Update

Newsflash November 2013

The revised Swiss Restructuring Law

The Swiss Federal Assembly has passed the revised Swiss restructuring law in the closing vote of 21 June 2013. The referendum deadline has expired uncalled on 10 October 2013. The primary aim of the partial revision of the Swiss Debt Enforcement and Bankruptcy Act is to facilitate restructurings.

After the collapse of Swissair in 2001, there were calls for a revision of the Swiss rules for in-court restructurings as set forth in the Swiss Debt Enforcement and Bankruptcy Act (hereafter "DEBA"). An expert committee instituted by the Federal Office of Justice advised to partially revise the current law by selected improvements without the need to fully revise current law. On these grounds the Federal Council opened the formal consultation for a partial revision of the current law. The Federal Assembly passed the revised restructuring rules in the closing vote of 21 June 2013. The referendum deadline has expired uncalled on 10 October 2013. According to a press release from the Federal Council dated 6 November 2013, the partial revision of the Swiss Debt Enforcement and Bankruptcy Act will enter into force on 1 January 2014. The main changes are summarized below.

Moratorium as a Restructuring Instrument

From the perspective of the company to be restructured, it is pivotal that the revised law contemplates the possibility to terminate a successful (provisional or definitive) moratorium without the need to reach a composition agreement or to open bankruptcy liquidation proceedings. As a result, such companies are offered a valuable alternative to an out-of-court restructuring which typically bears increased exposure to liability for the relevant executive bodies (board of directors; management). Furthermore, the company is relieved from the pressure of ongoing debt enforcement proceedings during the moratorium phase.

The attractiveness of the new restructuring rules for short-term restructurings is further bolstered by the fact that, during a provisional moratorium, it is no longer compulsory to appoint an administrator. Moreover, upon a reasoned application, it is permissible not to publish the grant of a provisional moratorium. In case it becomes evident during the provisional moratorium that, within the maximum duration of four months, a successful restructuring cannot be achieved and a definitive moratorium will become necessary, a publication will have to occur in any event, though. In this case, the appointment of an external administrator is mandatory as well.

Obtaining a moratorium will also be simplified. In particular the requirement to submit a draft of the composition agreement is removed from the DEBA (which, at this early stage, is not particularly useful anyway and has become a mere formality under the existing law already). The composition court considers the grant of a provisional moratorium immediately upon receipt of the relevant application and takes further protective measures ex officio. The simplified access to a provisional moratorium combined with the possibility of a termination of the mora-

torium after a successful restructuring by the composition court are major changes that increase the attractiveness of the composition proceedings for restructuring purposes. Accordingly, it is expected that the moratorium route will be more attractive for in-court restructurings than the postponement of bankruptcy (which, however, still remains available).

Tightened Avoidance Regime

Generally, transactions entered into by the debtor prior to initiating insolvency proceedings may be challenged under the avoidance regime.

Under the rev. DEBA, both, the rules regarding avoidance for intent as well as avoidance of gratuitous transactions will experience an inversion of the burden of proof which will work to the detriment of persons or entities which are affiliated with the insolvent debtor. Accordingly, under the revised law the benefitting party must proof that it could not have been aware of the disproportion between performance and consideration (in case of an avoidance action of a gratuitous transaction) or of the intention of the insolvent debtor to prefer certain creditors over others (in case of an avoidance action for intent). Additionally, it is explicitly stated that affiliated group entities qualify as related entities for purposes of the two avoidance actions.

Although case law has already partially reached similar conclusions by means of natural presumptions, this change leads to a considerable tightening of the Swiss avoidance regime, namely insofar as groups of companies are concerned.

In turn, transactions involving the debtor which occur during a moratorium and with the approval of the composition court or a creditors' committee will no longer be challengeable under the revised law (art. 285 para. 3 rev. DEBA). This reform is to be welcomed and will, in particular, facilitate the preservation of (all or part of) the debtor's business under a rescue company or hive-off vehicle as the relevant sales of all or parts of the business activities will be relieved from the risk of being challenged. This may ultimately benefit the estate as it may lead to higher sales proceeds.

Under revised law the time limits to bring forward avoidance actions will be conceived as (interruptible) limitation deadlines (art. 292 rev. DEBA) and no longer as non-interruptible forfeiture deadlines.

Composition Agreement with Company Formation

For the sake of clarity, the revised DEBA now explicitly caters for the possibility of a composition agreement with company formation. Under such an agreement, creditors whose claims are subject to the terms of the composition agreement will not (exclusively) receive dividend payments in cash, but (additionally) participation or membership rights in a newly formed company, which in practice will be formed during the composition proceedings as a subsidiary of the company involved in the composition proceedings. The composition agreement with company formation can take place as part of a dividend agreement but also as part of a composition agreement with assignment of assets (art. 314 para. 1bis and 318 para. 1bis rev. DEBA). According to the legislative materials, this may lead to a forced participation of creditors in the newly established company, which may be particularly problematic if the participation or membership rights to be distributed to creditors are not traded at a market. This view is contested in (older) legal writing, though.

Revision of Employment Legislation

The automatic and mandatory transfer of all employment contracts which are related to a transferred business will be dropped for all insolvency proceedings (art. 333b rev. Swiss Code of Obligations, hereafter "CO"). By way of abolition of this transfer requirement the purchaser of all or part of the business activities of an insolvent company will be in a position to take over only selected employment contracts. This change should support future restructuring undertakings as well.

Furthermore and based on the same spirit, the compulsory joint and several liability of the former employer and the purchaser of the business for those claims of the employee that have become due before the business transfer, or that will become due until the point in time on which the employment contract could have been ordinarily terminated, is dropped under revised law.

The obligation to negotiate a social plan, introduced by art. 335h et seq. rev. CO, is not applicable to mass layoffs taking place during bankruptcy or composition proceedings that are concluded by a composition agreement.

Further Noteworthy Changes

> The privilege for the Swiss Federation's claims for non-paid value added tax in insolvency proceedings (value added tax privilege) which has only entered into force recently will be abolished under the rev. DEBA. Privileging claims for non-paid value added tax has been recognized early on to be fatal for restructurings.

> The option to apply for a postponement of bankruptcy pursuant to art. 725a CO will be kept in force. It remains to be seen whether this instrument, which is only rarely granted in the German speaking part of Switzerland, will be dwarfed by the newly regulated composition proceedings.

> Under the revised law, future claims arising under long term contracts will only be admitted to the schedule of claims if they cover the period until the next possible termination date (calculated from the opening of insolvency) or until the end of the fixed duration of a contract. If the insolvency estate has made use of performances under the long term contracts, art. 211a rev. DEBA provides for the indemnification thereof to be a claim against the insolvency estate. This change removes legal uncertainties under the current law.
With the consent of the administrator the debtor will be in a position to extraordinarily terminate long term contracts during the moratorium against full indemnification of the counterparty. However, special provisions concerning the termination of employment contracts remain reserved.

> In an ordinary composition agreement equity-holders shall also participate in the restructuring efforts (art. 306 para. 1 no. 3 rev. DEBA).

Please do not hesitate to contact us in case of any questions.

Your Contacts

Zurich
Tanja Luginbühl-Hossmann
tanja.luginbuhl@lenzstaehelin.com

Roland Fischer
roland.fischer@lenzstaehelin.com

Telephone + 41 58 450 80 00

Geneva / Lausanne
Daniel Tunik
daniel.tunik@lenzstaehelin.com

Telephone +41 58 450 70 00

Our Offices

Zurich
Bleicherweg 58
CH-8027 Zürich
Telephone +41 58 450 80 00
Fax +41 58 450 80 01
zurich@lenzstaehelin.com

Geneva
Route de Chêne 30
CH-1211 Genève 17
Telephone +41 58 450 70 00
Fax +41 58 450 70 01
geneva@lenzstaehelin.com

Lausanne
Avenue du Tribunal-Fédéral 34
CH-1005 Lausanne
Telephone +41 58 450 70 00
Fax +41 58 450 70 01
lausanne@lenzstaehelin.com

www.lenzstaehelin.com