or ratified by decision of a creditors' committee. This change will facilitate the sale of a business to an acquirer during a composition moratorium and will also benefit the insolvency estate by receiving a higher purchase price due to the increased certainty of the transaction.

However, if the acquirer is a related party (including an affiliated group entity), the transaction can now be challenged more easily, since the new law shifts the burden of proof from the challenging party to the affiliated or related acquirer. For instance, in case of an avoidance action for an alleged transaction at an undervalue, the acquirer must prove that there was no imbalance between the assets sold and the consideration paid. Likewise, in case of an avoidance action for intent, the acquirer must prove that it could not have been aware of the intention of the transferor to privilege certain of its creditors (eg, intragroup creditors). As a result, intercompany transactions must be carefully analysed in advance, particularly in view of the fact that a successful avoidance action also exposes the board and management of the transferor and also possibly the board and management of the transferee to directors' and officers' liability.

According to the revised law, the statute of limitations can be interrupted and therefore the claims under the avoidance regime will not be forfeited by a mere lapse of time.

Composition proceeding

The revised act makes the composition proceeding more attractive for both the company and a potential acquirer. For a company in distress, the new law makes it easier to overcome the legal hurdles of a composition proceeding. Compared to the

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previous law, the requirement to submit a draft of the composition agreement has been abolished. Instead, it is sufficient to submit a provisional restructuring plan. The composition court shall immediately approve the provisional composition moratorium and will refuse the application only if there is obviously no chance of a successful restructuring or a confirmation of a composition agreement.

Further, each composition proceeding will start with the approval of the provisional composition moratorium and can be terminated in case of a successful clean-up during the moratorium (eg, by mutual agreement of the creditors or by granting of new funds). It is no longer mandatory to appoint an administrator and publish the provisional moratorium. This transforms the moratorium into a restructuring instrument that offers a more realistic and practical alternative to the postponement of bankruptcy pursuant to Article 725a of the code – an instrument which has rarely been used in the past. The maximum duration of the provisional moratorium is four months. Thereafter, a definitive moratorium is required. The definitive moratorium must be published and requires the appointment of an administrator.

Another major change is the extraordinary termination right during the moratorium of the company in distress related to long-term contracts. This termination right is subject to the consent of the administrator. The counterparty is entitled to compensation, which may be filed only as an ordinary composition or bankruptcy claim.

The new law makes it clear that after the opening of bankruptcy proceedings claims arising under long-term contracts (eg, loan agreements or lease agreements) can be made only for the period up to the end of the next termination period or agreed fixed period. Benefits of the creditor during this period will be deducted from the claim.

Further, the new law specifically provides for a composition agreement providing for the forming of a new company (in practice, often a subsidiary). In such a case, creditors may be compensated not only in cash, but also in shares of the new company. The composition agreement can be structured either as a dividend arrangement or as a composition agreement with assignment of assets.

Finally, the privilege for value added tax claims has been abolished in the interest of equal treatment of the creditors.

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