

New restructuring law in Switzerland

Birgit Sambeth Glasner and Florence Pastore describe the key features of the new restructuring laws which have recently come into force



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On 1 January 2014, a new restructuring law¹ entered into force in Switzerland².

Combining a partial revision of the Swiss Debt Enforcement and Bankruptcy Act (DEBA), notably of its Chapter 11 on Composition Proceeding, with the introduction of new provisions to the Swiss Code of Obligations (CO), the amended legislation is designed to facilitate the early implementation of restructuring measures.

In the wake of the grounding of Swissair on 2 October 2001, which led the national carrier to file for a composition proceeding, the Swiss authorities were urged through various parliamentary interventions to assess the need for a possible revision of the Swiss restructuring law. The group of prominent experts concluded that the system was generally effective yet improvable.

A decade after, without having been drastically changed, the system has been improved and adjusted into a more restructuring oriented tool:

- First, selected changes are made to Composition Proceeding, which notably reinforce the Moratorium Phase and create space and time for the debtor and its creditors to initiate a constructive process of debt restructuring.
- Furthermore, the concerns expressed by the left-wing parties about the protection of employees have been taken into account, with the introduction of an obligation to negotiate a social plan, if specific conditions are met.
- Lastly, amendments are brought to avoidance provisions

applicable within groups of companies.

This contribution intends to present the main features of the Swiss revised restructuring law, focusing on the enhancements brought to the Composition Proceeding³.

Basically, a Composition Proceeding can be defined as a proceeding pursuant to which a debtor and its creditors seek to agree on a modification of the terms and conditions relating to the performance of the debtor's obligations, subject to the approval of the creditors and to the Court's homologation. It is divided into a "Moratorium Phase" (provisional and definitive stay), followed by the creditors' examination and approval of the suggested Composition Agreement, and the Homologation by the Court.

The amended legislation significantly improves the Moratorium Phase, making it an authentic and restructuring-oriented stay, dedicated to exploring and implementing financial, accounting or organisational restructuring measures while being protected from enforcement actions.

If the restructuring succeeds before the expiration of the Moratorium Phase, the stay is lifted *ex officio*. The purpose of the moratorium has been extended and strengthened as, under the previous legislation, it necessarily resulted either in the confirmation of a Composition Agreement or in a Bankruptcy Decree.

Simplified access to the Composition Proceeding

The access to the Composition

Proceeding is facilitated. Whereas the proceeding can still be initiated by the debtor, by a creditor or by the competent court upon notification of over indebtedness or bankruptcy filing, the requirements for the debtor's request have been significantly simplified. The latter shall substantiate its current and future assets and returns and provide a provisional restructuring plan but the provision of a draft Composition Agreement is no longer required.

Provisional Stay

The Composition Proceeding begins with a Provisional Stay - for a maximal duration of four months - granted immediately upon filing and without the creditors being heard.

Appointment and duties of a Provisional Commissioner

Unless specific conditions are met⁴, a Provisional Commissioner is appointed and entrusted with the duty to safeguard third-parties' interests and to analyse the chances of restructuring the debtor or of homologating a composition agreement.

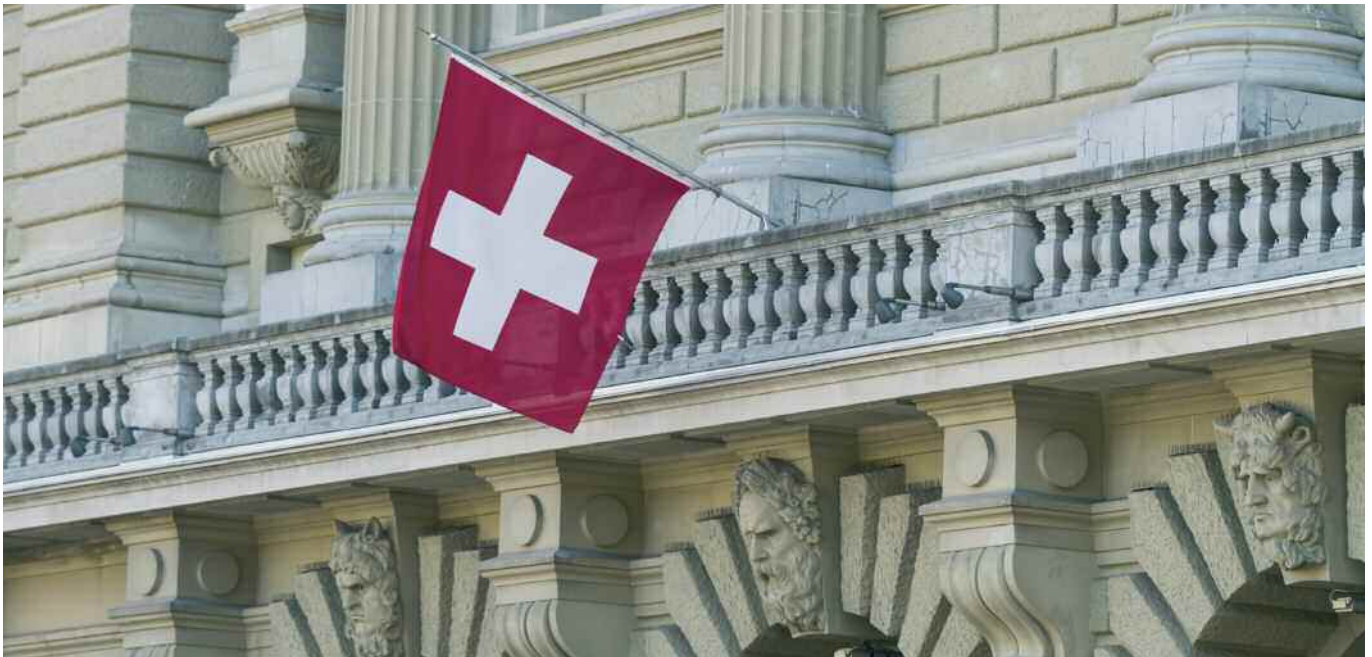
Based on this assessment, the Provisional Commissioner's task is either to supervise the preparation of the restructuring measures and their implementation or to assess the feasibility of a Composition Agreement and to prepare a draft.

(Non-)disclosure of the Provisional Stay

Upon filing of a reasoned application and provided that interests of third-parties are protected, the publication of the Provisional Stay can even be waived by the Court, the

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appointment of a Provisional Commissioner being then mandatory.

Definitive Stay

Before the expiration of the Provisional Stay, the Court has to decide *ex officio* either to grant a Definitive Stay or to open a Bankruptcy. The Definitive Stay, of four to six months, can be extended, upon request of the Commissioner, to 12 months and, in complex matters, up to 24 months.

Appointment and duties of Commissioner(s)

During the Definitive Stay, the Commissioners appointed by the Court will continue the restructuring process conducted throughout the Provisional Stay and supervise the activities of the debtor.

Appointment and duties of a Creditors' Committee

A major enhancement is the possible appointment by the court, already at the stage of the Definitive Stay, of a Creditors' Committee in which all categories of creditors will have to be evenly represented (such as employees, banks, financial creditors, representative of noteholders etc).

The Creditors' Committee is

entrusted with the duty to supervise the activity of the Commissioner(s). It is entitled to give recommendations to the Commissioner(s) and is empowered to approve, in place of the Court, a series of transactions⁹ which the debtor is prohibited to perform by himself during the Definitive Stay and which would otherwise be void and null.

Indeed, the transactions conducted during the Stay with the approval of the Composition Court or of the Creditors' Committee cannot be avoided.

Effects on the Creditors' Rights

During the stays, enforcement actions against the debtor can neither be initiated nor continued, this even for privileged claims⁶. In addition, the amended legislation prohibits the initiation of protective measures and attachment proceedings. Lastly, the assignment of a future claim agreed upon before the stay has no effects if the assigned claim arises after the stay was granted.

Further key developments regarding the Composition Agreement:

- First of all, the requirements for the homologation of the Composition Agreement are

eased since a distribution on unsecured and non-privileged claims is not to be guaranteed anymore.

- The new legislation clarifies that the composition dividend can consist of ownership or participation rights in the debtor or in a newly founded company, formalising the commonly developed restructuring practice of transferring the assets of the restructured company to a newly founded subsidiary and of distributing the shares of the same amongst the creditors.
- In case of an Ordinary Composition Agreement, an equitable contribution is to be made by the shareholders and other holders of ownership rights in the company.

Conclusion

The revised legislation brings significant improvements and is restructuring and reorganisation oriented.

First, the composition proceeding and its commencement are enhanced, since the requirements for the granting of a stay have been simplified. Moreover, the stay and its effects are strengthened and broadened, which, combined with



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the possible non-disclosure of the provisional stay, make it an authentic moratorium allowing for an early exploration and implementation of efficient restructuring measures between the debtor and its creditors.

Secondly, with the possibility to terminate ongoing contractual relationship that could prove burdensome for the debtor, more assets are made available for faster and more efficient restructuring measures.

Lastly, the involvement of the creditors is reinforced by the possible appointment of a Creditors' Committee during the moratorium phase, having in mind that a series of transactions are void if not approved by the Court or by the Creditors' Committee.

Nevertheless, in order to ensure the sustainability of the various measures to be possibly taken and of the transactions related thereto, the creditors, the debtor as well as the Commissioners have to be

properly assisted and advised.

Combined with an efficient dispute prevention and resolution strategy, the amendments shall facilitate and encourage the restructuring of distressed companies and help the debtor and its creditors to turn financial crisis into business opportunities⁹. ■

Footnotes

- 1 <http://www.admin.ch/opc/fr/official-compilation/2013/4111.pdf>
- 2 As per the provisions on transitional law, the former rules on composition proceedings apply when a petition for a stay has been filed before the amended legislation entered into force, i.e. before January 1, 2014; other transitional provisions are missing, notably regarding changes to avoidance claims.
- 3 The new legislation brought other important changes, which are not treated in the present contribution. In a nutshell:
 - During a composition proceeding for the purpose of restructuring and continuation of the company, the debtor is entitled, upon the Commissioner's approval, to terminate at any time an ongoing contractual relationship, for the term of its choice (this provision neither applies to composition proceedings pursuing the liquidation of the company nor to bankruptcy proceedings).
 - Changes to avoidance provisions for groups of companies are introduced, whereby a reverse onus of proof provision was adopted for a certain types of avoidance actions in order to prevent the transfer of assets from financially

distressed companies to other group companies.

Accordingly, the burden of proof is shifted to the defendant when the beneficiary of the possibly avoidable transaction is closely related to the debtor. Thus, a natural or legal person (including companies of a group) close to the debtor which has received assets from the latter during the *période suspecte* has to prove that the assets received and the related consideration are not disproportionate or that the fraudulent intention of the debtor was not recognisable to him. If the person closely related to the debtor is unable to provide the required evidence, the respective assets will have to be transferred back.

- 4 For instance if third-party interests are not at stake or if the appointment of a Provisional Commissioner would substantially reduce the assets available.
- 5 i.e. disposing of long-term assets, granting security interests thereon, pledging liens on property, granting sureties or making gifts.
- 6 In case of a non-disclosed Provisional Stay, enforcement proceedings can be introduced but not continued.
- 7 In case of a non-disclosed Provisional Stay, this provision does not apply as long as the Stay has not been communicated to the assignee.
- 8 See "Necessity of facilitated communication and creative dispute resolution in the context of cross border insolvencies, To restructure or to liquidate? How can mediation make the difference", Birgit Sambeth Glasner, UIA Congress 2013 Macao, http://www.altenburger.ch/fileadmin/user_upload/presentations/Birgit_Sambeth_Glasner_UIA_Congress_Macao_2013_To_restructure_or_to_liquidate_How_can_mediation_make_the_difference.pdf

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