



The Corporate Insolvency and Governance Bill

Restructuring and Insolvency Aspects

Updated on 10 June 2020

The Corporate Insolvency and Governance Bill (the “**Bill**”) is finally out (all 238 pages of it!) and had its second reading in Parliament on 3 June. The expectation is that it will come into force by the end of June/early July. As such, we need to ask ourselves: what does it all mean?

The first thing to note is that the Bill deals with both temporary measures that are necessary and linked to the Covid-19 pandemic as well as those that are here to stay and that have been on the radar since the Government’s consultation ended in 2018. It is also worth noting that the Bill applies to England and Wales, Scotland and Northern Ireland with the provisions effectively mirrored in the latter two jurisdictions and with reference to the equivalent legislation, being the Insolvency NI Order 1989 in Northern Ireland.

We consider below, at very high level, the key aspects of the current insolvency regime that the Bill seeks to modify. Ultimately, although not entirely in line with certain recent press releases from the Government following the pandemic lockdown, the Bill’s main aim seems to be to provide companies with additional tools and breathing space to see them through their current financial difficulties. Different sectors and classes of people/institutions will be impacted in different ways by the Bill; whether in relation to enforcement options in the short term or in relation to their position as creditors more longer term where consideration will need to be given to additional insolvency processes.

Temporary Measures in light of the impact of Coronavirus

A number of temporary measures, designed to provide short term relief from the effects of Coronavirus, have been introduced by the Bill.

1. Wrongful trading

- **What does it do?** In calculating the quantum that any director may be liable to pay in respect of a wrongful trading claim, the court will assume that the director is not responsible for the worsening of the financial position of the company or the creditor position during the relevant period.
- **Relevant period:** the relevant period for the purposes of these provisions is 1 March 2020 to 30 June 2020, or one month after the coming into force of the act, whichever is later.
- **Exclusions:** the provisions don’t apply to a whole host of companies listed in the Bill which would mainly fall into the category of insurance and FSMA regulated companies.
- **Issues:** An IP could therefore, theoretically, still bring a claim for wrongful trading which covers, for example, a period before the “relevant period” as well as the “relevant period” but there would be a carve out for any contribution due in respect of the relevant period. There must therefore be a question mark over how, practically, both IPs and courts will quantify the element of contribution that relates to that 4 month period carved out and in respect of which no contribution will be due? There are no changes to any of the other provisions applying to directors such as misfeasance, breach of duties, fraudulent trading or director disqualification. As such, directors will have to continue to be wary of their conduct during this time and take professional advice. A separate note on directors’ duties (prepared prior to the release of the Bill) can be found [here](#).

2. Statutory demands and winding up petitions

The expectation here following previous press releases from the Government was that the aim of the legislation was to deal with landlords taking aggressive action against tenants; the drafting in fact goes beyond that and applies to all creditors, not just landlords of commercial tenants.

- **Aim:** allow companies breathing space and prevent the threat of winding up proceedings being used as an aggressive debt collection tool; encourage communication and negotiation between parties.

- **Timing:** the provisions are temporary in nature and impact statutory demands presented between 1 March 2020 and 30 June 2020 (or one month from the enactment of the legislation if later) and impacts winding up petitions (“**WUP**”) presented between 27 April 2020 and 30 June (or one month from enactment if later). The impact of the Bill is therefore retrospective and is likely to impact demands that are currently being made and threats as well as actual WUPs.
- **Prohibition:** Creditors are prevented from presenting a WUP in the relevant period above UNLESS they can show that they have reasonable grounds for believing that the inability to pay is not Covid-19 related or the debtor would have been unable to pay, notwithstanding any Covid-19 related financial issues. A court will only grant a winding up order in relation to a WUP presented in this time if the company would have been unable to pay its debts, notwithstanding Covid-19 issues.
- **Impact:** Statutory demands served in the relevant period are void. Even if petitioners seek to present a WUP after 30 June, if it is based on a statutory demand presented in the relevant period, the petition will be dismissed. Whether the inability to pay is Covid-19 related or not will be irrelevant. That would even impact demands served after 1 March but before “lockdown” where the debt due will clearly have accrued prior to lockdown and will therefore likely be unrelated to the pandemic; despite that, it will still fall away,
- **What does it mean?** Petitioning creditors will have to prove a negative to be able to present a petition between 27 April and 30 June. They can only present if they can show that the inability to pay is not linked to Covid-19 or that the inability to pay would have arisen even without the effects of Covid-19. Practically, it is likely to mean far more contested petition hearings as debtor companies will likely argue that they fall within the prohibition. There is also now a risk of certain orders being retrospectively invalidated if they were made on or after 27 April and fit the other criteria such that the court will then order that those companies be restored to the position they would have been in but for the compulsory order. Who picks up those restoration costs? This could have an impact on several cases where the Official Receiver may have been appointed as liquidator. What level of burden is going to be placed on companies to evidence Covid-19 is the reason they can't pay their debts as they fall due? Would evidence of being up to date with payments prior to the lockdown be sufficient? For companies that were already in debt where the position has worsened as a result of Covid-19 and related measures, this is much less clear. The legislation puts the onus on the creditor to have reasonable grounds for believing the criteria are met. Will the process for withdrawing petitions presented in the relevant period be more straightforward than currently so they take up less court time? These are all questions and issues that will no doubt be borne out over the coming months once the Bill is passed, has retrospective effect and the relevant demands and petitions are reviewed.
- **Workaround?** Could creditors wait till after 30th June to present a WUP rather than deal with the risk of having a contested hearing? There is of course the risk that the 30 June date is extended; especially if the date of early July being suggested for the opening of bars and restaurants is further delayed. Could these prohibitions lead the way for creditor administration applications? Do creditors need to give thought to alternative debt recovery options but are those also stymied as a result of other prohibitions that have recently been brought into force such as under the Coronavirus Act 2020 or with reference to Practice Direction 51Z].
- **Commencement:** void dispositions under section 127 of the Insolvency Act 1986 (**IA 1986**) will not be an issue as the date of commencement of the liquidation will be deemed to be the date of the making of the order rather than the date of presentation of the WUP, which would usually be the case.

3. Corporate Governance

This gives the Secretary of State (“SoS”) the power to make further regulations around corporate governance, as required, to help companies to initiate an insolvency process (such as for example holding AGMs and passing resolutions).

- **Aim:** the SoS would only seek to create such new regulations with the aim of reducing the number of companies going through an insolvency process which could have a knock on impact on the economy more generally.
- **Timing:** any changes to be proposed are only intended to have a six month lifespan.
- **Meetings:** provides an extension of period to hold AGMs to 30 September 2020 (or any extended date) and provides for “Virtual only” meetings (all attendees are in different places (connected through a video/tele conference facility) and voting being carried-out electronically or by other means) to give companies more flexibility. The Bill provides for these measures to be retrospective from 26 March 2020 so that any company that has already had to hold a general meeting that complied with social distancing, but in turn did not meet the relevant obligations in their constitution, will have done so in accordance with the law.
- **Filings:** temporary provisions have been made for extensions of time to the period for filing accounts, to be extended to 30 September 2020 in certain circumstances. The same extension has been provided in relation to notices to be provided to the Registrar of companies, albeit the time periods vary here.

Permanent Measures

The permanent measures introduce new provisions to the IA 1986 to provide a new restructuring breathing space and restructuring plan process for companies, effectively building on the out-of-court administration process introduced by the Enterprise Act 2002, by affording out-of-court debtor in possession restructurings (hitherto not regulated or protected) statutory recognition.

1. New Restructuring Moratorium

- **Aim:** Breathing space to allow the company to be rescued as a going concern. This could perhaps be achieved with the injection of further cash (in respect of which fresh security can be granted during the moratorium) or a CVA or other process.
- **Who does it apply to?** A moratorium can be triggered in relation to an “eligible” company. Insurers, banks, investment banks, PPP companies, investment firms and several other financial services institutions are ineligible for this process. A company will also not be eligible if, in the 12 months preceding, it has already been the subject of a moratorium or other insolvency procedure. The list of excluded companies is long and detailed and should be checked with care to ensure eligibility.
- **How?** Like administration, it can be triggered through an out of court route (by the directors and where there is no outstanding winding up petition and not in relation to an overseas company) or by way of court order if there is a pending winding up petition or it relates to an overseas company.
- **What is required?** Certain necessary filings will have to be made to trigger the moratorium (akin to administration). A statement from the directors will have to confirm that, in the directors’ view, the company either is or is likely to become unable to pay its debts. A statement from the proposed monitor (see below) will also be required stating that, in their view, a moratorium will

likely result in a rescue of the company as a going concern. In the current economic climate, this may not be as straightforward an exercise as may ordinarily be the case. Although it remains to be seen, it appears likely that the directors must have a restructuring/turnaround plan in fairly mature shape – or be in the process of effecting one – in order to convince a monitor to make the necessary confirmation. Where a WUP has already been presented, the court will consider whether there is likely to be a better outcome for creditors than would be likely if the company were to be wound up without first going through the moratorium process.

- **Who's in charge?** The directors remain in control of the company but there are limitations on what they can do without the consent of the monitor (see further below). A “monitor” (being a licensed Insolvency Practitioner) will be appointed to oversee the process and is an officer of the court. The directors have a duty to cooperate and provide the monitor with information requested in order for him/her to form a view on the continued viability of the company and to determine whether it remains likely that the company can be rescued as a going concern. There is provision for monitors to apply to court to seek directions. There is also a presumption of validity as regards the monitor's acts, in spite of any procedural defect in the appointment. It though remains open to parties impacted by the moratorium to challenge a monitor's actions. The same challenge is also available in relation to the actions of the directors during the time of the moratorium to the extent that it causes harm to the interests of creditors. Any subsequently appointed administrator or liquidator may also bring a challenge to the monitor's remuneration.
- **How long for?** The initial period is 20 business days.
- **Extension?** After 15 business days, the directors can extend by a further 20 business days or they can seek the consent of the creditors to extend by up to 12 months. If the creditors don't consent, permission of the court can be sought. There are some conditions to obtaining an extension – the directors and monitor will have to confirm their initial statements remain correct (as set out above). Also, the company has to have paid certain debts that accrue or arise during the moratorium. In reality, it is likely that an extension will be sought as a matter of course, given the time and intensive effort which ordinarily go into effecting a turnaround.
- **Termination?** The moratorium will terminate (i) automatically after expiry of the initial 20 business days (or the expiry of any extension following that); (ii) automatically on the commencement of a separate insolvency process; or (iii) on notification to the court where the monitor has taken the view at a given point that it is no longer possible to achieve a rescue as a going concern. It is incumbent on the monitor to continue to assess the situation throughout and, if s/he forms the view that such a rescue is no longer possible, s/he must file a notice at court to terminate the moratorium ahead of time.
- **Moratorium against what?** No winding up petitions other than by the directors (although there is a carve-out for public interest petitions), no resolutions for voluntary winding up other than as proposed by directors, only directors can make an administration application, and no notices of intention to appoint administrators or notices appointing administrators can be filed for out-of-court appointments. Landlords are prevented from exercising forfeiture rights and the right of peaceable re-entry which aligns with the Coronavirus Act (irritancy in Scotland), without permission of the court. Secured creditors can't enforce security (other than in relation to collateral agreements) without permission of the court, no legal process can be initiated or continued and there is to be no repossession of hire-purchase goods. Floating charges do not crystallise during the moratorium (whether by notice or by operation of law). Security granted during the moratorium can, however, be enforced provided the monitor consented to the granting of the security. Only creditors who are outside the payment holiday created by the Bill are able to apply to court to lift the moratorium.
- **Restrictions on company transactions:** The company cannot obtain credit of more than £500 unless the creditor is made aware of the moratorium. Dispositions of company property other than

in the ordinary course of business aren't allowed without monitor consent and the company can only dispose of certain assets covered by a charge if it does so by way of application to court or with charge-holder consent.

- **Payment holiday?** During the moratorium, payments of more than £5,000 or 1% of the total unsecured debt cannot be made to creditors by the company without the consent of the monitor; however, certain debts are excluded from this and must be paid during the course of a moratorium. If the company is unable to do pay these debts, the monitor is obliged to bring the moratorium to an end and no extension to the moratorium can be obtained. The debts which must be paid during a moratorium include the monitor's fees and expenses, and liabilities for rent, goods and services relating to the moratorium period (in a similar mould to administration expenses) as well as wages and salaries of employees and redundancy payments.
- **Commercial borrowing:** The list of debts for which there is no payment holiday also includes, however, debts or other liabilities arising under "a contract or other instrument involving financial services" which, significantly, includes agreements governing most standard forms of commercial borrowing. At first glance, therefore, paradoxically whilst lenders are prevented from enforcing security during the moratorium (without leave of the court), without more it seems that liabilities which fall due to lenders during the moratorium must continue to be paid by the company. As these contracts are not affected by the prohibition on termination set out below, it appears a lender could also, if contractually entitled to do so, make demand for repayment and accelerate facilities during a moratorium. In short, it appears the company's lenders will need to be fully involved and supportive of any rescue plan, in order for a company to have the benefit of the moratorium.
- **Offences:** There are various offences that apply to the conduct of both the directors and the monitor in the event of a breach of any of the requirements, which also extends to fraud in the run up to or during the moratorium (going back 12 months from its commencement).

2. The new Restructuring Plan

As an adjunct to the moratorium, Schedule 9 of the Bill sets out the procedure for formulating a binding restructuring plan during the moratorium, in what seems to be a mixture of aspects from CVAs, schemes of arrangement and sanctioned arrangements under the US Chapter 11 process.

- **What?** This applies to companies that are or are likely to face financial difficulties and where a compromise agreement is proposed between the company and its creditors or a class of creditors with a view to mitigating the financial difficulties. It requires 75% at least in value of creditors (or class of creditors) present and voting to vote in favour for the court to consider sanctioning the proposal.
- **Who?** The provisions provide for a cross-class cram down to the extent that any proposal will bind all creditors. Dissenting creditors will have a certain amount of protection but ultimately it will be up to the court to exercise its discretion to do what it thinks is right to achieve what is in the best interest of all stakeholders. In other words, unlike UK schemes of arrangement and CVAs, this new process allows the court to bind in classes of creditors who have voted against the plan, if it is just to do so. This represents a significant departure from the UK's insolvency regime, and one which failed to make it through the heavily-negotiated reforms arising from the Enterprise Act 2002.
- Importantly, the Bill leaves it open to the Secretary of State to introduce regulations which exempt certain types of regulated entities (authorised persons under the Financial Services and Markets Act 2000) from being able to propose a restructuring plan.

3. **Ipsa facto / termination clauses**

- **Aim:** The intention behind these provisions is to ensure continuity of supply and thereby encourage and allow companies more of a chance to rescue their businesses. The prohibition applies to companies that are subject to a “relevant insolvency procedure” (the new moratorium, administration, appointment of an administrative receiver, CVA, liquidation, appointment of a provisional liquidator or where a convening order has been made in respect of a restructuring plan). The prohibition does not apply to schemes of arrangement.
- **Prohibition:** The Bill includes a prohibition on the termination of any contract for the supply of goods or services to a company or “doing any other thing” in respect of that contract by reason of the company becoming subject to a relevant insolvency procedure. Suppliers will still be able to terminate on non-insolvency grounds including for example non-payment if the default occurs following the commencement of the relevant insolvency procedure. If the supplier had a right to terminate before the company became subject to a relevant insolvency procedure but not did exercise that right, the supplier will lose the right to terminate for that reason during the insolvency period.
- **Exemptions and exclusions:**
 - The essential supplies regime will continue to apply;
 - Where the prohibition bites, the supplier may still terminate if the office holder consents (meaning an administrator, administrative receiver, liquidator or a provisional liquidator), the company consents (in a scenario where the company is subject to the new moratorium, a CVA or where a convening order has been made in respect of a restructuring plan) or the court grants permission where it is satisfied that the continuation of the contract would cause the supplier hardship;
 - There is a temporary exemption for small suppliers where the counterparty becomes subject to a relevant insolvency procedure during the period beginning on the date this section of the Bill comes into force and ending on the later of 30 June 2020 or one month after the coming into force of this section. A small supplier is one that meets certain thresholds and these vary depending on whether or not the supplier is in its first financial year at the relevant time;
 - Certain entities involved in financial services will not be subject to the prohibition where they themselves are in distress or where they are a supplier to a company in distress. These entities are listed in the Bill and include (amongst others) deposit-taking and investment banks and insurance companies;
 - Whilst the prohibition applies to contracts for the supply of goods or services, certain contracts involving financial services are excluded from the prohibition and can continue to be terminated or varied on the grounds of insolvency. These contracts are listed in the Bill and would include things like loan agreements and overdrafts.
- **Outstanding charges:** Suppliers are not allowed to make it a condition of any supply of goods or services after the time when the company becomes subject to the relevant insolvency procedure, or do anything which has the effect of making it a condition of such a supply, that any outstanding charges in respect of a supply made to the company before that time are paid.

Clearly, given the speed at which the Bill has been drafted and introduced, there are many questions which remain to be answered, and a great deal of judicial authority and commentary is anticipated in the near future. As and when updates become available, we will issue further guidance.

Contact us

If you have any questions about the Bill or the commentary in this briefing please contact a member of our Restructuring and Insolvency team, who will be happy to assist.



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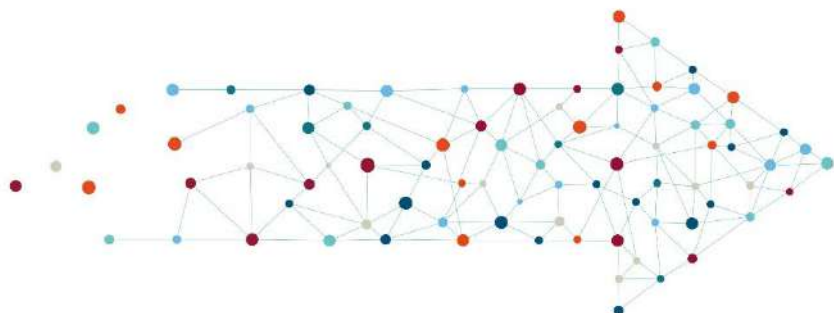
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