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Dear clients and business friends,

What began almost twelve years ago with the appointment of an expert group to examine the need to review the law governing corporate restructuring is now coming to fruition with the entry into force of the new corporate restructuring provisions on 1 January 2014.

The planned amendments to the law on debt enforcement and bankruptcy also entail certain changes to the law of obligations. One novelty is that in the presence of certain requirements, an obligation to enact a social plan arises. A social plan is an agreement by means of which the employer and employees establish measures that, in the event of large reductions in headcount, provide for social-based solutions and mitigate or at least alleviate cases of hardship.

The present contribution hopes to provide an overview on the scope of application and the contents of the new statutory rules on social plans.

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1. Legislative History

After a number of proposals put forward in parliament following the collapse of Swissair the Federal Department of Justice established a group of experts to clarify the need for legislators to act in amending the law governing corporate restructuring. The preliminary draft prepared by the group of experts dated June 2008 was still without any provisions governing the obligation to draft a social plan. Such provisions were first introduced in the consultation proceedings in the first half of 2009 as a supplementary proposal of the Swiss Federation of Trade Unions in cases involving mass layoffs, and were intended to counter-balance the new rule eliminating the obligation to assume all employees of the acquired entity in the event of a corporate takeover. The obligation to draft a social plan found its way into the draft of the Federal Council of September 2010 and was ultimately incorporated - after intense parliamentary debate - into the version of the bill dated 21 June 2013. On 10 October 2013, the deadline for calling a referendum against the planned amendments to the previous law expired without a referendum being invoked, so that the obligation to draft a social plan shall apply with the entry into force of the new provisions on 1 January 2014.

2. Obligation to Draft a Social Plan

2.1 In General

With the exception of federal government personnel and in a limited number of cases in which a collective bargaining agreement requires the drafting of a social plan, employers in Switzerland are under no statutory obligation to draft a social plan.

Social plans are a consensual instrument by means of which measures can be anticipated/enacted to avoid redundancies, or limit the number or mitigate the consequences thereof (Art. 333h [1] of the new Code of Obligations). The new provisions are intended to obligate employers, under certain conditions, to enter into negotiations by law with employees that would culminate in the drafting of a social plan.

2.2 Obligation to Negotiate

Pursuant to Art. 335i of the new Code of Obligations, the obligation to conclude a social plan applies to all entities that employ at least 250 employees where the employer intends to dismiss 30 employees or more for economic reasons within 30 days. Redundancies that take place over an extended period but which are based on the same operational decision are counted together (Art. 335i new Code of Obligations).

The obligation to draft a social plan pursuant to Art. 335k new Code of Obligations does not apply in the event that mass redundancies are made in the context of insolvency proceedings (bankruptcy or proceedings with a view to reaching an agreement with creditors).
2.3 Obligation to Draft a Social Plan outside of Insolvency Proceedings

Outside of insolvency proceedings, the new provisions introduce a general obligation on employers to enter into negotiations with trade unions, any employee representatives or with employees directly, with a view to concluding a social plan in the event of planned redundancies that meet the aforementioned threshold. Where these negotiations fail to reach a consensus, the social plan required under Art. 335j of the new Code of Obligations is to be established under a binding arbitral award of an arbitral tribunal. The law affords the parties unfettered autonomy in terms of the appointment of the arbitral body. Proceedings before the arbitral award are governed by the corresponding provisions of the Code of Civil Procedure (Art. 353 et seq.). In the event of subsequent bankruptcy proceedings or where a liquidation settlement is executed thereafter, the binding nature of the arbitral award means that the social plan can no longer be called into question (nor can it be challenged by means of an actio pauliana pursuant to Art. 285 et seq. law on debt prosecution and bankruptcy).

2.4 Obligation to Draft a Social Plan within Insolvency Proceedings

However, where the company finds itself in insolvency proceedings, an effective obligation to draft a social plan would, given the lack of available assets, be illusory in most cases and would stand in the way of achieving a sustainable restructuring outcome. In the absence of financial means on the part of the employer, the measures enacted in the social plan might not be able to be realised.

In addition to this, the conclusion of a social plan would be unreasonable, because the remaining creditors would be disadvantaged by the resulting asset outflow.

Nevertheless, where an entity or business unit changes ownership within the meaning of Art. 333 Code of Obligations without all employees also being taken over, the consultation rights of employees pursuant to Art. 333a Code of Obligations and (where the relevant conditions apply) those set forth in Art. 335f. Code of Obligations are to be safeguarded. Employees or their representatives thereby obtain an opportunity to submit proposals to the insolvency body (bankruptcy administrations, creditor bodies, commissaires and liquidators) with regard to the measures intended to mitigate the consequences of redundancies. It is then up to these bodies to decide if and to what extent these proposals are to be acted on at the expense of the bankrupt’s estate, and whether a social plan can be subsequently agreed upon.

3. Substance of the Social Plan

The bill does not contain substantive provisions on the social plan, so that the parties hereto are essentially free to structure the plan as they see fit. The social plan can contain such measures as e.g. agreements on shorter termination notices periods for employees than for employers, paid re-training programs, assistance in job-seeking, severance packages, early retirement and benefits in cases of hardship.

It goes without saying that measures agreed in the social plan cannot be differentiated on the basis of illegal criteria (prohibition against discrimination).

Finally, Art. 335h (2) new Code of Obligations provides that the social plan cannot endanger the continued existence of the entity. This avoids a situation where entities which are contemplating restructuring for business reasons decide to refrain from doing so because of the statutory obligation to draft a social plan.

4. Summary

Because of the level of substantive freedom granted, the new statutory obligation to draft a social plan outside of insolvency proceedings allows one to draft tailor-made solutions for a company facing the prospect of redundancies that meet the aforementioned threshold. Nevertheless, in light of the requirements concerning the size of the company and the number of dismissals involved, this obligation will only apply to less than 1% of private companies, albeit accounting for 33% of all employees.

The practical relevance of the new statutory obligation to draft a social plan will be revealed over time. In addition to this, the questions of what priorities need to be made for a social plan or at what point in time an agreement on a social plan is meaningful will have to be answered in practice.