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W P F O C U S

A T T O R N E Y S A T L A W

DEBT RESTRUCTURING PROCEEDINGS PER THE REVISED
DEBT PROSECUTION AND BANKRUPTCY STATUTE

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DEBT RESTRUCTURING PROCEEDINGS PER THE REVISED DEBT PROSECUTION AND BANKRUPTCY STATUTE

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INTRODUCTION

The Schuldbetreibungs- und Konkursgesetz (“SchKG” or the “Debt Prosecution and Bankruptcy Statute” or the “Statute”) was enacted in 1889. It is currently one of the oldest Swiss federal statutes and it had never been thoroughly reviewed since it came into effect on January 1, 1892. Consequently, in the mid-1970’s the Swiss Federal Council commissioned a committee of experts to review the Debt Prosecution and Bankruptcy Statute from the points of view of both theory and practice. The committee of experts concluded that the basic conception of the Statute had withstood the test of time despite the age of the Statute and the changed needs of the economy. The committee of experts therefore recommended only a partial revision of the Statute. The Swiss Parliament ratified the recommended 1994 partial revision. The revised Debt Prosecution and Bankruptcy Statute will become effective January 1, 1997.

The revision of the Debt Prosecution and Bankruptcy Statute is mostly a refinement of the original Statute. In addition, the practice of the Federal Courts will be integrated into the revised Statute. The main point of discussion during the hearing in Parliament on the revision of the Statute was “Chapter 11 Style” debt restructuring proceedings. Fundamental changes were proposed to ensure that the debt restructuring proceeding is relevant to today’s economic needs. The revision creates a true debt restructuring proceeding.

THE PRINCIPAL CHANGES IN THE DEBT RESTRUCTURING LAW

- The right of qualifying creditors to apply for a debt restructuring moratorium
- Ex officio institution of a debt restructuring moratorium by a Debt Restructuring Judge
- Provisional debt restructuring moratorium
- The duration of a debt restructuring moratorium: up to a max. of two years
- Possibility for the Judge to modify the management powers of the debtor
- Extension of the duties and jurisdiction of the administrator

The following describes the new debt restructuring proceeding including the moratorium period and its practical effects.

1. THE DEBT RESTRUCTURING MORATORIUM

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1.1 THE PETITION FOR A DEBT RESTRUCTURING MORATORIUM

a) Jurisdiction

The debt restructuring proceeding is initiated by the filing of a debt restructuring petition with the Debt Restructuring Judge (Art. 293 Par. 1 revSchKG). Under the original Statute, the debt restructuring authorities were responsible for the debt restructuring proceeding. The revised Statute now explicitly puts a Debt Restructuring Court in place.

Within the framework of the organisation of their Courts, the Cantons must appoint a Debt Restructuring Judge. The application of the revised debt restructuring Statute requires a great deal of specialised knowledge and experience from a judge. To ensure a unified, efficient application of the Statute, it is our opinion that in the larger Cantons there is an impetus for the creation of a separate Debt Restructuring Court. Beyond that, the Cantons may create an Upper Debt Restructuring Court as a Court of Appeal.

b) Right of Action

While under the original Statute only the debtor himself could petition for a debt restructuring moratorium, now every creditor who may file a petition for bankruptcy may request the opening of a debt restructuring proceeding (Art. 293 Par. 2 revSchKG). What does the qualification “...who may file a petition for bankruptcy” mean? In the normal case it means that a creditor must have completed the first stage of collection proceedings. In addition, a notice must have been delivered to the debtor as per Art. 159 revSchKG demanding payment with the proviso that the creditor may file a petition for bankruptcy if the payment is not received. Alternatively, if the prerequisites of Art. 190 revSchKG for the initiation of a bankruptcy without a prior collection proceeding are met, then every creditor must be able to file the petition for a debt restructuring moratorium without having first initiated collection proceedings. In this case all creditors may, without having initiated collection proceedings, petition immediately for the opening of bankruptcy proceedings. Consequently, they must also be able to initiate the less onerous petition for a debt restructuring moratorium. Any other interpretation of Art. 293 Par. 2 revSchKG would be illogical.

Related to this, of note are the circumstances addressed in Art. 190 Par. 1 Sub-Par. 2 SchKG, when

a debtor subject to bankruptcy prosecution has ceased making payments. In practice, high demands are made of the Courts in these circumstances. Despite this, there are repeated cases in which the debtor is clearly unable to pay and yet does not make use of the available forms of relief. According to the original Statute, the only form of action available to the creditor was the petition for bankruptcy. Now creditors have the capability to request the less onerous debt restructuring moratorium. Creditors may thereby instigate, even against the will of the debtor, a restructuring proceeding. Attention should be paid however to the fact that the creditor petitioning for the restructuring proceeding may, under certain circumstances, be required to pay the costs in advance (see Sub-Par. 1.1c below).

Another novelty is the power of the Bankruptcy Judge to stay the bankruptcy proceeding ex officio, without petition from the debtor, if some indications for the conclusion of a debt restructuring agreement are present (Art. 173a Par. 2 revSchKG). The Bankruptcy Judge then transfers the files to the Debt Restructuring Judge. If the Debt Restructuring Judge rejects the petition for a moratorium, then the Bankruptcy Judge declares the debtor bankrupt ex officio without any further action by a creditor (Art. 173a Par. 3 revSchKG). Practice will show whether the Bankruptcy Judge will make use of this provision, or whether the provision will just be empty words. The Parliament has created a large burden for the Bankruptcy Judge. However, the Bankruptcy Judge will rarely have sufficient information to justify intervention ex officio. Due to the chronically overloaded court calendar, the Bankruptcy Judge will rarely have the time to make investigations.

c) Formal Demands

In addition to the draft debt restructuring agreement, the petition for a debt restructuring morato-

ATTACHMENTS TO THE PETITION
FOR A DEBT RESTRUCTURING
MORATORIUM

- Draft of the debt restructuring agreement
- Extract of the commercial register
- Complete set of books for the last 3–4 years
- Current trial balance
- Current status of the assets
- Current listing of creditors
- Current listing of debtors
- List of employees with salaries and wages
- Details of the employee pension plans
- For property owners: extract of the land register
- Bank statements and correspondence for the last 3–4 years
- Important contracts such as rent, leasing and loan contracts etc.
- Details of assets abroad
- Current extract of the debt prosecution register

rium requires submission of documentation concerning the financial position of the debtor such as a balance sheet, profit and loss statement, tax documentation etc.

The Debt Restructuring Judge should have sufficient information to judge whether the conditions for the granting of a debt restructuring moratorium are present (Art. 294 Par. 2 revSchKG). If the petition for the moratorium was made by a creditor, the Judge may require the debtor to submit the respective documentation (Art. 294 Par. 1 revSchKG).

It is routine today for the debt restructuring authorities to request a down payment against administration and processing costs upon the filing of a petition for a moratorium, before they even

examine the petition. For example, in Canton Zurich, an advance against costs in the tens of thousands of francs is requested, depending on the number of creditors and the trading volume of the company. The Federal Courts have declared that this practice does not contravene Federal law. Cantonal procedural law is applicable. The revised debt restructuring Statute contains no provision that would prevent a Debt Restructuring Judge from demanding a payment in advance if the Cantonal law provides for it. As a result, the current practice will likely be continued.

d) Consequences

The filing of a petition for a debt restructuring moratorium does not necessarily affect the right of enforcement of the creditor up until the granting of the moratorium. A Bankruptcy Judge may nevertheless set aside a decision on a pending application for bankruptcy during this period (Art. 173a Par. 1 revSchKG).

1.2 THE CONDITIONS FOR THE GRANTING OF
A DEBT RESTRUCTURING MORATORIUM

In deciding whether a debt restructuring moratorium should be granted, based on the revised Statute, the Debt Restructuring Judge evaluates the asset and income position of the debtor and especially the possibility of the conclusion of a debt restructuring agreement. Certain assessment criteria for debt restructuring – company activities and causes that led to the inability to pay – have been dropped.

The Debt Restructuring Judge will not grant a moratorium if it is clear from the documentation that compelling conditions for the conclusion of a debt restructuring agreement are not present as per Art. 306 Par. 1 Sub-Par. 2 revSchKG (see Sub-Par. 2.1b below).

1.3 THE PROVISIONAL DEBT RESTRUCTURING MORATORIUM

Easily one of the most decisive changes to the Statute is the provisional debt restructuring moratorium. The Debt Restructuring Judge may, in cases where it is justified, grant a provisional debt restructuring moratorium after the filing of a petition for a moratorium – by either the debtor or a creditor – or after referral by the Bankruptcy Judge, as per Art. 173a revSchKG, for a maximum of two months (Art. 293 Par. 3 revSchKG). A provisional administrator is appointed by the Judge and is charged with the clarification of the asset and income position of the debtor as well as any restructuring possibilities. The provisional debt restructuring moratorium is also publicly announced (Art. 296 revSchKG). The provisional moratorium has the same consequences as the ordinary debt restructuring moratorium (Arts. 297 and 298 revSchKG; see Sub-Par. 1.4 below).

The provisional debt restructuring moratorium is one of the elements in the revised Statute creating a true restructuring law. Both the debtor as well as the creditor can quickly attain the protection of a debt restructuring moratorium with this legal remedy, so that with the aid of an independent third party – the administrator – the possibilities of a restructuring can be defined and any necessary steps taken. Even an obstinate debtor can be forced into a restructuring proceeding (see Sub-Par. 1.1b above). Under certain circumstances even a debtor’s rights to management may be rescinded and be delegated to the administrator (see Sub-Par. 1.4 below). This leaves the question open however, whether the Debt Reconstruction Judges are prepared, against the will of the debtor, to dispense measures within the framework of a provisional ruling that would interfere strongly with the freedom of decision of the debtor.

On the other hand, single creditors may be blocked from interfering with restructuring efforts to try and gain an advantage for themselves. In particular, no debt prosecution may be either initiated or continued during a provisional debt restructuring moratorium. Presently, for example, the tax authorities may bring an enforcement action to obtain payment and can successfully attach property in an advanced enforcement proceeding while a petition for a moratorium is pending. Under the revised Statute it would be possible to avoid this situation.

1.4 THE GRANTING OF THE DEBT RESTRUCTURING MORATORIUM

a) Process

While under the original Statute the debt restructuring authorities only heard the debtor, under the new law a petitioning creditor is also summoned to the proceedings. Additionally, the Debt Restructuring Judge may also hear other creditors. If a creditor has filed the petition, the proceeding for a debt restructuring moratorium becomes an adversarial proceeding.

The Debt Restructuring Judge may require that the debtor submit necessary documentation such as balance sheets, income statements, etc. so that he can judge the petition. If the debtor refuses to fulfill his responsibility, the Judge may either apply the means of coercion contained in the Cantonal procedural law or, within the framework of the provisional debt restructuring moratorium, require the administrator to supply the documentation (Art. 293 Par. 3 revSchKG).

Where an Upper Cantonal Debt Restructuring Court exists, the debtor and the petitioning creditor may appeal the decision of the Debt Restructuring Judge to this Court (Art. 294 Par. 3 revSchKG). Consistent with the practice of the Federal Courts so far, the revised Statute explicitly contains the

right of all creditors to appeal the designation of a particular person as administrator (Art. 294 Par. 4 revSchKG). Also according to the revised Statute an appeal to the Federal Courts may not be made.

b) Duration of the Debt Restructuring Moratorium

Under the revised Statute the Debt Restructuring Judge may approve a debt restructuring moratorium for a period of four to six months. The duration of a possible provisional debt restructuring moratorium is not taken into account (Art. 295 Par. 1 revSchKG). Upon petition of the administrator the debt restructuring moratorium may be extended to twelve months, or in complex cases even by twenty four months (Art. 295 Par. 4 revSchKG).

According to the original Statute, a debt restructuring moratorium had a maximum duration of only six months. The extension of the duration of a debt restructuring moratorium is one of the elements that creates a true restructuring law. The long duration allows a restructuring solution to be sought without too strong a time pressure.

1.5 THE CONSEQUENCES OF THE DEBT RESTRUCTURING MORATORIUM

a) On the Enforcement Rights of the Creditor (Art. 297 Par. 1 and 2 revSchKG)

During the debt restructuring moratorium no new debt prosecutions may be started and existing prosecutions may not be continued. The exception to this are debt prosecutions for enforcement of privileged claims of the first class and debt prosecution for the enforcement of claims secured by real property. However, the final step, that of selling the real property, may not be completed during the moratorium.

The limitations and forfeiture statutes are stayed during the debt restructuring moratorium.

b) On the Accrual of Interest (Art. 297 Par. 3 revSchKG)

The revised Statute explicitly states that the continued accrual of interest for all unsecured claims stops with the granting of the moratorium. However, other conditions may be established in the debt restructuring agreement. Should the debt restructuring moratorium be lifted or the debt restructuring agreement not be concluded, then the staying of interest accrual is lifted and backdated. The claims would be charged interest again as though no debt restructuring moratorium had been granted.

c) On Offsetting (Art. 297 Par. 4 revSchKG)

Under the revised Statute the offsetting provisions of the Bankruptcy Statute as per Arts. 213 and 214 revSchKG are declared applicable. A debtor of the bankrupt may only offset a counter-claim if the counter-claim existed before the opening of bankruptcy proceedings. Moreover, the offsetting is contestable if the operation of the offsetting occurred with knowledge of the insolvency. In the case of the debt restructuring moratorium, the date of the public announcement of the moratorium or of a previous stay of bankruptcy replaces the “opening of bankruptcy proceedings” as per Arts. 725a, 764, 817 or 903 of the Swiss Code of Obligations. Of interest in relation to this provision is that a stay of bankruptcy during a bankruptcy proceeding does not have the same consequence of changing the offsetting deadline – at least according to the letter of the law. A question is posed as to whether the same concept should not apply in this instance with regard to Art. 297 Par. 4 revSchKG.

d) On the Business Activities and the Powers of Disposition of the Debtor (Art. 298 revSchKG)

As under the original Statute, the debtor may as a general principle continue his business activities

under the supervision of the administrator. Under the revised Statute the Debt Restructuring Judge may rule that the debtor may only undertake certain transactions in collaboration with the administrator. The Judge may go even further and take the powers to manage the business away from the debtor and delegate them to the administrator. The Parliament anticipated cases in which the debtor is not able or does not want to run the business properly so as to protect the interests of the creditors. If the debt restructuring moratorium came into effect through the actions of a creditor against the will of the debtor, and the debtor is not prepared to co-operate with the administrator, then depriving the debtor totally of his management powers is the only effective way to proceed. Thought may also be given to the case of a provisional debt restructuring moratorium against which the debtor has submitted an appeal.

In our opinion, limiting the contractual capacity of the debtor during the debt restructuring moratorium may only be effective vis-à-vis third parties if they have, or should have had, knowledge of it. Limitations of the debtor's contractual capacity by special directive of the Debt Restructuring Judge should therefore be included in the publication of the debt restructuring moratorium.

Under the original Statute, after the publication of the debt restructuring moratorium, the debtor could no longer make legally binding decisions over the disposition of real property, or make pledges, guarantees or gifts. This ruling has led partially to the unnecessary blocking of a restructuring proceeding, particularly in the area of disposition of real property. Under the revised Statute, these legal transactions are now possible with the consent of the Debt Restructuring Judge. At the same time, the necessity for consent on all dispositions over assets of property, plant and equipment is increased. The contractual capacities of the

debtor and the administrator have been increased in total.

Upon infraction by the debtor of a limitation of disposal, the Debt Restructuring Judge may, upon notification by the administrator, sanction the debtor either by rescinding all disposition rights of the debtor or by revoking the moratorium. The debtor and the creditors must be heard before such a decision is taken.

1.6 THE DUTIES AND THE JURISDICTION
OF THE ADMINISTRATOR

- a) Supervision of the Debtor,
Informing the Creditors and Business
Management Powers
- The supervision of the business activities of the debtor is one of the inalienable duties of the administrator (Art. 295 Par. 2 lit. a revSchKG).
- The administrator must take precautionary measures such as restricting the bank and post office signatory powers of the debtor, in order to fulfill his supervisory duties. Another important function of the administrator is that of keeping the creditors informed on the progress of the debt restructuring moratorium. The operation of the rumor mill along with the collapse of the company often leads to an emotionalisation of the restructuring process. The administrator has the possibility of leading the process back to reality by means of good, factual information. It is therefore important that the administrator is respected as a neutral person by the creditors.
- Whether the administrator has the duty of independent business management depends on the directions of the Debt Restructuring Judge upon the granting of the moratorium.

- b) Establishing the Assets
(Art. 299 revSchKG)
- Immediately after his appointment the administrator takes an inventory of the assets and values them.
- The valuation of secured assets is important to the proceeding. The valuation establishes the amount of the participation by secured creditors in the debt restructuring agreement if there is a shortfall in the value of the secured assets (Art. 305 Par. 2 revSchKG). The administrator must report on the status of the security interest valuations for review by the creditors and the debtor including the secured creditors before the creditors meeting. A second valuation of the secured assets may be requested within ten days of receipt of the report by a request to the Debt Restructuring Judge against an advance payment for costs by both the creditors and the debtor. The creditor may only reclaim the cost of the valuation from the debtor if the previous valuation changes appreciably.

- c) Establishing the Liabilities
(Art. 300 revSchKG)
- As previously, the administrator publishes a call to the creditors. He summons the creditors to register their claims with him within 20 days. At the same time he alerts them that creditors with late or non-registered claims will have no right to vote at the debt restructuring agreement proceedings.
- Under the revised Statute the administrator must send a registered letter announcing the call to creditors to every creditor whose name and address is known. With a properly maintained set of accounts, this means that all creditors booked must be advised of the call to creditors. What are the consequences of an infraction of this ruling? Is the process invalidated? In our opinion, that would not be not the case. A mistake of the administrator may not have such grave consequences. On the

- other hand, no adverse consequences should result for the creditor concerned. In particular, the loss of voting rights – the consequence of a late registration of a claim – should not occur.
- Once the submission date for the registration of claims has expired, the administrator obtains the debtor's opinion on the applications for claims (Art. 300 Par. 2 revSchKG). This plays an important role particularly pertaining to an official debt restructuring agreement (percentage comparison) (Art. 315 Par. 1 revSchKG; see Sub-Par. 2.4b below).

- d) Preparation and Execution of the
Creditors Meeting
(Arts. 301 and 302 revSchKG)
- Based on the determined assets and the registered claims, a draft of the debt restructuring agreement may be prepared. The Statute does not specify who must or may prepare this draft. Under the original Statute, the debt restructuring agreement could only be produced by the debtor because only he could even start the debt restructuring proceeding. However, the revised Statute takes the position that the debt restructuring proceeding may be conducted against the will of the debtor. If the debt restructuring moratorium is ordered on the petition of a creditor and the debtor refuses to submit a debt restructuring agreement to the creditors, then in our opinion the administrator must draft the debt restructuring agreement and submit it to the creditors. The debtor must, however, be heard. He must be able to take a position regarding the debt restructuring agreement.
- As soon as the draft of the debt restructuring agreement is submitted, the administrator publishes the announcement of the creditors meeting. The publication must be made at least one month prior to the creditors meeting. Every creditor whose name and address is known must be invited by registered letter (see Sub-Par. 1.6c above).

The administrator is in charge of the agenda at the creditors meeting. He reports on the status of the assets and the income to the creditors. The debtor must take part in the meeting and impart information as required.

The debt restructuring agreement is submitted to the creditors for written approval. The written endorsements may be provided right up until the ratifying decision of the Debt Restructuring Judge (Art. 305 Par. 1 revSchKG). Until now, the practice of the Federal Courts was to consider only those written endorsements received up until the start of the ratifying hearing.

e) Reporting and Petitioning to the Debt Restructuring Judge (Art. 303 revSchKG)

Before the moratorium expires the administrator submits all documents and reports his findings and the progress of the debt restructuring moratorium to the Debt Restructuring Judge. The administrator must provide information on the endorsements of the debt restructuring agreement received and must submit a petition for ratification or refusal of the debt restructuring agreement. The report of the administrator also provides details of the voting rights of the creditors, the necessary quorum for acceptance of the debt restructuring agreement, the fulfillment of the required conditions for ratification of the debt restructuring agreement (Art. 306 Par. 1 Sub-Par. 2 revSchKG) and those claims disputed by the debtor.

1.7 THE CONCLUSION OF THE DEBT
RESTRUCTURING MORATORIUM

In the normal case the debt restructuring moratorium concludes with the ratification or refusal of the debt restructuring agreement. If the debt restructuring agreement is ratified, it will be fulfilled. If, however, it is rejected by the creditors or is not

ratified by the Debt Restructuring Judge, or if the Judge revokes the debt restructuring moratorium, then any creditor may request the immediate opening of bankruptcy proceedings (Art. 309 revSchKG). Under the original Statute the petition for bankruptcy was only possible against a debtor subject to prosecution for bankruptcy. For the special case where a debt restructuring moratorium has been granted but no debt restructuring agreement is ratified, the new Art. 309 revSchKG will introduce the possibility of bankruptcy for all debtors.

2. THE DEBT RESTRUCTURING AGREEMENT
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2.1 THE APPROVAL OF THE DEBT
RESTRUCTURING AGREEMENT

a) The Approval of the Creditors
(Art. 305 revSchKG)

In order for the debt restructuring agreement to be ratified, either a majority of the creditors with at least two thirds of the total claims or a quarter of the creditors with at least three quarters of the total claims must approve it. Only the votes of creditors and claims with voting rights will be taken into account (Art. 300 revSchKG; see Sub-Par. 1.6c above). The alternative quorum has been newly introduced. It should thereby prevent a majority of small creditors with a small portion of the total claims from determining whether the debt restructuring agreement will be approved.

b) The Prerequisites for the Ratification of the Debt Restructuring Agreement by the Debt Restructuring Judge (Art. 306 revSchKG)

Ensuring that a creditor with a privileged claim can be completely satisfied is a compelling condition for the ratification of the debt restructuring agreement. This can only be ignored if such a creditor relin-

quishes his security interest. Thanks to the revision of the privilege ranking in Art. 219 revSchKG, this hurdle will not be as high as it was previously. Under the revised Statute there are only two privileged classes. Remaining in the first class are the privileges of the employees for their salaries for the last six months, insured persons with entitlements per the federal law on accident insurance (UVG) as well as from the non-obligatory occupational pension, the claims on pension plans vis-à-vis a related employer and the valid familial claims to support and assistance for the last six months. In the second class there remains only the privilege vis-à-vis the holder of the parental authority for claims arising from trusteeship. All other bankruptcy privileges, especially the premiums for state social security or for tax claims, have been dropped.

In the normal debt restructuring agreement it must also be ensured that the offered payment is in a fair proportion to the financial situation of the debtor. In doing so any reversionary rights are to be taken into account.

In a debt restructuring agreement with assignment of assets, the result of the liquidation or the sum offered by a third party must be higher than the result would be in a bankruptcy.

In his report, the administrator must give his opinion as to whether the required conditions are present. But finally, the Debt Restructuring Judge must make a discretionary decision on the agreement. The requirement of worthiness for debt restructuring has been dropped in the revised Statute (see Sub-Par. 1.2).

c) The Ratification Process

After submission of the administrator's report the Debt Restructuring Judge begins preparations for the hearing on the ratification of the debt restructuring agreement. The creditors are then informed of the time and place of the hearing by public announcement. In the publication attention is drawn

to the fact that the creditors' objections to the debt restructuring agreement may be made at the hearing (Art. 304 revSchKG).

Under the original Statute ratification of the debt restructuring agreement by the debt restructuring authorities only occurred upon the petition of the debtor. Under the revised Statute a debt restructuring agreement may be ratified against the debtor's will (see Sub-Par. 1.6d above). The debtor must therefore be given a chance to submit a petition for rejection to the Debt Restructuring Judge and to speak in support of it.

The decision of the Debt Restructuring Judge may be appealed to the Upper Cantonal Debt Restructuring Court, where one exists, within 10 days of the order to proceed. An appeal to the Federal Courts is, on the other hand, not foreseen.

As soon as the decision is legally valid it will be publicly announced. At the same time the debt prosecution and land registry offices are informed. In the case of a debt restructuring agreement with assignment of assets, the decision will also be communicated to the commercial registry office if the debtor is entered in the commercial register (Art. 308 revSchKG).

2.2 THE STAYING OF THE FORECLOSURE
OF MORTGAGE INTERESTS
(ART. 306A REVSKHG)

Within the framework of the ratification of the debt restructuring agreement, the Debt Restructuring Judge may, on petition of the debtor, stay the foreclosure on a property secured against debts which was made before the debt restructuring moratorium. The duration of the stay may be for a maximum of one year from the ratification of the debt restructuring agreement. The following conditions must be fulfilled in order for the stay to be granted:

- There may not be more than one year’s interest unpaid.
- The debtor must credibly show that the property is necessary to the conduct of his business and that the foreclosure would endanger his economic existence.

Before the hearing on the ratification of the debt restructuring agreement, the affected mortgage creditors are to be given the chance to submit a written opinion in opposition to the debtor’s petition. They are to be personally invited to the creditors meeting and the ratification hearing of the Debt Restructuring Judge.

The staying of the foreclosure is ended by means of the law if the debtor freely submits to the foreclosure or if he dies. The Judge may also revoke the stay on petition of the creditor if the creditor can credibly show that:

- the debtor achieved the stay by means of untrue statements,
- the debtor has acquired new assets, which would allow him to pay the debt without endangering his economic existence, or
- the economic existence of the debtor is no longer endangered by the foreclosure.

The debtor must be heard before the decision.

2.3 THE CONSEQUENCES OF THE DEBT RESTRUCTURING AGREEMENT GENERALLY

a) Binding for all Creditors
(Art. 310 revSchKG)

Basically, the ratified debt restructuring agreement is binding on all creditors, provided their claims existed before the announcement of the moratorium. Excepted are solely the secured creditors for claims covered by the security interest. The debt restructuring agreement is also binding for claims that were substantiated after publication of the moratorium without the consent of the administrator.

Under the revised Statute it is generally now the case that commitments entered into during the debt restructuring moratorium with the consent of the administrator are a privileged claim on the assets of the debtor in the case of a later debt restructuring agreement with assignment of assets or bankruptcy. The recurring question as to whether the fees of the administrator are privileged is not explicitly dealt with in the new law. It can be assumed, however, that the decisions of the Federal Courts under the original Statute, whereby the fees of the administrator are to be considered as a general claim if a debt restructuring agreement with assignment of assets was intended from the start, is now generally valid for the debt restructuring process.

b) Consequences for Pending Debt Prosecutions (Art. 311 revSchKG)

All debt prosecutions started against the debtor before the moratorium are dropped with the ratification of the debt restructuring agreement. Debt prosecutions for attachment are excepted from this. As before, this is only valid for secured claims if the attachment of the property has not already taken place, though with the new restriction that the deadline for other creditors to join in an attachment must have passed (Art. 199 Par. 2 revSchKG).

2.4 THE ORDINARY DEBT RESTRUCTURING AGREEMENT

a) Contents (Art. 314 revSchKG)

The ordinary debt restructuring agreement should include the extent to which the creditors waive their claims and how the debtor will settle his liabilities and ensure the settlement.

Under the revised Statute a former administrator or a third party may be given responsibility for the supervision, company management and liquidation of the debt restructuring agreement settlement.

Should the debtor not agree to the debt restructuring agreement, the Debt Restructuring Judge will be forced to appoint the administrator or a third party to wind up the agreement. In this case, the debtor will only have free disposition over the assets after the fulfillment of the agreement.

b) Treatment of Disputed Claims
(Art. 315 revSchKG)

The previous provisions concerning the treatment of disputed claims have been maintained. The Debt Restructuring Judge, at the time the debt restructuring agreement is ratified, will give the affected creditor a deadline of 20 days to submit an application for the disputed claim. The setting of the deadline is combined with the penalty that after the deadline has passed the right to secure the debt restructuring payment is lost. Under the revised Statute, the action must be submitted at the same location as the debt restructuring proceeding. Thereby the practice of the Federal Courts to date concerning the place of jurisdiction is continued. The question is open as to whether recognition is to be taken of a different contractual court of jurisdiction. If the Federal Courts continue their current practice, the answer must be affirmative.

c) Non-fulfillment of the Debt Restructuring Agreement vis-à-vis Individual Creditors
(Art. 316 revSchKG)

As previously, the individual creditor with whom the debt restructuring agreement has not been fulfilled may request the Debt Restructuring Judge to rescind the debt restructuring agreement for his claim. Despite such a petition, the creditor does not lose his rights in the debt restructuring agreement.

The decision of the Debt Restructuring Judge to rescind the debt restructuring agreement vis-à-vis a creditor may be appealed to an Upper Debt Restructuring Court if such a court exists.

2.5 THE DEBT RESTRUCTURING AGREEMENT WITH ASSIGNMENT OF ASSETS

a) General

There has been little in the way of material change to the former law on the debt restructuring contract with assignment of assets. The new law is formally presented in Arts. 317-331 revSchKG.

b) Concept and Contents
(Arts. 317 and 318 revSchKG)

As previously, the creditors may, by means of the debt restructuring agreement, be granted rights of disposition over the assets of the debtor. The revised Statute contains the explicit option for the assets to be partly or wholly assigned to a third party – e.g. to a collection company. This previously common practice in restructuring proceedings is now anchored in the law. Of interest in the revised Statute is that this can also be done against the will of the debtor (see Sub-Par. 1.6d above).

The creditors exercise their rights through the liquidator and the creditors committee. Both are to be chosen at the creditors meeting. The creditors committee remains as an obligatory body in the debt restructuring proceeding with assignment of assets.

As to the contents of the debt restructuring agreement, this is in large part carried over from the previous provisions. In the revised Statute, in the case of an assignment of the assets to a third party, the manner and the securing of the execution of the assignment must be regulated in the debt restructuring agreement.

CONTENTS OF THE DEBT
RESTRUCTURING AGREEMENT WITH
ASSIGNMENT OF ASSETS

- Waiver by the creditor of that portion of the claim not covered by the liquidation or by the results of the assignment of assets
- Possibly: exact ranking of an eventual right to subsequent claims
- Naming of the liquidators and the members of the creditors committee
- Setting of the boundaries of jurisdiction of the liquidators and the creditors committee
- Method and manner of the liquidation
- Method and securing of the execution of an eventual assignment of assets to a third party
- Naming of the publication entity apart from the official gazette

c) Consequences (Art. 319 revSchKG)

With the legally validated ratification of the debt restructuring agreement the debtor loses his right of disposal over his assets. Also, the signature powers of the persons with signature authority to this point are canceled.
The firm listed in the commercial register will be appended with the words “in Nachlassliquidation” (“in debt restructuring liquidation”).

d) Duties of the Liquidating Body

The liquidators are to undertake all necessary measures for the protection and liquidation of the assets. In the case of an assignment of the assets to a third party they are to undertake all necessary actions for the execution of the assignment (Art. 319 Par. 3 revSchKG).
The liquidators are subject to supervision and control by the creditors committee. The areas of the

jurisdiction of the two bodies are to be regulated in the debt restructuring agreement.

e) Determining the Creditors with
a Right to Participation

To determine the right of creditors to participate and their claims, a procedure to establish a list of creditors and their claims is implemented. In the revised Statute the provisions covering this procedure (Arts. 244-251 revSchKG) are explicitly made applicable to a debt restructuring proceeding (Art. 321 Par. 2 revSchKG). As a result, the prior Federal Court decisions will be anchored in the law, whereby the listing procedure is implemented not only for unsecured creditors but also for claims secured by real or personal property and pledges. For the determination of encumbrances on property (servitudes, burdens, certificates of pledge and reserved personal rights) the listing plan (debt register) is explicitly stated in Art. 323 revSchKG as the deciding factor.

f) The Liquidation of the Assets

In the case of liquidation, the procedures used to date are largely valid. Claims will be prosecuted. Other assets will be liquidated by open sale or by public auction (Art. 322 revSchKG). Special provisions for the method of liquidation may be included in the debt restructuring agreement.
If the liquidators and the creditors committee relinquish the right to a contested or hard to collect claim, then the assignment of the claim for private enforcement is to be offered to the creditors in the sense of Art. 260 revSchKG (Art. 325 revSchKG).
The revised Statute contains provisions for the foreclosure of mortgaged properties and pledged objects (Arts. 323 and 324 Par. 2 revSchKG). An open sale of a property burdened with mortgages is only allowable if either no mortgage creditor suffers a loss on foreclosure or if the creditors

agree with a loss on foreclosure for the open sale. If these conditions are not met a public auction is to be held.

The pledge creditors are basically still not required to deliver the pledged objects to the liquidator. They may enforce the pledges by prosecuting for enforcement of the pledge or, provided they have the contractual right, by private enforcement. When required in the interest of protecting the assets, the liquidators have the right to set the pledge creditor a deadline of at least six months within which the pledge must be enforced. The pledge creditor is also notified that if the deadline passes unmet, the pledged object must be handed over to the liquidators for enforcement. This requirement is enforced by the penalty of losing the security interest if the pledged object is not delivered and no explanation is given.

g) General Procedural Provisions

As in bankruptcy proceedings, the liquidators must produce an apportionment list after each interim payment and retain it for the creditors for review (Art. 326 revSchKG).
At the closing of the proceedings a final accounting is to be produced which includes the costs of the proceedings (Art. 328 revSchKG).
The liquidators produce a closing report which, after approval of the creditors committee, must be submitted to the Debt Restructuring Judge and be retained for the creditors for review (Art. 330 revSchKG).
If the debt restructuring liquidation lasts longer than a year, the liquidators must produce an annual business statement. This business statement is to be approved by the creditors committee and is submitted to the Debt Restructuring Judge and is retained for the creditors for review (Art. 330 Par. 2 revSchKG).

3. THE SETTLEMENT OF PRIVATE DEBT
BY AGREEMENT

3.1 THE GOAL OF THE NEW PROCESS

With the newly introduced process for settlement of private debt by agreement (Arts. 333-336 revSchKG) an alternative to the declaration of insolvency per Art. 190 revSchKG is available to private debtors who are not listed in the commercial register. Private debtors have the choice, under the protection of a legal moratorium and with the help of a third party, to settle their debts. Parliament envisioned simple circumstances with few creditors.

3.2 THE PROCESS

A debtor who is not under prosecution for bankruptcy may submit a petition to the Debt Restructuring Judge for the implementation of a settlement of private debt by agreement. In the petition a debtor’s assets and income position must be set out (Art. 333 revSchKG).
The Debt Restructuring Judge grants to the debtor a moratorium of a maximum of three months and appoints an administrator if the following conditions are met (Art. 334 Par. 1 revSchKG):

- The settlement of the debt does not appear impossible from the start.
- The process costs are secured.

Upon petition by the administrator the moratorium may be extended to at the most six months. It may be revoked if it appears certain that the debt can not be settled (Art. 334 Par. 2 revSchKG).
The decision of the Debt Restructuring Judge is communicated to the creditors. An appeal may be made to a Upper Cantonal Debt Restructuring

Court should one exist (Art. 334 Par. 4 revSchKG). In a subsequent ordinary debt restructuring moratorium, the duration of the moratorium granted for the settlement of private debt by agreement is to be taken into account (Art. 336 revSchKG).

3.3 THE CONSEQUENCES OF THE MORATORIUM

The moratorium has the following consequences (Art. 234 Par. 3 revSchKG):

- The debtor may only be prosecuted for periodic subsistence and support payments.
- The deadlines for the filing of an application by a creditor for attachment of assets to satisfy an unsecured claim (Art. 88 revSchKG), the application by a creditor to liquidate the attached assets to satisfy an unsecured claim (Art. 116 revSchKG) and the application by a creditor to liquidate objects to satisfy a secured claim (Art. 154 revSchKG) are all suspended.
- A potential attachment of salary is also stayed for the duration of the moratorium (Art. 93 Par. 2 revSchKG).

3.4 THE TASKS OF THE ADMINISTRATOR

The administrator assists the debtor in the creation of a proposal for settlement of the debts. The administrator leads the negotiations with the creditors (Art. 335 Par. 1 and 2 revSchKG). The Judge may also charge the administrator with the supervision of the fulfillment of the debt settlement agreement reached with the creditors (Art. 335 Par. 3 revSchKG).

3.5 THE CONTENTS OF THE DEBT SETTLEMENT AGREEMENT

The debt settlement agreement need not be submitted to the Debt Restructuring Judge for consent because it can only be ratified with the approval of all of the creditors. Accordingly, the debtor and the creditors are, in our opinion, free in structuring the debt settlement agreement. Explicitly accounted for in the Statute are the comparative percentage to be paid to the creditors, the staying of the claims and the granting of other relief on interest or payments (Art. 335 Par. 1 revSchKG). The Statute does not provide for an agreement with a third party similar to the debt restructuring agreement with assignment of assets. It also does not explicitly exclude such an agreement.

4. CLOSING COMMENTS

Through the statutory revision, a true restructuring law has been created. The petitioning and participation rights of the creditor, the possibility of a provisional debt restructuring moratorium, the greatly lengthened duration of the debt restructuring moratorium and the possibilities for assigning jurisdiction to the administrator are vital components of the new Statute. Whether the revised Statute will keep faith with its intent will, in our opinion, depend mainly on whether or not the Debt Restructuring Judges take advantage of their new jurisdictional capabilities and their new powers. Should the Judges, for example, be very restrictive in their ruling on provisional debt restructuring moratoriums, then the advantages of the new Statute will be greatly limited.

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