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2020 年客户更新

在新冠病毒流行以及《以色列破产及经济复原法 5778-2018》影响下的公司行为和债权人优先受偿

-English Follows –

最近许多公司高管客户都向我们咨询在公司受到新冠病毒影响、现金流减少、债务增多，而且危机结束时间未明的情况下，他们应该如何操作公司。

这篇客户更新的目的在于为公司及其高管提供一些实用工具，以协助他们以《以色列破产及经济复原法 5778-2018》为鉴管理处于新冠危机中的公司。然而，需要指出的是，对于现金周转问题，法律上有各种各样的解决方案，却没有一种对所有问题都适用的解决方案。我们在此声明，该客户更新仅为客户提供信息，不能被视为法律咨询的替代品或者任何关于该主题的法律意见。

该客户更新的初始点在于，由于商业行为受到禁止或者是规定限制，许多的公司收入停止， 因此无法偿还债务，或者如果情况继续下去极有可能不能按时偿还债务。有说法表示，该等公司的经济状况已经符合《破产法》第二条所规定的现金流检验法。该方法是判定公司是否资不抵债以及满足开启破产程序条件的两种检验方法之一。另一方面，政府至今的计划和声明显示，政府有可能会给公司提供援助。援助工具多种多样，包括国家提供担保、各种资助、免收欠款（如市政税、增值税等），甚至政策性干预合约关系（如租约等），又或规定政府命令停止营业之后的商业风险如何分配。

在目前的情况下，公司的高管们都在问自己如何管理所剩不多的资金，让他们苟延残喘，坚持等到暴风雨过去；另一方面，他们时刻准备继续经营，以便在危机过后迅速恢复。

在这样的情况下，有可能公司高管（在综合考虑所有的风险和可能性之后）会发现对于公司的生存来说，最佳的方案是只偿付给部分的供应商和债权人；与此同时与其他人协商延迟支付欠款或者债务分配。然而这样会引发一个问题，那就是该做法是否会被视为让某些债权人优先受偿；致使公司进入破产程序后可能会让高管承担责任。

在危机下继续经营

一般来说，当公司的资金收紧并且符合《破产法》第二条关于资不抵债的定义，该公司已经符合启动破产程序命令的条件。在这种情况下，公司或者公司的高管（根据法律列出的条件）都可以要求法院启动破产程序。 与此同时，法律并不强迫相关人在这种情况下一定要找法院；也并不认为这是解决资不抵债的唯一途径。在这样的情况下，法律要求公司高管执行减少欠债的程度以及结果的义务。

除了寻求法院帮助之外，《破产法》也建议可以向公司重组专家咨询（为公司量身定做一个重组方案）以及与公司的债权人进行协商达成债务和解。值得强调的是，法律中所建议的解决方案并不是一个封闭的清单，公司及其高管有权选择其他方式减少欠债。处理新《破产法》颁布（2019年9月）以前的破产案例的过往经验告诉我们，现金流检验法并不适用于一切情况。如果看到公司有可能生存和克服暂时的资金周转问题，法院倾向允许公司继续营业。以上所述的情况是我们在诠释法律条款时所需要考虑的。

债务人优先受偿

在经过董事会和高管周全考虑面前的各种可能性之后，得出只偿付给部分供应商的结论，与此同时与其他供应商协商延迟支付欠款或分配债务的决策，会否被视为让部分债务人优先受偿，而面临该优先偿付行动被取消的后果呢？

根据新《破产法》第219条关于取消导致某些债权人优先受偿的交易的规定（ “该取消交易规定”） ，法院有权在满足以下几种条件的情况下，责令取消可以偿还个别债权人债务或者让其在清偿顺序上提前的交易： (1) 交易进行的日期在公司申请破产令三个月以内；（2）交易进行时公司已经资不抵债；(3) 因为该交易，该债权人得到比在公司破产清算顺序情况下金额更大的债款偿还。

新《破产法》草案的法律解释对旧法（《破产条例》第98条）进行了极大程度的更新。新法废除了公司让债权人优先受偿的意图的要求。该条款的核心目的是促进债权人的公平受偿，而不是防止债务人进行不公平交易。鉴于此变化，新法确立了新的检验方法——客观结果法：如果交易的结果造成优先受偿或提高该债权人的清偿顺序，就取消该交易。

《破产法》第219 （b）条列出了该取消交易规定的例外，赋予法院在以下情况下，不取消导致个别债权人优先受偿的交易：

1. “在交易当日或临近交易日，债务人在该交易的执行背景下接受了恰当的代价…”

这规则称为 “新价值规则” ，可以使用于在那些从经济角度来看比较适合被看作债务人能从中取得新价值的新交易，而不是旧交易。

2. “交易在债务人的正常商业过程中进行，并且所偿还的债款也是在债务人正常商业过程当中所产生的…″

从表面上来说，291（a）条中的 “结果测试”本可以导致所有在申请破产令前的三个月之内的支付被取消（除其他情况外， 根据291(2)a条公司在此时期开始被推定为破产）。然而，立法的目的并不是导致债务人提前瓦解，而是尝试允许其在艰难时刻继续运营。与此同时，法律针对处罚非常规交易，挥下“取消”的利剑。因此，法律上存在例外情况，允许债权人在正常商业和经营过程中进行支付。法律解释也强调，该例外正为供应商、债权人和其他机构和债务人之前的日常商业和经营活动而设，以保证债务人对他们支付的款项是最终而确定的。

在立法原意考虑到的经典情形下，《破产法》对公司日常经营活动付款和非常规付款或其他非常规交易（如增强担保）进行区分：公司需要尽可能的继续按时支付正常付款，但提前清偿或其他非常规活动则面临因债权人优先受偿而被取消的风险。在目前的危机下，我们需要更加全面和整体的解决方案，不光是非常规付款，甚至连常规付款都有可能延迟。在这样的情况下， 日常款项的按时支付都有可能被视为让部分债权人优先受偿。若情况如此，公司高管按照法律要求减轻公司负债的过程中，应当做好对自己行为做出解释的准备。

在危机中公司高管和董事会的职责

法律上，事后（当对公司开启破产程序时）被视为给予债权人比他们能在破产清算过程中能得到的更多的欠款的行为，该行为已经符合219（a）对于个别债权人优先清偿的行为的规定，导致交易取消。所涉及的公司高管也需要对该交易负责。然而，高管的责任需要根据新《破产法》所列

出的个人责任进行分析，尤其是该法第288条。需要弄清楚在批准该交易的时候公司高管是否知晓或应该知晓公司处于资不抵债的状态，并且没有尽力减少欠债程度。

特殊情况下，在主观分析各种可能性，并且充分考虑各种信息之后，有可能公司高管会得出一个结论：对某些供应商进行优先支付才是减少欠债程度最合理的解决方案。因为，如果考虑为危机之后的日子作准备，公司需要这些供应商的帮忙才能走出泥沼。

公司高管尽力减少公司欠债程度的另外一个行为是与公司债权人进行协商从而达成债务和解。债务和解有可能是与每位债权人逐个达成和解（最适合的解决方案，既可以是达成分期偿付，也可以是延迟偿付，又或是改变付款条件以及将本金和利息分开支付）。也可以和债权人达成集体和解，对每组的债权人提供同样的还款计划（根据《破产法》第10章中针对重组而不是清算的规定）。《破产法》第288（2）b条建议与债权人进行协商以减轻欠债程度，此建议与解决危机的过程的第二部分相同，以寻求一个对所有情况都适用的整体方案。在文章首先描述的第一部分中，在考虑过所有的风险后，公司高管的结论是，他们只愿意对公司的部分日常欠款进行支付；但在解决危机的第二部分，高管可能想尝试对于剩下的欠款达成各种和解方案，从而将还款期限推迟到危机结束之后。

结束语

我们认为有必要强调，《以色列破产及经济复原法5778-2018》于2019年9月开始生效，这篇《客户更新》所介绍的是来自该法律的条款，以及它们的影响，既参照该法生效前的法律解释，也参照新法的法律解释。自然而言，在缺少最新的案例的情况下，该法律的应用只能根据法院的判决慢慢发展。需要强调的是，刚才谈到的与新法相适应的解释以及应该采取的公司行为，也预期会与案例和具体实践的积累而一起发展。

此外，新冠危机的蔓延已经严重影响了全球经济和以色列众多行业，现在也无法预知该危机会如何结束。与此同时，该危机的最终影响在危机结束后才能知晓。因此，法律不是为了也无法对我们现在所处的如此极端的情况提供解决方案。这要求我们发挥 “跳出盒子之外” 的创造性思维，根据现实情况正确应用法律原则。

请随时与我们联系，我们愿意解答您的任何疑问。

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Corporate Conduct and Creditor Preference during the Corona Crisis in light of the Insolvency and Economic Rehabilitation Law, 5778 - 2018

Many clients are turning to our office with practical questions regarding that actions that are expected of them as corporate executives, during the time when the corporation's cash fund is thinning out and the debts are accumulating, especially when the end of this current crisis is not yet on the horizon.

This update is intended to offer companies and their executives practical tools for conduct during the Corona crisis based on the Insolvency and Economic Rehabilitations Law, 8758 – 2018. However, it is understandable that there are a variety of possible solutions that may fit the legal principles and that one cannot point to a solution that fits the wide spectrum of scenarios. For the sake of good order, we clarify that this update is intended for merely informational purposes and should not be considered as a substitute for legal advice or opinion of any kind regarding the issues hereinafter.

The starting point of this update, is that as a result of the imposing of restrictions and guidelines for prohibiting different types of businesses, many corporations experience **income cessation**, which does not

allow them, or at very least creates a **real fear**, that as the situation continues they will not be able to fulfill their financial obligations in a timely manner. Consequently, the corporation's financial situation allegedly fulfils the **cash flow test** stated in clause 2 of the Insolvency Law, which is used as one of the two tests needed in order to deem a corporation as insolvent and as a **condition for opening insolvency proceedings**. On the other hand, there is a possibility, that already has somewhat of a presence in government programs and statements, that the government will provide assistance to businesses through various tools ranging from state guaranteed loans, various grants, waivers of compulsory payments such as property taxes and VAT, and even regulatory intervention in contractual relationships such as lease agreements and the determination of risk distribution in circumstances where government instructions were given to stop the activities of businesses.

In the situation we are currently experiencing, **company executives are asking themselves how they should be managing their currently slim funds in a way that will allow them to "keep their heads above water" and wait "until the rage passes", and on the other hand be prepared to continue operations and enable a quick recovery as soon as the crisis unfolds.**

In this situation, executives may find (after examining the risks and odds), that the right move for the company's survival is paying part of the suppliers and creditors, while negotiating payment deferral and debt distribution with the others. But that raises the question of **if the move constitutes creditor preference** and if the move fails, and insolvency proceedings will be issued against the company, **will these actions expose the executive to personal liability**.

Continuing Conduct During the Crisis

Allegedly, when a company suffers from a cash crunch and meets the conditions of an insolvent company as defined in clause 2 of the Insolvency Law, the company will be subject to an order of opening proceedings. In this situation, both the corporation and its creditor (under the conditions specified within the law) may apply to the court and request such an order. At the same time, the **law does not impose an obligation to turn to the court and does not see it as an exclusive alternative when coping with the situation**. In such a situation, the law imposes **a duty on the executives to reduce the scope and outcomes of the insolvency**.

Along with the option of turning to the courts, the law offers an option of **consulting with a corporate restoration expert** (who will recommend tailor-made streamlining actions to assist with the restoration of the corporation) as well as **negotiate a settlement with company's creditors**. It must be noted, that the alternatives specified in the law are not defined as a closed list and the corporation and its executives **may turn to other ways** in order to reduce the insolvency. Past experience, based on the previous insolvency laws that used to be in effect before the new law came (in September 2019), teaches us that the **cash flow test is not foolproof** and the courts tend to enable the Company to continue its operations when there is an economic horizon for its survival and overcoming the temporary crunch. This starting point also guides us when examining the provisions of the law during the situation described.

Creditor Preference

Does an informed decision made by the directors and executives of the company, after the consideration of the available options, to deliver part of the corporation's suppliers payment **on time**, while negotiating with the other suppliers payment deferral and debt distribution, constitute a preference of creditors which would need to be cancelled?

The cancellation of a transaction that gives priority to certain creditors is stated in section 219 of the new law whereby the court **may** order the cancellation of the transaction which results in the repayment or advancement of debt to a creditor, if the following conditions prescribed by law are met: (A) the date of execution of the transaction falls within the 3 month period prior to the date of filing a request for an

opening of proceedings; (B) the company was insolvent at the time the transaction was executed; (C) due to the transaction, the creditor will receive a larger portion of the debt compared to the portion he would have received during an insolvency proceeding within the order of creditors.

The explanatory notes to the bill indicate a significant change regarding the topic compared to the old law (section 98 of the bankruptcy order), where the **requirement for the intention to prefer a creditor has been eliminated**. The main reason for the provision is to promote the equal distribution between creditors and not to prevent the debtor from executing unfair transactions. Therefore, the new law sets an **objective consequential test -- a transaction which results in debt repayment or getting moved up the order of creditors – is deemed void.**

Section 219(B) sets out the exceptions to the cancellation rule and allows the court not to cancel a transaction that gives priority to creditors when one of the following exists:

1. "At the time or near the time of the transaction, the debtor received an appropriate remuneration under the circumstances of the executed transaction…"

This is the "new value rule" intended to apply in a case where it is economically wrong to look at the transaction as a past debt preference but rather as a new transaction for which the debtor receives new value.

2. "The execution of the transaction was within the ordinary course of business of the debtor and the debt was repaid due to the execution of the debtor's ordinary business…"

On the surface, the consequential test as adopted in section 219(A) **could have led to the cancellation of all payments** made by the debtor during the 3-month period prior to filing of an opening of proceedings order (inter alia, because of the presumption of insolvency that is applied to it during this period under section 219(A)(2)). Except, that the legislature's intention **was not to cause the debtor's premature implosion**, but rather try and allow it to progress during the difficult period while imposing the sanction and cancellation only specific transactions. Hence, there is the exception allowing the making of payments during the debtor's usual course of business. In the same way, the explanatory notes to the law make it clear that the exception is intended precisely for day to day situations, assuring suppliers, credit providers, and other entities operating with the debtor in the ordinary course of business that the payments which are transmitted to them are certain and final.

In the classic situations intended by the law, we shall distinguish between payments within the ordinary course of business and exceptional payments or other unusual transactions (such as strengthening collateral) -- the regular payments should continue to be paid in a timely manner as much as possible, while early payments or other unusual transactions will be more exposed to the option of cancellation due to creditor preference. **However, the current crisis requires more transversal and holistic solutions that will delay some of the affiliate payments and not just handle exceptional events. In such a situation, the execution of regular payments is possibly exposed to the preference claim. Executives should prepare and justify such conduct (assuming it is the case) when executing actions intended to minimize the insolvency as required by law**.

The Responsibility of Executives and Board Members During the Crisis

In light of the law, a transaction that in retrospect (when issued an opening of proceedings order against the corporation) led to the repayment of a larger portion of the debt in comparison to the portion that would have been given during the insolvency proceedings, and the conditions under section 219(A) cancelling the transaction are met, the executives of the corporation might hold personal responsibility for carrying out the transaction. However, the executive's responsibility must be examined in accordance to sections of the new law imposing personal responsibility, and in particular section 288 of the law. It

should be asked if at the time of the action's approval, did the executives know, or should they have known that the company was insolvent **and did not take reasonable measures to reduce its scope**.

In certain situations, under the subjective facts and with the individual circumstances of each case, after weighing the information and the data before them, the executives may conclude that the payment that appears to favor a certain creditor might rather constitute reasonable means of reducing the extent of insolvency and preparing for "the day after" the crisis in which the corporation will need the same creditor in order to continue its operations and avoid the pit.

One of the steps that executives are expected to take in order to reduce the extent of insolvency is **negotiation with the creditors of the corporation to reach a debt settlement.** A debt settlement can be **unique** for each creditor (it might be more appropriate with one to reach a payment settlement arrangement, with another a deferral of payment solution, and the third actually changing the payment terms and separating the interest rate from the principal) or a **collective** debt arrangement offering the same plan to all of the creditors who are ranked similarly in the credit line (in accordance with the provisions of chapter 10 of the law referring to a settlement without the opening of proceedings). The instructions of section 288(B)(2) of the law indicate that negotiations with creditors to lessen insolvency "corresponds" with the second part of the correct action and offers a more holistic alternative in any case. In the first part as described above, if after considering the risks, the executives concluded that they intend to pay only some of its current corporate obligations, the second part shall be attempting to reach different arrangements in relation to the other debts in order to allow for breathing space until the crisis passes.

Ending Note

We found it appropriate to emphasize that the provisions of the Insolvency and Economic Rehabilitation Law, 2018 – 5779, which took effect in September 2019, this client update describes a series of provisions from within the law above and the possible implications that could be drawn from the interpretation also given in the context of the legal situation prior to the entry of the new law and in the explanatory notes to the law. Naturally, and in the absence of up-to-date case law, the interpretation and application of law above is expected to develop gradually future case law. It should also be emphasized, that the possible interpretations described above, as well as conduct that should be considered, are expected to be updated in tandem with the development of case law and practice.

Moreover, as it appears the Corona crisis is already affecting the global economy and extensive sectors in Israel in a significant way. Of course, we cannot anticipate in advance the way the crisis will end, and its implications will be examined only in retrospect. Therefore, it is important to note that the law is not intended or designed to respond to transverse stress situations as we now experience and therefore requires creative and "out of the box" thinking that is adapted to the circumstances of each case in order to properly apply the principles of the law.

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