INSOLVENCY & RESTRUCTURING LAW BRIEFING

› NEWSFLASH: SWISS INSOLVENCY / MORATORIUM

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The insolvency of Petroplus has increased the few debt moratorium cases by one and reminded us of its importance. Despite a comprehensive revision of the Swiss Debt Collection and Bankruptcy Act in 1997 there has been little change to the fundamental idea of bankruptcy law that both available options, namely bankruptcy and debt moratorium, lead mostly to the same result and that is: liquidation.

It is not that bankruptcies and moratoria are limited to a few unknown companies. Not the least since the famous Swissair grounding, the legal community has been involved in some major proceedings and assisted foreign creditors in connection with queries regarding potential restructuring, claims against the estate or representations in creditors' committees. Whether a company's assets consist of aircraft on a tarmac or oil in tanks located abroad, the debt moratorium granted to Petroplus may lead to some old and new international insolvency law questions.

Voices about the need for a reform increased already in connection with the Swissair proceedings and at the end of 2010 the Swiss Federal Council finally presented a bill for an amended bankruptcy law the main aim of which is to facilitate restructuring of insolvent companies. The amended law would introduce a new chapter on debt moratorium. The Parliament will discuss the bill later this year.

For the time being however the Swiss debt moratorium features are as follows:

- Once directors have notified courts about the insolvency or over-indebtedness of a company the judge will declare it bankrupt or alternatively grant a debt moratorium, or rarely postpone the bankruptcy order if there is a prospect of restructuring.
- Larger companies tend to seek for a moratorium. Unlike in other jurisdictions, usually the purpose of a moratorium is not to continue to do business but to find a better way of liquidation for creditors than in bankruptcy proceedings.

Phase I: Moratorium

- When granting a moratorium, the court will appoint an administrator. The company or a creditor can make suggestions with respect to the person of the administrator however their proposal is not binding on the judge.
- Companies may in principle continue their business activities under the supervision of the administrator, however (i) certain specific acts (if ordered by the court) may require the administrator's consent and (ii) the sale or pledge of fixed assets (incl. shareholdings), granting guarantees and making gifts, require the consent of the court. A lack of consent would make the transaction null and void.
- Administrators may consider restructuring proposals made by directors; however their role is not to restructure the company if such restructure is not in the interest of all creditors. The principal task of an administrator is to draft a composition agreement which is likely to be accepted by the creditors. As soon as the draft composition agreement has been drawn up, the administrator call a meeting of creditors.

- In principle a debt moratorium in Switzerland is also intended to cover assets abroad. Whether its effect is recognised abroad is decided according to the applicable foreign law. Hence, the scope for attachment available to the Swiss judge and the administrator may be restricted by orders of foreign courts and authorities. Conceivably this may lead to conflicts of jurisdiction with respect to assets located abroad.

Phase II: Composition Agreement

- The aim of a composition agreement can either be to offer the creditors the repayment of a certain portion of their claims (ordinary composition agreement) or, more common, to achieve an assignment of assets to third parties in consideration of a payment to the estate, to be distributed among the creditors (composition agreement with assignment of assets).
- The ratification of the composition agreement does not require the consent of all creditors. A composition agreement is ratified by (i) majority of the creditors whose claims equal to 2/3 of all claims or (ii) a quarter of the creditors whose claims equal 3/4 of all claims.

Phase III: Implementation of the Composition Agreement

- By means of the more common composition agreement with assignment of assets, a company's capacity to do business and dispose of its assets elapses with the confirmation of the composition agreement by the court. In this case creditors exercise their rights through the liquidators and a creditors' committee, who are elected at the creditors' meeting. Liquidators are supervised and controlled by the creditors' committee and the latter may decide on objections by creditors against the liquidators' orders regarding the sale of assets.
- Transactions entered into by the company prior to the confirmation of the composition agreement can be subject to claw back if such transaction are considered to be at undervalue or have been entered into in order to divest assets before the creditors or the administrator had access.

Creditors' Position

- In composition agreements with assignment of assets creditors are represented in creditors' committees. The principle of equal treatment, provided by statute, does not allow the administrator or liquidator to give preferential treatment to claims of individuals or groups of persons, regardless of the urgency of such treatment from the creditor's point of view. There are a couple of exceptions:
  - In general, secured claims may be enforced and settled directly out of the proceeds of the security; and
  - claims of employees, accident insurances and pension funds are privileged.
- All creditors who are not privileged rank pari passu irrespective of the maturity or "seniority" of their claim. Even claims which are (still) conditional must be treated equally (although subject to the conditions being satisfied).
- Again, the purpose of a moratorium is not to continue business (the ordinary composition agreement being the exception) but to find a better way of liquidation for creditors. Shareholders wishing to take restructuring measures may be able to do so. This includes the right to sell their shareholding. However they must convince the administrator/liquidator that such restructuring is the best solution not for the company, but for the creditors.

As mentioned above, reform efforts have already been initiated. Although the conditions of insolvency (e.g. over-indebtedness) remain regulated by Swiss corporate law, there will be amendments in the bankruptcy law regarding duties of directors in case of insolvency (and not only over-indebtedness), facilitating a composition agreement without liquidation and speeding up the proceedings in general. It remains to be seen whether this increases restructurings of insolvent companies.

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The Firm

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The Insolvency and Restructuring Team

The Insolvency and Restructuring team assists financial institutions and other creditors, as well as companies in financial distress on all aspects of Swiss insolvency law. The team calls upon the expertise of our lawyers from the corporate, banking and finance, aviation, banking, employment, intellectual property and tax law groups, and is thereby able to provide a comprehensive contentious and non-contentious advice. We have been involved on complex cross-border restructuring and insolvency work.

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