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Privileging of loans under insolvency law due to Corona

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Due to new legislation, loans granted since 1 March 2020 are subject to privileges with regard to insolvency challenge rights and liability under insolvency law.

The act on the temporary suspension of the obligation to file for insolvency and to limit the liability of executive bodies in the event of insolvency caused by the COVID-

19 pandemic (COVID-19 Insolvency Suspension Act – COVInsAG) was announced on 27 March 2020 and came into force retroactively as of 1 March 2020.

In addition to the general suspension of the obligation to file for insolvency, the COVInsAG determines the privileged treatment of loans (including the provision of collateral) and shareholder loans with regard to the challenge of transactions in insolvency proceedings, which is relevant from a credit financing perspective. Furthermore, lenders benefit from the limitation of liability in connection with the granting of a new loan.

Suspension of the obligation to file for insolvency

The obligation to file for insolvency is suspended from 1 March 2010 until 30 September 2020. The suspension may be extended by statutory order until 31 March 2021. This does not apply if the insolvency is not due to the consequences of the spread of the coronavirus or if there is no chance of eliminating the insolvency. If the debtor was not insolvent on 31 December 2019, it is presumed that the insolvency is based on the Corona crisis.

Privileged status of bank loans and shareholder loans

If new loans are granted during this suspension period, the payment of interest and repayment of principal up to 30 September 2023 and the provision of related collateral during the suspension period are not deemed to be disadvantaging to the creditors and are not subject to insolvency proceedings.

This limitation of insolvency challenge rights also applies to the return of shareholder loans and appropriate interest payments in this respect as well as to payments on claims arising from legal transactions which correspond economically to such a loan, such as deferral or maturity agreements with regard to claims of the shareholder for payment of rent or remuneration for service.

Moreover, shareholder loans and equivalent shareholder claims are not legally subordinated in insolvency proceedings applied for until 30 September 2023.

Further special conditions apply to loans granted by the Kreditanstalt für Wiederaufbau (KfW) or under other government aid programmes in connection with the COVID-19 pandemic. In these cases, the privilege in challenging rights is extended to loans granted after the end of the suspension period and applies regardless of when they are repaid.

Privileges under liability law for bank loans and shareholder loans

In favour of the lenders, the COVInsAG stipulates that the granting of loans (including novations and extensions) and collateral during the suspension period is not to be regarded as an immoral contribution to delay in filing for insolvency. This excludes the invalidity of the loan agreement pursuant to section 138 German Civil Code and the risk of the lender's liability for damages pursuant to section 826 German Civil Code for reasons of not providing a restructuring concept.

Objective

These privileges do not only apply to insolvent debtors, but also to debtors who are not yet insolvent. It is intended to facilitate access to financial resources for companies affected by the COVID-19 pandemic and thus contribute to the liquidity of the economy. On the other hand, lenders should not be forced to repay repayments on the loans or to lose access to the collateral in the event that the company is not rescued and insolvency proceedings are nevertheless opened.

We have compiled on our website comprehensive information and recommendations for action in response to the legal implications arising from the coronavirus pandemic: https://deutschland.taylorwessing.com/en/coronavirus

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