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COVID 19: insolvency law

In connection with the coronavirus (COVID-19) and the associated circumstances, new legal questions arise, the answering of which currently presents the experts with difficult tasks. In view of the highly complex situation, we try to provide information on the legal topics as simply as possible. This special issue of krfacts presents the COVID-19 Ordinance on Insolvency Law issued by the Federal Council.

I. Insolvency law

At the Federal Council meeting of 16 April 2020, the Federal Council presented the Ordinance on Insolvency Law Measures to Manage the Corona Crisis, which is intended to prevent COVID-19-related bankruptcies and the associated loss of jobs. The ordinance contains three main measures for this purpose: Adjustment in the notification of over-indebtedness (1.), adjustment of the law on inheritance contracts (2.) and the so-called COVID-19 deferral (3.). In addition, the COVID-19 Solidarity Guarantee Ordinance was provided with a new liability clause (4.) The Ordinance will enter into force on 20 April 2020.
If an event is cancelled or a contractual partner is unable to provide the agreed service, a question arises as to what should happen. Who must be required to bear the resulting losses?

1. Adjustment in the over-indebtedness notification

According to Art. 725 para. 2 of the Swiss Code of Obligations (CO), companies are obliged to prepare an interim balance sheet at going-concern and disposal values if there are reasonable grounds for concern of over-indebtedness and to submit this to an approved auditor for examination. If the interim balance sheet shows that the company is over-indebted, the company's executive body must notify the bankruptcy court, unless there are subordinations by company creditors to the extent of the determined over-indebtedness.

The COVID-19 regulation on insolvency law now abolishes this obligation to notify the bankruptcy court if two conditions are cumulatively met:

1. the company must not already have been overindebted on 31 December 2019, and

2. there must be a prospect that the over-indebtedness can be eliminated by 31 December 2020.

The obligation to draw up the interim balance sheet in the event of well-founded concerns about over-indebtedness remains in force. Now, however, the auditor's examination can be waived.

The company's decision to waive notification of the court on the basis of the two conditions must be justified and documented in writing, e.g. in minutes of the meeting. The lack of over-indebtedness on 31 December 2019 can be proven by the corresponding balance sheet. The prospect of eliminating over-indebtedness by the end of 2020 can be documented by the interim balance sheet prepared at going-concern and disposal values and by liquidity plans.

Stock corporations, limited liability companies, cooperatives and foundations can make use of the lifting of the duty of disclosure in the event of over-indebtedness. However, this is not possible for financial service providers and banks.

2. Adjustment of the debt-restructuring law

For an application for a debt-restructuring moratorium, which is governed by Art. 293 et seq. of the Federal Law on Debt Enforcement and Bankruptcy (SchKG), a provisional restructuring plan (Art. 293 lit. a SchKG) will no longer be required after 20 April 2020. The maximum duration of the provisional debt-restructuring moratorium will also be increased from four months to six months.

With Art. 5 of the Ordinance, the Federal Council also gives debtors the opportunity to prepare for restructuring by suspending the applicability of the facts set out in Art. 296b lit. a and b SchKG. In concrete terms, this means that during a provisional debt-restructuring moratorium, no bankruptcy will take place ex officio, even if the bankruptcy would be necessary to preserve the debtor's assets or if there is obviously no longer any prospect of reorganisation or confirmation of a composition agreement. However, the applicability of Art. 296b lit. a and b SchKG is only suspended under the condition that on 31 December 2019 there was no over-indebtedness or subordination of company creditors to the full extent of the over-indebtedness.

3. COVID-19-moratorium

The so-called COVID-19 deferral is intended to provide debtors financially affected by the virus with a simple procedure by which they can obtain a deferral of payment of three months, or a maximum of six months if extended upon request. Individual enterprises, partnerships or legal entities can benefit from this. Excluded from the scope of application, however, are publicly traded companies or companies that have exceeded two of the following conditions in 2019: a balance sheet total of CHF 20 million, a turnover of CHF 40 million or an annual average of 250 full-time equivalents. Accordingly, SMEs should be the main beneficiaries of the COVID-19 deferral.

Again, this is subject to the condition that the company was not over-indebted as of December 31, 2019 or that subordination assignments by creditors are available to the full extent of the over-indebtedness.

The request for deferment must be submitted to the competent probate court, which must decide on it without delay. With the request, the debtor must credibly present his financial situation. As a rule, the submission of the balance sheet and income statement for the year 2019 should be sufficient. The court will make the deferral public and the debtor is instructed to inform the creditors known to him immediately.

It is important to note that the COVID-19 deferral only applies to claims against the debtor that arose before the deferral was granted. Claims arising after the deferral are not covered. Deferral is also excluded for wage and alimony claims, as these are considered to secure the existence of creditors.

During the deferral, debt collection against the debtor for claims covered by the deferral can neither be initiated nor continued, and arrest and other security measures are excluded. However, it is still possible to enforce the debt by way of realisation of a pledge, but the realisation of the real estate lien is not required. Despite the deferral, interest on all receivables continues to accrue. Finally, it should be mentioned that the statutes of limitation and forfeiture periods for these claims are suspended.

The debtor may continue his business activities, but during the period of deferment he may not perform any legal acts which impair the legitimate interests of creditors or favour individual creditors to the detriment of others. Thus, the sale or encumbrance of parts of the fixed assets as well as the creation of distraints are only permissible with the consent of the probate court. If the debtor pays claims which have arisen after the deferral and are therefore not covered by the deferral, but does not pay claims subject to the deferral, this does not constitute a contestable act within the meaning of Art. 285 et seq.

4. Personal liability of the institutions in the case of the joint guarantee credit

The COVID-19 Regulation on Insolvency Law introduces personal and joint and several liability for the joint and several guarantee credit of the organs and the persons involved in the management or liquidation. This applies to the damage caused by using the credit for an improper purpose in accordance with Art. 6 of the COVID-19 Solidarity Guarantee Ordinance. Prohibited are in particular:

- The distribution of dividends, bonuses and capital contributions;
- the granting or refinancing of private or shareholder loans;
- the amortization of group loans; and
- the direct or indirect transfer of these loans to affiliated group companies outside Switzerland.

For further information, please refer to our krfacts special edition "Contract Law and Credit" of April 9, 2020. This and further legal information from other legal areas around COVID-19 can be downloaded from www.krlaw.ch.

II. Further questions

Due to the developing situation and the different circumstances of each individual case, we recommend that you contact us with any legal questions.

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