

# BEITEN BURKHARDT

The BEITEN BURKHARDT coronavirus information centre with the most relevant legal answers:

<https://www.beiten-burkhardt.com/de/corona-informationscenter>

Contact details of our BEITEN BURKHARDT "Coronavirus Task Force" to support you in the crisis at the end of the email.

The corona crisis currently confronts us with probably the greatest challenge of the post-war period. The legislator is pressing ahead with its response to the crisis and is currently preparing a draft bill to mitigate the repercussions of the crisis. To this end, the planned legislative package comprehensively intervenes in central insolvency and civil law regulations in order to protect the affected companies from insolvency and to steer the economy towards the future.

## 1. SUSPENSION OF THE OBLIGATION TO FILE FOR INSOLVENCY

Provided that the factual insolvency is based on the consequences of the COVID-19 pandemic, the obligation to file for insolvency should be suspended **until 30 September 2020**, unless there is no prospect of eliminating insolvency.

Insofar as the debtor was not already insolvent on 31 December 2019, the statutory presumption applies in his favour that the factual insolvency is based on the consequences of the COVID-19 pandemic and there is prospect of eliminating insolvency. If the debtor can provide evidence that he was not yet insolvent at the turn of the year, it is incumbent on the person who invokes the existing obligation to apply (e.g. insolvency administrator, creditor, public prosecutor) to prove that the factual insolvency of the debtor was based on other reasons than the consequences of the COVID-19 pandemic and/or the insolvency of the debtor could not be eliminated anyway.

In addition to the suspension of the obligation to file for insolvency, the draft bill provides that the management bodies are not liable for payments from company assets despite factual insolvency if these are made in the orderly course of business. This applies in particular to payments for maintenance or resumption of business operations or for the implementation of a restructuring concept.

## 2. MORATORIUM

In view of imminent losses of income and revenue as a consequence of the COVID-19 pandemic, a large number of companies will not be able or will only be able to a limited extent to pay their current liabilities in the next few months. In order to tackle the resulting economic and legal problems, the German Federal Government is planning to introduce a civil law moratorium.

Accordingly, a debtor may refuse to make payments for the fulfilment of an entitlement until 30 September 2020 if he is not able to make the payment due to circumstances which can be attributed to the COVID-19 pandemic. The same would apply if making the payment was not possible without endangering decent livelihood or the economic foundations of the business operation.

In principle, all contractual relationships are covered. Special regulations are planned in particular for lease agreements and loan agreements. The right to refuse performance shall not only apply to remuneration claims but also to other claims such as to delivery or creation of a work. The right to refuse, however, is excluded if the refusal of performance is unreasonable for the creditor.

In this case, the debtor is entitled to rescind or terminate the agreement.

The right to refuse performance does only apply to agreements or claims arisen before the 08 March 2020. The moratorium does not lead to discharge from the contractual obligations, but only to a temporary deferral (*Stundung*). The planned consequences only occur if the debtor explicitly invokes the right to refuse. The debtor generally bears the burden of proof for the existence of the requirements of the right to refuse performance.

### **3. LEASE RELATIONS**

The right of the lessor to termination in case of delay in payment should be limited (both for living and commercial space). According to the draft bill, the lessor is not entitled to terminate the lease insofar as the lessee fails to pay the rent in the period between 01 April 2020 and 30 June 2020 despite maturity and the non-performance is a result of the COVID-19 pandemic. The connection between the COVID-19 pandemic and the non-performance is assumed. This regulation applies temporarily until 30 September 2020. If a lessee experiences payment difficulties due to the pandemic and is therefore not in a position to pay the rents for the months April to September 2020, the lessor cannot effectively terminate, limited until 30 September 2020. The lessor, however, reserves the right to furnish proof - in practice presumably successful only in individual cases - that the payment default is not based on the COVID-19 pandemic.

The planned regulation, however, only suspends the lessor's right to termination. On the other hand, the obligation to pay rent continues to exist. The draft bill suggests that the obligation to pay rent does not lapse due to the consequences of the COVID-19 pandemic and the lessor can also compulsorily enforce it further on.

### **4. LOAN AGREEMENTS**

Also the loan law undergoes substantial changes through the legislative package of the German Federal Government. The aim is to provide the contracting parties with time to seek solutions in order to be able to continue the loan relationship after the end of the crisis. In addition, a privileged treatment of "restructuring loans" is planned in order to prevent a credit crunch otherwise to be feared.

#### **4.1 Repayment of existing loans**

Claims from loan agreements concluded prior to 08 March 2020 with regards to refunds, interest or redemption payments which become due between 01 April 2020 and 30 September 2020, should generally be deferred for the duration of six months if the provision of the performance owed is unreasonable for the debtor due to the COVID-19 pandemic.

This is in particular the case for companies if the economic basis of their business operation is endangered. A connection between the crisis and losses of revenue is presumed by law and does not have to be proven by the debtor.

Thereby, the maturity of the loan entitlements - with regard to the original performance date - will be deferred by six months each. In addition, terminations due to default of payment or substantial deterioration of the debtor's financial circumstances are excluded during this period. The creditor should offer the debtors concerned the opportunity of a personal meeting during this period in order to provide a firm basis for the contractual relationship in view of the crisis. If the parties do not find a negotiated solution, the term is automatically extended by six months.

## **4.2 Privileged treatment of restructuring loans**

In order to prevent a credit crunch, loans (also shareholder loans) which are newly granted during the period of suspension (currently until 30 September 2020), are treated in a privileged manner under insolvency law. The repayment of such loans is deemed not to be detrimental to the creditor until 30 September 2020. Therefore, these repayments cannot be contested despite subsequent insolvency. This increases the willingness of the creditors to grant short-term loans and, thus, increase the chances of recovery for companies affected by the crisis. The draft bill further provides that new shareholder loans are equated with foreign loans under certain conditions, i.e. they are not treated as subordinate if an insolvency application has been filed until 30 September 2023.

Furthermore, the draft bill provides that new loans and their collaterals are not immoral during the period of suspension. This should also contribute to the willingness of banks to grant new loans urgently needed. Hereby, the established case law of the German Federal Court of Justice is encountered, according to which a ("restructuring") loan granted during the crisis, which only extends a delay in filing for insolvency, is immoral and thus void. This risk should be eliminated by fiction.

## **5. FACILITATIONS FOR THE RIGHT OF APPEAL**

Legal acts performed during the period of suspension, which are rendered in accordance with the agreement, are excluded from appeal in subsequent insolvency proceedings according to the planned new regulation. Without this regulation, these legal acts would be appealable if the beneficiary was aware of the debtor's insolvency or in any case was aware of circumstances which necessarily implied the debtor's insolvency. This is probably frequently the case at the present time. In general, the risk of legal challenges is considerably limited for the exchange of benefits in accordance with the agreement during the suspension period (currently until 30 September 2020) and is no longer an obstacle to continued delivery. In addition, further facilitations are provided for.

## **6. CORPORATE LAW**

The restrictions of possibilities to convene meetings to contain the COVID-19 pandemic also have effects on the ability to act of companies, associations and cooperatives. They are partially no longer in a position to pass ordinary or extraordinary resolutions in the usual way of presence. This can lead inter alia to the fact that financing operations fall through, specific measures to resolve the crisis are not being taken or positions in the management and the supervisory board cannot be newly filled. Therefore, the draft bill inter alia provides for the following temporary legal changes:

- general meetings of stock corporations should be allowed to take place remotely by means of online participation upon decision of the management board even without a corresponding regulation in the Articles of Association, the possibility of challenges to this decision will be restricted;
- the management board may pay an advance on the anticipated net retained earnings upon expiry of a financial year even without an authorization in the Articles of Association,
- the management board may decide that the general meeting can also take place later than in the first 8 months of the financial year (does not apply to SE).

The draft bill further contains facilitations for meetings and resolutions of cooperatives, associations and communities of condominium owners. Corresponding facilitations for meetings and resolutions in a GmbH (limited liability company) shall follow with a further law.

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Best regards,

Your BEITEN BURKHARDT Task Force Team

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<https://www.beiten-burkhardt.com/de/corona-informationscenter>