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Series of publications on new Swiss corporate law

Corporate restructuring and insolvency under the revision and modernization of Swiss corporate law

I. INTRODUCTION

The Parliament has adopted a new bill regarding Swiss corporate law on June 19, 2020. This new legislation is expected to enter into force in 2022.

This reform aims to modernize Swiss corporate law. A series of publications shall provide an overview of the main aspects of the reform, each of which shall deal with a specific topic.

This publication shall focus on the new provisions on corporate restructuring. In a nutshell, the reform is designed to increase the chances of a successful restructuring by clarifying some existing rules and introducing some additional duties of the board of directors (the Board) in case of financial distress.

II. CAPITAL LOSS

The new rules are substantially the same as the existing ones. Hence, the notion of capital loss remains unchanged: a capital loss arises when 50% of the share capital and the reserves, which cannot be distributed to the shareholders, are no longer covered by the net assets.

In case of a capital loss, the Board must take measures to stop loss from accruing. If such measures shall be approved by the shareholders, the Board must submit them to the general meeting of the shareholders (the **General Meeting**).

The following list provides examples of reorganization measures:

- reorganization of the company (e.g., redundancies);
- restructuring of the company (e.g., sale or liquidation of unprofitable business);
- capital increase;
- subordination of receivables;
- conversion of receivables into share capital; or
- re-valuation of real estate or participations held.

The new provisions provide that if the company has opted out from the auditing requirements, the balance sheet shall nevertheless be reviewed by an approved auditor before being submitted to the General Meeting. This new provision increases the liability risk of the Board and Board members of such companies having opted out from the audit should pay extra care to this item prior to approving the financial statements.

III. OVER-INDEBTEDNESS

As for the capital loss, the new rules are consistent with the existing ones. However, some useful clarifications have been made.

When the assets of the company no longer cover the liabilities, the company is overindebted. In case of serious indication of over-indebtedness, the Board must draw up interim financial statements at both going concern and liquidation values and such financial statements shall be audited. If the going concern of the company can no longer be upheld, only financial statements at liquidation values shall be drawn up.

If the audited financial statements show that the company is indeed over-indebted, the Board shall file for bankruptcy without delay. In such a case, the court may declare the bankruptcy or grant a debt-restructuring moratorium. It should be noted that the stay of insolvency proceeds (i.e., ajournement de la faillite) is no longer an option (i.e., it is entirely replaced by the debt-restructuring moratorium).

There are two exceptions to the obligation of the Board to file for bankruptcy: (i) enough creditors agree to subordinate their claims, including interests thereon, to the extent of the over-indebtedness, and (ii) the Board has reasonable ground to believe that the over-indebtedness can be remedied within a reasonable period of time, which must not exceed 90 days after the audited financial statements have been prepared, provided that such deferral does not jeopardize the creditors' claims. The second exception has been introduced by the new bill and it codifies the case law that already granted a grace period to the Board before filing for bankruptcy.

IV. IMPENDING ILLIQUIDITY

The corporate reform establishes a new duty for the Board: to monitor the company's solvency. Illiquidity arises when the company, on a continuous basis, does not have enough liquidity to pay its liabilities when they become due and does not have the possibility to obtain funds to cover such liabilities.

In case there is a risk of illiquidity, the Board must take measures. (i) first, the Board has to take short term and simple measures to restore the solvency of the company; (ii) second, if needed, the Board shall take restructuring measures (see the capital loss measures above, which shall be submitted to the General Meeting in case they fall within the competence of the shareholders); (iii) third, if none of the measures taken by the Board is successful, the Board may file for a debt-restructuring moratorium.

This waterfall system evidences that the legislator has preferred to emphasize private restructuring over court-sanctioned restructuring. However, the Board has a wide discretion. The Board does not have to follow the waterfall. Hence, if the Board considers that the restructuring cannot be achieved through private measures, then it may directly file a request for a debt-restructuring moratorium.

The new specific duty to take adequate measures in case of insolvency might seem like a novelty but it is not. Indeed, the Board already had such a duty through its general obligation to control and supervise the financial health of the company and such general duty already encompassed the supervision of the solvency.

V. CONCLUSION

The reform does not introduce any major novelties. However, some welcome clarifications and clean-ups have been made.

The systematic of the new rules now distinguishes clearly the concepts underlying a restructuring. For each situation, different measures shall be taken. Company may be in a situation of insolvency, but not in a situation of capital-loss or over-indebtedness. Hence, it makes sense to apply different measures.

The revision of the articles 725 and seq. CO might create a more favorable environment to help companies in implementing a restructuring, but only future experience will confirm that the purpose of the reform to facilitate the restructuring of companies in crisis has been reached.

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