Banking - Austria

Termination of Loan Facility in Case of Financial Deterioration

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Facts

In a recent case the Supreme Court had to decide whether a creditor has the right to terminate a loan facility because of the debtor's worsened economic situation. The bank had granted two loan facilities based on the debtor's financial forecasts. After six months the debtor asked for a disbursement. Pursuant to business development reports, the debtor's financial situation had deteriorated. Therefore, the bank rejected the request for disbursement and asked for an additional expert opinion based on a new financial restructuring forecast. Six months later the financial auditor approved - under special assumptions - the debtor's solvency. The bank paid out the loan facility and the debtor consequently went into bankruptcy. The grantor of a surety argued against the bank's claim, under the surety that the bank itself had caused the insolvency by denying the disbursements and thus had lost its right to make demands under the surety.

Creditor's Duty of Disbursement

A creditor may cancel a loan agreement in case of deterioration of the debtor's financial circumstances. This right of termination already exists in case of a threatening deterioration. The creditor may ask for an opinion about the debtor's financial situation before a disbursement is made. In particular, if the loan facility is granted on the basis of special financial forecasts, the creditor is entitled to examine the debtor's financial situation. However, if the creditor itself causes the deterioration, such right of cancellation does not exist.

In contrast, a reorganization loan does not allow the creditor to refuse the payment or cancel the contract in case of a deteriorating financial position because it has taken the economic risk of the reorganization failing. The creditor is obliged to pay out the loan in any case; otherwise, the debtor is liable for the consequences of a delayed disbursement. In addition, the debtor might lose its claims against security providers.

Comment

According to the circumstances of the case, the bank was authorized to ask for an opinion on the borrower's financial condition. However, such right must be exercised in time (within at least two months) because a delay could be deemed as violation of the principle of good faith and could harm the debtor's financial situation. This might make the creditor liable for any ensuing financial problems. If the loan is given for the purpose of financial reorganization, such right of holding back disbursements does not exist.

A reorganization clause can also be granted impliedly. The creditor's knowledge of the debtor's strained financial condition at the moment of concluding the loan facility could lead to it qualifying as a reorganization loan. Keeping such possibility in mind, it is necessary to exclude this interpretation expressly; otherwise, the bank could lose the right to examine the debtor's financial situation before a disbursement.

This case involved a German bank and therefore the decision was rendered by applying German law. However, its treatment of reorganization loans would also hold under Austrian substantive law.

For further information on this topic please contact Tibor Fabian at BINDER do^ppt^kd=Äó=íÉäÉéÜçåÉ=EHQP=N=RPQ=UMMFI=Ñ~ñ=EHQP=N=RPQ=UMUF=çê=Éã~áä= (fabian@bindergroesswang.atFK=qÜÉ=_fkabo=do^ppt^kd=ïÉÄëáíÉ=Å~å=ÄÉ=~ÅÅÉëëÉÇ= at www.bindergroesswang.at.