Proskauer

Corporate Insolvency and Governance Bill: Behind the Detail

June 3, 2020

Further to our last update on prospective changes to the UK insolvency regime in light of COVID-19, the UK government revealed the Corporate Insolvency and Governance Bill on 20 May. The Bill follows the lead of several other jurisdictions including the Netherlands, Hong Kong, Spain, Australia and Germany in introducing such emergency measures and includes perhaps some of the most significant reforms to the UK insolvency regime since The Enterprise Act 2002.

The Bill introduces a number of both temporary and permanent changes as follows:

Temporary changes

- Wrongful Trading: wrongful trading sanctions are temporarily suspended from 1 March to 30 June meaning that liquidators and administrators may not bring wrongful trading claims for losses caused during that period. The Bill is wordedin such a way as to allow courts to 'assume that the (Director) is not responsible for any worsening of the financial position of the company or its creditors…during the relevant period'. The intended effect is to allow Directors to continue to run their respective businesses without the threat of personal liability. In reality however, Directors will continue to owe duties to the company and to creditors and during this period and there is still a risk that administrators and liquidators once appointed will directors for breach of those duties. In addition, the law concerning for misfeasance and fraudulent trading for example remain as do the provisions of the Insolvency Act governing antecedent transactions such as preferences and transactions at an undervalue.
- Statutory Demands and Winding-up Petitions: A winding-up Petition cannot be presented from 27 April to 30 June, or within the period falling 1 month after the passing of the bill, whichever is later, on the ground that the company has failed to satisfy a statutory demand served during that period. A winding-up Petition can be presented if the creditor has reasonable grounds for believing that (a) Covid-19 has not had a financial effect on the debtor; or (b) the debtor would have been unable to pay its debts regardless of COVID-19. “Financial Effect” is defined as: “COVID has a financial effect on a company if the company’s financial position worsens in consequence of, or for reasons relating to, COVID19.

- Ipso Facto clauses: Under the current legislation there is a restriction on what key suppliers (gas, electricity, water) can do in the event of a company's insolvency. Those restrictions have been extended to all suppliers and prohibit suppliers from changing contract terms to increase payments. There is an exception where the continued supply causes hardship to the supplier's business and small company suppliers are exempt from the above until 30 June.Significantly, none of these restrictions will apply to Financial Services providers in the provision of a Financial Contract (both of which are widely defined in the Bill} and will cover (amongst others} banks or insurers, in relation to contracts that include, but are not limited to lending, leasing and the purchase or sale of securities and commodities.
- Companies House Filings: If the filing requirement is 21 days or less, companies now have up to 42 days. If the filing requirement is 3, 6, or 9 months, companies now have up to 12 months.

Permanent changes

- Company Moratorium: Companies who are (a) insolvent or (b) likely to become insolvent (with some exceptions) are eligible to apply for a moratorium. Financial services companies (e.g. insurance companies, banks etc.), companies already in a formal insolvency process, and companies that have been subject to a CVA, administration or otherwise in the period of 12 months prior to the filing date, are not eligible to apply. The directors of the company must, amongst other requirements, file a statement that, in their view, the company, is or is likely to become, unable to pay its debts. The company must appoint a licensed Insolvency Practitioner as a "Monitor", who is to manage the process of applying for the moratorium and any extension (if required) and to ensure the company complies with the moratorium requirements. The Monitor must make a statement that the moratorium will likely result in the rescue of the company as a going concern OR, if "one were to disregard any worsening of the financial position of the company for reasons relating to COVID, it is likely that the moratorium would result in the rescue of the company as a going concern".
- Moratorium features: 20 business days, but within the first 15 business days the company may apply to the court to extend the moratorium without creditor consent, for a further period of 20 business days, or up to one year (starting with the first day of the initial period) with the consent of creditors or longer if deemed appropriate by the court. The Directors remain in control, subject to supervision by the Monitor, although in practice it is not clear the what extent this supervisory capacity will go. If the company enters into a compromise, arrangement or insolvency procedure the moratorium will end. Any creditor can challenge the actions of directors or the Monitor if their interests have been unfairly prejudiced.

- Restructuring Plan: Both solvent and insolvent companies can use a Restructuring Plan, which can be proposed by the company, creditors or an administrator or liquidator. A Restructuring Plan will bind both unsecured and secured creditors require creditor consent of 75% by value of each class, present and/or voting. Court approval is needed and dissenting classes can be crammed down (known as a “cross-class cram down”) if the plan is “just and equitable”. For the most part the Restructuring Plan is designed to operate in a similar way to a Scheme aside from one notable difference to a Scheme being that there is “no majority of number” test needed.

Related Professionals

- **Elisabeth I. Baltay**
  Partner
- **Andrew Wingfield**
  Partner