Changes in Bankruptcy Law

An overview of (temporary) measures in response to COVID-19

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APPROX.

Contents

COVID-19 has an enormous impact on the economy. For that reason, national governments take all sorts of measures to mitigate the economic impact. In various countries, the measures also include (temporary) changes of their insolvency and bankruptcy legislation. In this report, recent measures taken in 20 different jurisdictions are described.

This report is not intended to be exhaustive and only measures published before April 10, 2020 are included on a best effort basis. No actions should be initiated on the basis hereof without seeking further advice.

1. AUSTRALIA

Directors of Australian companies risk personal liability if they continue trading and incurring debts at a time when they know, or ought to know, the company will be unable to meet those debts. Accordingly, in order to provide directors with maximum flexibility as they navigate the economic impacts of COVID-19, temporary statutory measures have been implemented to ensure that the usual risks for directors arising from insolvent trading are, effectively, suspended. The relaxation of the ordinary obligations will be in place for a period of six months commencing from late March 2020. However, this only concerns debts entered into in the normal course of business during that six month period. On the other hand, the threshold for a creditor to initiate winding up proceedings against a company, or bankruptcy proceedings against an individual, have also been amended. The minimum debt has been temporarily increased from AUD 2,000 and AUD 5,000 respectively, up to AUD 20,000. In addition, the statutory period of notice requiring payment of debt has been increased from 21 days to six months. The main purpose of these measures is to allow companies and individuals time and space to restructure their affairs without going into formal insolvency proceedings. In addition, the Treasurer has been given temporary power to enact further measures to deal with any further uncertainty that arises going forward.

Read more about the measures taken in Australia on our website.

2. BELGIUM

The Belgian government has not (yet) proclaimed specific changes to insolvency rules and regulations. The Brussels enterprise court, however, communicated that no bankruptcy decisions would be pronounced for the time being and that, where possible, repeat creditors (such as the social security or tax authorities) should delay summons for the opening of bankruptcy proceeding. It can be assumed that other courts will take similar decisions. Although, a difference will need to be made between a debtor who is already structurally illiquid or over-indebted and a debtor who runs in to structural difficulties because of COVID-19.

3. BRAZIL

On March 31, 2020, Brazilian National Council of Justice approved six non-mandatory guidelines to Restructuring and Bankruptcy Courts during the COVID-19-pandemic.The guidelines recommend that judges in charge of such proceedings:

i. prioritize the analysis of deposit release requests made by creditors or companies under restructuring;

ii. suspend general meetings of creditors, with the allowance of virtual meetings when necessary to maintain the debtor's activities or to initiate payments;

iii. extend the *"stay period"* when necessary to postpone the general meeting of creditors;

iv. authorize the presentation of an alternative reorganization plan when the debtor demonstrates a decrease to its capacity to fulfil the obligations assumed in the proceeding due to the pandemic, including a possible recognition of force majeure or act of God before a declaration of bankruptcy;

v. determine that trustees continue to supervise debtor's activities virtual or remotely and publish monthly reports; and

vi. analyse with caution the approval of emergency measures, eviction order for non-payment and the realization of executive acts of patrimonial nature against companies and other economic agents in lawsuits demanding defaulting obligations.

On April 1, 2020, temporary amendments to Brazilian bankruptcy law were proposed. The proposal provides for a suspension of all debt-collection activities against debtors for defaults after March 20, 2020 for 60 days. During that period, it would also be illegal to declare a debtor bankrupt. The suspension will not apply to any obligations entered into after March 20, 2020. After the 60-day period, debtors that suffer at least 30% reduction in revenue as result of COVID-19 will be able to apply for a voluntary preventive negotiation process. Debtors will also be able to enter into new financing agreements during the preventive negotiation process. Any money received in that process will be considered outside of any subsequent bankruptcy.

The temporary amendments also provide for a suspension, for 90 days, of all obligations established in judicial or extrajudicial reorganization plans in force, authorizing debtors subject to such plans to present new reorganization plans that may include credits existing after the date of the filling of the recovery. Finally, the amendments increase the minimum amount of unpaid debts necessary to declare a debtor bankrupt, which becomes BRL 100,000.

The temporary amendments are currently proposed to remain in effect until December 31, 2020 and were not yet approved by Brazilian congress.

4. CZECH REPUBLIC

On March 31, 2020, the Czech government adopted statutory changes in the regulation of insolvency proceedings. The proposed statutory changes also include a general restriction on creditors' insolvency petitions that will affect creditor-driven insolvency resolution of those debtors who already became insolvent prior to the COVID-19-outbreak. The most notable measures include an extraordinary moratorium open to all companies negatively influenced by governmental measures taken in connection with COVID-19 until August 31, 2020. Unlike an ordinary moratorium, this extraordinary moratorium does not require support by the majority of creditors.

Further, the statutory obligation to file for insolvency on behalf of the insolvent debtor will be suspended until six months after the end of emergency measures, but no later than on December 31, 2020. This intended suspension, however, does not apply generally. Only companies that had not been insolvent before the measures were introduced, and the insolvency of which is a direct consequence of those measures, can apply for this suspension. All other companies and their directors still have the obligation to file for insolvency; otherwise, they expose themselves to the risks of liability for damages to the creditors. Lastly, insolvency petitions filed by creditors will not be taken into account until August 31, 2020. There is no exception to this rule and no connection to the government measures or COVID-19 has to be established.

5. FRANCE

In France, the government took urgent measures and adapted the insolvency law on March 27, 2020. This law authorizes (i) the filing by internet and (ii) videoconference or call hearing.

Before the health emergency, directors were required to file for bankruptcy within 45 days from the cessation of payments of the company (i.e. when the company cannot with its available treasury pay its due debts). Currently, the company that has fallen in cessation of payment after March 12, 2020 does not have to file for bankruptcy anymore, but it can wait until three months after the end of the health emergency crisis. In the meantime, the companies can open preventive measures (conciliation or ad hoc mandate) to negotiate with their creditors, obtain loans from banks which can be guaranteed by the French State and put in place any measures to rescue their business.

6. GERMANY

In Germany companies are in principle obliged to file for bankruptcy in the event of inability to pay or if the total debt exceeds the assets (Überschuldung). If the bankruptcy is not filed, the management board risks personal liability. This obligation has now been temporarily waived, subject to certain conditions. The most important condition is that the inability to pay and/or the *Überschuldung* are the result of the Coronavirus outbreak. In addition, there must be a real prospect that other governmental aid measures and/or negotiations with financiers and other creditors can help overcome the crisis. If that is not the case, the obligation to file for bankruptcy remains. In principle, the temporary regulation applies until September 30, 2020, but the German Ministry of Justice is entitled to extend the arrangement until December 31, 2021 at the latest.

For a more detailed reflection of the temporary measures, please see the analysis of our German colleagues.

7. HONG KONG

In response to, among other things, the COVID-19 outbreak, Hong Kong has announced its intention to implement insolvency proceedings inspired by the so-called 'Chapter 11' proceedings from the United States. Such a procedure must offer the possibility of restructuring outside bankruptcy, whereby a minority of opposing parties can be forced to cooperate. The procedure is intended to be in place by early 2021.

8. INDONESIA

In response to the COVID-19 pandemics, the Supreme Court of the Republic of Indonesia issued a letter with guidelines for implementation of duties during the period of preventing the spread of COVID-19 within the Supreme Court and the judicial institution. Pursuant thereto, the District Court of Central Jakarta has decided that the submission of a new case must be executed by e-filing, effectively from 23 March 2020 to 5 April 2020. This policy will be reviewed from time to time. Considering the escalation of the spread of COVID-19 in Indonesia, the District Court of Central Jakarta most likely will extend this policy.

The insolvency proceedings petition must be submitted in person because the system of e-filing has not covered such submission. Consequently, petitions of insolvency proceedings cannot be filed with the Commercial Court at District Court of Central Jakarta since 23 March 2020. As for the ongoing cases, which had been filed before 23 March 2020, the Commercial Court at District Court of Central Jakarta is still examining those ongoing cases. In some cases, physical hearings are still taking place at the court's premises.

9. LUXEMBOURG

Luxembourg adopted a regulation in relation to the suspension of deadlines in judicial matters (amended on April 1, 2020). This regulation provides that the deadline of one month to file for insolvency (as of the day that the statutory cumulative conditions have been met) be suspended. This entails that directors of an insolvent company are not under the legal obligation to file within one month for the duration of the state of crisis.

10. NETHERLANDS

The Dutch courts published temporary alternative rules of procedure with regard to insolvency proceedings. The most notable change is that, in principle, physical hearings will not take place and all hearings will be through audio or video conference or in writing. All courts will take into account that protection of rights and protection against abuse of rights remain of great importance, especially in insolvency proceedings.

Further, a large number of insolvency law experts have called on politicians to speed up the introduction of a 'Dutch Scheme of Arrangement' (Dutch acronym, **WHOA**). Simply put, WHOA enables debtors outside bankruptcy to offer a (binding) tailor-made restructuring plan to their creditors. This means that a minority of opposing parties can be bound to accept a discount on their claims. Moreover, under certain circumstances, WHOA offers the possibility - in extreme cases - to terminate agreements prematurely.

The legislative process with regard to WHOA has been underway for some time and the Ministry of Justice marked the bill as urgent. The desired entry into force of WHOA is July 1, 2020.

On our special COVID-19 Client Resources Hub you can find more information about the consequences of the COVID-19 outbreak and the measures taken (in English).

11. POLAND

In Poland, no specific COVID-19-related bills amending bankruptcy and restructuring laws have been enacted thus far. According to press reports as well as unofficial information, the government started working on potential solutions responding to an expected wave of insolvencies triggered by COVID-19:

- the compulsory filing of a bankruptcy petition by a debtor will be suspended for the duration of the state of epidemic threat (March 14-20) and the state of epidemic (from March 20);
- the new deadline for a debtor to file a bankruptcy petition will be three months from the date the state of epidemic is officially declared to have ended;
- the new rules will only apply to debtors whose insolvency was triggered by problems created by COVID-19.

In addition, the activity of courts has been reduced and hearing dates in bankruptcy and restructuring cases have been cancelled. The cancellation of hearings already adversely affected certain restructurings (as a handful of decisions must be issued at the hearing). For instance, the court must schedule a hearing to approve a composition, so the cancellation of a hearing will delay the repayment of creditors on the basis of compositions already adopted.

12. ROMANIA

There are no changes whatsoever yet to the insolvency law in the context of COVID-19. The only practical change is that all court proceedings relating to insolvency matters are on standby until the beginning of June, subject to duration of the state of emergency currently in place in Romania and further decisions of the Superior Council of Magistrates, the supervisory body of magistrates in Romania.

However, as the petitions filed by debtors are subject to an accelerated settlement procedure, within ten days from filing, some courts, at least the Bucharest Tribunal started scheduling hearings via Skype and most likely will rule on such petitions in the current context of the state of emergency.

13. RUSSIA

The Russian government announced a moratorium on creditors' initiation of bankruptcy proceedings against specific categories of debtors:

1. entities and individual entrepreneurs who have suffered the hardest from the COVID-19 pandemic, i.e. engaged in a particular type of economic activity, such as airline, tourist, hospitality, sports and recreation, education, etc.;
2. entities deemed systemically important for the state economy; and
3. entities of strategic importance to the state economy.

The moratorium entered into effect on April 6, 2020 and will last for six months (and may be further extended). Creditors' involuntary bankruptcy petitions filed during the moratorium must be rejected by a Russian court. In addition, during that period:

i. eligible debtors are no longer obliged to file voluntary bankruptcy petitions within the statutory period prescribed by law;
ii. regular enforcement measures are prohibited; and
iii. any transaction that does not fit into the normal course of business within that company or whose value exceeds 1% of the company's assets will be void.

Read more about the measures introduced in Russia on our website.

14. SINGAPORE

Singapore has introduced legislation to provide temporary relief to businesses and individuals unable to fulfil contractual obligations to be performed on or after February 1, 2020 for specific types of contracts entered into or automatically renewed prior to March 25, 2020, where such inability is materially caused by COVID-19. The temporary relief will initially be in place for up to six months, with the possibility of extension. During this period, contracting parties cannot (among others) initiate court and insolvency proceedings against the non-performing party if certain requirements are satisfied, including sending a notification for relief. Other enforcement measures are similarly constrained. The legislation also provides for assessors to determine issues under the Act on a quick and cost-effective basis. As of April 8, 2020, the legislation for such temporary relief has not commenced having the force of law but it will not be too long before they do.

Further, the monetary thresholds for bankruptcy and winding up applications are increased and the statutory period to respond to demands from creditors are extended, both substantially. Lastly, directors will be temporarily relieved from their obligations to prevent their companies trading while insolvent if the debts are incurred in the company's ordinary course of business. Please note that directors remain criminally liable if the debts are incurred fraudulently, and remain exposed to civil claims if they have breached their duties *qua* director.

Read more about the measures taken in Singapore on our website.

15. SLOVAKIA

Slovakia extended its deadline for the obligation to file for bankruptcy in case of over indebtedness from 30 to 60 days after the debtor became (or could have become, if it had exercised professional care) aware of its over-indebtedness. Currently, this extension only applies to debtors that become over indebted in the period between March 12, 2020 and April 30, 2020. In the case of inability to pay debts, the application is left for the creditors (and their right to file has not been altered in relation to COVID-19). In addition, insolvency trustees must refrain from taking any action aimed at liquidation (sale) of the assets of bankrupt debtors until April 30, 2020.

16. SPAIN

In Spain, companies can be obliged to file for bankruptcy under certain circumstances. As a result of the state of emergency declared in Spain, that obligation has been waived as long as the state of emergency is in force. In addition, during the first two months after the end of the state of emergency, courts will not deal with bankruptcy petitions filed by creditors during that period. In addition, petitions for voluntary bankruptcy will be dealt with as a matter of priority, even if they have been filed later than a creditor's petition for bankruptcy.

For more information on the measures taken in Spain, please see our website.

17. TURKEY

As per Article 330 of the Turkish Enforcement and Bankruptcy Law, enforcement proceedings may be suspended for a certain period of time in the event of a pandemic, a calamity or war through the President of the Turkish Republic's decision. Within the scope of various State actions and measures that are implemented to prevent possible spread of COVID-19, a presidential decree has been issued and entered into effect on March 22, 2020, in line with the above-mentioned Article 330, for suspension of enforcement and bankruptcy proceedings.

In this regard, all pending and new execution proceedings, along with precautionary attachment proceedings regardless of whether they have pre- or post-judgment nature, have been stopped until April 30, 2020. Therefore, no enforcement of precautionary attachment orders issued by courts and new execution proceedings can be commenced until the said date. However, the enforcement proceedings regarding child support payments and wage garnishments (if such wage garnishment is commenced before March 22, 2020) are exempt from this suspension.

Courts are placed on rotation and working on alternate days with skeleton personnel. As such, whilst there is no limitation in terms of initiating lawsuits, including bankruptcy cases and court sanctioned restructuring applications, significant delays are likely. Further, expert investigations are being adjourned to new dates after April 30, 2020.

18. UKRAINE

In response to the restrictive measures from the Ukrainian government aimed at the prevention of the spread of COVID-19, the Council of Judges of Ukraine approved recommendations for the working regime of Ukrainian courts for the period of the COVID-19 quarantine. This will affect the course of pending and new legal proceedings. So far, the Ukrainian Parliament did not pass any laws aimed at resolving the situation with running limitation periods (for applying to the court with a claim, to submit court orders for enforcement to the enforcement authorities or otherwise), so such periods continue to run in general order. To date, no specific measures have been enacted related to insolvency law.

19. UNITED KINGDOM

In the United Kingdom, directors can be criminally prosecuted if they continue a business in the knowledge that the company will not be able to pay its debts. This rule gives rise to anxiety and fear on the part of directors at a time when it is uncertain how the current situation will develop. For this reason, UK government announced emergency measures to be implemented to provide protection to directors of companies that continue to trade notwithstanding the threat of insolvency, and to prevent, where possible, companies entering into insolvency due to COVID-19.

The proposed measures include:

- wrongful trading provisions in the Insolvency Act 1986 will be suspended retrospectively from March 1, 2020. This will be for an initial period of three months, and will remove directors' liability where a company is close to insolvency but continues to trade;
- a moratorium (or "breathing space") period for companies in financial difficulty (though still ultimately viable). During this time, creditors would not be able to enforce their debts, allowing the company to prepare to restructure;
- a requirement for suppliers to continue to supply to companies in financial distress during the moratorium; and
- the creation of a "restructuring plan", with the ability to bind creditors to it. This will allow companies to continue to pay employees and suppliers. Moreover, it will temporarily be impossible for creditors to file for the bankruptcy of their debtor if the debtor is in a restructuring process.

Legislation to bring these proposals into effect is likely to be enacted in the coming weeks and greater detail provided as to how they will apply in practice.

For a more detailed reflection of the temporary measures, please see the analysis of our UK colleagues.

20. UNITED STATES

The Coronavirus Aid, Relief, and Economic Security Act (the **CARES Act**) intersects with three provisions of the Bankruptcy Code: (i) the Small Business Reorganization Act (the **SBRA**); (ii) chapter 7 of the Bankruptcy Code, affecting consumers; and (iii) chapter 13 of the Bankruptcy Code, affecting consumers. The changes apply for a period of one year from the effective date of the CARES Act. The changes may not modify the Bankruptcy Code in a substantial way, but the change of the SBRA, that constitutes an increase of the cap of debt allowed to qualify for the SBRA from USD 2,725,625 to USD 7,500,000, may cause an increase in filings under such provision, whereas otherwise such companies would have filed for chapter 11-proceedings.

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