Dynamic changes planned for Finnish insolvency proceedings

Mikko Tavast and Jan Lilius write on the forthcoming amendments which will bring dynamic changes to individual proceedings in Finland

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The Finnish Act on the Restructuring of Enterprises ("Restructuring Act") was prepared quickly during the recession that hit Finland in the 1990s. The intention was to offer an alternative to bankruptcy for viable companies experiencing temporary hardship. The Restructuring Act has since seen several amendments, and – more likely by chance rather than design – major amendments have always taken place during times of crisis.

The last major amendment took place in 2007 just before the global financial crisis and, as the latest amendment nears implementation, the times are once again insecure.

Despite the pandemic, the number of bankruptcies and restructurings in Finland is intriguingly low. The record low figures of 2020 can be explained by temporary legislation providing solace to debtors, but, over a year after the temporary legislation ceased to be in force, the numbers are yet to reach even 2019 levels. Now in 2022, Finnish companies are facing new challenges following the conflict in Ukraine and related sanctions on Russia, but recent insolvency statistics do not seem to reflect the added challenges in the business environment.

The current amendment relates to the Directive on Restructuring and Insolvency (Directive 2019/1023). The final date for the implementation of the Directive was 17 July 2021, but Finland applied for the maximum one-year extension, which means that the implementation must take place by 17 July 2022. In fact, the amendment to the Finnish Restructuring Act will be implemented on 1 July 2022. The Directive has many objectives: enabling preventive restructuring frameworks, ensuring a second chance to over-indebted entrepreneurs and increasing the effectiveness of insolvency procedures, but here the focus is solely on the topic of preventive restructuring frameworks, which will be implemented in Finland by amending the Restructuring Act.

After the implementation of the amendment, there will be two options for restructuring proceedings: the new early proceedings and regular restructuring proceedings, the latter of which will materially resemble the current restructuring proceedings. Only the debtor will be able to file for the early proceedings, which means that, without the debtor's contribution, creditors only have the option of regular proceedings. However, in practice, it is very rare that a petition for restructuring would be filed by a creditor, as bankruptcy is often the preferred choice.

The early proceedings will be suitable for debtors facing impending insolvency, while insolvent debtors (and their creditors) will have to choose between the regular proceedings and bankruptcy, depending on the depth of their insolvency. This is likely to mean that drawing the line between impending insolvency and actual insolvency will become an interesting legal issue in the future. While there are many differences between the early restructuring proceedings and the regular restructuring proceedings, the means of restructuring, i.e., the legal tools to restructure the debtor company's business, will be materially the same in both proceedings.

With the implementation of the Directive, there will be many changes in Finnish restructuring legislation – too many to mention them all here. Notably, the early proceedings will be time-limited, because the maximum time for the moratorium, which includes the interdictions protecting the debtor from measures from its creditors, such as the interdictions of repayment and debt collection, will be 12 months. No time limit will be applicable to regular proceedings. If the 12-month moratorium proves insufficient, it will be possible to apply for a transition to the regular proceedings. A transition may also be made if the debtor proves to be or becomes insolvent during the process.

The amendment also contains other notable changes, including a prohibition on *ipso facto* clauses in restructuring. Such clauses have already been considered ineffective according to Finnish Supreme Court practice, but the application of the principle has been clear only in the case of bankruptcies, whereas the ineffectiveness of *ipso facto* clauses in restructuring has not been properly tested. The codification of the prohibition will be a welcome clarification to the legal state of *ipso facto* clauses in restructuring.

In addition to the changes required by the Directive, there is another amendment to the

Restructuring Act planned for 2023. The proposed changes are not based on the requirements of the Directive. The intention is to streamline and simplify restructuring proceedings and to prevent the misuse of the provisions of the Restructuring Act, for instance, by filing several successive restructuring petitions. The changes proposed for 2023 also include imposing an incentive on creditors to notify the restructuring administrator of their restructuring claims in time, lowering the requirements for summary approval of a restructuring programme and making it easier to reject successive restructuring petitions.

As a result of the amendment of 2022 and the proposed amendment for 2023 described above, Finnish restructuring legislation will see many changes in a short time that will dramatically change not only the options available, but also the dynamics of individual proceedings. It will be very interesting to see how and to what extent the field of restructuring will change with the availability of two different restructuring proceedings and how the changes will in practice affect debtors, creditors, and insolvency practitioners.

The Directive's objective to encourage debtors to file for restructuring at an earlier phase is advisable. Notoriously, debtors file for restructuring too late, which means that debtors often enter the proceedings in a worse financial situation than they would if they had filed earlier. This causes a risk for restructuring proceedings by making it harder to prepare a restructuring programme that fulfils the requirements of the Restructuring Act and gains sufficient creditor support. It also increases the risk of the restructuring programme failing in the implementation phase.

However, the actual effect of having an option of early restructuring proceedings remains to be seen. Even with current legislation, it is possible to file for restructuring proceedings at an early phase either with an application based on impending insolvency or with sufficient creditor support in the petition phase. Regretfully, this option has not been used often enough. ■

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