Corporate Insolvency and Governance Bill

21/05/2020

Restructuring & Insolvency analysis: We look at the reforms to UK insolvency laws set out in the Corporate Insolvency and Governance Bill which was introduced to the House of Commons and given its first reading on Wednesday 20 May 2020 ahead of being formally debated in the coming weeks.

The Corporate Insolvency and Governance Bill (Bill), which was introduced to the House of Commons and given its first reading on Wednesday 20 May 2020, represents the biggest change to the UK's insolvency framework in 20 years.

The overarching objective of the Bill is to provide businesses with the flexibility and breathing space they need to continue trading during the current coronavirus (COVID-19) pandemic. The measures are designed to help UK companies and other similar entities by easing the burden on businesses and helping them avoid insolvency during this period of economic uncertainty.

The explanatory notes published alongside the Bill state that the Bill has three main sets of measures to achieve its purpose:

- to introduce greater flexibility into the insolvency regime, allowing companies breathing space to explore options for rescue while supplies are protected, so they can have the maximum chance of survival
- to temporarily suspend parts of insolvency law to support directors to continue trading through the emergency without the threat of personal liability and to protect companies from aggressive creditor action
- to provide companies and other bodies with temporary easements on company filing requirements and requirements relating to meetings including annual general meetings

The Bill is a combination of reactionary, temporary measures designed to help businesses survive the coronavirus pandemic, and permanent measures which were formulated as a result of the Insolvency and Corporate Governance consultation that culminated with the government's response in 2018 (see News Analysis: Exploring the government's response to the insolvency and corporate governance consultation). The Bill includes seven main provisions:

- introduction of a company moratorium
- introduction of a restructuring plan
- temporary restrictions on winding-up petitions
- temporary suspension of wrongful trading liability
- prohibition on termination clauses in supply contracts
- temporary changes to holding annual general meetings and general meetings, and
- extensions to some Companies House filing requirements

We explore each of these provisions briefly below. Further information and analysis will be published as soon as it is available.

Company moratorium

Directors of insolvent companies or companies that are likely to become insolvent can obtain a 20 business day moratorium period which will allow viable businesses time to restructure or seek new investment free from creditor action. The moratorium will be overseen by an insolvency practitioner acting as a 'monitor' although the directors will remain in charge of running the business on a day-to-day basis (known as a 'debtor-in-possession' process with the company being the 'debtor'). The moratorium will be free-standing; it will not

be a gateway to a particular insolvency (or any process at all, if the company can be rescued during the moratorium without needing entry into an insolvency procedure).

The moratorium is commenced by filing the prescribed papers at court. This includes a statement by the directors that the company is, or is likely to become, unable to pay its debts and the 'monitor' must make a statement that it is likely that a moratorium for the company would result in the rescue of the company as a going concern.

It will be possible to extend the initial 20 business day moratorium for an additional period with the consent of the creditors or the court. The request for an extension must be made within the initial 15 business day period of the moratorium. The moratorium will bind both secured creditors and unsecured creditors.

Restructuring plan

The new†restructuring plan†will closely resemble the existing English ‘scheme of arrangement’ and will allow a company to bind all creditors—including junior classes of creditors even if they vote against the plan—through the use of a cross-class cram down provision. Such cram down could be imposed provided dissenting classes of creditors are no worse off than they would be in the relevant alternative. The classes of creditors would be proposed by the distressed company on a case-by-case basis. For a class to vote in favour, 75% of a class by value, and more than 50% by number, would have to agree to the plan.

The new restructuring plan procedure is intended to broadly follow the process for approving a scheme of arrangement (approval by creditors and sanction by the court). As well as familiarity, this will have the advantage of providing a long-established and tested body of jurisprudence that courts will be able to draw upon when dealing with the new restructuring plan and considering matters such as class formation (ie relevant scheme case law should be applicable to relevant provisions of the new restructuring plan procedure).

No financial conditions are set in order to qualify for a restructuring plan. This means both solvent and insolvent companies will be able to propose restructuring plans to their creditors.

Winding-up petitions

The Government is legislating to temporarily prevent winding up proceedings being taken on the basis of unsatisfied statutory demands and to temporarily stop winding up proceedings where coronavirus has had a financial effect on the company which has caused the grounds for the proceedings.

The Bill provides that a winding-up petition based on section 123(1)(a) of the Insolvency Act 1986 (IA 1986) (ie an unsatisfied statutory demand in respect of a debt exceeding £750) cannot be presented by a creditor during the period beginning on 27 April 2020 (it has retrospective effect) until either 30 June 2020 or one month after the coming into force of the Bill, whichever is later, unless the creditor has reasonable grounds for believing that (a) coronavirus has not had a financial effect on the debtor, or (b) the debtor would have been unable to pay its debts even if coronavirus had not had a financial effect on the debtor.

Where a winding-up petition was presented on or after 27 April 2020 but before the draft legislation law, and that petition would not have satisfied the above grounds, the official receiver must apply to the court for directions and the court may make such order as it thinks appropriate to restore the position to what it would have been if the petition had not been presented. In other words, winding-up orders made on or after 27 April 2020 that do not comply with the Bill will be void.

Wrongful trading

The Bill temporarily suspends the wrongful trading provisions under†IA 1986, s 214†and IA 1986, s 246ZB †to give company directors greater confidence to use their best endeavours to continue to trade during this pandemic emergency, without the threat of personal liability should the company ultimately fall into insolvency. Existing laws for fraudulent trading and the threat of director disqualification will continue to act as a deterrent against director misconduct.

The suspension runs from 1 March 2020 and ends on either 30 June 2020 or one month after the provision comes into force, whichever is later, so the measure has retrospective effect. However, in the event that the

impact of the pandemic on businesses continues beyond the end of that period, the Bill allows for the suspension to be extended for up to six months using secondary legislation. That process may be repeated, extending the suspension period further. If it is clear that the pandemic is no longer having an impact on businesses, the period of suspension may also be ended. Such extension and ending of the period will be through regulations contained in a statutory instrument.

Termination clauses (essential supplies)

Suppliers will often stop supplying or threaten to stop supplying a company that has entered into an insolvency process or a restructuring procedure. The supply contract often provides the supplier with the contractual right to do this, but such supplies can often be crucial to achieve continued trading and a rescue the business.

The Bill introduces a permanent change to the use of†termination clauses in supply contracts. As a result of the measure, where a company has entered†an insolvency or restructuring procedure or obtains a moratorium during this period of crisis, the company's suppliers will not be able to rely on contractual terms to stop supplying, or vary the contract terms with the company (for example: increasing the price of supplies). The customer is required to pay for any supplies made once the insolvency process has commenced, but is not required to pay outstanding amounts due for past supplies while it is arranging its rescue plan.

The measure also contains safeguards to ensure that suppliers can be relieved of the requirement to supply if it causes hardship to their business. There will also be a temporary exemption for small company suppliers during the emergency.

Annual general meetings (AGMs) and general meetings (GMs)

The Bill temporarily allows those companies that are under a legal duty to hold an AGM or GM to†hold a meeting by other means—even if their constitution would not normally allow it. As a result, directors will not be exposed to liability for measures that need shareholder endorsement, and shareholders' rights are preserved.

The measures also make provision to extend the period within which companies and other bodies must hold an AGM, in order to offer further flexibility if required. Those bodies with a deadline for holding an AGM expiring between 26 March 2020 and 30 September 2020 will be given until 30 September to hold their AGM, taking advantage of the more flexible arrangements for holding such meetings which are introduced by the Bill. There is also a power to provide for further temporary extensions of any deadlines for holding an AGM.

These measures will only apply in respect of a temporary period which begins on 26 March 2020 and runs until 30 September 2020. There is a power to extend that period by up to three months at a time, but the temporary period cannot be extended beyond the end of the current financial year.

Companies House filing requirements

Companies are required, primarily by virtue of the Companies Act 2006 (CA 2006), to file prescribed documents by fixed deadlines at Companies House each year. Missing the deadline automatically results in a financial penalty and can result in criminal sanctions for the company's directors or the company being struck off the register of companies. The Bill allows the Secretary of State to temporarily make further extensions to deadlines for certain filings which include:

- accounts under CA 2006, Pt 15
- annual confirmation statements under CA 2006, Pt 24
- notices of related relevant events under the CA 2006, and
- registration of charges under CA 2006, Pt 25

Next stages

According to Parliament's website, MPs will next consider all stages of the Bill on Wednesday 3 June 2020.

The Government intends to ask Parliament to expedite the parliamentary progress of the Bill. This could mean that these restructuring tools may be available from the start of July 2020, subject to the Bill having a straight-forward journey through Parliament.

Useful links

The Bill is available in full† here.

The explanatory notes can be found here.