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Opening bankruptcy proceedings during COVID-19 pandemic

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Introduction

Two main avenues exist for opening bankruptcy proceedings over a Swiss company:

- a creditor can initiate the procedure via debt enforcement; or
- the company can file a petition for bankruptcy with the court.

In some rare cases, a creditor may call for bankruptcy without prior enforcement (fast-track bankruptcy application).

Bankruptcy through debt enforcement

Any creditor may initiate debt enforcement proceedings against a Swiss company for unpaid debts. These proceedings may result in the company's bankruptcy – that is, the total liquidation of its assets with the aim of covering as many of its debts as possible.

To initiate an enforcement procedure, the creditor must first complete a formal request for enforcement (a standard form obtained from the debt enforcement offices) and send it to the competent debt enforcement office. On receipt of the formal request, the office will serve the debtor with a summons to pay.

On receipt of the summons to pay, the debtor can:

- pay the outstanding debt within 20 days;
- object to the summons to pay (simply by declaring an objection – no reasoning needed); or
- do nothing.

If the debtor does not object to the summons to pay, or if such objection is set aside in summary or ordinary legal proceedings, the enforcement proceedings may continue and the debtor will eventually be declared bankrupt by the court at a court hearing. The court may defer the bankruptcy ruling at the request of the board of directors or a creditor if the company's restructuring appears to be possible. The debtor may also propose an arrangement with the creditors (ie, composition agreement) and request a moratorium.

In certain rare circumstances, a creditor may file a petition for immediate bankruptcy without having to go through the whole enforcement process (fast-track bankruptcy application). The creditor must establish that the company is no longer in a position to be able to make payments to creditors and has ceased doing so. However, this is a high threshold. It is insufficient to simply state that the company has cash-flow problems or that one creditor has not been paid.

Bankruptcy by petition of the company

Company boards of directors have a duty to continuously monitor the company's financial situation and take certain measures if it gets into financial difficulties. For example, where there is good cause to suspect overindebtedness, the board of directors must prepare an interim balance sheet (as regards the company's going-concern and liquidation values), which must be audited by a licensed auditor. If the interim balance sheet shows that the claims of the company's creditors are not covered by its assets, the board of directors must notify the bankruptcy court, unless certain creditors are willing to subordinate their claims. On receiving the board of director's notification, the bankruptcy court will commence insolvency proceedings.

More time to initiate restructurings and avoid bankruptcy due to COVID-19

Given the extraordinary circumstances caused by the COVID-19 pandemic, the government has temporarily suspended the aforementioned duty to notify the bankruptcy court in the event of imminent overindebtedness where there is a possibility that this situation can be remedied after the crisis.

Although the temporary release of a board of directors' duty to notify the bankruptcy court is not in itself a restructuring measure, it provides such boards with more time to initiate their company's restructuring and ultimately avoid bankruptcy. The suspension came into effect on 20 April 2020 and will remain in force until 20 October 2020.
The suspension of the reporting obligation is subject to two conditions:

- The company must not have already been overindebted on 31 December 2019.
- There must be a prospect that the overindebtedness can be remedied by 31 December 2020.

Boards of directors must nevertheless provide adequate justification and documentation for their decision not to notify the bankruptcy court despite overindebtedness.

This article has been published by Beat Mumenthaler (Partner), Alain Muster (Senior Associate) and Lukas Rusch (Senior Associate) on 11 September 2020 at International Law Office (ILO), London.

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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