

NewsLetter

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Moratorium and Composition Proceedings under Swiss Law

This newsletter intends to give an overview to certain pertinent aspects of composition proceedings under Swiss law. As such, it shall ease the comprehension of current procedural and material issues in connection with the composition proceedings which were initiated by certain members of the Swissair group. Given the importance, complexity and size of the Swissair case it is to be noted, however, that there are no precedents and it is to be expected that the procedure will require its own rules.

Overview

Composition proceedings under Swiss law are divided into three different stages:

1. Approval of the composition procedure (approval procedure). In this first stage, the court will only deal with a request for a moratorium ("Stundungsgesuch") and evaluate the chances of concluding a composition.
2. The creditors' examination and acceptance of the proposed composition (acceptance procedure).
3. Confirmation of the composition by the court (confirmation procedure). Once a composition is confirmed, it will be executed.



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It is important to note that both Swiss Corporate as well as Swiss Bankruptcy Law strictly follow an entity-by-entity approach. The application of a member of a group of companies as such does not per se affect any other companies of the same group. The members of a group of companies which did not file an application for a moratorium can

continue their ordinary business to the extent as such remains possible. They are not part of nor subject to the proceedings initiated.

Purpose of a Moratorium

A moratorium and the composition proceedings related to it are regulated by the Swiss Federal Debt Collection and Bankruptcy Act (DCBA) and are designed for a

debtor who wants to avoid bankruptcy proceedings. The purpose underlying a moratorium is to enable a debt restructuring of a debtor or, if a debt restructuring seems to be unfeasible, to preserve the assets of a debtor for a limited period of time until the further course of the composition proceedings can be determined. The debtor under moratorium is protected from its creditors for a limited time. It is important to note that the debt restructuring in a composition agreement affects unsecured non-prioritized claims only.

Grant of Moratorium

The DCBA distinguishes a provisional moratorium from a definitive moratorium. There is no need for the debtor to already submit a draft of a composition agreement in case of an application for a provisional moratorium. Upon receipt of such an application, the composition court decides in due course about the grant of a provisional moratorium. A provisional commissioner can be appointed and entrusted with the position of a supervisor regarding the debtor's financial position, its revenue basis and the prospects of recovery (Art. 294 DCBA). The court may also order necessary conservatory measures to protect the debtor's assets. The initial period of such a moratorium may not exceed two months.

Once the composition court is in possession of the further documents necessary to evaluate the fundamentals of a composition, it is held to decide on a definitive moratorium (Art. 293 and 294 DCBA). If there are prospects of recovery, the composition court will grant the debtor such a moratorium for four to six months and appoint one or several commissioners at the court's own choice. The moratorium can be extended to twelve, in particularly complex cases to 24 months (Art. 295 DCBA). The grant of the provisional moratorium and of the moratorium are publicly announced.

Moratorium's influence on Debtor's Rights

The debtor may continue business operations. He is, however, under supervision of the commissioner when conducting the business. Depending on the circumstances of the case, the court can direct that certain acts of the debtor require the explicit consent of the commissioner in order to be legally valid. The court can also

order the commissioner to take over the management from the debtor. Without authorisation of the composition court, the debtor is prohibited during the moratorium to sell, encumber or pledge fixed assets, to give guarantees or to make gifts. Such transactions are null and void. If the debtor contravenes these rules or the commissioner's instructions, the court can revoke the debtor's capacity to dispose of his assets or cancel the moratorium. The debtor and the creditors will be heard in such case (Art. 298 DCBA).

Effects of a Moratorium to Creditors

The main effect of a moratorium to creditors is that the debtor will be protected from most of creditors' actions against its assets. Debt enforcement proceedings can – with some particular exceptions – neither be initiated nor continued. In return, statutes of limitations and forfeitures do not run.

Procedure and Participation Rights

A provisional moratorium may be granted by the court without preliminary hearing. A hearing is only later on required before the court decides on the definitive grant of the moratorium. The debtor and creditors who filed a composition application against a debtor are entitled by law to participate in this hearing. It is in the court's discretion to invite and hear other creditors (Art. 294 DCBA). Once a definitive moratorium has been granted, the commissioner calls on the creditors in a public announcement and with individual notice to file their claims. Creditors who fail to file their claims within 20 days will be precluded from voting on the composition agreement. Only at a later stage, the creditors will have the opportunity to challenge rejections of their own alleged rights and admissions of other creditors' rights. Once a draft of the composition agreement has been drawn up, the commissioner convokes a meeting of the creditors. The creditors have the possibility to inspect the files during a period of 20 days before the meeting. The commissioner takes the chair of the creditors' meeting and reports on the debtor's assets and revenue basis. The draft of the composition agreement is presented to the creditors for approval (Art. 300 et seq. DCBA). Further participation rights of the creditors in the proceeding are rather limited.

Types of Composition Agreements

Three different types of compositions are commonly distinguished:

- Moratorium composition ("Stundungsvergleich"); which provides for full payment of creditors' claims but at a time later than the original payment dates.
- Percentage composition ("Prozent- oder Dividendenvergleich"); the creditors agree that only a certain percentage of the amounts of all claims must be paid within an approved time-frame.
- Composition with assignment of assets ("Liquidationsvergleich"); the debtor agrees to transfer all or part of its assets to the creditors, who then satisfy their claims out of the proceeds realized by the liquidation of the assets.

A composition agreement is deemed ratified – subject to the confirmation by the court – if a majority of the creditors, who represent two thirds of the total of claims, or one quarter of the creditors, who represent at least three quarters of the claims have given their consent. The privileged creditors are counted neither with their vote nor with their claim since they are able to proceed independently with enforcement against their collateral. An approved composition is binding on all parties, i.e. on the debtor and all creditors, and excludes as such any other liquidation procedure, at least as far the claims covered by the composition plan are concerned.

Failure of Composition Proceeding

If the composition agreement is rejected or the moratorium revoked, any creditor may proceed with liquidation proceedings. The decision of the court not to confirm the plan also has the effect that any creditor may file a petition in bankruptcy within 20 days after the decision is taken.

NewsLetter

The ww&p NewsLetter provides comments on new developments and significant issues of Swiss law. These comments are not intended to provide legal advice. Before taking action or relying on the comments and the information given, addressees of this NewsLetter should seek specific advice on the matters which concern them.

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