CORPORATE INSOLVENCY AND GOVERNANCE BILL

The Corporate Insolvency and Governance Bill was first read to Parliament on 20 May 2020. It is set to be fast tracked into legislation and will likely be law by 10 June 2020.

Whilst some of its measures are designed to provide temporary relief during the COVID-19 crisis, it also includes provisions which will have a lasting impact on insolvency law and the ability of creditors to enforce payments. In addition to companies with financial difficulties however, it will have a significant impact on all those who trade with them, including customers, suppliers and landlords. Directors will also need to be carefully guided around the genuine prospects of a company being able to trade as a going concern where the mid to longer term impacts of the current circumstances may well remain uncertain.

Moratorium

- The new bill includes provisions for a new type of insolvency process.
- It allows "eligible" companies (which includes most companies save for specific exceptions) to obtain a moratorium against creditors for an initial period of 20 business days but with the ability to extend that in certain circumstances.
- Unlike administration or liquidation, this form of insolvency process will leave the company's directors in charge of the company, albeit a monitor who is a qualified insolvency practitioner is appointed at the same time to oversee the process.
- In order to obtain the moratorium, a company (who is not subject to a winding up petition) simply has to lodge papers at the Court including:
  - a statement from the directors that in their view the company is likely to become unable to pay its debts; and
  - a statement from the proposed monitor that the moratorium would likely result in the rescue of the company as a going concern.
- There is an ability to obtain a longer moratorium in circumstances where creditors have given approval or the Court approves it.
- The moratorium has a very similar effect to the moratorium under administration, which prevents the presentation of winding up petitions and other insolvency applications being made as well as restricting enforcement and legal proceedings against the company in respect of pre-moratorium debt.
- Pre-moratorium debt covers most debts accrued prior to the moratorium commencing and also includes those debts that accrue during the moratorium (with certain exceptions)

Comment

We would expect to see a large number of companies applying for this moratorium following enactment. In circumstances where Government support around COVID-19 is phased out, directors will need to critically assess if applying for the moratorium is appropriate – is there a real prospect of continuing as a going concern or is a more fundamental restructuring required to survive.

Winding Up Petitions / Statutory Demands

- If a creditor has served a statutory demand between the dates of 1 March 2020 and 30 June 2020, they will not be permitted to petition for the winding up of the debtor based on that demand.
- A creditor is not permitted to petition for the winding up of a company between 27 April 2020 and 30 June 2020 on the other grounds set out in the Insolvency Act 1986 (which includes an inability to pay debts as they fall due or balance sheet insolvency) unless the creditor has reasonable grounds for believing that:
    - coronavirus has not had a financial effect on the company, or
    - the relevant ground would apply even if coronavirus had not had a financial effect on the company.
- Coronavirus has a "financial effect" on a company if the company's financial position worsens in consequence of, or for reasons relating to, coronavirus.
- There are also provisions which deal with petitions which have already been issued.

Comment

1. Given the suggestion that statutory demands served between 1 March 2020 and 30 June 2020 are ineffective, creditors may simply elect to re-serve demands outside of this period.
2. The definition of "financial effect" is very wide – you would struggle to find a business whose financial position has not worsened as a result of COVID-19. There will, therefore, be a focus on proving whether or not the grounds could be proved if COVID-19 had not happened. On that point, however, do expect the Courts to examine these issues in some detail, as Mr Justice Snowden did in anticipation of this legislation (Short Gardens LLP v LBC Camden - April 2020). Coronavirus is unlikely to present a complete "free pass".
3. The legislation will be retrospective in effect and therefore affects those creditors who have already issued statutory demands believing them to be lawful.

Schemes of arrangement - restructuring plan

- There are proposed amendments to rules in relation to schemes of arrangement, which will introduce a new 'restructuring plan' procedure.
- This generally follows the process for approving schemes of arrangement, but also includes the ability for a company to bind classes of creditors (and where appropriate, members) to a restructuring plan, even if it has not been approved by each class.
- Where:
    - a company has encountered or likely to encounter financial difficulties that may affect its ability to carry on the business as a going concern;
    - a compromise or arrangement is proposed between that company and (i) its creditors (or any class of them) or (ii) its members (or any class of them); and
    - that restructuring plan is for the purpose of eliminating, reducing, preventing or mitigating the effect of those financial difficulties,

  the bill gives the Court a discretion to sanction the restructuring plan subject to certain conditions being met, even though the requirement to provide a majority in number representing 75% in value of a class has not been met.

Termination Provisions in Supply of Goods and Services Contracts

- The Bill proposes as a permanent change that once a customer is subject to an insolvency procedure, the supplier cannot terminate for:
    - The customer's insolvency
    - Or a pre insolvency breach of contract

  unless it has the consent of the insolvency practitioner/ customer, or a court grants permission to allow termination because otherwise it will cause the supplier hardship.
- There is a temporary exclusion for small suppliers (as defined in the Bill) until the later of 1 month of enactment or 30th June. There are also exclusions for financial contracts. These include the obvious such as lending contracts but also include other contracts such as certain commodities contracts.

Comment

There has been for some time at English law a restriction on termination for essential supplies (i.e. utilities) but this extension is a very substantial change as it will now extend to all suppliers. Most English law contracts include express provisions allowing a supplier to terminate on the customer's insolvency and these would be overridden. Suppliers will need to consider carefully the impact on the drafting and structure of new contracts, as well as what this means for managing their risk in relation to continued supply to insolvent businesses and being able to crystallise liability for insolvency. It also could impact on the supplier's bargaining position insolvency.

Wrongful Trading

- When a company enters administration or liquidation, an administrator or liquidator can apply to the Court for a declaration that directors of the company are liable to personally contribute to the assets of the company. The declaration can be made where the directors allowed the company to continue trading beyond the point at which the insolvency procedure was inevitable, and did not take every step to minimise potential losses to creditors.
- At present, there is uncertainty around trading conditions and directors are having to make decisions about the future viability of their companies and whether it is appropriate for trading to continue.
- In light of this, the Bill will temporarily suspend wrongful trading provisions for the period 1 March 2020 to 30 June 2020, the measure will therefore be retrospective. The court will not take into account any worsening of the company or its creditors' financial position during the period of suspension of liability and liquidators/administrators will be unable to bring claims for wrongful trading against directors during this period.
- However, this Bill does not suspend or abrogate directors' fiduciary and statutory duties; and given the short wrongful trading suspension period (4 months) it would be risky for directors of failing companies to rely heavily upon these measures alone to avoid liability in the long term. Also, as Government measures may have helped businesses to mitigate impact on creditors during this period, as trading was suspended; the key decisions on wrongful trading likely having to be made by directors post 30 June.

AGM Changes

- Public companies and certain private companies have a statutory duty to hold an annual general meeting ("AGM") within a specified period and failure to do so is a criminal offence. The constitution of companies may also require that AGMs and other meetings are held in person or at a particular place.
- The Bill proposes to introduce temporary relaxations to enable companies and other bodies to hold AGMs. The measures proposed will give greater flexibility as to the manner in which such meetings are held, for example, they will be able hold meetings, and allow votes to be cast, by electronic means.
- The measures also make provision to extend the period within which companies and other bodies must hold an AGM. 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. There is also a power to provide for further temporary extensions of any deadlines for holding an AGM.

Extension of filing deadlines

The Bill proposes to extend deadlines for certain filings at Companies House which includes: accounts, annual confirmation statements, notices and registration of charges.

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