

CORONAVIRUS UPDATE: DUTCH TEMPORARY MORATORIUM OF PAYMENTS LEGISLATION

On 24 November 2020 the Dutch Senate (*Eerste Kamer*) approved a Temporary Moratorium of Payments Law (*Tijdelijke Voorziening Betalingsuitstel Covid-19*) for Dutch companies that are in distress as a consequence of the Coronavirus (the **Dutch Moratorium**). Please see below a short overview of the proposed law.

Is the law currently effective?

Not yet. The last step in the legislation process was the approval by the Senate (*Eerste Kamer*) on 24 November 2020. The law will enter into force on a date to be determined by Royal Decree. As the law is marked as an emergency law (*spoedwet*), it is expected that it will enter into force on 1 January 2021 or earlier.

Who can request the Dutch Moratorium?

Any debtor who conducts a business, not being a financial institution, insurance company or an investment fund (*beleggingsinstelling*) within the meaning of Clause 1:1 of the Dutch Financial Supervision Act (*Wft*).

For how long will the Dutch Moratorium apply?

The initial period of the Dutch Moratorium is two months, which period can be extended twice by a maximum period of each two months. Therefore a maximum of six months in total.

What are the consequences of the Dutch Moratorium becoming effective in relation to a debtor?

During the Dutch Moratorium the following applies in relation to the creditor that made the bankruptcy filing: (i) the relevant bankruptcy filing will not be heard by the Dutch court, (ii) the relevant creditor cannot force payment of debts which have become due prior to the Dutch Moratorium becoming effective or suspend any services under the defaulted contract, and (iii) the creditor cannot demand for payment or take recourse against the debtor's assets during the Dutch Moratorium.

What are the conditions for granting the Dutch Moratorium?

The debtor must provide prima facie evidence that it is temporarily unable to continue to pay its debts solely or mainly as a consequence of the Coronavirus and have resulted in the debtor not being able to continue its ordinary course of business. In other words: the Dutch Moratorium is only available to those

companies who are in distress because they have not been able to sufficiently continue their business as a result of the Coronavirus.

Is there any guidance on what the prima facie evidence should entail?

Yes. The legislative proposal prescribes that it is sufficient if the debtor provides financial information which shows that (i) prior to the outbreak of the Coronavirus or the Coronavirus related measures (i.e. 15 March 2020) being implemented the debtor was able to pay its debts, and (ii) since the measures being implemented the debtor's turnover declined by at least 20% compared to the average turnover three months prior to the outbreak of the Coronavirus.

Are there any other conditions to be assessed by the Dutch court?

Yes. After having reviewed the prima facie evidence, the Dutch court will also need to assess whether (i) it is expected that the debtor shall be able to continue to pay its debts after the Dutch Moratorium being terminated and (ii) the interests of the creditor(s) who made the bankruptcy filing are not materially and unreasonably prejudiced. To assure the latter, the Dutch court may implement measures to protect the interest of creditors. If the Dutch court decides that the reasons for lifting the attachments are no longer present, the lifted attachment revives.

Can the Dutch Moratorium be used against creditors who didn't file for bankruptcy but who initiated security enforcement actions?

Yes. The debtor can request the Dutch court in summary proceedings (*voorzieningenrechter*) to defer enforcement actions of certain creditors' rights against its assets, if such is necessary for the continuation of the business. This means that a debtor can use this law to postpone enforcement actions by its lenders in relation to security rights. Fully lender-led enforcement strategies would therefore (temporarily) be blocked. On the same basis, the debtor could request the court to lift attachments which were levied by a creditor. The debtor can also request the Dutch court in summary proceedings to defer claims of assets that are under the control of the debtor. The conditions that apply to the Dutch Moratorium as described above shall apply here as well.

Does the Dutch Moratorium provide protection against actions from all creditors?

No, the legislative proposal is not designed to impose a statutory moratorium on all payment obligations of the debtor. The Dutch Moratorium provides a possibility to ask the Dutch court to postpone bankruptcy filings, enforcement and attachment actions, and claims of assets under the control of the debtor by specific creditors, for a maximum period of six months and subject to the aforementioned conditions.

Will directors be protected for continuing to trade during the Dutch Moratorium?

The legislative proposal does not provide for specific protection for directors in respect of the directors duties' and related liability risks. This means that a careful approach in relation to topics including fraudulent preference, selective payments and actions of tort remains applicable. We note that the legislative proposal does provide that due payments made during the Dutch Moratorium cannot be nullified on the basis of fraudulent preference (article 47 Dutch Bankruptcy Act) solely based on the fact that a bankruptcy filing was already made (but postponed) at that time.

How long will the law be applicable?

The Dutch Moratorium is proposed to enter into force as soon as possible by Royal Decree, and the current status is that it will terminate on 1 February 2021, unless extended by Royal Decree. Such extension can take place each time for a maximum period of 2 months. Ultimately, the law is meant to be a temporary law and thus is expected to remain applicable for a number of months only.

CONTACTS



Ilse van Gasteren
Partner
Financial Markets
Group

T +31 20 711 9272
E ilse.vangasteren
@cliffordchance.com



Jelle Hofland
Partner
Financial Markets
Group

T +31 20 711 9256
E jelle.hofland
@cliffordchance.com



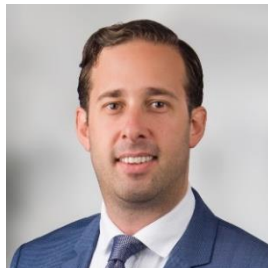
Jeroen Kolthof
Associate
Financial Markets
Group

T +31 20 711 9490
E jeroen.kolthof
@cliffordchance.com



Dirk Jan Duynstee
Partner
Litigation & Dispute
Resolution

T +31 20 711 9120
E dirkjan.duynstee
@cliffordchance.com



Evert Verwey
Counsel
Litigation & Dispute
Resolution

T +31 20 711 9681
E evert.verwey
@cliffordchance.com



Guido Bergervoet
Counsel
Litigation & Dispute
Resolution

T +31 20 711 9534
E guido.bergervoet
@cliffordchance.com



Charlotte Spierings
Associate
Litigation & Dispute
Resolution

T +31 20 711 9600
E charlotte.spierings
@cliffordchance.com

This publication does not necessarily deal with every important topic or cover every aspect of the topics with which it deals. It is not designed to provide legal or other advice.

www.cliffordchance.com

Clifford Chance, IJsbaanpad 2, 1076 CV
Amsterdam, PO Box 251, 1000 AG
Amsterdam

© Clifford Chance 2020

Clifford Chance LLP is a limited liability partnership registered in England and Wales under number OC323571. Registered office: 10 Upper Bank Street, London, E14 5JJ. We use the word 'partner' to refer to a member of Clifford Chance LLP, or an employee or consultant with equivalent standing and qualifications. Clifford Chance LLP is registered in the Netherlands with the commercial register of the Chamber of Commerce under number 34360401. For our (notarial) third party account details, please see www.cliffordchance.com/nlregulatory

Abu Dhabi • Amsterdam • Barcelona • Beijing •
Brussels • Bucharest • Casablanca • Dubai •
Düsseldorf • Frankfurt • Hong Kong • Istanbul •
London • Luxembourg • Madrid • Milan •
Moscow • Munich • Newcastle • New York •
Paris • Perth • Prague • Rome • São Paulo •
Seoul • Shanghai • Singapore • Sydney •
Tokyo • Warsaw • Washington, D.C.

Clifford Chance has a co-operation agreement with Abuhimed Alsheikh Alhagbani Law Firm in Riyadh.

Clifford Chance has a best friends relationship with Redcliffe Partners in Ukraine.