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THE CORPORATE INSOLVENCY AND GOVERNANCE BILL: A TOOLKIT FOR THE COVID ERA AND BEYOND?

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On 20 May, the draft Corporate Insolvency and Governance Bill was introduced into the House of Commons. It contains a mixture of temporary measures necessitated by the immediate economic and practical challenges of COVID-19, and longer-term reforms to our restructuring and insolvency regime. The Government intends for it to pass into law on an expedited timetable, going through the remaining stages in the Commons on 3 June before passing to the Lords.

The Government says that the Bill will provide vital support to businesses to help them through this period of instability and support them while they address the challenges resulting from the impact of coronavirus. This includes providing companies and other bodies with temporary relaxations on company filing requirements and requirements relating to meetings. However, the vast majority of the Bill is focused on helping companies to maximise their chances of survival, and in this briefing we discuss whether the new measures are likely to achieve this aim, and consider whether further reforms may be required.

Temporary COVID-19 measures

Wrongful Trading

A director can be held financially liable for wrongful trading if he or she knew (or ought reasonably to have concluded) that there was no reasonable prospect of the company avoiding insolvent liquidation or administration, and did not take every step with a view to minimising the potential losses to the company's creditors. In more normal times, this is an important safeguard for creditors and potential creditors, helping to focus directors' minds on the plausibility of the rescue options they are considering.

On 28 March, the Government announced that the wrongful trading provisions would be suspended, with retrospective effect from 1 March, until 30 June. The Bill addresses this pledge, although some companies are excluded from the modifications, and the exclusions are widely drafted, so care should be taken to check whether a particular company is in fact covered. For instance, there is a wide exclusion in respect of issuers (and guarantors) of capital markets debt.

Rather than suspending the provisions in their entirety, the Bill will bring this pledge into effect by addressing the financial consequences of a finding of wrongful trading – that is, a finding that the directors did not take every step to minimise potential losses to the creditors after concluding (or in circumstances where they should have concluded) that there was no reasonable prospect of avoiding insolvent liquidation or administration.

Under the normal operation of the provisions, the Court first decides whether the directors were 'wrongfully trading', and then decides whether the directors should make a contribution to the company's assets in consequence. The Court may decide that they should not – in particular, the courts have held they cannot order a contribution if the directors' conduct has not led to a net deterioration of the company's assets (which it may not have done, depending on the circumstances). The temporary measures provide that in determining the level of contribution (if any) that it is proper for a director to make, the Court is to assume that that director is not responsible for any worsening of the financial position of the company or its creditors that occurs between 1 March and 30 June, or a month after the Act comes into force, if that is later.

In addressing the provision in this way, the Government has largely removed the financial consequences of 'wrongful trading', but it has sidestepped the issue of whether it is reasonable for directors to conclude that there is still a reasonable prospect of avoiding insolvency. This means that, in practice, it would still be prudent for directors to consider the issue, and take every step to minimise potential losses to creditors where they conclude that there is not, but the directors can take comfort from the fact that they are unlikely to be personally liable if they get the judgement wrong while the temporary measures are in place.

Normally, directors also run the risk of disqualification under section 10 of the Company Directors Disqualification Act 1986 if they participate in wrongful trading. However, this only applies if the Court has made a declaration that they are liable to make a contribution to the company's assets. By significantly reducing the risk that directors are held to be financially responsible for any worsening of the company's financial position, the modifications should correspondingly reduce the risk of disqualification consequent to a wrongful trading finding, although this is not explicitly stated in the Bill.

However, the changes will not remove the possibility of disqualification under other heads, some of which relate to insolvency, and all other aspects of the directors' duties framework remain in place, thereby retaining additional checks and balances on directors' behaviour. Other duties, such as the duty to have regard to the interests of creditors, overlap to some extent with the wrongful trading regime.

Accordingly, the suspension does not remove the need for directors to assess their duties and decision making carefully at every stage (including the impact on creditors and other stakeholders where appropriate). However, it is wrongful trading which introduces an objective element to the Court's assessment of directors' decision making in this area. Considering directors' decision making as a whole, therefore, the effect of these modifications seems to be to make it unlikely that the Court will adversely judge decisions made by directors unless they are of the view that they did not turn their minds to what was in the best interests of creditors, or did not honestly believe the judgments they had arrived at about the effect of COVID-19 on their business. This should give directors real comfort that they can avoid taking irreversible decisions on the basis that they will not be unfairly exposed to the risk of personal liability if they misjudge the potential negative impact of COVID-19 on their business, which is likely to be particularly important in circumstances where otherwise viable companies need to take on additional liabilities and/or pull a range of other short-term levers in order to maximise their chances of weathering the crisis.

The suspension can be extended using secondary legislation, and conversely ended early if the pandemic ceases to have an effect on business.

Statutory demands and winding up petitions

The Bill places temporary restrictions on the circumstances in which a creditor can bring a petition to wind up a company. From 27 April, creditors will not be able to bring petitions based on statutory demands served between 1 March and 30 June 2020, or one month after the measures come into force, if that is later (this is the 'Relevant Period' for this part of the Bill, which may be extended under certain circumstances). A statutory demand, which is a written demand for payment over £750 served by a creditor on a company, can normally be used as evidence of a company's inability to pay debts for the purposes of a winding up petition, if it remains unpaid for three weeks or more.

Creditors will still be able to bring winding up petitions on other grounds (including unpaid statutory demands served before the Relevant Period), but during the Relevant Period they can only do so if they have reasonable grounds for believing that coronavirus has not had a financial effect on the company, or the relevant ground would have arisen even if coronavirus had not had a financial effect on the company. The Bill also contains provisions to address petitions presented, and winding up orders made, in the period between 27 April and the date when the measures come into force. These aim to put the company in the position it would have been in had the petition not been presented, or the winding up order not made, although in reality this may not always be easy to achieve.

These restrictions were announced by the Government some time ago, but until now there has been considerable uncertainty about how they would operate and how widely they would apply. Given the short term liquidity and operational challenges many companies are facing as a result of COVID-19, these measures are to be welcomed. They should help give companies breathing space from some types of more aggressive debt collection methods, and make it more likely that where a company's difficulties are temporary and/or a restructuring is possible, creditors come to the table to help facilitate a solution rather than acting unilaterally to protect their interests. However, the restrictions only apply to winding-up petitions. They will not affect the ability of creditors to apply for the company to be placed into administration, for instance. Nor will they stop a debt becoming due, or otherwise reduce the underlying liability, so directors will still need to be mindful of the other consequences of defaulting on a payment.

Permanent reforms

The reform package consists of two new restructuring procedures: a standalone moratorium, intended to give struggling businesses a formal breathing space to pursue a rescue plan, and a restructuring plan with provision for cross-class cram-down. In addition, certain suppliers to a distressed company will be prevented from terminating contracts on the basis that their counterparty is in an insolvency or restructuring procedure.

These reforms have been in the pipeline for some time – the Government consulted on them back in 2016 – but they have been fast tracked in response to the current crisis. However, as we explore below, when looked at in detail there is a question as to how responsive these particular measures will be to some of today's challenges.

Restructuring Plan

The restructuring plan procedure will provide companies facing financial difficulties with a new, flexible means of implementing a balance sheet restructuring. The new procedure is very closely based on, and similar in outline to, the scheme of arrangement: as with a scheme, a court order will

be required to convene meetings at which relevant creditors and/or shareholders will vote in classes on a compromise or arrangement, which will need court sanction to become effective.

However, there are some important distinctions between the two procedures. The Bill expressly provides that every creditor or member whose rights are affected by the plan must be permitted to participate in the meetings, but that does not apply to any class that the Court has determined does not have a genuine economic interest in the company (only the proponent of the plan could apply for such a determination). There is likely to be some focus on whether this should be construed as a simple appropriation and codification of existing case law in relation to schemes of arrangement, which will no doubt be revived and closely scrutinised by practitioners and the Court, or as going beyond that position by allowing a restructuring plan to alter the rights of a class of out-of-the-money creditors without putting the plan to that class (as the wording of the Bill seems to suggest).

At the meeting(s) 75% or more (in value) of those present and voting in each class must approve the plan. Unlike a scheme of arrangement, there is no requirement for a simple majority in number of creditors or members to approve the arrangement. However, the most significant distinction between the two procedures is that, in certain circumstances, the restructuring plan allows for cross-class cram-down. The Court may sanction a plan even if it is not agreed by the requisite majority in one or more of the classes if:

- none of the members of the dissenting class would be any worse off under the plan than they would be in the event of the "relevant alternative"; and
- the plan has been agreed by the requisite majority of at least one class who would receive a payment or would have a genuine economic interest, again, in the event of the "relevant alternative".

For these purposes, the relevant alternative is whatever the Court considers would be most likely to happen in relation to the company if the plan were not sanctioned.

Sitting behind this simple formulation there are a number of issues that will need to be resolved by the courts and practitioners over time. Five key issues are set out below:

1. Firstly, the Court will need to consider what would be most likely to happen to the company if the plan were not sanctioned. Although consideration of what the proper "counterfactual" should be is already an important issue in creditors' schemes (given its bearing both on class composition and on fairness), it has rarely been litigated, and the Court has tended to show deference to the views of the directors where differences have arisen. However, given that under this procedure the accuracy or otherwise of the counterfactual will provide the basis on which a dissenting class of creditors (or members) can have its rights affected notwithstanding their dissent, it will likely now come under much greater scrutiny.
2. Whilst that first issue is a point the courts have confronted before, the second issue is more novel. Under Chapter 11 in the US at least one "impaired" class must vote in favour of a plan. Consequently, there has been a lot of focus on what qualifies as impairment for these purposes. However, instead of referring to "impairment", the formulation adopted by the Bill for a plan to be imposed on a dissenting class is for one class "who would receive a payment", or who has "a genuine economic interest in the company" in the relevant alternative, to support the plan. For a class to vote on a plan implies it will be subject to a compromise or arrangement, and that there is therefore some "give and take" with that class. However, it is not clear whether that is the same as that class being impaired as that term might be understood in Chapter 11. Can, for

instance, the vote of a fully secured senior class approving a modest maturity extension and covenant reset in respect of its own debt instrument impose a debt equitisation on a junior class? It would appear, at least on the face of the legislation, that such a construction would be possible. However, as discussed further below, it is also made clear that the Court will have a broad discretion as to whether to sanction a plan and that it may refuse to do so on the basis that the plan is not just and equitable, particularly when cross-class cram down is in play.

3. Third, a related point - can the restructuring plan allow "cram up" as well as "cram down"? Unlike in Chapter 11, there is no requirement for a dissenting class of creditors to be satisfied in full before a more junior class may receive a distribution or keep any interest under a restructuring plan (often referred to as the "absolute priority rule"). Nor is there an attenuated version of this, as had originally been proposed during the consultation phase, whereby the Court would be able to confirm a plan that does not comply with the absolute priority rule only where non-compliance is: (i) necessary to achieve the aims of the restructuring; and (ii) just and equitable in the circumstances. Without such limitations, could (and if so, to what extent) a junior impaired class impose a restructuring on a senior class if it can be shown that that senior class was "no worse off"? Again, the legislation on its face appears to be broad enough to contemplate this, but it can be expected that such an approach will be scrutinised closely by the Court in the context of the exercise of its discretion. It may well be that, in confronting this type of issue, we see the judiciary developing a variation on the priority rules that exist in other jurisdictions.

4. Fourth, whilst the intention of adapting the existing scheme of arrangement technology was partly so that the existing jurisprudence for schemes would carry across to restructuring plans, the cram down construct may drive different approaches by companies and creditors to class composition. Under schemes of arrangement, the modern approach of the Court has been to foster a broad and expansive approach to class to avoid the practical application of the scheme jurisdiction being limited by a minority hold out. However, under a restructuring plan that point is less relevant; in fact, given how the cram down power operates it may encourage a move towards the fragmentation of classes into smaller groupings with the aim of creating one "impaired" class that approves the restructuring. Whether and to what extent the scheme jurisprudence in relation to class composition is carried across into the restructuring plan will be a key question.

5. Finally, the Court's broad discretion when deciding whether or not to sanction the plan will be absolutely key. With schemes, the Court has typically deferred to the views of creditors as being the best judge of their own interests, such that where the requisite majority has approved the scheme, and provided the class has been properly constituted and the statutory requirements have been complied with, the Court will typically sanction the scheme. However, under the restructuring plan the Court is now being inserted more directly into the commercial dispute. It will be asked to form a view on commercial issues (such as the valuation evidence adduced to show a dissenting class is "no worse off", and the question of what is the true counterfactual). It may also be asked to do so in very different circumstances than we have seen to date in relation to the scheme of arrangement, which has largely been used as a tool to restructure debts between sophisticated financial creditors and investors. The restructuring plan could potentially be used to deal with other types of debt, particularly in response to the issues created by COVID (rental liabilities, or certain categories of trade creditor, for example) but this would pose new questions for the Court to consider, especially in relation to the fairness of the plan. It can be expected that dissenting creditors will now attempt to push the Court to take a more interventionist approach to exercising its discretion.

The legislation envisages that a plan could be implemented within the new moratorium. While this could afford some degree of protection, in many cases the benefits may be quite limited because of the restrictive scope of the moratorium as discussed below.

There are also restrictions on compromising moratorium related debts before a period of 12 weeks has elapsed after the end of a moratorium. The interaction between the plan and the moratorium architecture will raise a number of highly complex issues that will need to be considered when implementing a plan either while a moratorium is in place or during the 12 week period afterwards.

Overall the restructuring plan should be a useful addition to the tool kit. In particular, the much anticipated ability to cram-down a dissenting class has the potential to make some restructurings simpler. It should obviate the previous approach to achieving a cram-down (i.e. a scheme of arrangement coupled with a security enforcement or pre-pack administration) where there is an out-of-the-money class that does not consent to the restructuring. Further, the Bill should remove certain shareholder rights relating to restructurings, including the requirement to seek shareholder approval to allot new shares and disapply rights of pre-emption, which may prove useful for the implementation of debt-for-equity swaps where shareholders are diluted through the issue of new shares to creditors.

However, and as flagged above, it is likely to give rise to new and complex issues for practitioners and the courts to consider. The “light touch” approach to drafting has some merit in that it provides flexibility and scope for the creative use of judicial discretion, but equally leaves open some complex points. A number of those were touched on above, but there are a range of others where the Court will likely be asked to fill in the details. For instance, the new provisions prevent a restructuring plan being used to effect a takeover by way of cancellation scheme (in the same way as the existing Part 26 cannot be so used). However, consideration will need to be given as to how a restructuring plan implementing a debt for equity swap might effectively cancel the shares or share rights of existing holders and otherwise interact with the share capital provisions of the Companies Act.

The judiciary has demonstrated that it is well able to take account of concerns around oppression of the minority while upholding commercially sensible deals as practitioners have found ever more innovative uses for schemes, and there is no reason to doubt that the same outcome will not be achieved for restructuring plans. However, there are significant differences between the two processes and it may take some time for the law in relation to the use of the restructuring plan to settle. It will no doubt be considered as part of the tool-kit during the contingency planning stages of deals, but it is likely that companies and creditors will then weigh up whether they are willing for their deal to be a test case during the bedding-in period, particularly when there will remain a focus on ensuring execution certainty, or whether they will prefer to rely on existing scheme and pre-pack technology. Therefore questions remain as to whether the restructuring plan is likely to prove responsive to the short-term needs of businesses struggling with immediate liquidity and operational issues caused by the current crisis. Such businesses may, in the medium to long term, need to avail themselves of this sort of restructuring tool as the crisis recedes and once there is a clearer view on what needs to be done to fix the balance sheet, but in the short term many may prefer to look to other tools if they are to avoid collapse.

Moratorium

The new moratorium will be a standalone procedure, although it may be used in conjunction with a CVA, scheme of arrangement or the new restructuring plan procedure. While it is in force, it will,

amongst other things, protect the company from winding up petitions and most types of legal proceedings, provide the company with a payment holiday in respect of some liabilities incurred before it came into force, and prevent creditors from taking certain enforcement actions in respect of those liabilities. Certain categories of company are ineligible, such as banks, insurance companies, and many other companies operating in the financial services sector. As with the new wrongful trading provisions, a broad range of companies are excluded from scope.

An insolvency practitioner is appointed as 'monitor' for the duration of the moratorium. The directors remain in charge of the day to day operations of the company, though their actions will be subject to some restrictions, and may in certain circumstances require the consent of the monitor or the Court. In general, the monitor has quite substantial duties, but not many powers; where there is uncertainty as to how the monitor should act, they are (as officers of the court) able to apply for directions.

The directors must believe that the company is, or is likely to become, unable to pay its debts, and the proposed monitor must believe that it is likely that the moratorium will result in the rescue of the company as a going concern. In most cases, directors can access the moratorium by filing the relevant documents at court. A court application is only required for overseas companies and companies subject to outstanding winding up petitions.

For the first month after the Bill is enacted, some of the conditions for obtaining a moratorium will be relaxed. Directors of companies subject to winding-up petitions will be able to access it by filing out of court, and the monitor can discount the possibility of the financial condition of the company worsening due to coronavirus when forming the view that the moratorium will allow it to be rescued as a going concern.

The initial duration of moratorium is short, at 20 business days. It can be extended, but the conditions for extension may not always be practicable. Unless a CVA, scheme or restructuring plan is underway, extension is only possible if the company has paid (a) all debts incurred during the moratorium (that is, new obligations), and (b) all pre-moratorium debts that do not benefit from the payment holiday.

If this condition is satisfied, after 15 business days, the directors can extend the moratorium (subject to certain further conditions), so that it runs for 40 business days in all. If a longer extension is needed, the directors must either get the consent of creditors whose debts are subject to the payment holiday, or make an application to court.

As drafted, it is not clear whether the monitor must believe that the company can be rescued as a going concern within the initial period, or can assume that it is reasonably likely to be possible to obtain a suitable extension if required. In most circumstances, turning a company around in 20 business days is a tall order indeed (or even 40 business days, if the monitor was to factor in the first extension, which does not require a court application in the absence of consent).

At first glance, and although the time periods could potentially be more generous, the moratorium appears to provide a valuable addition to the toolkit – a statutory standstill which protects a company from its creditors whilst it negotiates its restructuring. Similar, in some ways, to the automatic stay under Chapter 11.

However, when looked at more closely, it does not compare favourably with the automatic stay in Chapter 11 which can also be twinned with debtor-in-possession (DIP) financing if required.

The most significant detail contained in these provisions, and which is scarcely alluded to in the Explanatory Notes to the Bill, is the broad range of liabilities not caught by the moratorium. In particular, debts arising under a contract involving financial services are excluded. While the exclusion of some types of financial contract is to be expected where there is a concern around market integrity (e.g. certain types of set-off and netting structures), the scope as drafted is extremely wide, encompassing almost all types of lending and derivative arrangements. This means that while the moratorium may buy companies breathing space where their trade creditors are concerned, it will offer them almost no protection against their financial creditors. If the monitor thinks the company is unable to pay a debt that is due and doesn't benefit from the moratorium protections, he or she is obliged to bring the moratorium to an end. In addition, there does not seem to be anything in the Bill that would prevent a financial creditor from relying on a relevant event of default to accelerate its debt to avail itself of the means to bring the moratorium to an end or otherwise seek to enforce. This effectively means that companies will only benefit from the moratorium if they have their financial creditors onside. Some small and medium sized companies may be able to reach an informal accommodation with their principal lending bank, but many companies will need to have a formal standstill in place with financial creditors before entering a moratorium.

The effectiveness of the moratorium is likely to depend, therefore, on the nature of the problems the company is facing. If there are concerns that an otherwise promising financial restructuring might be derailed by actions by suppliers at the operational level of the business, or the problems are purely operational, companies may consider using the moratorium. However, if the company needs to deleverage its capital structure, and there are hostile financial creditors, the moratorium is unlikely to help. While in the longer term, the support of the majority of financial creditors is a necessary prerequisite for a successful restructuring, one of the key purposes of a moratorium should be to buy companies time to bring creditors on board and negotiate that restructuring, and as such the limited scope of the moratorium is disappointing, as it is unlikely to maximise the chances of survival for larger companies with more complex capital structures. A further weakness is the lack of DIP financing flexibility, which means that the moratorium does not help to solve the problem of getting funds into the business on an urgent basis to help the company bridge towards a more orderly rescue plan.

In addition, there will be significant uncertainty around the operation of the new moratorium, at least in the short term. In particular, the definitions of the classes of 'pre-moratorium' and 'moratorium' debts are quite loosely drafted, and there is some uncertainty as to when certain liabilities will need to be paid. These issues may require extensive clarification from the Court.

One of the further issues which require focus is the treatment of 'moratorium debts' if a company enters liquidation within 12 weeks of a moratorium ending. The Bill alters the statutory hierarchy, so that debts for which the company did not have a payment holiday under the moratorium take priority (along with the Official Receiver's fees and expenses) over all other claims. As drafted, this appears to catch debts under financial contracts that fall due during the moratorium, including those that fall due because the counterparty has accelerated the debt. If that is indeed the legislative intention, this represents a substantial departure from the current well established statutory order of priority, which could have a number of unintended consequences.

Termination clauses

It is common practice for businesses to include provisions in supply contracts that enable them to terminate a contract if their counterparty enters an insolvency process. These 'ipso facto' provisions offer some protection to the supplier, but can sometimes destabilise attempts to rescue the counterparty as a going concern, or give undue weight to the interests of key suppliers. Notwithstanding English law's long-standing deference towards freedom of contract, the Insolvency Act already contains some restrictions on the use of ipso facto clauses (although these are currently limited to a narrowly defined class of 'essential' utility and IT contracts).

The wider restrictions in the Bill will apply if a company enters certain insolvency procedures, including administration, liquidation, a CVA, and the new moratorium and restructuring plan, but not a scheme of arrangement. Provisions that provide for automatic termination because of the insolvency procedure, or allow the counterparty to choose to terminate, will cease to have effect, as will provisions that allow 'any other thing' to take place by reason of the insolvency (this is broadly and loosely drafted, and may give rise to some problems of interpretation, but seems intended to catch, for instance, provisions that attempt to change payment terms on the basis of insolvency). Counterparties will also be unable to rely on provisions that would have allowed them to terminate the contract because of an event occurring before the company entered an insolvency process, where the entitlement has already arisen but was not exercised. These restrictions will not apply if the insolvency office holder (where applicable) or the company consents. Otherwise, the supplier has the option to apply to court on the grounds that the continuation of the contract would cause hardship. Suppliers are also prevented from making payment of outstanding debts a condition of continued supply.

However, if a company uses the new moratorium, it can nonetheless opt, in certain circumstances, to pay pre-moratorium liabilities, which may include amounts outstanding under supply contracts. Above a certain threshold, such payments require the consent of the monitor, which in turn may only be given if the monitor thinks that the payment will support the rescue of the company as a going concern. Administrators have a similar ability to make such payments. This means that, where a supplier is essential and exercises commercial leverage, or says that it simply can't supply if it is not paid, the company may choose to pay the supplier despite the new restrictions. In certain circumstances this may help keep rescue attempts on track – limiting the operation of termination clauses on paper is one thing, ensuring the supplies turn up in practice is quite another - but it does mean that the phenomenon of the 'essential' or 'ransom' supplier will not disappear completely.

The provisions will not apply to a wide range of financial contracts, or where one or both contracting parties is in the financial services sector. To avoid exacerbating the effects of coronavirus on smaller companies, they will temporarily also not apply to certain 'small entities'.

This limitation of the operation of ipso facto clauses is likely to be a helpful addition to the toolkit in some circumstances (though it will be necessary to navigate the distinctions between these new provisions and the regime that applies to essential supplies). However, seeking to maintain good relationships with suppliers will remain key for a number of reasons. Not all key commercial arrangements will be caught by the new provisions, and, where they are within the scope of the provisions, 'insolvency events' that trigger termination rights may well be widely drafted, allowing suppliers to terminate in the run-up to a counterparty's insolvency. The new measures will offer no protection in these circumstances and are likely to lead counterparties to become even more focussed on including, and exercising, early warning triggers in commercial contracts. Even if these

hurdles can be overcome, a company in financial difficulty may well need to restructure its commercial arrangements in order to continue.

A COVID toolkit?

The temporary measures that adapt the operation of the wrongful trading regime and place limitations on the use of statutory demands and winding up petitions are to be welcomed. These measures should help prevent some viable businesses entering insolvency processes in the near term.

However, it remains to be seen whether the permanent measures introduced by the Bill will provide the right answer to the question being asked by today's crisis.

The restructuring plan procedure is a helpful addition to our restructuring regime: it responds to the long-identified need for a straightforward mechanism to prevent out-of-the money creditors and/or shareholders blocking a viable restructuring. In the longer term it should help to ensure the UK restructuring regime remains competitive. However, it may take some time before the restructuring plan can be approached with the same confidence and certainty as a scheme of arrangement (or a scheme of arrangement twinned with a security enforcement or pre-pack administration). That means it may not be directly responsive to some of the problems generated by the current crisis, which is perhaps unsurprising, given its genesis predates COVID-19 by some time. Moreover, given the level of court involvement that will be required, there is a question as to whether the restructuring plan will be relevant outside the context of high value/complex capital restructurings. Whilst there are no legal restrictions on SMEs adopting a restructuring plan, the costs of entry may prove to be prohibitive (as is the case for schemes of arrangement).

The idea of the standalone moratorium was also conceived pre-COVID. In some respects it is a potentially exciting development: an easily accessible moratorium that buys a struggling business breathing space to weather the short term effects of the current crisis, and put together a viable plan for managing its medium and long term effects. However, as currently drafted, the scope of the moratorium is likely to severely limit the companies which could benefit from its protection unless they already have the support of their financial creditors going into a restructuring. On the more positive side, the restrictions on termination clauses should help to facilitate business restructurings in certain circumstances.

More fundamentally, and as mentioned above, the Bill does not contain any measures to facilitate the provision of rescue finance or DIP financing. In some respects this is perhaps unsurprising, as rescue finance was one of the areas considered when the Government consulted on these proposals, but the idea was not taken forward at that time. However, in light of the current crisis, it is to be hoped that the Government may consider revisiting this decision.

Given these factors, companies are likely to consider whether to turn to administration instead if they need the protection of a moratorium in order to turn the business around or pursue a restructuring. The primary purpose of administration is to rescue the company as a going concern, and although in practice in has been used more frequently as a quasi-liquidation procedure, or a means of transferring the viable parts of a business to a new owner by means of a pre-packaged sale, the current crisis has seen a renewed focus on its use as a rescue mechanism. While administration is often seen as a terminal process, in which management is replaced by insolvency practitioners, it does not have to be used in this way. That being said, certain limited amendments to the administration regime which would have improved its operation – such as clarification that an

administrator can raise funds on a priority basis as an expense of the administration, extension of the moratorium to the exercise of set-off rights, and an ability (as is the case in Chapter 11) to adopt or reject contracts – have not been taken forward at this time.

Accordingly, it will be crucial for practitioners and the Government to assess the efficacy of the new reforms after they have been in force for a short time. The Bill gives the Government extremely wide short-term powers to amend insolvency legislation in response to the demands of the coronavirus crisis, which may prove helpful once any stumbling blocks are identified in practice. At the same time, we would urge the Government to continue to consider what other additional reforms may be needed to deal with the longer term economic impacts on business caused by the current crisis. This review should not discount the possibility of building on the existing administration regime to improve its efficacy as a business rescue tool, taking into account the ways in which it is currently being used. It may also be time to take steps to implement new measures to facilitate the provision of rescue finance in order to bolster the effectiveness of the moratorium and provide more flexibility to fund and bridge towards a more orderly rescue for the benefit of all stakeholders.

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