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# Insights: The Corporate Insolvency and Governance Bill - A Litigator's Perspective

**On 20 May 2020, the Corporate Insolvency and Governance Bill (the "Bill") was introduced to the UK Parliament. The Bill is expected to be fast-tracked through Parliament and be enacted as early as June 2020.**

The Bill deals with both temporary measures in response to the immediate effects of the COVID-19 pandemic, and major reforms to the insolvency regime. It represents one of the most debtor-friendly developments in recent times.

Both the ground-breaking nature of some of the measures, and the speed at which it appears to be intended to be enacted, will inevitably result in uncertainty, risk and, ultimately, litigation as to the protections and risks set out therein. Here, we consider the most likely areas of dispute, at least at this early stage.

## THE TEMPORARY MEASURES

### Restrictions on statutory demands and winding-up petitions

The key temporary measures introduced in the Bill safeguard companies from debt recovery actions during and arising from the COVID-19 pandemic:

(i) statutory demands presented between 1 March 2020 and 30 June 2020[1] are void;

(i) winding-up petitions cannot be presented between 27 April 2020 and 31 June 2020, unless a creditor has "reasonable belief" that: (a) COVID-19 has not had a "financial effect" on the company; or (b) insolvency would have arisen anyway, irrespective of COVID-19.

These temporary measures appear to have been introduced primarily to protect commercial tenants from actions taken by landlords, following a number of attempted actions by landlords in view of the recent three month moratorium (starting on 26 March 2020) restricting their ability to forfeit leases or re-enter premises[2] – although the provisions of the Bill are of general application and are not limited to this sector. It is unclear whether further steps will be taken to limit the actions of landlords. Particularly if they are, leading to landlords feeling targeted and in potential financial distress unable to service their obligations, we expect to see retaliatory action by landlords to protect their interests.

[1] As with all dates in the Bill, these dates can be extended where appropriate.

[2] Pursuant to section 82 of the Coronavirus Act 2020 with respect to England and Wales.

Whilst a "breathing space" measure may be sensible to protect the broader economy, the vague terms in which these temporary measures are couched may create considerable uncertainty. The requirement that COVID-19 has had a "financial effect" on a company appears a low and vague bar, in circumstances where the pandemic is very likely to have had such an effect on a large number of companies in the jurisdiction. It may also be difficult to ascertain whether insolvency would have arisen in any event, given the novel circumstances of the pandemic and its effects. This will inevitably result in disputes.

### Partial disapplication of wrongful trading liability

The Bill also includes temporary measures limiting (but not entirely suspending) directors' personal liability for wrongful trading between 1 March 2020 and 30 June 2020. Directors will be assumed not to be responsible for any "worsening of the financial position of the company or its creditors" that occurs during this period. This partial relief appears of limited value, given that other relevant duties will continue to apply (e.g. directors' duties to shareholders, to take into account the interests of creditors where the company is in the zone of insolvency). As such, it may have little impact on the likely litigation against directors that we expect to see as companies enter into insolvency procedures and creditors search for value.

## THE PERMANENT MEASURES

### The restructuring plan

One of the most significant new measures in the Bill is the introduction of a new restructuring plan, modelled on a scheme of arrangement but similar to a US Chapter 11 procedure. It permits a cross-class cram-down (including of secured creditors), with a 75% approval threshold and Court approval (similar to a scheme of arrangement).

This appears to be an extremely flexible tool. As with schemes of arrangement, there is no requirement that the company is insolvent, although the company must have encountered, or be likely to encounter, financial difficulties that are affecting or will affect its ability to carry on business as a going concern. The jurisdictional connection is the same as for a scheme of arrangement.

Whilst the new plan has been welcomed, there remain questions. How it will work in a cross-border scenario is unclear: there is no express provision for the plan (as approved by the Court) to have extra-territorial effect, and there will be no automatic recognition of the plan under the European Insolvency Regulation. The Courts may be needed to clarify points as to this recognition.

Further – and in particular – the cross-class nature of the cram-down and its practical implications will likely only become clearer as the first cases on the restructuring plan progress through the English Courts.

Case law from schemes of arrangement is likely to be relevant generally, but the exact way that dissenting classes can be crammed-down is not clear. Whilst the legislation seemingly allows a junior-led cram-down of senior creditors, this scenario, it would appear, remains subject to Court approval taking into account overarching concerns such as fairness. Again, this is an area that will only become clearer once live plans have been considered by the Court.

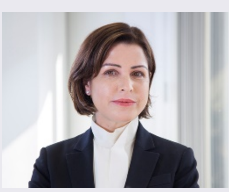
**The moratorium**

The Bill also introduces a moratorium period of 20 business days for companies in financial distress, in which period creditors cannot take enforcement action, to "hold the ring" whilst a restructuring plan is put in place. The moratorium will be overseen by a monitor (a licensed insolvency practitioner), although directors remain in control of the company subject to that oversight.

This initial (and very short) period can be extended by various prescribed time periods (depending on the type of consent obtained), in circumstances where doing so to continue to seek a restructuring would likely result in the company continuing as a going concern. We may see disputes as to when such extensions would be appropriate.

Whilst the moratorium gives the company a payment holiday on most of its debts, some debts, including financial and banking debts, will need to continue to be serviced.  This may blunt the practical impact and use of the moratorium.

## CONTACT

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