Dear clients and business friends,

The prevailing difficult economic environment is also reflected in legislation. Developments in the area of restructuring are of the greatest relevance. Whereas the term “restructuring” was up until recently only referred to sporadically in the context of company law (particularly in the Mergers Act) and tax law, this has now developed into an independent field of the law. Below, we discuss a select number of developments in the law of restructuring.

First, we provide an overview of the substance and status of the ongoing revision of the Swiss Debt Enforcement and Bankruptcy Act (the Bankruptcy Act) [SchKG]. We focus primarily on the significant changes planned for how composition proceedings are dealt with. We also dwell briefly on corporate restructuring procedures which have come up for discussion in the context of changes to the Bankruptcy Act, and the supplementary message from the Federal Council that is currently pending with regard to these procedures. We conclude our discussion in this issue of Legal News with a look at the restructuring and insolvency rules which apply in the financial sector.

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1. Ongoing Revision of the Bankruptcy Act

Apart from those rules which apply specifically in the financial sector, the Swiss Federal Debt Enforcement and Bankruptcy Act (the Bankruptcy Act) constitutes the core of the law on restructuring. As a result of the economic crisis which occurred at the beginning of the 1990s, legislators sought to favour the restructuring of affected companies rather than their liquidation. Corresponding amendments came into force on 1 January 1997. The collapse of Swissair in 2001 provided the impetus for the present revision of the Bankruptcy Act. The notion of restructuring also represents the main focus of the ongoing revision. The appointed group of experts came to the conclusion that the existing weaknesses of the Bankruptcy Act could be overcome with targeted improvements, thus obviating the need for a comprehensive revision.

1.1 Status of the Legislative Process

On 8 September 2010, the Federal Council submitted its Message on amendments to the Federal Act on Debt Enforcement and Bankruptcy. The National Council failed to take up the proposed bill during its autumn session. The Council of States on the other hand took up the bill during its 2012 summer session, making several changes. The Law Commission of the National Council then requested that the bill be taken up, and that the bill will be debated in 2013.

1.2 Key Points of the Revision

The declared primary objective of the revision is to make corporate restructuring easier. In this context, the bill sets forth the following measures:

Composition moratoriums are no longer predicated on the objective of providing creditors with a composition agreement, as has been the practice up to now. Demonstrating that the proposed restructuring has a reasonable chance of success during the composition moratorium phase should be sufficient. A composition moratorium could thus be approved for purely restructuring purposes. In the event of a composition agreement (moratorium or dividend) the conditions for approving such an agreement are to be lowered by removing the requirement that third-class claims be secured. In the past, the requirement that third-class claims be secured led to significant funds remaining blocked, thereby impeding the realisation of any composition agreement.

The participation rights of creditors are henceforth to be strengthened, inter alia by the possibility of appointing a creditors’ committee during the moratorium phase.

In the event of a composition moratorium for the purpose of keeping the company running during restructuring, the debtor is to be afforded the possibility of extraordinarily terminating a continuing obligation, subject to the trustee’s consent and provided the opposing party is compensated. In this way it is possible to
terminate a long-term rental contract or usufructuary lease. The planned removal of the retention rights of a landlord or lessor in relation to commercial premises is also intended to facilitate restructuring.

Employment contracts have been explicitly exempted from the right to extraordinarily terminate continuing obligations. In the case of a corporate takeover on the other hand, the obligation under present law to retain all employees is to be discarded. The quid pro quo for this dilution of workers’ rights is the introduction of an obligation to adopt a social plan. It goes without saying that this amendment in particular has been the source of heated debate in the parliamentary hearings.

1.3 Comprehensive Restructuring Process in the Law of Obligations

The moratorium found in the provisions relating to securities in the Code of Obligations is to be removed in the context of the revision to the Bankruptcy Act and is to be integrated into the latter’s provisions on composition procedures. This has also been the subject of disagreement. Some are demanding that the rules on restructuring under company law be comprehensively expanded. The justification for this demand is that under current law, restructuring is usually embarked upon too late, as management tries everything in order to avoid taking matters before a court until it has no other option. In addition, the Bankruptcy Act’s provisions on composition proceedings provide for the disempowering of management, since procedural authority is transferred to third parties. Finally, the granting of a composition moratorium coincides with a loss of confidence, since customers, employees and banks must all anticipate that proceedings will ultimately end in bankruptcy or liquidation.

The Law Commission of the National Council took up this idea and adopted a motion on 29 August 2012, mandating the Federal Council to provide a supplementary report to its 8 September 2010 Message on amendments to the Bankruptcy Act, regarding a comprehensive restructuring procedure under the law of obligations.

2. Developments in the Financial Sector

In the area of finance, the law governing restructuring has evolved to become a distinct legal specialty. Accordingly, the competencies of the Swiss Financial Market Oversight Authority (FINMA) have been expanded. FINMA has exclusive jurisdiction over bankruptcy proceedings involving banks, securities traders, insurance companies, mortgage bond centres, fund management companies, investment companies with variable (SICAV) and fixed capital (SICAF) and limited partnerships for collective investment schemes. It also has an oversight role in the restructuring of these companies.

Recently, the Banking Act has been subject to a large number of amendments and additions. The Banking Act’s revised provisions on restructuring and securing deposits came into force on 1 September 2011 and were subsequently supplemented by “too big to fail” provisions, which for their part, came into force on 1 March 2012. On 1 November 2012 FINMA also issued its Bank Insolvency Directive (BIV-FINMA), which henceforth governs restructuring comprehensively.

3. Outlook

The new bank restructuring rules are already in force. It is to be assumed that - despite the contention surrounding the introduction of the social plan obligation - the revision of the Bankruptcy Act shall be concluded in the coming months. This revision should make corporate restructuring somewhat easier. Economic circles are already demanding more far-reaching legislative reform to make restructuring even easier under company law.

However, even today, the following applies for every company: The earlier the need for restructuring is anticipated, the greater the chance for success of said restructuring and the smaller the pain of any interventions that prove necessary. The best are of course measures that are planned but which do not need to be implemented. However, where such measures should nevertheless prove necessary, the most efficient measures are those that have been carefully planned and properly supported. This is how companies can be retained and jobs secured.

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