Moratoria during COVID-19 pandemic – an overview

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Introduction

A moratorium under the Debt Enforcement and Bankruptcy Act is a standstill period granted by a court for a company going through financial hardship to assess whether it can enter composition proceedings or go bankrupt.

Originally, unlike in other jurisdictions, the purpose of a moratorium in Switzerland was not necessarily to continue doing business, but rather to find a better way to liquidate a company; however, this has changed as a result of the COVID-19 crisis. There is now another type of moratorium under Swiss law (although probably only until 20 October 2020), which is intended to promote restructuring.

Ordinary moratorium

An ordinary moratorium is granted by a Swiss court for a first provisional period of up to four months. Such a provisional moratorium can, once converted into a definite moratorium, be extended for four to six months. On the moratorium commissioner's request, a definite moratorium can be extended for 12 months and, in complex cases, up to 24 months.

In principle, debtors may continue their business activities under the supervision of a moratorium commissioner; however, certain specific acts (if ordered by the courts) may require the commissioner's consent and the sale or pledge of fixed assets, granting guarantees and making gifts, require the consent of the courts. A lack of consent makes such a transaction null and void.

During a moratorium, debt collection cannot be initiated or continued against debtors. Seizure and other security measures (eg, attachments and freezing orders) are excluded. With the exception of urgent cases, civil proceedings and administrative proceedings are stayed. Statutes of limitation are also stayed. The debtor's interest payments on all claims not secured by pledge cease to accrue once the moratorium has been granted.

Moratorium commissioners may consider restructuring proposals made by a company's directors; however, their role is not to restructure the company if such restructuring is not in the interest of all creditors. The principal task of a moratorium commissioner is to draft a composition scheme, which is likely to be accepted by creditors.

COVID-19 moratorium

The COVID-19 moratorium aims to provide a simple procedure for debtors that are in (temporary) difficulty because of the COVID-19 crisis. This allows them to reorganise and prepare for after the crisis. The moratorium's procedures and requirements are deliberately simple to allow as many companies as possible to benefit therefrom. Further, it is granted almost unconditionally. The COVID-19 moratorium does not apply to public or large companies. Public companies are those which: (a) have equity listed on a stock exchange; (b) have outstanding bonds; or (c) contribute at least 20% of the assets or turnover to the consolidated accounts of a company referred to in points (a) or (b). Large companies are those which, in 2019, met two of the following criteria: (a) a balance sheet of more than Sfr20 million; (b) revenue of at least Sfr 40 million; or (c) an average full-time equivalent of at least 250.

In view of the current difficulty in estimating the duration of the crisis, it is appropriate to grant the moratorium for three months initially. After that, it can be extended for up to an additional three months.

When applying for the COVID-19 moratorium, a debtor must render its financial situation likely and provide as much evidence as possible. In contrast to the ordinary moratorium, the COVID-19 moratorium does not require the appointment of a moratorium commissioner, which keeps costs low.

Only claims which arose before the COVID-19 moratorium are subject thereto. Receivables that arose after the COVID-19 moratorium are not included. First-class claims are excluded from the COVID-19 moratorium (eg, the debtor's employees). The COVID-19 moratorium's effects on the rights of the creditors largely correspond to those of the ordinary moratorium. Because no commissioner is appointed under the COVID-19 moratorium, debtors thereunder are not monitored.

If a debtor wishes to conclude a composition scheme or benefit from the wider effects of an ordinary moratorium, it must seek to convert the COVID-19 moratorium into an ordinary moratorium. If the debtor has no capacity to restructure itself, the court will declare its bankruptcy.

This article has been published by Beat Mumenthaler (Partner) and Jean-Baptiste Lhôte (Associate) on 19 June 2020 at International Law Office (ILO), London.

No legal or tax advice

This legal update provides a high-level overview and does not claim to be comprehensive. It does not represent legal or tax advice. If you have any questions relating to this legal update or would like to have advice concerning your particular circumstances, please get in touch with your contact at Pestalozzi Attorneys at Law Ltd. or one of the contact persons mentioned in this Legal Update.

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