CENTRE DE DROIT
BANCAIRE ET FINANCIER

Subordination of claims by related parties

The Federal Supreme Court sets the limits

Par Tatiana Ayranova le 22 May 2025

On 15 May 2025, the Federal Court published a ruling of principle (TF 5A_440/2024 of 31 March 2025) clarifying the following question : Are loans granted by related parties to a company without an explicit subordination agreement subordinated in the event of the company's bankruptcy ? The Federal Supreme Court confirmed that claims arising from such loans must, in principle, be treated as ordinary third-class claims in the event of bankruptcy (Art. 219 para. 4 LP). However, only in exceptional cases characterised by a manifest abuse of a right may these claims be considered subordinated to those of other creditors (equitable subordination). An essential condition for the recognition of such an abuse of rights is, in particular, that the company was over-indebted at the time the loan was granted.

Between 2016 and 2018, several shareholders, as well as a sister company, granted loans to F. AG, a construction company facing financial difficulties. Following the opening of bankruptcy proceedings against F. AG in April 2018, these creditors requested that some of their claims be ranked in the third class. The supervisory commission and the cantonal authorities refused this ranking, considering that the claims should be ranked as subordinated claims. The creditors then appealed to the Federal Court, which overturned the decision of the highest cantonal court confirming the ranking of the disputed claims in third class, without subordination.

In reaching this conclusion, the Federal Court followed the following reasoning. At the time the loans in question were granted, the contractual subordination between a creditor and the debtor company was governed by Art. 725 para. 2 aCO (replaced by Art. 725b para. 4 ch. 1 CO since 1 January 2023). By means of a subordination agreement, the creditors concerned agree that their claims are subordinated to all other debts of the company for the entire duration of its over-indebtedness. Contractual subordination within the meaning of this provision also has effect in the event of bankruptcy.

In the present case, however, the question was whether and under what conditions a claim was subordinated, regardless of an explicit subordination agreement. Loans granted by related creditors to companies in difficulty can be problematic. They could enable the company to continue its activities without genuine restructuring, to the detriment of other creditors. Legal doctrine has examined the treatment of claims by related parties by proposing that loans granted by such parties to companies in difficulty be reclassified as equity (a position rejected by the Federal Court) or be considered automatically subordinated (equitable subordination) after third-class claims (section 219(4) LP).

The justification for equitable subordination was examined in this judgment from the perspective of a manifest abuse of a right. The Federal Supreme Court considers that a manifest abuse of a right can only be found if the loan from a related party is granted at a time when the beneficiary company is already over-indebted according to its balance sheet. Other criteria sometimes put forward in legal doctrine, such as the 'third-party test' (where a third party would not have granted the loan on the same terms in terms of amount, structure or duration) or the 'reorganisation effect' (loan granted at a time when only the injection of equity capital could have had a reorganisation effect), have been rejected by the Federal Court as insufficient to justify subordination. The Court concluded that, as long as the company is not over-indebted, which was not the case here, the granting of a loan by a related party and the subsequent assertion of the claim in bankruptcy do not constitute a manifest abuse of a right within the meaning of Art. 2 para. 2 CC.

With regard to tacit subordination, the Federal Court considers that it will only be permitted in accordance with the well-established rules on the interpretation of contracts. In the present case, the Federal Supreme Court rejected the argument of an implied subordination, stating that there was no evidence to conclude that there was an actual or presumed intention (determined according to the principle of trust) to subordinate the loans granted.

Finally, the Federal Court also considered whether the absence of rules on the subordination of loans from related parties to companies in difficulty constituted a genuine lacuna or a qualified silence. The issue of the subordination of such loans has been discussed on several occasions in the context of legislative reforms. The legislature explicitly refrained from introducing an automatic subordination rule, in particular so as not to discourage financing in times of crisis. According to the Federal Supreme Court, the absence of explicit rules in this area therefore constitutes a qualified silence.

This ruling enhances legal certainty for shareholders and directors when considering rescue financing for their companies. It also provides practitioners with a clearer framework for dealing with restructuring situations. In the broader context of all creditors (including financial institutions), the decision confirms that claims of related parties are not automatically subordinated in the event of bankruptcy, except in cases of manifest abuse of a right based on the objective criterion of the company's over-indebtedness. It also emphasises the importance of formalising any subordination in a written agreement in order to ensure its enforceability.
