

Insolvency & Restructuring - Switzerland

Debt collection and insolvency: is it all about money?

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Introduction

Swiss debt collection and insolvency are liberal when it comes to initiating proceedings. This leads to potential (and actual) abuse of law, both from the alleged creditors and the debtor.

The Federal Council and the Federal Supreme Court recently reacted against the potential abuse of law in debt collection and insolvency proceedings.

Measures against abusive insolvencies

In certain insolvency cases, it has been shown retrospectively that a company could pursue its activities for a long time even though it has not paid taxes and other state claims. This was possible as the law prevented the opening of insolvency proceedings because of unpaid public claims (originally, the idea was that a creditor company should not go insolvent because of state claims: the state should be entitled to seize only the amount necessary to cover the claim).

Moreover, in order to escape from other creditors, a debtor could request without detailed reasoning the opening of insolvency proceedings, and in most cases would not have to pay an advance on the costs. In contrast, a creditor requesting the opening of insolvency proceedings must pay the advance on costs and bear these costs.

The Federal Parliament accepted a motion according to which new rules will be set in place against abusive insolvencies and the misuse of some debt enforcement provisions. In April 2015 the Federal Council submitted a revision dealing with these problems.

The Federal Council suggested that the competent state agencies should be entitled to request the opening of insolvency proceedings over a debtor company for unpaid taxes or fines, thus ending the special treatment for state claims and its misuse by smart debtors. In addition, the Federal Council proposed that board members of the debtor company who are registered in the commercial register shall be held jointly liable for the costs of summary insolvency proceedings that cannot be covered by the insolvency estate, insofar as the board does not prove that they have not committed any fault. This new rule does not liberate the creditor that requests the opening of the insolvency proceedings to pay the advance on costs but it will allow the creditor that paid the advance on costs to request the board members to reimburse the costs if the creditor could not recover them otherwise.

The proposed revision is an important step towards a fairer insolvency procedure. However, does it take into account creditors' interests? Under the proposed rule, the creditors that requested the insolvency proceedings and had to pay the advance on costs will still bear a financial risk, as they must initiate additional litigation proceedings against the board members in order to recover the advance on costs in relatively low amounts. The question remains whether it is worth chasing the respective board members.

Negative claim against abusive proceedings

It is straightforward to initiate debt collection proceedings against a debtor or company located in Switzerland – a form must be filled in stating the amount that the debtor allegedly owes and the reason or document on which the debt is based. After submitting the payment request to the debt collection office, the office will notify a payment request to the alleged debtor. The existence of the claim and related problems will be examined at a later stage. The debtor can oppose the request, forcing the creditor to initiate court proceedings in order to set aside the opposition. However, the creditor can also decide not to file anything, leaving the debt collection proceedings pending.

The problem with the simplicity of the process is that any filed debt collection form and subsequent payment order form against the debtor is registered in a debt collection register. Any third party with a

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valid interest in information about the debtor's financial standing can access this register. An extract register is often required by contracting parties before contracts are concluded. For instance, in order to be chosen as a tenant in tenancy agreements, landlords typically require an extract of the debt collection register. If the potential tenant has an entry in it, the landlord might think twice before issuing the tenancy agreement to this debtor. An alleged creditor or bad faith third party can easily cause disruption by initiating debt collection proceedings without any valid reason.

If the debtor thinks that the debt does not exist (or that it has already been paid) and does not want to wait for the creditor to initiate court proceedings, the debtor may file a negative claim against the alleged creditor and request that the court formally declares that the debt does not exist. This negative claim forces the alleged creditor to prove its claim during the proceedings – if the alleged creditor cannot produce all required evidence on time it will fail to prove the alleged claim and lose the court proceedings. However, until now the Federal Supreme Court has had restrictive jurisprudence regarding such claims and has requested that alleged debtors prove that an entry in the register would hinder their economic freedom (eg, if banks refuse to grant a loan based on the entry); moreover, the Federal Supreme Court has found that alleged debtors have not been hindered in their economic freedom when the alleged debt has been low.

In a recent judgment, the Federal Supreme Court decided to relax its jurisprudence. An alleged debtor may now initiate a negative claim against the alleged creditor without having to prove any impediments in its economic freedom. Only under restrictive conditions may the alleged creditor argue that the negative claim is inadmissible.

This new ruling allows the alleged debtor to force the creditor – which has still not tried to set aside the debtor's opposition – to prove its alleged claim faster than the creditor had intended to. If the court finds that the claim does not exist, the debtor may request that the entry in the debt collection register is not visible to third parties.

This new judgment allows combative alleged debtors to be armed against abusive debt collection proceedings without changing underlying fundamentals of the Swiss debt collection system. If an alleged creditor can initiate debt collection proceedings, the alleged debtor can now easily initiate court proceedings against the creditor. Moreover, if the claim is abusive and the court grants a judgment in favour of the alleged debtor, the alleged creditor must pay compensation if the debtor is represented by a lawyer. The question remains whether the alleged creditor will be willing to voluntarily pay this compensation. If not, the alleged debtor can initiate proceedings to recover the legal fee.

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