ALSTON & BIRD

ALSTONFINANCE.COM

Finance ADVISORY

JULY 6, 2020

COVID-19 Update – What Your Business Needs to Know About the Corporate Governance and Insolvency Act 2020

by Andrew Petersen and Thomas Dunn

In an update to our previous advisory on the UK government's changes to insolvency law in response to the ongoing COVID-19 crisis, the government has now announced a further shakeup to the insolvency regime in an effort to prevent otherwise commercially viable companies being forced to file for bankruptcy due to problems caused by the pandemic.

On 25 June 2020, the Corporate Governance and Insolvency Act received royal assent. The Act puts into place a series of measures to amend insolvency and company law to, in the government's words, "give companies the breathing space and tools required to maximise their chance of survival". The Act builds on the previous reforms introduced on 28 March and consists of six insolvency measures and two corporate governance measures. The Act blends temporary measures designed to alleviate the impact of the COVID-19 crisis with permanent changes to the insolvency regime, amounting to the most fundamental reform of UK insolvency law for a generation.

Insolvency Measures

Wrongful trading provisions

The Act will temporarily remove the threat of personal liability for wrongful trading from company directors. Under the Insolvency Act 1986, it is an offence for a director to continue trading when he or she knows that the business is unable to avoid going into liquidation. This threat will be temporarily removed for any period of trading between 1 March 2020 to (at least) 30 September 2020, and alleviates some of the concern on the part of directors of companies that are incurring additional borrowings offered by the UK government, such as the Coronavirus Business Interruption Loan Scheme, or the lending facility offered by the Bank of England.

Existing laws for fraudulent trading and the threat of director disqualification will continue to act as a deterrent against director misconduct.

Statutory demands and winding up petitions

The Act introduces temporary provisions to void statutory demands, which acts retrospectively back to 1 March 2020 and will continue until 30 September 2020. The Act will also restrict winding up petitions from 27 April 2020 to 30 September 2020. Instead, petitions will need to be reviewed by the courts. The government hopes that these temporary measures will "prevent aggressive creditor action against otherwise viable companies struggling because of coronavirus".

Company moratorium

Companies will be provided with a 20-business-day moratorium to consider a rescue plan, which can be extended to 40 business days in some cases (further extensions can be made with the agreement of creditors or the courts). During this moratorium, unlike in administration or liquidation, the company remains under the control of its directors. The process will be overseen by a monitor who must be a licensed insolvency practitioner. Before entering into the moratorium, the monitor must conclude that the moratorium is likely to result in the rescue of the company as a going concern and keep this under consideration throughout the moratorium.

All companies (including foreign companies with sufficient connection with the UK) are eligible unless subject to exceptions.

This new moratorium may not be suitable for all companies, but in instances where creditors are supportive (or a contractual standstill has been agreed), this new measure should give struggling companies the breathing space they need while a company voluntary arrangement or other restructuring is agreed.

Prohibition on the use of termination clauses

To ensure that companies going through a formal rescue process can continue to receive the supplies necessary to keep their businesses running, curbs on the use of termination clauses have been introduced.

If a company has entered an insolvency or restructuring procedure and obtains a moratorium, the company's suppliers will not be able to rely on contractual provisions to terminate, stop supplying the company, or vary the contractual terms of the supply agreement (for example by increasing the price of supplies). The company is required to pay for any supplies received once it is in the insolvency process but is not required to pay outstanding amounts due for past supplies while it is arranging its rescue plan. The prohibition applies if your counterparty goes into an insolvency procedure and there is no applicable exclusion taking either you, your counterparty, or your contract out of scope.

The measure also contains safeguards to ensure that suppliers can be relieved of the requirement to supply if it causes hardship to their business. There are a number of "excluded entities" the prohibition does not apply to, for example insurers, banks, and payment institutions.

New restructuring plan

The Act introduces a new restructuring plan as an option for companies in financial difficulty. The plan will enable complex debt arrangements to be restructured and supports the injection of new rescue financing, preventing companies from having to go through a "value destructive liquidation process". This new procedure has been modelled on the existing procedure for schemes of arrangement. Under the new procedure, creditors and members are to be divided into classes, and each class must vote on the proposal. The restructuring plan will need the approval of at least 75% by value and a majority by number of each class.

There are two preconditions to proposing such a plan:

- The company has encountered, or is likely to encounter, financial difficulties that are affecting, or will or may affect, its ability to carry on business as a going concern.
- The purpose of the compromise or arrangement is to eliminate, reduce, prevent, or mitigate the effect of the financial difficulties.

The new regime also introduces "cross-class cram-downs", which dissenting creditors would be forced to sign up to if sanctioned by the court as "fair and equitable" and if the court is satisfied that those creditors would be no worse off than if the company entered an alternative insolvency procedure. This means that, for the first time, a small group of minority creditors does not have the power to stop a restructuring process at a large company. It is likely that we will be seeing the courts having to make some difficult decisions in the near future in interpreting this new ability to cram down one or more classes of creditors/shareholders.

Financial services firms

It should be noted that certain financial services firms and contracts have been excluded from some of these reforms. Financial services regulators have existing powers to intervene in the business of financial services firms in distress, and the UK has a number of existing special insolvency regimes for certain financial services firms. Those regimes reflect the complexity of dealing with these financial services firms when they are at risk of collapse, and such specialist regimes shall continue to function as (un)usual.

Corporate Governance Measures

Annual general meetings and general meetings

The Act temporarily allows those companies that are under a legal duty to hold an annual general meeting (AGM) or general meeting (GM) to hold a meeting by other means (conference call, video conference, etc.) even if their articles of association do not allow it.

These measures are retrospective to 26 March 2020 and will apply up to AGM/GM deadlines expiring before 30 September 2020, meaning that companies that breached their company constitution by holding an AGM in a way that adhered to UK government guidelines on social distancing will have done so in accordance with the law. Companies that postponed their AGMs that were due to be held after 26 March 2020 now have a limited period to hold their AGM using the new flexible means.

Extension of filings

Finally, to alleviate some of the pressure on companies to keep up with filing deadlines at Companies House, the Act enables the government to make regulations to extend deadlines for three types of filing:

- Accounts.
- Confirmation statements.
- Registrations of charges.

These extensions will apply to companies with account filing deadlines expiring since 26 March 2020 but before 30 September 2020 (or, if earlier, the last day of the period of 12 months immediately following the end of the relevant accounting reference period).

Alston & Bird has formed a multidisciplinary response and relief team to advise clients on the business and legal implications of the coronavirus (COVID-19). You can view all our work on the coronavirus across industries and subscribe to our future webinars and advisories.

You can subscribe to future *Finance* advisories and other Alston & Bird publications by completing our **publications subscription form**.

If you have any questions or would like additional information, please contact your Alston & Bird attorney or the following:

Andrew Petersen
+44.0.20.3823.2230
andrew.petersen@alston.com

Thomas Dunn
+44.0.20.3823.2229
thomas.dunn@alston.com

ALSTON & BIRD

WWW.ALSTON.COM

ATLANTA: One Atlantic Center ▪ 1201 West Peachtree Street ▪ Atlanta, Georgia, USA, 30309-3424 ▪ 404.881.7000 ▪ Fax: 404.881.7777
BEIJING: Hanwei Plaza West Wing ▪ Suite 21B2 ▪ No. 7 Guanghua Road ▪ Chaoyang District ▪ Beijing, 100004 CN ▪ +86.10.85927500
BRUSSELS: Level 20 Bastion Tower ▪ Place du Champ de Mars ▪ B-1050 Brussels, BE ▪ +32 2 550 3700 ▪ Fax: +32 2 550 3719
CHARLOTTE: Bank of America Plaza ▪ 101 South Tryon Street ▪ Suite 4000 ▪ Charlotte, North Carolina, USA, 28280-4000 ▪ 704.444.1000 ▪ Fax: 704.444.1111
DALLAS: Chase Tower ▪ 2200 Ross Avenue ▪ Suite 2300 ▪ Dallas, Texas, USA, 75201 ▪ 214.922.3400 ▪ Fax: 214.922.3899
LONDON: 5th Floor ▪ Octagon Point, St. Paul's ▪ 5 Cheapside ▪ London, EC2V 6AA, UK ▪ +44.0.20.3823.2225
LOS ANGELES: 333 South Hope Street ▪ 16th Floor ▪ Los Angeles, California, USA, 90071-3004 ▪ 213.576.1000 ▪ Fax: 213.576.1100
NEW YORK: 90 Park Avenue ▪ 15th Floor ▪ New York, New York, USA, 10016-1387 ▪ 212.210.9400 ▪ Fax: 212.210.9444
RALEIGH: 555 Fayetteville Street ▪ Suite 600 ▪ Raleigh, North Carolina, USA, 27601-3034 ▪ 919.862.2200 ▪ Fax: 919.862.2260
SAN FRANCISCO: 560 Mission Street ▪ Suite 2100 ▪ San Francisco, California, USA, 94105-0912 ▪ 415.243.1000 ▪ Fax: 415.243.1001
SILICON VALLEY: 950 Page Mill Road ▪ Palo Alto, California, USA 94304-1012 ▪ 650.838.2000 ▪ Fax: 650.838.2001
WASHINGTON, DC: The Atlantic Building ▪ 950 F Street, NW ▪ Washington, DC, USA, 20004-1404 ▪ 202.239.3300 ▪ Fax: 202.239.3333