Securitisation transactions: avoidance actions under DEBA

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Introduction

A key consideration for any investor or rating agency is the insolvency analysis of a securitisation transaction. In this context, the insolvency remoteness of the special purpose vehicle (SPV) is a decisive element (for further details please see "Legal considerations regarding SPVs"). Another important consideration are the circumstances under which a securitisation transaction may be set aside in the context of an insolvency proceeding. Therefore, this article focuses on the avoidance actions set out in the federal Debt Enforcement and Bankruptcy Act (DEBA).

Purpose of avoidance actions

Avoidance actions aim to restore to the bankruptcy estate assets which have been withdrawn from the company, as further specified in Articles 286 *et seqq* of the DEBA, to the detriment of the creditors of the estate. Therefore, the purpose of these actions is the annulation of the respective legal acts impairing the execution rights of such creditors, thereby compensating the disadvantage caused by the relevant acts. As a result, where a challenge succeeds, the counterparty must return to the bankruptcy estate any asset received pursuant to the challenged act.

Types of avoidance action

Articles 286 *et seqq* of the DEBA provide for three types of avoidance action relating to:

- gifts and transactions at an undervalue;
- acts undertaken when the debtor was already over-indebted; and
- dispositions made by the debtor in order to disadvantage its creditors or give preference to some of its creditors to the detriment of others.

Voidability of gifts and transactions at undervalue

Article 286 of the DEBA provides that a transaction may be challenged if no or no equivalent consideration is given. The motive for such transaction is irrelevant. In particular, no intent to cause damage is required. Notably, pursuant to an amendment of the DEBA enacted a few years ago, in case of transactions in favour of related parties (including group companies), the burden of proof as to the equivalence of the consideration provided is (contrary to the general rule) with such related party.

Voidability due to over-indebtedness

Pursuant to Article 287 of the DEBA, the following acts may be set aside if effected when the debtor is already over-indebted:

- the posting of collateral for a pre-existing obligation absent a pre-existing undertaking to do so;
- the settlement of monetary claims other than in cash or other commonly used payment methods; and
- the settlement of claims prior to maturity.

Under Swiss law, a debtor is over-indebted if its assets do not cover its liabilities. Over-indebtedness of the debtor when the relevant act is undertaken, as a rule, must be proven by the claimant in an avoidance action.

Voidability for intent

Article 288 of the DEBA provides for the voidability of any act or transaction undertaken by a debtor in order to disfavour or favour certain of its creditors if such intent was or should have been known to the counterparty of such act or transaction. The scope of this provision is not limited to entering into contracts, but basically extends to any of the debtor's acts. As a result and in light of Federal Supreme Court case law, on the verge of bankruptcy, even the payment of a matured claim may qualify as a challengeable act.

Likewise, with respect to transactions between related parties (including group companies), the law presumes that the debtor's intent to disfavour or favour creditors had been apparent to such related party, which accordingly bears the burden of proving that this was not the case.

Applicable suspect periods

The suspect period for avoidance actions is one year for transactions effected at an undervalue. The same period applies to challenges based on over-indebtedness. In the case of an avoidance for intent, a five-year suspect period applies.

The suspect period ends with the adjudication of bankruptcy or, in case of a composition agreement with assignment of assets, the grant of the moratorium. Notably, only the consummation of the challenged transaction or act must be effected within the suspect period. Therefore, the disposal of an asset or the perfection of a security interest may become subject to challenge even if the corresponding obligation has been entered into prior to the relevant suspect period.

Reflection of avoidance risks by market participants

The risk of avoidance actions in Switzerland does not seem to be higher than in most other continental European jurisdictions and, accordingly, is not considered to be a major legal risk by investors and rating agencies. Such analysis is bolstered by the structuring of Swiss securitisations transactions, which typically provide for, among others, dealing at arm's-length terms and ways of preventing the sale of assets to a structure after the debtor is over-indebted.

Nevertheless, it is worth carefully analysing the contemplated securitisation structure prior to its implementation from an overall commercial perspective, taking into consideration the applicable avoidance regime and its interpretation by the Federal Supreme Court.

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