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Consequences of the coronavirus - Contract adjustment and restructuring

With the outbreak of the coronavirus in Switzerland, various legal questions arise for companies, in particular with regard to the validity and amendment of contracts. If insolvency is imminent, measures to prevent bankruptcy are required. The following text provides an overview of the most important points in this context.

1. Background

To contain the outbreak of coronavirus (COVID-19), the authorities in Europe have taken various measures. In Switzerland, the Federal Council, on the basis of *Ordinance 2 on Measures to Combat Coronavirus*¹, has ordered, among other things, that public and private events be banned (sec. 6 para. 1), that publicly accessible facilities be closed (sec. 6 para. 2), that human gatherings of more than five people be prohibited (sec. 7c) and that certain persons/employees be required to stay at home (sec. 10b f.).

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¹ To be found at <https://www.admin.ch/opc/de/classified-compilation/20200744/index.html> (as of 21 March 2020)

For a large number of companies in Switzerland, the measures taken by the Federal Council have resulted in considerable impairments and restrictions. In this context, contractual and restructuring law issues arise, among others.

2. Contract law

2.1 Defaults

In Germany, there is apparently a debate going on as to whether debtors should have a general right to refuse performance until 30 September 2020 due to the corona crisis. In Switzerland, however, the principle "*pacta sunt servanda*" still applies – that agreements are to be honoured.² However, there are certain exceptions to this principle, which are explained below.

Swiss law does not explicitly regulate the case of force majeure. Nevertheless, this figure is recognized in Swiss jurisdiction.³ Whether the coronavirus and its effects can be qualified as force majeure cannot be judged generally. Rather, it depends on the contract in question whether it contains a clause on force majeure (or a similar clause) and whether this provision can be interpreted in such a way that the corona virus falls under this clause. In such a case, the consequences provided for in the clause shall apply.

Unless a contract under Swiss law contains specific provisions on force majeure, the general principles of contract law shall apply. Misfeasance of contracts (including defective performance and default) generally results in liability for damages (sec. 97 CO). However, the corona crisis can lead to a situation where the debtor is not at fault for the defective performance in a specific

case if, for example, he cannot deliver the ordered protective masks due to export restrictions. In such cases, the law provides the debtor's exculpation from the liability for damages due to lack of fault (e.g. sec. 97 para. 1, 103 para. 2, 106 para. 1 and 109 para. 2 CO). Whether the conditions for this are given must be analysed for each case individually, since other reasons for performance disruptions are also possible in times of the coronavirus. However, default interest for monetary debts is owed regardless of fault (cf. sec. 104 CO) and an exculpation based on impossibility (see below) is not possible ("*One must have money*"⁴).

In connection with the coronavirus, the case of subsequent objective impossibility (in other words, impossibility that is not attributable to either party, sec. 119 CO) is of substantial importance. This would be the case, for example, for an event which can no longer be held due to an official ban on events. The legal consequence of this is that the claim of the service recipient for performance expires (sec. 119 para. 1 CO) and the service provider is obliged to refund the consideration (e.g. down payment) already received (in whole or in part; sec. 119 para. 2 CO).

In each case, it needs to be determined whether the performance is objectively impossible or whether the general economic conditions (e.g. value relationship between performance and consideration) have changed due to changed external circumstances (coronavirus), which justify an adjustment of the contract. Such constellations are particularly conceivable in supply chains (see below).

² cf. e.g. Urteil (Bundesgericht) 4A_263/2019 vom 02.12.2019 E. 6.3

³ e.g. BGE 80 II 216, 220

⁴ Huguenin Claire, Obligationenrecht - Allgemeiner und Besonderer Teil, 3. Aufl., Zürich - Basel - Genf 2019, S. 264.

2.2 Supply chains

It is possible that the usual supplier of a Swiss product manufacturer may no longer be able to supply due to trade restrictions, while a competitor could. If such an alternative procurement is only possible at disproportionate expense (e.g. due to sharply increased market prices), the product manufacturer may be exempted from the obligation to perform based on the so-called *clausula rebus sic stantibus*. Provided that the relevant conditions are met in the individual case (neither party has to bear the risk of changed circumstances according to the contract or the law, no foreseeability of the change of circumstances and gross disproportion between performance and consideration), the court may adapt the contract to the changed circumstances or even dissolve it.⁵

2.3 Continuing obligations, in particular lease contracts

Continuing obligations can be terminated at any time for good cause.⁶ Whether the corona crisis constitutes an important reason justifying termination must be determined in each individual case.

The measures adopted by the Federal Council may have a significant impact, in particular on the lease of commercial premises under Swiss law, in that the leased property may no longer be used in accordance with the contract, or only to a limited extent (order to close publicly accessible facilities). In the case of commercial leases,

termination should be permissible if there are long-term losses and the rent becomes an unbearable burden.⁷ As far as rent reductions are concerned, we believe that sec. 259d CO is relevant, according to which the tenant can demand that the landlord reduce the rent if the suitability of the rented property is impaired. However, whether an officially ordered closure is actually a defect that entitles the tenant to a rent reduction is legally new territory and controversial in the doctrine.⁸ In any case, the specific lease contract must be studied and a conversation with the landlord should be sought.

On 27 March 2020, the Federal Council decided to support tenants who are in arrears with the payment of rent and ancillary costs due between 13 March and 31 May 2020 as a result of measures ordered by the authorities to combat coronavirus. For these tenants, the payment period pursuant to Art. 257d para. 1 CO, after which landlords may terminate the lease contracts of private individuals and tenants of business premises in the event of late payment, will be extended from 30 days to 90 days.⁹

3. Restructuring of companies in financial difficulties

If companies run into serious financial difficulties despite having exhausted the possibilities offered by contract law and the emergency aid totalling CHF 42 billion¹⁰ decided by the Federal Council (e.g. short-

⁵ Schwenzer Ingeborg, Schweizerisches Obligationenrecht - Allgemeiner Teil, 7. Aufl., Bern 2016, S. 279 f.

⁶ Huguenin Claire, Obligationenrecht - Allgemeiner und Besonderer Teil, 3. Aufl., Zürich - Basel - Genf 2019, S. 19.

⁷ Andrea Martel. Coronavirus: Müssen geschlossene Läden weiterhin Miete zahlen? NZZ, 18. März 2020.

⁸ Andrea Martel. Coronavirus: Müssen geschlossene Läden weiterhin Miete zahlen? NZZ, 18. März 2020.

⁹ Alessandro Della Valle, Bundesrat trifft weitere Massnahmen im Marathonlauf gegen Corona, 27. März 2020, to be found at <https://www.swissinfo.ch/ger/bundesrat-legalisiert-betriebsschliessungen-mit--lex-ticino-/45648354>

¹⁰ Daniel Meier, Andrea Hirstein, Vor der grossen Corona-Welle: Was wir wissen – und was nicht. NZZ am Sonntag, 22. März 2020, S. 1

time working), this does not mean that they have to file for bankruptcy. The law provides certain instruments to protect the debtor.

3.1 Moratorium and emergency moratorium

Of particular importance is the moratorium (sec. 293 ff. Swiss Debt Enforcement and Bankruptcy Law). With this option, the debtor is given the opportunity to conclude a composition agreement, which serves to his financial recovery. Within the framework of the moratorium, enforcement proceedings against the debtor can neither be initiated nor continued (sec. 297, para. 1, DEBL) and it therefore provides comprehensive protection.

The protection of the debtor is also the purpose of the emergency moratorium in accordance with sec. 337 et seq. DEBL, which can be declared applicable by the cantonal government in the event of extraordinary circumstances (in particular a continuing economic crisis, such as the corona crisis; sec. 337 DEBL). However, within the framework of the emergency moratorium, enforcement proceedings against the debtor can still be raised and continued until the seizure of assets or bankruptcy warning (sec. 343 para. 1 DEBL). In addition, after the expiration of the emergency moratorium, no further moratorium is possible for six months (sec. 349 para. 2 and 3 DEBL). As a rule, debtors are therefore better served with the instrument of moratorium (available at any time), which provides more comprehensive

protection against enforcement proceedings and is designed for a longer period (28 months as opposed to 10 months).

3.2 Stay of enforcement

On 18 March 2020, the Federal Council issued the *Ordinance on the stays of enforcement in accordance with section 62 of the Federal Statute on Debt Enforcement and Bankruptcy*¹¹ and ordered the stay of enforcement. It will apply from 7 a.m. on 19 March 2020 until midnight on 4 April 2020. The statutory Easter enforcement holidays will begin immediately afterwards. These have the same effects with regard to the stay of enforcement and last until 19 April 2020 (sec. 56 no. 2 DEBL).

Enforcement acts which are carried out during the stay of enforcement are neither null and void nor contestable according to case law, but only take legal effect after the end of the grace period.¹² According to the Federal Supreme Court, enforcement acts (cf. para. 56 DEBL) are official acts by the competent authority which "brings the creditor closer to his goal and intervenes in the legal position of the respondent".¹³ These include, for example, the service of the order for payment, the granting of the opening of proceedings (*Rechtsöffnung*), the bankruptcy warning and opening of bankruptcy proceedings.¹⁴

However, once the stay of enforcement has expired (i.e. after 19 April 2020), debtors must expect to be confronted directly with debt enforcement proceedings or summonses to pay, as claims will continue to fall due during the standstill period. It is even possible that after the end of the stay

¹¹ To be found at <https://www.bj.admin.ch/dam/data/bj/aktuell/news/2020/2020-03-18/vo-d.pdf>

¹² BGer v. 18.9.2015, 5A_731/2015; BGE 132 II 153 E. 3.3; 127 III 173 E. 3.b., Kren Kostkiewicz, a.a.O., S. 110

¹³ BGer 5A_448/2011 vom 31.10.2011, E. 2.5

¹⁴ Penon Ilija/Wohlgemuth Marc, in: Kren Kostkiewicz Jolanta/Vock Dominik (Hrsg.), Kommentar zum Bundesgesetz über Schuldbetreibung und Konkurs SchKG, 4. Aufl., Zürich - Basel - Genf 2017, Art. 56 N 4

of enforcement, creditors may demand the opening of bankruptcy proceedings without debt enforcement proceedings on the basis of sec. 190 no. 2 DEBL, if the debtor has suspended payments and is objectively illiquid¹⁵. Debtors facing financial difficulties should therefore take legal precautions (e.g. application for moratorium) at an early stage and not only at the end of the standstill.

Moreover, during the standstill period, creditors can continue to resort to private recovery measures (private realisation or self-sale), as this is often provided in facility and security agreements.

3.3 Abroad and outlook

In Switzerland's neighbouring countries, namely Austria and Germany, the authorities plan to extend the deadline for depositing the balance sheet if the reason for insolvency is based on the consequences of the corona pandemic. The Austrian government intends to extend the 60-day period to 120 days.¹⁶ In Germany, the obligation to file for bankruptcy is to be suspended until 30 September 2020 due to the corona crisis.¹⁷ An extension of the deadline for depositing the balance sheet analogous to the measures in Germany and Austria would also be welcomed in Switzerland (cf. sec. 725 para. 2 CO), which has no statutory deadlines for this¹⁸, but is not planned at present.

4. Conclusion

The outbreak of the coronavirus and the accompanying official measures confront companies with major economic and legal challenges. The specific circumstances and contracts must be analysed in detail to provide clarity about the legal possibilities. In any case, measures must be taken at an early stage in order to prevent substantial damage and irreparable consequences such as bankruptcy.



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¹⁵ Talbot Philip, in: Kren Kostkiewicz Jolanta/Vock Dominik (Hrsg.), Kommentar zum Bundesgesetz über Schuldbetreibung und Konkurs SchKG, 4. Aufl., Zürich - Basel - Genf 2017, Art. 190 N 12

¹⁶ Cf. Felix Hörlsberger and Magdalena Nitsche, Vorsichtsmaßnahmen zur Vermeidung von Zahlungsunfähigkeit, Dorda Corona Task Force vom 20. März 2020, to be found at <http://www.dorda.at/news/restrukturierung>

¹⁷ Süddeutsche Zeitung, Unterstützung bei Arbeitslosigkeit und drohender Insolvenz, 17. März 2020, to be found at <https://www.sueddeutsche.de/wirtschaft/insolvenzantrag-arbeitslosigkeit-jobcenter-corona-1.4847248>

¹⁸ For an overview of the case law cf. Mauchle Yves/von der Crone Hans Caspar, Wie lange darf der Verwaltungsrat mit der Überschuldungsanzeige zuwarten?, SZW 2014 S. 227 ff.