

Powering ahead

COVID-19 – Changes to
corporate insolvency law



Contents

The COVID-19 pandemic has created significant challenges for all businesses. As the crisis abates, and we start moving into a new form of business as usual, the likely structural, fiscal and economic adjustments which the crisis is expected to cause over a longer period of time are vast.

We summarize any relevant changes or proposals to corporate insolvency law proposed or enacted in reaction to the COVID-19 pandemic covering multiple jurisdictions.

Jurisdiction
Belgium
China
France
Germany
Hong Kong
Ireland
Italy
Luxembourg
Netherlands
Singapore
Spain
Sweden
UAE
UK
US

We hope you find this useful and look forward to discussing further.

Belgium

The Belgian (federal) government issued a COVID-19 Decree providing a temporary protection for debtors that are affected by the COVID-19 pandemic and its consequences from their creditors by imposing a stay on the rights of these creditors (i) to enforce debts, (ii) to terminate existing agreements prematurely and (iii) to initiate bankruptcy proceedings.

The COVID-19 Decree introduces a stay of enforcement in relation to all debts, irrespective of their date of incurrence or due date, but only until 17 June 2020 (at 11:59). Please note that the original date has already been extended and that a new extension is thus possible.

This reprieve is granted to all companies whose continuity is in danger due to the COVID-19 pandemic and its consequences, and that had not stopped making payments on or prior to 18 March 2020. No protective or executory attachment can be made, and no means of enforcement may be taken or continued on assets of the company. However, there are a few notable exceptions:

- legal enforcement on immovable assets remains possible
- if a creditor can argue that the debtor does not qualify to benefit from the moratorium, that creditor can file a petition to lift the moratorium with the president of the competent Court of Enterprises
- certain assets fall outside of the scope of the COVID-19 Decree such as security interests and assets abroad

The COVID-19 Decree stipulates that all contracts that were closed by the company before 24 April 2020 cannot be terminated unilaterally or by the courts on the grounds of non-payment of a monetary debt that is contractually due and payable.

It should be noted that this suspension of the right to terminate existing contracts does not apply in the event of a breach of non-monetary obligations. Parties will regain all their rights after the end of the moratorium, meaning that they will be able to terminate the contract unless the breach of non-payment has been remedied. The COVID-19 Decree explicitly states that the aforementioned shall be without prejudice to the obligation to pay debts that are due. Also, other contractual remedies, such as the exception of non-performance, set-off and retention rights, remain available.

Any company affected by the COVID-19 pandemic cannot be declared bankrupt or, if it is a legal entity, dissolved, unless (i) at the initiative of the public prosecution or a temporary director, or (ii) with the company's consent, meaning it is still possible to file for bankruptcy.

However, the deadline to do this has been extended. Where one is ordinarily required to file for bankruptcy within a month after the company has ceased all payments, the COVID-19 Decree suspends this obligation until 17 June 2020 if the COVID-19 pandemic or its consequences are the reason of the filing for bankruptcy.

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China

The Supreme People's Court of China issued the Guiding Opinion on Several Issues Concerning the Proper Trial of Civil Cases related to Covid-19 Pandemic (II) (the "Opinion") on 19 May 2020 as a result of the outbreak of Covid-19 pandemic. This guiding opinion will be used as a mandatory guideline that all courts in China should follow. Thus far, This is the only legislation touches upon the area of insolvency as a result of the Covid-19 pandemic that we are aware of.

Article 17 to 23 of the Opinion relate to conducting hearing of bankruptcy cases during the Covid-19 pandemic. We set out below a summary of the key terms of the Opinion for your information.

- if a company cannot pay off its due debt due to the impact of the pandemic or pandemic prevention and control measures, then, when the creditor petitions for bankruptcy, the court shall actively coordinate with the debtor and the creditor to guide them to negotiate with each other to eliminate the cause of bankruptcy petition filing by way of allowing payment installments, extension of time limit for performance of contractual obligations and adjusting the contracting price, etc
- when examining whether a company meets the conditions for bankruptcy, the court shall pay attention to assessing whether or not the dilemma that the relevant company finds itself in is due to the pandemic (or pandemic prevention) that should be decided differently. For a company that was in good business conditions before the pandemic and then became unable to pay off due debts due to the impact of the pandemic or the control measures, the court shall take into consideration the company's business sustainability and the development prospects of the company's industry, rather than simply deciding that a company should enter into bankruptcy process based on its interim cash flow status and assets/liability position during the pandemic period
- the court shall actively guide the parties to modify or extend the timing of the reorganization plan or the settlement agreement that was difficult to perform due to the Covid-19 pandemic
- the court shall encourage the use of digital/telecommunication methods for the announcements and notices of bankruptcy, declaration of claims, convening of creditors' meetings, inquiry and disposal of debtors' property, and introduction of investors, etc

Client may refer to the text of the **Opinion here**, which is in Chinese language only.

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France

On 23 March 2020, a state of health emergency was declared and this state expires, as it stands, on 24 May 2020. Several Orders of 25 and 27 March 2020, issued pursuant to this law, made temporary but substantial changes to the law on business difficulties. These orders were the subject of two circulars from the Ministry of Justice, one undated and relating to the functioning of the commercial courts, the other of 30 March 2020 and specific to the impact of the orders on the treatment of business difficulties.

View our update on the **procedures for dealing with business difficulties**.

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Germany

Germany suspended the obligation to apply for insolvency for Corona-related cases and attached liability of company directors.

Pursuant to the "COVID-19 Insolvency Suspension Act – COVInsAG" ("COVInsAG") which entered into force with retroactive effect from 1 March 2020, the obligation to file for insolvency for companies affected by the corona epidemic is currently suspended until at least 30 September 2020 (subject to a longstop date of 31 March 2021) where the duty to file for insolvency under normal circumstances would have arisen on or after 1 March 2020 (the "Suspension Period"). This also has an effect on the director's liabilities attached to this obligation. Furthermore, the Act also restricts potential claw-back rights of a future insolvency administrator.

Suspension of the obligation to file for insolvency

The suspension only applies if the debtor's current insolvency is a consequence of the Corona pandemic and if there are prospects to overcome the illiquidity. If the debtor is currently illiquid but was not illiquid on 31 December 2019, the Act provides for a legal presumption that the debtor's current insolvency situation is a consequence of the Corona pandemic and that there are prospects to overcome the debtor's current illiquidity.

The aim of the COVInsAG is to give damaged companies and their representatives in the corporate bodies time to conduct the necessary financing and restructuring negotiations to avert insolvency in the current particularly tense situation.

Directors must be able to demonstrate that the company was not illiquid on 31 December 2019 (as the legal presumption only applies in this case), companies will need to set-up and demonstrate liquidity, showing that the insolvency situation did not occur before 31 December 2019. The majority of companies are likely to rely on an accountant and should in such case also instruct their accountant to document and plan a restructuring scenario to be able to demonstrate the prospects of the restructuring.

In line with the suspension of the obligation to file for insolvency, the Act also restricts the right of creditors to file for the opening of insolvency proceedings over the assets of a debtor. An application which is filed by a creditor between 28 March 2020 and 28 June 2020 will only be successful if the debtor was already insolvent on or before 1 March 2020. A possible extension of the suspension period for creditors is currently under review by the German Federal Ministry of Justice and Consumer Protection.

Suspension of liability

The COVInsAG also suspends the liability of managing directors for any payments made after the occurrence of an insolvency event and is implemented consistently – in accordance with the regulations on the suspension of the obligation to file for insolvency.

At the same time, it is becoming apparent that payments made during the Suspension Period, which serve to maintain business operations will be regarded as compatible with the requirements of emergency management (Sections 64 sentence 2 GmbHG/ 92 para 2 sentence 2 AktG) which will widely prevent liability of the management when making ongoing payments for rents, leases, salaries and other required payments.

Restrictions of future claw-back rights

In line with the suspension of the obligation to file for insolvency, the Act also restricts claw-back rights of a future insolvency administrator in case of a future insolvency proceeding.

If new loans are provided to the debtor or if the creditor is granted new securities for his loan during the Suspension Period, repayments on these loans which occur until 30 September 2023 and the provision of these securities are not deemed to be to the disadvantage of the other creditors and will therefore not be subject to claw-back by a future insolvency administrator. This also applies to the repayment of shareholder loans but not to the provision of new securities for these loans.

Payments or the delivery of goods or services to a creditor during the Suspension Period, to which the creditor was entitled, shall not be subject to claw-back rights by a future insolvency administrator. This shall not apply if the creditor knew that the debtor's restructuring and financing efforts were not suitable to overcome its current illiquidity. The burden of proof for the latter is therefore borne by the insolvency administrator.

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Hong Kong

In response to the COVID-19 outbreak, the Hong Kong Government has implemented a series of economic and fiscal relief measures designed to help businesses to cope with the crisis.

No forbearance law

Unlike some other jurisdictions such as UK and Singapore, no mandatory forbearance law have been introduced in Hong Kong so far.

However, there was a de facto forbearance due to the Hong Kong Courts' extended closure (from 24 January 2020 till 4 May 2020) as a result of COVID-19. This effectively extended some forbearance to debtors.

Hong Kong Government's stimulus plans

The Hong Kong Government has so far introduced three rounds of stimulus packages with the latest one unveiled in April 2020 being the largest, at a scale of HK\$137.5 billion (approximately US\$18 billion). Noteworthy measures taken by the Hong Kong Government include:

- the Employment Support Scheme, under which the Hong Kong Government will issue wage subsidies to eligible employers in order to encourage enterprises to retain employees, and prevent mass lay-offs
- the SME Financing Guarantee Scheme, under which the Hong Kong Government will provide concessionary low-interest loan to small and medium sized enterprises with up to 100% government guarantees, and the total guarantee commitment of the Special 100% Loan Guarantee has recently been further enhanced to HK\$50 billion
- tax relief measures including automatic 3-month extension of the deadline for 2018/19 tax payment and payment by instalments available to businesses in financial distress through application

Responses from Hong Kong Monetary Authorities and banks

The Hong Kong Monetary Authorities (the "HKMA") has released approximately HK\$1 trillion of lending capacity by taking the following measures:

- lowering the countercyclical capital buffer by 1.5%
- cutting the current level of regulatory reserves by half
- deferring the implementation of various requirements under the Basel III framework

In addition, the HKMA has also made efforts in ensuring banking system's liquidity by providing U.S. dollars to local banks using repo transactions with the Federal Reserve, clarifying HKMA's liquidity facilities framework and reiterating its stance that banks are able to utilise their liquidity buffers to meet liquidity demands.

On 1 May 2020, HKMA launched the Pre-approved Principal Payment Holiday Scheme for eligible corporate customers. Under the Scheme, banks in Hong Kong will offer principal payment holidays to covered corporate borrowers on a pre-approval basis.

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Banks have continued to provide relief offers such as delay in repayments, extension of loan tenors or reduction of fees to keep in line with HKMA's appeals. For instance, banks have introduced measures such as:

- extending repayment period for businesses in the transportation sector
- allowing customers to convert trade financing lines into temporary overdraft facilities
- offering accounts receivables loans to businesses in the retail sector
- providing unsecured loan products for small and medium sized enterprises
- speeding up loan approval process

Corporate Rescue legislation

Hong Kong currently does not have any statutory corporate rescue procedure.

In March 2020, the Hong Kong Government announced a plan to revive the previously shelved corporate rescue bill. It is worth noting that similar corporate rescue legislative proposals were previously considered in the previous crisis years of 2003 and 2009, and also in 2014, but eventually failed to be passed.

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Ireland

While a range of emergency legislation has been introduced in Ireland in response to Covid-19, to date no such legislation specifically deals with corporate insolvency issues or the right of lenders to take enforcement action against a defaulting borrower. Certain guidance and financial supports have been put in place however, as set out in this briefing.

Restriction of Directors – Some Guidance

Where a company goes into insolvent liquidation, the liquidator must bring proceedings against the directors to seek to restrict them acting as directors, unless the Office of the Director of Corporate Enforcement (“ODCE”) grants the liquidator relief from doing so. The ODCE must be satisfied that the directors acted honestly and responsibly based on a report from the liquidator. Separately, the directors may face proceedings to impose personal liability for the debts of the company. Such proceedings are unlikely to arise where the ODCE has granted relief from the bringing of restriction proceedings.

In circumstances where the crisis has made many previously solvent companies technically insolvent (unable to pay their debts as they fall due), directors are understandably concerned as to what might happen to them personally where such companies continue to trade with a view to financial recovery but ultimately fail. The ODCE has provided welcome guidance on its approach to directors of companies made insolvent by the Covid-19 crisis, who act honestly and in good faith on objective evidence in trying to rebuild their businesses. The guidance includes the following key points:

- The ODCE will not generally consider that the directors have behaved improperly where a company becomes insolvent because of events outside of their control.
- The actions taken, or not taken, by the directors in response to the financial difficulties they face, will inform the decision as to whether a restriction application will be made.
- If a company does enter insolvent liquidation, the ODCE will look at a number of issues, including:
 - the adequacy of the directors’ processes and procedures for monitoring the company’s financial position;
 - whether the directors sought professional advice (including legal advice);
 - the basis on which the directors formed the view that the company would be able to trade out of its difficulties; and
 - how long trading continued after it should have been apparent to the directors that the company was insolvent and would be unable to recover.

Furthermore, the ODCE notes that the Irish Courts allow some latitude to continue to trade while insolvent where:

- there is a reasonable prospect of survival; and
- the directors have acted honestly and responsibly in other respects.

It seems, therefore, that provided the directors' decisions are made in good faith, based on reasonable assumptions and assessments in the context of their own specific circumstances and provided they have otherwise acted honestly and reasonably, the ODCE is unlikely to consider that directors of companies which ultimately fail as a result of the Covid-19 crisis should be restricted.

Banking and Payments Federation Ireland ("BFPI")

The BFPI is an industry body representing Irish and international banks, non-bank mortgage lenders and certain credit servicing firms and other regulated service providers. It has offered three key elements of financial support, on a voluntary basis:

- Temporary payment breaks for up to three months for personal and business customers, including those in arrears. The payment breaks do not automatically operate but must be applied for by borrowers. The CBI has indicated it expects firms to make payment breaks generally available to borrowers impacted by the COVID-19 pandemic, whether or not they were already in financial difficulties.
- Adjournment of court proceedings for up to six months from mid-March 2020.
- Making available various working capital facilities and supply-chain supports to businesses.

The Central Bank of Ireland, which regulates and authorises financial institutions, has indicated in a "Dear CEO" letter issued on 8 June that it expects all regulated firms to take a 'consumer-focused' approach and to act in the best interest of its customers. It has also said that a temporary payment break provided to a customer affected by Covid-19 is not to be reflected as a default in the relevant customer's file on the Central Credit Register.

Revenue Commissioners

The Irish Revenue Commissioners have introduced various measures for SMEs experiencing cashflow difficulties arising from Covid-19. These include:

- the temporary suspension of charging interest on late payments for VAT and PAYE (Employers) liabilities; and
- all debt enforcement activity is suspended until further notice.

Proposed Legislative Changes

Whilst no specific legislation has been introduced in the area of corporate insolvency, various professional bodies have lobbied government and proposed temporary amendments to the Companies Act 2014 and other proposed reforms in light of the crisis. Certain proposals are set out below:

- Examinership:
 - Examinership is a court-led process whereby an insolvent company may be afforded a moratorium from enforcement action for a period of up to 100 days to enable the court-appointed examiner to put together a scheme of arrangement for the survival of the company. Examinership will only apply where there is a reasonable prospect of the survival of the company as a going concern. It is proposed that, as a response to the Covid-19 crisis, the period of protection should be capable of extension beyond the current maximum of 100 days, at the court's discretion.
 - One of the requirements of the Act is that prior to entering examinership, a company must demonstrate that it will maintain liquidity during the period of examinership. It can be difficult to raise financing for this purpose under the current regime. It has been proposed that this requirement be suspended.
 - The Act currently provides priority to certain liabilities which are certified by the examiner and incurred by a company during the period of court protection on the basis that they are necessary for the survival of the company. This does not provide the certainty required by funders and it has been proposed that the concept of 'debtor in possession' financing, a concept which is familiar in the Chapter 11 regime and elsewhere, should be introduced.

– Remote Meetings of Creditors

- The Companies Act 2014 anticipates that statutory meetings of creditors (whether for liquidations, examinerships or Schemes of Arrangement) shall be held in person. Given the social distancing and lockdown requirements introduced by the Covid-19 crisis, it has been proposed that legislative amendments should be made to provide for such meetings to be held remotely with the relevant documents being circulated in advance with the notice to creditors. In practice, these meetings are already being held via zoom/Skype etc., but the validity of decisions made at such meetings are, on strict legislative interpretation, open to challenge.

– Creditor Statutory Demand

- In Ireland, a creditor may issue a statutory demand which, if not met after 21 days, creates a presumption that the company is insolvent and the creditor may petition to wind up the company. The current minimum threshold for such a demand is €10,000. It has been proposed that the threshold should be temporarily increased to €50,000 and that such notices are suspended for the duration of the crisis.

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Italy

Preliminarily it may be useful to provide a short description of the main insolvency and restructuring procedures applicable to companies in the Italian legal system.

Out-of-court debt restructuring plan – A means for a distressed company to obtain new financing without the intervention of the court and the risk of claw back actions. A restructuring plan is prepared by the debtor company and agreed with its creditors. The plan is approved by an expert who considers the reasonableness of the assumptions and the debtor company's ability to fulfil its payment obligations. Plans generally include an industrial and financial plan, a moratorium, a debt refinancing or rescheduling plan and an analysis of all payments to be made and security granted under the plan.

Debt restructuring arrangement – Enables a debtor company to deal with excessive indebtedness while continuing to trade. Provides a moratorium without the need for the court to make a declaration of insolvency.

For an agreement to be effective, creditors who are owed 60% in value of the debtor company's debts must be party to the agreement. The agreement is confirmed by the court and binds only those creditors who are party to the agreement. Other creditors must be paid in full.

Pre-insolvency composition with creditors – Enables a debtor company in a crisis-status (such as insolvency or at least financial crisis, including a temporary illiquidity or inability to pay its creditors) to agree a restructuring or a liquidation plan with the majority of its creditors in order to not be declared bankrupt. If the plan is approved by the required majorities of creditors and confirmed by the court, it is also binding on the dissenting creditors. If the plan is not confirmed, upon request of a creditor or the public prosecutor, the court may declare the debtor bankrupt.

It is a debtor-in-possession procedure, but a court-appointed commissioner supervises the debtor and transactions that are not in the ordinary course of business need to be authorised by the court.

Bankruptcy – Following a declaration of insolvency, the court appoints a supervising judge and a receiver who is entrusted with the management of the business (if any).

On declaration of insolvency an automatic moratorium arises.

Creditors prove for their receivables and the receiver draws up a list of creditors.

The receiver realises the company assets and distributes the proceeds to the creditors in accordance with the priority set by the law. Creditors are paid pro rata to their claims.

Extraordinary administration – Only available to the restructuring of companies and groups of companies that have a strategic position in the Italian economy. The procedure is commenced by the Ministry of Industry who appoints the extraordinary commissioner(s) and supervised by the court.

There are two types of Extraordinary administration (under the legislative decree 270/1999, Prodi bis law, and under the law 39/2004, Marzano law). In both procedures the debtor is declared insolvent by the court.

A liquidation or restructuring plan is prepared by the commissioner and approved by the Ministry. Only under the Marzano law procedure might creditors be requested to approve the plan.

Compulsory administrative liquidation – Only available to public entities, insurance companies and banks or other regulated entities that cannot be declared bankrupt. The procedure is commenced by a decision of insolvency of the court while the competent administrative authority appoints the commissioner(s).

The purpose of the procedure is the realisation of the company assets and the distribution of the proceeds to the creditors.

Following the Coronavirus outbreak, the Italian government adopted, inter alia, extraordinary measures also in relation to bankruptcy and other insolvency proceedings, all aimed to ensure the continuation of business activities.

The Law Decree no. 23 issued on 8 April 2020 (so-called “Decreto Liquidità”) ¹ sets out, inter alia, the following provisions for bankruptcy and other insolvency proceedings.²

The entry into force of the new Company Crisis and Insolvency Code (Legislative Decree no. 14 of 12 January 2019) was postponed from 15 August 2020 to 1 September 2021.³

For both pre-insolvency composition with creditors and debt restructuring arrangements, the following measures have been adopted:

- the deadline for the fulfilment of the arrangements already approved by the Court and expiring during the period between 23 February 2020 and 31 December 2021 is postponed by six months
- in the case of agreements not yet approved by the Court but pending on 23 February 2020, the debtor can apply to the court to obtain a time limit for the filing of a new plan (composition with creditors) or a new proposal (debt restructuring arrangement) or only to amend the deadline for the fulfilment of the agreement
- in the case that the debtor applied to the court for a pre-insolvency composition with creditors reserving the right to file the plan within a term set by the court (so-called “concordato preventivo in bianco”), even though he was already granted with an extension of the term to file the plan, he can apply for a new extension of such term up to 90 days

Applications for bankruptcy and for the admission to extraordinary administration or to compulsory administrative liquidation filed between 9 March and 30 June 2020 shall not be admitted by the courts.

If the application is not admitted in the relevant period but at a later date the debtor is declared insolvent, the relevant period will not be taken into account for the purposes of determining the time limit for clawback actions.

¹ The full text published on the Italian Official Journal website is available at:
<https://www.gazzettaufficiale.it/eli/id/2020/04/08/20G00043/sg>

² A further analysis of the provisions set out in the Law Decree no. 23 of 8 April 2020 is available on our website at:
https://www.eversheds-sutherland.com/global/en/what/publications/shownews.page?News=en/italy/en/ITALY_CORONAVIRUS_EMERGENCY_17_04_2020

³ By the legislative decree no. 14 of 12 January 2019 a comprehensive and organic reform of insolvency proceedings and rules governing the business crisis has been adopted (Company Crisis and Insolvency Code) to replace the insolvency law currently in force.

As explained, the new law is expected to come into force on 1 September 2021; until then the provisions and principles of the old bankruptcy act (Royal decree no. 267 of 16 March 1942, as subsequently amended and implemented) shall apply. The new law is compliant with EU Regulation 2015/848, the Commission Recommendation 2014/135 and the principles of the United Nations Commission on International Trade Law model law on insolvency.

The new law provides inter alia the following:

the term bankruptcy (fallimento) shall no longer be used and shall be replaced by the term judicial liquidation (liquidazione giudiziale);

priority shall be given to proceedings aimed at overcoming the crisis by keeping the business as a going concern (even if through a new entrepreneur), provided that they are in the best interests and to the satisfaction of creditors. Therefore, the reform (i) provides that judicial liquidation will be commenced only when no other suitable solution has been proposed by the debtor; (ii) facilitates debt restructuring agreements; (iii) encourages out-of-court debt restructuring plans; (iv) provides that the pre-bankruptcy arrangement with creditors has to be focused on business continuity;

a definition of state of crisis (i.e. the likelihood of future insolvency) is provided with explicit consideration given to business economics;

early warning procedures and out-of-court procedures for the settlement of the crisis are introduced to facilitate the early disclosure of the crisis and the negotiations between the debtor and the creditors. Out-of-court procedures for the settlement of the crisis -which shall not apply to either listed or large companies- will be commenced by the debtor's demand and carried out by a new special body set up at every office of the Chamber of Commerce.

The full text of the legislative decree no. 14 of 12 January 2019 published on the Italian Official Journal website is available at: <https://www.gazzettaufficiale.it/eli/id/2019/02/14/19G00007/sg>

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The Law Decree no. 34 issued on 19 May 2020 (so-called “Decreto Rilancio”) ⁴ provides, inter alia, that, for companies admitted to the insolvency procedure of extraordinary administration, the terms for the fulfilment of the plans concerning the transfer of the business complex and the restructuring plans, expiring after 23 February 2020, even though already postponed by law provisions, are further extended by six months.

Please consider that the above extraordinary measures have been adopted by way of law decrees. Under Italian Law, law decrees enter into force immediately after they are published in the Official Journal however must be converted into law within 60 days.

To date the above law decrees have not yet been converted into law. It may be that, during the conversion process, the provisions are amended or integrated.



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The full text published on the Italian Official Journal website is available at:
<https://www.gazzettaufficiale.it/eli/id/2020/05/19/20G00052/sg>

Luxembourg

As a preliminary comment, please kindly note that a draft bill aiming at modernizing the Luxembourg insolvency law has been filed with the Luxembourg Chamber of Deputies in 2013 and is under discussion ever since. The Luxembourg current insolvency law is highly criticised due to the lack of measures aiming at (i) preventing commercial companies/merchants to file for bankruptcy and (ii) protecting the own assets of merchants who are individuals. For instance, over-indebtedness is not a condition to file for bankruptcy under the current insolvency law and there is no modern procedure for the safeguard of commercial companies/merchants.

As a result of the Covid-19 pandemic, the state of crisis has been declared in Luxembourg until 17 June 2020 – unless the duration of the state of crisis is renewed from time to time (the “State of Crisis”).

For the time being, the only measure that has been taken in relation to insolvency law is the suspension of the obligation of commercial companies/merchants to file for bankruptcy within 1 month from the date of the cessation of payments during the State of Crisis according to the grand-ducal decree dated 18 March 2020 and introducing specific measures in the context of the fight against Covid-19 (as amended from time to time).

However, the Luxembourg Chamber of Commerce advised the Luxembourg government to adjust the liability regime of directors in case of bankruptcy to the exceptional circumstances resulting from the Covid-19 pandemic and other Luxembourg economic players are asking for measures preventing commercial companies/merchants to file for bankruptcy.

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Netherlands

The Dutch government has implemented a series of financial measures to help Dutch companies to continue their businesses while facing uncertainties and financial distress as a result of COVID-19. However, there have been no (proposed) changes to Dutch corporate insolvency laws to date in connection with COVID-19.

It is worth noting that the proposed bill on court confirmation of extrajudicial restructuring plans (Wet homologatie onderhands akkoord (WHOA), also referred to as 'the Dutch scheme of arrangement') was adopted by Dutch Parliament in May 2020. The WHOA aims to support business continuity and recovery and can also help implement international restructurings. Under the WHOA, a debtor may offer an extrajudicial restructuring plan to all or some of its creditors or shareholders. If certain requirements are met, the restructuring plan can be confirmed by a Dutch court, making it binding on all affected parties. The restructuring plan may include a cross-class cram-down and group company obligations (even if the group companies are non-Dutch), and it can also terminate onerous contracts. The WHOA is now subject to approval by the Dutch Senate, where no amendments can be made. It is expected that the WHOA will enter into force in the second half of 2020.

On 4 June the Dutch government announced a draft bill for a temporary (up to a maximum of 6 months) moratorium for Dutch companies that are in distress as a consequence of the Coronavirus. The draft bill suggests that during a Dutch moratorium (i) any bankruptcy filings will not be heard by Dutch courts, (ii) the relevant creditor filing for bankruptcy cannot force payment of debts which have become due prior to the Dutch moratorium becoming effective or suspend any services under the defaulted contract, and (iii) the creditor cannot demand for payment or take recourse against the debtor's assets during a Dutch moratorium. A debtor can also request a Dutch court in summary proceedings to defer enforcement actions of certain creditors' rights against its assets, if such is necessary for the continuation of the business. On the same basis, a debtor could request a court to lift attachments which were levied by a creditor.

The bill is yet to be adopted by Dutch parliament but is expected to enter into force as soon as possible. The bill is set to terminate on 1 October 2020 (unless extended by the Dutch legislator).

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Singapore

On 7 April 2020, the Singapore Parliament passed the wide-ranging COVID-19 (Temporary Measures) Act 2020 ("the Act") to provide temporary, targeted relief to alleviate the immense pressures caused to individuals, firms and businesses as a result of the COVID-19 pandemic.

Insofar as corporate insolvency laws and procedures in Singapore are concerned, the Act introduces several modifications which ultimately make it more difficult in order for a company or business to be wound up.

These modifications, commencing on 20 April 2020 for an initial period not exceeding 6 months, can be briefly summarised as follows:

- the prohibition against the taking of certain legal action (including but not limited to the commencement of winding up applications, application for a judicial management order, or the appointment of a manager or receiver over any party's property or undertaking), against a party who qualifies for relief under the Act. In this regard:
 - such prohibition generally applies to obligations in relation to Scheduled contracts which are to be performed on or after 1 February 2020, of which the inability to perform are materially caused by a COVID-19 event, and where the party seeking relief has served a notification under the Act on the relevant parties
 - if there is a dispute as to whether the non-performance was to a material extent caused by a COVID-19 event, it will be referred for determination by an assessor from a pool of Assessors appointed by the Ministry of Law
 - should relief be granted (either upon service of the notifications of relief or determination by Assessors), it would be an offence for a party to enforce against any of the contracts covered under the Act. Further, any steps taken in breach of the Act will be dismissed, or deemed void or invalid
- the monetary threshold for corporate insolvency has been increased from \$10,000 to \$100,000
- the time period for a party to respond to a statutory demand has been increased from 21 days to six months
- Directors of a company or partners to a limited liability partnership will be temporarily relieved from their obligations to prevent their company or business from trading while insolvent, if the debts are incurred in the company's or limited liability partnership's ordinary course of business. That said, these directors and partners remain criminally liable if the debts are incurred fraudulently

For the avoidance of doubt, these modifications do not apply to insolvency applications commenced and statutory demands served before the commencement of the Act.

Powering ahead

COVID-19 – Changes to corporate insolvency law

Parliament has moved quickly to react to the COVID-19 pandemic that has severely affected businesses and their cash flow. However, the prohibitions under the Act, together with the upward revision of the monetary threshold for corporate insolvency, as well as the increased time to respond to statutory demands, will have an impact on the recovery efforts of creditors. This is especially so since the payments will continue to accrue, and the entire accrued sum will be due upon the expiry of the prescribed period under the Act. This may therefore result in an increase in default cases and legal proceedings immediately after the expiry of the prescribed period.

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Spain

Urgent extraordinary measures adopted in Spain bear in mind that the State of Alarm was declared on 14 March 2020:

- the suspension of the borrower's duty to apply for a declaration of insolvency is extended until 31 December 2020, whether or not the competent court has been notified of the opening of negotiations with its creditors on a refinancing agreement, an out-of-court settlement or the submission of an early proposal for a settlement
- likewise, and also until 31 December 2020, the judges will dismiss the necessary applications for compulsory insolvency proceedings (filed by a creditor) submitted since the declaration of the State of Alarm
- with respect to those companies and self-employed individuals who have been regularly complying with the obligations arising from a collective agreement, an out-of-court settlement or approved refinancing agreement, the duty to request the opening of the liquidation phase is postponed for one year following the declaration of the State of Alarm if during the term of the agreement the debtor becomes aware of the impossibility of complying with the committed payments and the obligations incurred after the approval of the agreement
- the amendment of the agreement or the approved out-of-court settlement or refinancing agreement is facilitated and a new application for such settlement or refinancing agreement may be filed without the need for a year to elapse from the submission of the previous one
- in the event of breach of the approved or amended agreement within two years from the declaration of the State of Alarm, cash receipts from loans, credits or other business of a similar nature granted to the insolvent party or deriving from personal or real guarantees provided in favor of the insolvent party by any individual - including those who are specially related to the insolvent party shall be deemed to be credits against the estate, provided that the agreement or amendment states the identity of the insolvent party and the maximum amount of the financing to be granted or the guarantee to be provided
- in the insolvency proceedings declared within two years from the declaration of the State of Alarm, credits will be classified as ordinary if they are derived from cash income from loans, credits or other businesses of a similar nature, which since the declaration of the State of Alarm had been granted to the borrower by those who have the status of individuals especially linked to him. Claims in which those who, according to the law, are specially related to the debtor as a result of payments of ordinary or privileged claims made on behalf of the creditor, as from the declaration of that status, shall also be considered as ordinary claims
- suspension of the legal cause for dissolution due to financial loss the application of the cause of dissolution for financial losses provided for in Article 363.1 e) of the Spanish Corporations Law is suspended. By virtue of this suspension, the losses for the financial year 2020 will not be taken into consideration for the sole purpose of determining the concurrence of the aforementioned cause for dissolution

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Sweden

In response to the Covid-19 pandemic the Swedish legislature has adopted various crisis packages with the aim to support viable companies during the crisis and reduce the number of job losses. It is worth noting that the various crisis packages consistently exempt companies that at the end of year end 2019 and /or time of the application for financial support where either insolvent (cash-flow definition, ie unable to pay debts as they fall due), under debt restructuring or required to submit a balance sheet for liquidation purposes. There have been no material changes to the corporate insolvency laws, nor any changes/proposed changes to general insolvency legislation, as an effect of the Covid-19 pandemic.

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UAE

Whilst the UAE Government has launched economic stimulus packages to minimize the disruption, the financial and social cost of the virus will be felt for many months, if not years, to come. In light of this severe economic disruption, companies of all sizes are likely to feel the impact of this disruption in some form.

Knowing the current practical options for insolvency and applying careful thought to the most appropriate approach is more important than ever before, and these circumstances may well prevail for some time.

Our update a '**snapshot of the insolvency process in UAE**' provides a brief snapshot of the current insolvency laws in the UAE and specifically focuses on the following:

- the background to the insolvency regime
- the types of restructuring processes available to companies
- director duties and liabilities under UAE law
- related shareholder duties and liabilities under UAE law
- practical guidance to consider

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UK

The British Government is currently in the process of enacting a new Bill, the Corporate Insolvency and Governance Bill (the “Bill”), which is expected to come into force in mid to late June 2020. The Bill includes both temporary provisions to assist distressed debtors during the pandemic and also permanent changes to UK insolvency law – in particular, the introduction of two new insolvency procedures and a limitation to the exercise of insolvency termination (or ipso facto) clauses.

Please see our summary of the **Corporate Insolvency and Governance Bill**, and links to other notes considering the proposed changes in greater detail.

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US

Insolvency and restructuring procedures

What are the main insolvency and restructuring procedures applicable to companies?

- Bankruptcy Liquidation
- Bankruptcy Reorganization

Liquidation – A financially distressed company may petition the bankruptcy court for protection under the U.S. Bankruptcy Code, or a small group of creditors may petition for an involuntary bankruptcy. A petition filed under chapter 7 of the Bankruptcy Code commences an automatic liquidation, overseen by a bankruptcy trustee. A case under chapter 11 of the Bankruptcy Code – which is nominally reserved for reorganizations – may sometimes be used for liquidation as well.

A company may also liquidate voluntarily outside of bankruptcy under court auspices (eg, receivership) or without court supervision (eg, assignment for the benefit of creditors)

Reorganization – A financially distressed entity may file a petition in bankruptcy court for protection under the U.S. Bankruptcy Code. Insolvency is not required. In a case under chapter 11 of the Bankruptcy Code, the preexisting management typically remains in control of the entity and assumes the fiduciary duties otherwise charged to a bankruptcy trustee. The entity seeks to develop a Plan of Reorganization to address its treatment of claims. The Plan of Reorganization must be confirmed by the bankruptcy court, which applies certain codified legal requirements, including consideration of the outcome of a vote of creditors. Certain entities (eg, banks, insurance companies) are not eligible for bankruptcy but may be liquidated through other processes.

Can a company obtain a moratorium whilst it prepares a restructuring plan? If so, what is the effect of the moratorium?

Yes. Immediately upon the commencement of any bankruptcy case (whether a liquidation or reorganization), US law imposes an “automatic stay,” which enjoins a wide variety of actions by creditors and other parties. Unless the court modifies the stay upon a creditor’s establishment of certain statutory requirements, the stay continues until the confirmation of a chapter 11 Plan, or the closing of the bankruptcy case.

How long will it generally take for a creditor to achieve the liquidation of an insolvent company, assuming an undisputed claim and no opposition from the company?

To liquidate in bankruptcy, unless the debtor is especially small, the creditor will often be required to find two additional petitioning creditors to join in the involuntary bankruptcy petition. Assuming that the required number of creditors to file an involuntary petition is established, the liquidation will begin in approximately four weeks. A judgment creditor may seek liquidation if no bankruptcy is filed; the timetable will vary considerably.

Insolvency office-holders and courts

Who can act as an insolvency office-holder?

In a chapter 7 liquidation, the insolvency office-holder is a bankruptcy trustee. The trustee is chosen from a local panel of trustees.

In a chapter 11 bankruptcy case, there typically is no insolvency office-holder. The debtor continues in possession of its assets, with existing management charged with the fiduciary duties that would otherwise be charged to a trustee. In a chapter 11 case in which the court determines that there has been fraud or gross mismanagement, then a bankruptcy trustee is appointed by the court, but not necessarily from the same local panel of trustees.

Who decides the identity of the insolvency office-holder, and what restrictions apply?

The trustee is appointed by the Office of the United States Trustee, which is an arm of the U.S. Department of Justice.

Are insolvency cases heard by specialist judges, or in the general commercial courts?

Bankruptcy cases are heard by specialist judges.

Position of directors

To what extent do the directors of the company remain in control of its affairs during any of the procedures described above?

In a chapter 7 liquidation, existing management is relieved of its duties immediately upon the appointment of a trustee. In most chapter 11 bankruptcy cases – assuming no fraud or gross mismanagement – the existing management remains in place and continues to control management decisions.

Are there circumstances in which directors are obliged to file for insolvency proceedings? If so, when do those circumstances arise?

There are circumstances in which existing management would voluntarily file a bankruptcy petition. The officers and directors are charged with fiduciary duties toward creditors once a company is insolvent. If filing a bankruptcy petition is in the best interests of creditors once the company is insolvent, then the officers and directors would be expected to do so.

What are the risks facing the directors of an insolvent company?

US state laws allow for claims against directors if they have breached their fiduciary duties to the company. The level of risk will generally vary, based on applicable state law and the terms of the company's governing documents.

Position of creditors

What are the main forms of security over movable and immovable property?

Security over movable property is generally taken by:

- security interest under Article Nine of the Uniform Commercial Code

Security over immovable property is taken by:

- mortgage

How does the opening of insolvency proceedings affect the rights of secured creditors?

Secured creditors are subject to the automatic stay and are generally expected to wait through the proceedings before realizing value. However, secured creditors will generally receive 100% of the value of their collateral at the end of the proceedings.

Where a debt owed to a secured creditor exceeds the value of the security, is the secured creditor entitled to claim for the shortfall?

Yes, but the claim for the shortfall would be unsecured.

Which classes of creditor are given preferential status? Are any classes subordinated?

Under US bankruptcy law, secured claims are guaranteed either to receive payment in full or to retain the property interest after the bankruptcy case. After satisfaction of secured claims, the following classes of claims are generally given priority:

- administrative expenses of the bankruptcy estate
- unsecured claims in an involuntary bankruptcy, arising in the ordinary course of business between the filing of the bankruptcy petition and the order for relief
- certain claims related to employee wages

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- claims related to contributions to employee benefit plans
- certain tax claims

There are no specific types of creditors or claims that must be subordinated. The bankruptcy court will generally respect parties' agreements to subordinate certain claims, such as in intercreditor agreements. In addition, the bankruptcy court has power to subordinate claims for inequitable conduct.

Is there a date by which creditors must make claims in the insolvency proceedings? If so, what are the consequences of failing to claim by that date?

In a chapter 7 liquidation, creditors must file claims within 70 days of the commencement of the case. In a chapter 11 bankruptcy case, there is no statutory requirement and therefore the deadline will vary.

Failure to file a claim by the deadline will almost always result in a bar from recovery from the bankruptcy estate.

Are contractual rights of set-off and/or netting effective in insolvency?

Contractual rights of set-off and/or netting are generally allowable, subject to a few additional requirements that would not be imposed outside of bankruptcy. The set-off or netting may not always be exercised immediately, however. Often, the rights may only be exercised at the end of the proceedings.

Are contract terms permitting termination of a contract by reason of insolvency ("ipso facto clauses") effective?

No. Except for certain contracts related to financial or commodity trading, ipso facto clauses are unenforceable.

Are retention of title clauses enforceable and (if applicable) what are the main requirements for enforceability?

Yes, but only if the creditor complies with the security interest requirements of the Uniform Commercial Code.

Are foreign creditors treated equally to domestic creditors?

Yes.

Setting aside transactions

What are the main transaction avoidance provisions applicable to the proceedings referred to above?

The primary types of avoidance actions are preferences, fraudulent conveyances and unauthorized post-petition transfers. Preferences are generally transfers by the debtor in the ninety days prior to bankruptcy (one year when the transfer is to an insider), which prefer one unsecured creditor over another. Fraudulent conveyances may be transfers involving actual fraud upon creditors, or constructive fraud – the latter of which are transfers at a time when the debtor was insolvent or the like, for which is received less than reasonable equivalent value. As the name implies, unauthorized post-petition transfers are transfers of the bankruptcy estate for which the Bankruptcy Code required court approval and none was granted.

Who is entitled to challenge transactions under these provisions?

A bankruptcy trustee or a chapter 11 debtor-in-possession may assert claims to avoid the transactions discussed above. Occasionally, an Official Committee of Unsecured Creditors will also be authorized to do so.

Cross-border insolvency

Do your courts recognize insolvency proceedings commenced in the courts of other jurisdictions?

Yes, if the other jurisdiction is a signatory to the UNCITRAL Model Law on Cross Border Insolvency.

If so, what assistance can your courts provide, following recognition?

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Following recognition, the primary assistance is in the form of enjoining certain actions and marshaling assets within the US.

Is it possible to commence insolvency proceedings in relation to a foreign company?

Yes.

Other matters

Please consider whether there is any other feature of your country's insolvency regime of which a lender, investor or purchasers of distressed debts or businesses should be aware? For example, are there any mistakes that foreign creditors often make?

It is valuable to arrange for local counsel in the jurisdiction of the proceedings, ideally as early as possible. There is a wide range of variation in local procedural rules and judges' preferences, and local counsel will be able to help navigate those variations.

Are there currently any proposals for significant reform of your insolvency laws either generally or more specifically arising from the impact of the Covid19 pandemic?

None pending at the moment, but there is a recent amendment to the Bankruptcy Code to make chapter 11 relief more readily available to smaller businesses. The threshold level of assets and liabilities for relief under that sub-chapter was lowered in responses to the Covid-19 pandemic.

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