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Temporary Stay on Termination of Contracts

Certain Aspects of the Temporary Stay on Termination of Contracts and the Contractual Recognition thereof pursuant to the Swiss Bank Resolution Regime

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I. Introduction

1. Financial Stability Board

As a reaction to the financial crisis beginning in 2007, there have been calls in many countries from politicians and the private sector to create adequate tools to deal effectively with failing credit institutions. As a result, in 2009 the G20 established the Financial Stability Board (the «FSB») as the successor to the Financial Stability Forum. The FSB aims to promote global financial stability by coordinating the development of regulatory, supervisory and other financial sector policies and conducting outreach to non-member countries.[1] In October 2011, the FSB published the Key Attributes of Effective Resolution Regimes for Financial Institutions (as amended, the «Key Attributes»)[2] which provides an international standard for resolution regimes. The Key Attributes specify twelve essential features of a resolution regime which allow the orderly resolution of financial institutions by the competent authorities.[3] One of the twelve essential features sets forth the resolution powers which authorities should have at their disposal to deal with a financial institution that is no longer viable or likely to cease being viable, but not yet insolvent.[4]

2. European Union

At the level of the European Union, the European legislator enacted new directives and strengthened the supervision of the financial sector by establishing on 1 January 2011 the European Banking Authority whose objective is to *«maintain financial stability in the EU and to safeguard the integrity, efficiency and orderly functioning of the banking sector»*.[5] In addition, the European Parliament and the Council enacted the EU Bank Recovery and Resolution Directive (2014/59/EU) (the «BRRD»). The purpose of the BRRD is to establish a framework for the resolution of failing financial institutions.

3. Switzerland

In Switzerland, the authorities concluded that the domestic regulation of financial market infrastructures in many areas no longer fulfilled the new international requirements (e.g. lack of transparency and deficit of guarantees in OTC markets).[6] Inspired by the changes made

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1 http://www.fsb.org.

2 FSB, Key Attributes of Effective Resolution Regimes for Financial Institutions of 15 October 2014, online at (last visited 7 July 2016): http://www.fsb.org/wp-content/uploads/r_141015.pdf. The FSB first published the Key Attributes in 2011 and supplemented the document with additional guidance on the implementation in October 2014.

3 FSB, Key Attributes (FN 2), 1.

4 FSB, Key Attributes (FN 2), 6.

5 http://www.eba.europa.eu.

6 Dispatch on the Financial Market Infrastructure Act of 3 September 2014, BBl 2014, 7484 (references are based on the German version of the dispatch).

at the level of the European Union and having regard to the FSB policies, the Swiss legislator decided to adapt the architecture of the financial market regulation in Switzerland through the enactment of new regulations. The first important new regulation, the Financial Market Infrastructure Act (the «FMIA»), entered into force on 1 January 2016 and created a uniform regulation of financial market infrastructures and derivatives trading.[7] The enactment of the FMIA had broad implications on a number of existing regulations, which required consequential amendments in order to be in line with the new regulatory and market developments, including amendments to regulations regarding market stability.

The Swiss Federal Act on Banks and Savings Banks of 8 November 1934 (as amended, the «Banking Act») and the Swiss Federal Ordinance on Banks and Savings Banks of 30 April 2014 (as amended, the «Banking Ordinance») are among the existing regulations which were amended through the enactment of the FMIA. The new art. 30a of the Banking Act enables the Swiss Financial Market Supervisory Authority («FINMA») to impose a temporary stay on termination of contracts in the case of an impending insolvency of a financial institution. In addition, the Banking Ordinance newly includes a provision regarding the contractual recognition of such temporary stays.

The new provisions on the temporary stay on termination of contracts have been in force since 1 January 2016. However, so far little attention has been paid to this topic. Therefore, in this article we will focus on these new provisions and their practical impact. The first part of this article will provide an overview of the new statutory provision on the stay power and, where applicable, a comparison to the old provisions. The second part of this article will elaborate on the new requirement of a contractual recognition of the temporary stay. This part will also include a comparison to the contractual recognition clause with respect to bank resolution measures which is in force in the European Union.

II. Temporary Stay on Termination of Contracts

1. Legal Basis

FINMA's power to impose a temporary stay on termination of contracts was previously regulated in the FINMA Banking Insolvency Ordinance of 30 August 2012 (as amended, the «BIO-FINMA»), which entered into force on 1 November 2012.[8] The inclusion of the provision in the BIO-FINMA had led to a controversy as to whether a regulation at the level of an ordinance provided for an adequate legal basis.[9] Since the provision has been amended and introduced into the Banking Act as a new art. 30a as per 1 January 2016, it is now enacted at the level of a statute.

2. Purpose

The temporary stay power was introduced into Swiss law to implement the respective recommendation of the Key Attributes.[10] Its purpose is to allow FINMA to take effective resolution measures if a bank is in crisis by ensuring that such measures do not lead to a termination of contracts which the bank has entered into. By maintaining the bank's contractual relationships, the continuity of the bank's critical functions can be ensured and the implosion of the bank may be prevented.[11]

3. Scope of Application

The Banking Act generally applies to banks, private bankers and savings banks (as in the Banking Act, hereinafter referred to as «banks»).[12] With the latest amendment of the Banking Act, which became effective on 1 January 2016, the scope of application of the Swiss resolution regime was extended to Swiss domiciled group parent companies of financial groups or financial conglomerates as well as to group companies domiciled in Switzerland that fulfil significant functions for activities which are subject to a banking licence.[13] Accordingly, FINMA now has the power to impose a temporary stay on termination of contracts with respect to such holding companies or significant group companies in Switzerland, even if they do not themselves have the status of a bank.[14]

Since the entry into force of the FMIA, the provisions relating to the bank resolution regime stipulated in the Banking Act – with a few exceptions relating to bankruptcy proceedings – also apply *mutatis mutandis* to financial market infrastructures, except to the extent the FMIA contains provisions to the contrary.[15]

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7 In addition, a new Financial Services Act aimed at governing the prerequisites for providing financial services and offering financial instruments and a new Financial Institutions Act aimed at providing for an activity-based, differentiated supervisory regime for financial institutions requiring authorization are in preparation and should be enacted soon.

8 Repealed art. 57 BIO-FINMA.

9 Consultation Report BIO-FINMA of 22 October 2012, 13; BSK BankG-Bauer, art. 30 N 15.

10 Explanatory Report BIO-FINMA of 16 January 2012, 39; Consultation Report (FN 9), 13; Dispatch (FN 6), 7604.

11 Dispatch (FN 6), 7604.

12 Art. 1 para. 1 Banking Act.

13 Art. 2bis Banking Act.

14 Dispatch (FN 6), 7602 *et seqq*.

15 Art. 88 para. 1 FMIA; the article at hand will focus on the resolution regime applicable to banks.

4. Imposition of Stay Power within Restructuring Proceedings

Pursuant to art. 30a para. 1 of the Banking Act, FINMA can stay the termination of contracts together with the ordering or approval of measures pursuant to section 11 «Measures in Case of Impending Insolvency» of the Banking Act. This section of the Banking Act includes both protective measures *(Schutzmassnahmen)*, which can be applied either on a stand-alone basis or within restructuring proceedings *(Sanierungsverfahren)*[16], as well as restructuring measures *(Sanierungsmassnahmen)* to be taken within restructuring proceedings. Though a temporary stay on termination of contracts could be ordered together with a protective measure applied on a stand-alone basis, it will typically be imposed within restructuring proceedings.[17]

As a precondition for the ordering of both protective measures and restructuring proceedings, there must be a justified concern that the bank is either over-indebted, has serious liquidity problems or no longer fulfils the capital adequacy requirements upon the expiry of a deadline set by FINMA.[18] In addition, FINMA can only initiate restructuring proceedings, if it appears likely that the bank can either fully recover or at least continue to provide selected banking services.[19]

Under the previous provision in the BIO-FINMA, FINMA was only permitted to exercise the stay power when transferring contracts to another entity in connection with the transfer of banking services. The current provision is no longer limited to this case, but rather any combination with another protective or restructuring measure is conceivable.[20]

Still, the transfer of banking services will likely continue to be one of the main measures with which the temporary stay will be combined. A transfer of banking services is possible within restructuring proceedings, if the restructuring plan sets forth the continuation of selected banking services, regardless of the sustainability of the bank as a whole.[21] In such case, all or part of the bank's assets and liabilities, as well as contractual arrangements, may be transferred to either another entity or a temporary «bridge bank».[22] In this context, the stay power serves to prevent the transfer of contractual arrangements from being thwarted by counterparties exercising their termination rights. Further, a temporary stay may also be imposed in conjunction with bail-in measures:[23] If the bank's insolvency cannot be prevented by other means, the restructuring plan may set forth a reduction of existing equity and the creation of new equity, the conversion of liabilities into equity (debt-equity swap) as well as the write-down of liabilities (haircut).[24] However, such bail-in measures are to be taken as a last resort only.

5. Termination must be related to Resolution Measures

As a condition for the imposition of a stay, the termination of the contract or the exercise of a contractual termination right must be related to the resolution measures taken by FINMA.[25] This is primarily the case if a contract either includes an automatic termination clause or the possibility to exercise an early termination right once an authority has taken resolution measures.

According to the dispatch on the FMIA, the stay power may also be imposed if the automatic termination or the early termination right is indirectly related to or derived from the resolution measure of FINMA. This is intended to address the case in which a contract stipulates, for example, additional contractual obligations, such as an obligation to provide additional security, if a resolution measure is taken against a bank, and non-fulfillment of such obligations could in turn result in the termination of a contract.[26]

Even though the termination of a contract which is stayed must be related to a resolution measure in the above sense, the bank which is subject to the resolution measure does not actually need to be a party to the respective contract. A temporary stay is, for example, permitted if the bank which is subject to the resolution measure is a guarantor or a contractually stipulated specified entity, provided that the automatic termination or the early termination right refers to such guarantor or specified entity. Cross-default clauses (e.g. the termination right under an agreement with a subsidiary, if resolution measures are taken against the parent company) are therefore also covered.[27] Pursuant to the FSB's second peer review on resolution regimes in FSB member jurisdictions, cross-default rights in all cases are covered in Canada, Japan and Switzerland. The stay power in the six FSB jurisdictions within the European Union is limited to the case of an agreement with a subsidiary of a bank, which is under resolution, and is available in specified circumstances only.[28]

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16 Art. 25 para. 1 and 2 Banking Act.

17 Dispatch (FN 6), 7604; in addition, art. 30a of the Banking Act is stipulated together with the provisions relating to restructuring proceedings.

18 Art. 25 para. 1 Banking Act.

19 Art. 28 para. 1 Banking Act.

20 Art. 30a para. 1 Banking Act.

21 Art. 30 para. 1 Banking Act.

22 Art. 30 para. 2 Banking Act.

23 See Benjamin Leisinger/Lee Saladino, TLAC and Bail-in, Extending the Capital Market Alphabet and Legal Thoughts on an Implementation by Swiss Issuers, GesKR 2015, 225–242, 229.

24 Art. 31 para. 3 Banking Act.

25 Art. 30a para. 2 Banking Act.

26 Dispatch (FN 6), 7605.

27 Dispatch (FN 6), 7605.

28 FSB Second Thematic Review on Resolution Regimes Peer Review Report of 18 March 2016, 28 and 49, online at (last visited 7 July 2016):

The imposition of a stay is not permitted or a stay lapses where the automatic termination or the exercise of a termination right is not connected to a resolution measure and is the result of the act of either the insolvent bank or the legal entity taking over the contracts in part or in full.[29]

6. Types of Contracts that may be Stayed

While the previous provision in the BIO-FINMA was limited to financial contracts, the current statutory provision applies to all types of contracts. The imposition of a stay on termination may, in particular, be crucial with respect to contracts regarding services which are required for the bank's operations (e.g. IT agreements) or with respect to rental or leasing contracts.[30]

In practice, financial contracts will likely continue to be of particular importance, since they frequently include automatic termination clauses. Notably the ISDA Master Agreement of the International Swaps and Derivatives Association sets forth standard automatic and cross-default clauses (see for example clause 6(a) second sentence und clause 5(a)(vi) of the ISDA 2002 Master Agreement).

According to the FSB's second peer review, only the resolution regimes in the six FSB jurisdictions within the European Union (in accordance with the BRRD) and in Switzerland cover all types of contracts.[31]

7. Types of Contractual Rights that may be Stayed

As mentioned, FINMA's stay power relates to the automatic termination of a contract and the exercise of a termination right under a contract.[32] In addition, FINMA also has the power to stay the exercise of set-off, realization and transfer rights, as set out in art. 27 of the Banking Act.[33]

8. Duration of Stay

The stay is limited in time. The maximum period of 48 hours pursuant to the old provision in the BIO-FINMA has been extended to two business days.[34] Accordingly, Saturdays, Sundays and public holidays at the place of the bank's registered office are no longer taken into account when calculating the time limit.[35] Most FSB member jurisdictions provide for a statutory limit of one or two business days.[36]

9. Continuation of Contract after Lapse of Stay

If, after the stay has lapsed, the bank is in compliance with the applicable legal prerequisites of the banking license and all other statutory provisions under Swiss law, the respective contracts will continue to be in force and the termination rights that were stayed can no longer be exercised.[37] This will usually be the case if the reason for the imposition of the measures taken by FINMA is no longer given, namely if there is no longer a justified concern that the bank's insolvency is impending.[38]

If the legal prerequisites of the banking license or other statutory provisions are not fulfilled after the stay has lapsed, the counterparty of the contract that was subject to the stay is permitted to exercise its contractual termination rights.[39]

III. Contractual Recognition of Temporary Stay on Termination of Contracts

1. Background

In an international context, contracts of Swiss banks may be governed by foreign law or provide for a foreign place of jurisdiction. In such cases there is no guarantee that the temporary stay on termination of such contracts ordered by FINMA would be recognized by foreign courts or authorities. As a consequence, the continuation of the contractual relationships of Swiss banks is not guaranteed in a crisis situation.[40] Similarly to the European Union,[41] the Swiss legislator has provided for a new contractual recognition clause that is aimed at ensuring the international enforceability of the temporary stay on termination of contracts.

2. Purpose

Pursuant to art. 12 para. 2bis of the Banking Ordinance, a bank is required to ensure that new contracts or amendments to existing contracts which are subject to foreign law or a foreign place of jurisdiction are only entered into if the counterparty recognizes a temporary stay on

http://www.fsb.org/wp-content/uploads/Second-peer-review-report-on-resolution-regimes.pdf.

29 Art. 30a para. 4 Banking Act.
30 Dispatch (FN 6), 7605.
31 FSB Second Thematic Review (FN 28), 28.
32 Art. 30a para. 1 (a) Banking Act; Dispatch (FN 6), 7605.
33 Art. 30a para. 1 (b) Banking Act.
34 Art. 30a para. 3 Banking Act.
35 Dispatch (FN 6), 7606.
36 FSB Second Thematic Review (FN 28), 28.
37 Art. 30a para. 5 Banking Act.
38 Dispatch (FN 6), 7606.
39 Dispatch (FN 6), 7606.
40 Explanatory Report of the Financial Market Infrastructure Ordinance of 20 August 2015, 51.
41 See section III.7.

termination of contracts as per art. 30a of the Banking Act.[42]

According to this provision the banks are under an obligation to draft their contracts in a way that a temporary stay according to art. 30a of the Banking Act is internationally enforceable.[43] In requiring that the effect of a temporary stay be incorporated contractually, art. 12 para. 2bis of the Banking Ordinance aims to ensure that Swiss or foreign courts will enforce the effect of art. 30a of the Banking Act.[44]

3. Scope of Application

Art. 12 para. 2bis of the Banking Ordinance is applicable to banks (see definition in section II.3), both at the level of the single entity as well as at group level.[45] Therefore, not only companies in Switzerland are concerned, but also foreign group companies of a Swiss bank. Consequently it must be ensured that the temporary stay is also enforceable against counterparties of foreign group companies with regard to termination rights which became exercisable due to a cross-default or similar provision.[46]

As mentioned above, the application of art. 12 para. 2bis of the Banking Ordinance is not limited to financial contracts, but encompasses all types of contracts.[47] However, the provision only applies to the extent a contract features one of the two following elements:

- First, contracts which are subject to a foreign law are included within the scope of application of the provision.[48] In our understanding, it is irrelevant in this respect, whether the contract is governed by a foreign law due to a choice of law clause in the contract or based on the conflict of laws rules that apply in the absence of such a choice by the contracting parties.
- Second, the scope of application of the provision includes contracts which provide for a foreign place of jurisdiction.[49] Also with regard to this requirement it is irrelevant, in our understanding, whether the foreign place of jurisdiction was determined by a choice of jurisdiction clause or whether it results from international civil procedure law.

The contractual recognition clause pursuant to art. 12 para. 2bis of the Banking Ordinance must be applied since 1 January 2016 by banks when entering into new contracts or amending existing contracts. As long as an existing contract is not amended, the inclusion of a contractual recognition clause is not required.

4. Recognition and Form of Recognition

Art. 12 para. 2bis of the Banking Ordinance does not set forth the form in which the contractual recognition must be implemented. With regard to certain financial contracts it is possible to apply the ISDA 2015 Universal Resolution Stay Protocol (which has replaced the ISDA 2014 Resolution Stay Protocol) by signing the relevant adherence letter.[50] This protocol enables parties to amend the terms of the relevant agreements to contractually recognize the cross-border application of special resolution regimes. To the extent that contracts, which are not covered by the ISDA Protocol, are concerned, the recognition should be explicitly agreed upon in the contract itself. It is in our view also sufficient if the contractual recognition clause is included in the main agreements of a transaction executed by all parties such as credit agreements or intercreditor agreements as long as there are no further parties to other agreements, such as security agreements, which would prevent such further parties from recognizing the contractual temporary stays.

In addition, several market and trade associations have drafted various contractual recognition forms such as the recommended form of contractual recognition of bail-in clause of the Loan Market Association («LMA»)[51]. Assuming that non-EU countries will grant similar resolution powers to their authorities, the LMA bail-in clause also contains a sweeper provision, which accounts for any resolution powers introduced outside the European Union. In our opinion, to the extent a sweeper provision covers temporary stays, no further specific Swiss contractual recognition clause pursuant to art. 12 para. 2bis of the Banking Ordinance is required.

5. Assessment of the Supervised Entities and Legal Consequences in case of Violation of Art. 12 Para. 2bis of the Banking Ordinance

Swiss banking supervision is based on a dualistic system according to which the audit of the supervised persons and entities is performed primarily by the external auditors. These external auditors are required to provide FINMA with a report on their audits. If violations of supervisory provisions are detected, the external auditors must give the audited person or entity an appropriate period to restore compliance with the law. If the period is not complied with or in the case of serious violations of

42 Explanatory Report (FN 40), 51.
43 Explanatory Report (FN 40), 51.
44 See Federal Reserve System, 12 CFR Parts 217, 249, and 252, 34 *et seqq*.
45 The provision further applies *mutatis mutandis* to financial market infrastructures under the FMIA (see section III.3; Art. 88 para. 1 FMIA).
46 Explanatory Report (FN 40), 51.
47 Dispatch (FN 6), 7605; Explanatory Report (FN 40), 51.
48 Art. 12 para. 2bis Banking Ordinance; Explanatory Report (FN 40), 51.
49 Art. 12 para. 2bis Banking Ordinance; Explanatory Report (FN 40), 51.
50 Explanatory Report (FN 40), 51; see also online at (last visited 6 July 2016): http://www2.isda.org/functional-areas/protocol-management/protocol/22.
51 The LMA Recommended Form of Bail-in Clause and Users Guide dated 7 April 2016 published by the LMA.

supervisory provisions, the audit company is obliged to notify FINMA.[52]

Art. 12 para. 2bis of the Banking Ordinance does not regulate the legal consequences of a violation of the provision. The provision is located in Section 2 «Organization» of the Banking Ordinance under the marginal note «Segregation of functions and risk management». Failure to comply with the requirement under art. 12 para. 2bis of the Banking Ordinance could therefore be deemed a violation of the requirement of an adequate risk management or an adequate administrative organization.[53]

In that case the statute provides for a declaratory order as the least restrictive supervisory measure, as well as further measures by FINMA, provided there is a «serious» violation of supervisory provisions. The stricter the measure, the higher the standard applied to the severity of the violation of supervisory legislation.[54] The impending sanction for a violation of art. 12 para. 2bis of the Banking Ordinance therefore depends on the severity of the respective violation in the given case.

6. Transitional Regulation

Pursuant to art. 69 para. 5 of the Banking Ordinance, FINMA may provide the banks with adequate deadlines for the implementation of the requirement set forth in art. 12 para. 2bis of the Banking Ordinance, taking into consideration recognized international standards.[55] FINMA has not published general binding rules based on art. 69 para. 5 of the Banking Ordinance (e.g. circular or ordinance).

7. *Excursus:* Contractual Recognition Clause in European Union Legislation

At the level of the European Union, the BRRD provides several tools for the regulators, including *«the power to transfer shares in, or assets, rights or liabilities of, a failing institution to another entity such as another institution or a bridge institution, the power to write down or cancel shares, or write down or convert liabilities of a failing institution, the power to replace the management and the power to impose a temporary moratorium on the payment of claims»*[56]. As the financial crisis has shown that the insolvency of an entity of a group can rapidly impact the solvency of the whole group, the above-mentioned powers of a resolution authority are intended to be effective not only in the European Union[57], but also outside the European Union, where the BRRD does not apply.[58]

Art. 55 of the BRRD aims to address this problem by requiring in-scope entities to include a contractual term in agreements governed by the laws of a non-EU member state. Pursuant to such contractual term the creditors or parties to such agreements must acknowledge and accept that the liability of the in-scope entities may be subject to the bail-in powers of a resolution authority. The European Union contractual recognition clause goes further than the Swiss contractual recognition clause, according to which the recognition is limited to temporary stays on termination of contracts. All relevant documents entered into or acceded to as of 1 January 2016 and pre-existing documents which are materially amended or under which new liabilities arise as of 1 January 2016 are subject to the requirements of art. 55 of the BRRD. As the BRRD does not apply directly, each member state of the European Union has to implement this directive into its national law.

IV. Conclusion

With the temporary stay on termination of contracts and the contractual recognition thereof, FINMA has obtained additional tools to preserve financial market stability in Switzerland. As a consequence, Swiss banks must consider including a recognition clause in all new contracts and amended contracts governed by foreign law or providing for a foreign place of jurisdiction as of 1 January 2016.

These changes to Swiss legislation fulfil the new international requirements regarding the imposition of a temporary stay on termination as per the FSB policies. Certain aspects of the new tools remain, however, disputable. The application of the temporary stay on termination is limited to two business days, which is rather short to implement resolution measures, which means that FINMA must act swiftly and already have devised a plan before ordering the temporary stay. In addition, it is not clear why the Swiss legislator has limited the contractual recognition to temporary stays on termination of contracts rather than extending such contractual recognition to all resolution powers, including bail-ins. Finally, it is questionable how foreign courts will apply the Swiss contractual recognition, how (mandatory) foreign law will collide with such Swiss contractual recognition and how such collisions will be resolved.

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52 Art. 24 *et seqq*. Financial Market Supervision Act; Jean-Baptiste Zufferey/Franca Contratto, FINMA The Swiss Financial Market Supervisory Authority, Basel 2009, 119 *et seqq*.

53 Decision of the Federal Administrative Court B-5041/2014, E. 3.5.4.

54 Urs Zulauf *et al.*, Finanzmarktenforcement, Verfahren zur Durchsetzung des Schweizer Finanzmarktrechts, 2nd edition, Bern 2014, 221 *et seqq*.; Art. 32 *et seqq*. Financial Market Supervision Act.

55 Art. 69 para. 5 Banking Ordinance.

56 Preamble N 84 BRRD.

57 In addition to the European Union, the BRRD is also intended to be effective in Iceland, Liechtenstein and Norway.

58 The FSB has published on 3 November 2015 the Principles for Cross-border Effectiveness of Resolution Actions which *«set out statutory and contractual mechanisms that jurisdictions should consider including in their frameworks to give cross-border effect to resolution actions in accordance with the Key Attributes.»*