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COVID-19 New Insolvency Rules

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Kate Rogers is recognised as a leading junior in chancery/commercial matters with particular specialisms in insolvency and company law. She is an experienced advocate, who regularly appears in the High Court on a variety of matters including obtaining urgent injunctive relief.

The Government has proposed imminent new insolvency rules with the aim of helping more businesses weather the COVID-19 storm and avoid entering an insolvency process. The overriding objective is to assist UK companies to keep trading whilst restructuring. The measures proposed to give this breathing space are set to include a suspension of the current wrongful trading provisions and a new moratorium for businesses undergoing a restructuring process.

Wrongful Trading

These proposal are very new and therefore it is not yet clear what exact form they will take, however, it appears that the ability to hold directors personally liable for the additional net shortfall to creditors incurred during a period of wrongful trading, pursuant to section 214 of the Insolvency Act 1986, will simply be suspended (retrospectively) from 1 March 2020 until such date as the Government determines. Presumably this will have to continue for longer than the immediate pandemic to allow those companies who became of a doubtful solvency position during the pandemic to rescue.

New moratorium and restructuring

There will be a new moratorium preventing creditors applying for administration orders or petitioning for the winding up of the company whilst the company seeks a rescue or restructure. During this time the company's supplies will be protected so that the company can continue to access raw materials and utilities. Early indications from Government are that this will include a restructuring plan that will bind all creditors. These plans are not in fact new: some may remember that proposals for new

corporate restructuring procedures were consulted on in 2018[1]. The Government is currently saying that the new legislation due shortly will incorporate these already proposed changes (it appears to be more a case of bringing them into legislation quickly). Looking at the proposals made in August 2018, if they are enacted without modification, then the changes we can expect are:

- Moratorium: distressed companies which are ultimately viable will be given a period of time (an initial period of 28 days with the possibility of extension) when creditors (including secured creditors) cannot take action against the company, allowing it breathing space to restructure or seek new investment. This will be modelled on the same parameters as the administration moratorium. Directors would remain in control of the company, but creditors' interests would be protected by the appointment of an authorised supervisor (called a 'monitor'). Entry into this moratorium will be by filing a notice at court together with the monitor's consent to act and thereafter notice being given to all creditors (unless there is an outstanding winding up petition, in which case, the company will need to apply to court). It will then be open to creditors to challenge the moratorium by application to court. It is likely that the moratorium available in Schedule A1 of the Insolvency Act 1986 will be repealed in due course in light of these new provisions.

- Prohibition on suppliers enforcing termination clauses in contracts: this is the method that is likely to address the Government's new proposal that companies will be able to access supplies during a restructuring. Suppliers of goods and services will not be able to enforce termination clauses in contracts on the basis that the company has entered an insolvency process/is subject to the new moratorium/ the new restructuring plan (subject to the supplier being able to make an application to court in cases of extreme hardship). It is likely that in any subsequent insolvency process a supplier would have super priority for supplies made during the moratorium.

- New restructuring vehicle: this is the 'restructuring plan' which would include the ability to bind dissenting classes of creditors who vote against it. The plan will require 75% of creditors by value, in each class of creditor, to vote in favour (subject to modifications for connected parties). This is intended to be a flexible plan that can be agreed between the company and its creditors. It is the Government's intention to legislate in way than means the restructuring plan will closely follows schemes of arrangement. There will be a right of appeal to the court if necessary. Note that the moratorium and

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[1] See https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/736163/ICG_-_Government_response_doc_-_24_Aug_clean_version__with_Minister_s_photo_and_signature__AC.pdf

the restructuring plan are distinct and do not have to be used together.

In addition to the above, the Business Secretary, Alok Sharma, has announced that AGMs can be held flexibly in a manner compatible with the current public health guidance, e.g. online by way of a platform such as Microsoft Teams, or by phone with only proxy voting.

Those advising companies should also note that there is effectively a de facto moratorium created by the blanket adjournment of the winding up lists in the Companies Court (although we must not forget that being subject to a petition presents its own difficulties).

Whilst the enactment of these provisions look set to bring some relief to businesses struggling in this current crisis, it’s important not to forget that all other checks and balances to help ensure that directors fulfil their duties properly remain in force.

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