

INSOLVENCY SWITZERLAND

A Revised Swiss Corporate Law: Amendments of Insolvency Rules

On 1 January 2023 the revised Swiss corporate law enters into force. An important part of this revised law relates to insolvency rules. Under current law, the trigger for the duty of the board to take countermeasures in case of financial distress was primarily the balance sheet test (imminent over-indebtedness). According to the revised law, the focus is primarily on the liquidity test (imminent illiquidity). In accordance with the motto "cash is king", the board of directors should be encouraged to take measures as early as possible while there is still room for restructuring.

1. Liquidity

The revised company law now expressly provides the following: the board of directors must monitor the solvency of the company. Due to the fact that liquidity planning is essential for the monitoring of the company's ability to pay debts as they fall due, the board of directors is obliged to ensure that an appropriate liquidity planning is in place. This serves as an early warning system to detect the financial distress of a company.

In addition, the reform introduces another explicit duty of the board of directors: in the event of imminent illiquidity, the board of directors needs to adopt appropriate measures to ensure liquidity or propose such measures – where required by law – to the shareholders' meeting. Contrary to the laws of other countries, illiquidity did up to now not trigger the board's duty to notify the court, as long as the company is not over-indebted. The duty of the board to take appropriate action in the event of imminent illiquidity includes the requirement to file for a debt restructuring moratorium if other restructuring measures may not resolve an imminent illiquidity of the company. However, this does not prevent the board of directors to file for bankruptcy in case there is no prospect of a restructuring.

2. Capital Loss

According to the revised company law, a capital loss is defined as the assets less liabilities no longer covering half of the sum of the share capital, the statutory capital reserve not repayable to the shareholders and the statutory profit reserve. In case the annual financial statements show a capital loss, the

board of directors will have to take appropriate measures to eliminate it and, if necessary, also take restructuring measures. The obligation to immediately convene a general meeting in case of capital loss will be abolished by revised law. Going forward, a general meeting only needs to be convened if the approval of the proposed restructuring measures falls within its competence.

A potential liability risk of the board of directors might result from the fact that under the new law, the last annual financial statements showing a capital loss must be audited by a licensed auditor before they are approved by the general meeting, even if the company has no elected auditors in place (opting out of the audit requirement). If the board of directors fails to subject the financial statements to the auditor, the resolution of the shareholders meeting on the approval of the annual financial statements and the appropriation of earnings are generally null and void. An audit is, however, not required if the board of directors files for a debt restructuring moratorium.

3. Over-indebtedness

Where the board of directors has good cause to assume over-indebtedness, audited interim accounts ("*Zwischenabschluss*") need to be prepared (the current law allows an audited interim balance sheet to suffice). If the audited interim accounts show an over-indebtedness, the board must notify the court and file for bankruptcy or a debt restructuring moratorium. This being said, in practice most bankruptcy courts allow unaudited interim accounts to suffice, if the over-indebtedness is obvious.

The bankruptcy court does not have to be notified, if either (a) the creditors subordinate their claims in an amount sufficient to cover the over-indebtedness, or (b) if there are reasonable prospects that the over-indebtedness will be cured within no later than 90 days after the audited interim accounts are available and if the creditor claims are not jeopardised any further (so-called silent restructuring). This requirement of non-impairment of creditor claims limits the options and time available for companies who continue to incur losses. The bigger the cash drain, the less time the board is given to take restructuring measures.

4. Bankruptcy deferral ("*Konkursaufschub*")

Going forward, if the board of directors notifies the bankruptcy court due to over-indebtedness of the company, the board may no longer request the court to defer the opening of bankruptcy proceedings in case of a prospect of restructuring. The board may, however, apply for a debt restructuring moratorium.

5. Restructuring



Three new rules bring new legal certainty and should facilitate restructuring of a company: (i) The maximum length of a debt restructuring moratorium (which can be granted as silent, ie, non-public) has been extended to eight instead of four months. (ii) Furthermore, the new law now clarifies that a debt-equity swap is a valid contribution to the nominal capital even in situations where the company is over-indebted. The shareholder no longer risks that he has to contribute an additional amount for the difference between the nominal value and the market value of the debt. (iii) Moreover, the bankruptcy law now explicitly states that debts assumed with the approval of the composition administrator are not subject to avoidance claims.

Development of Bankruptcy Proceedings

Whereas in 2020 and 2021 there were fewer bankruptcies nationwide than in previous years, since the beginning of 2022, across Switzerland, bankruptcies have been approximately at the pre-Covid-level. In some cantons, eg in the canton of Zurich, the number of bankruptcies reported is even higher than in the years 2017 to 2019. However, these bankruptcies affect primarily small and medium-sized companies.

The low level of bankruptcies due to COVID-19 is likely linked to the governmental support, such as COVID-19 government backed bridge loans. Almost 138,000 COVID-19 loans in the amount of CHF17 billion have been granted. Today, almost 100,000 loans for around CHF10 billion are still outstanding.

