EUROPEAN RESTRUCTURING WATCH ALERT
UK CORPORATE INSOLVENCY AND GOVERNANCE BILL: HIGHLIGHTS

MAY 2020

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On Wednesday 20 May, the Government published the highly anticipated Corporate Insolvency and Governance Bill (the "**CIGB**"). It legislates for the landmark changes to the UK's corporate insolvency regime and the temporary suspension of the statutory provisions on wrongful trading announced by the Business Secretary on 28 March 2020 (see Weil's European Restructuring Watch update of 30 March 2020).

The CIGB, designed to give companies a "breathing space", is being fast tracked and will introduce into law the following, some of which follow to a certain degree the proposals first announced by the Government in August 2018 (as discussed in Weil's European Restructuring Watch update on 7 September 2018):

I. Moratorium: to provide a breathing space for eligible companies to seek the rescue of the company as a going concern

II. Arrangements and reconstructions for companies in financial difficulty: the introduction of a new restructuring plan as an additional rescue process

III. Temporary prohibitions of winding-up petitions

IV. Temporary suspension of wrongful trading liability for directors

V. Prohibition on enforcement of supplier insolvency termination clauses

VI. Meetings and filings: the temporary extension of time periods and providing information to the companies registrar

We shall release a detailed overview of the Bill within the coming days, but in the meantime we set out below a high level summary of the proposals:

Moratorium

- The CIGB introduces a moratorium which will provide a "breathing space" for "eligible" companies* to allow them to enter into negotiations with creditors and will restrict filings for insolvency proceedings and enforcement and legal proceedings, and the enforcement of security during that period.
- The explanatory notes to the CIGB summarise the aim of the moratorium as "to facilitate a rescue of the company, which could be via a company voluntary arrangement (CVA) [...], a restructuring plan (as also introduced by [the CIGB]) or simply an injection of new funds."
- It will be open to directors to file for an initial 20 business day moratorium for eligible companies by filing a notice or (where a winding up petition has been presented) an application to court. The moratorium is extendable with or without creditor consent, by the directors for a further period of 20 days by filing of relevant papers in court, or as agreed with creditors.
- In the directors' view the company must be or be likely to become unable to pay its debts. Further, it must be likely that the moratorium will result in the rescue of the company as a going concern.
- Companies which have been subject to either insolvency proceedings or a moratorium during the previous 12 months will be ineligible for the moratorium.
- The moratorium will be overseen by a "monitor", an insolvency practitioner who will be an officer of the court. He or she will monitor the company's affairs and oversee various restrictions on the directors, including requiring the monitor's consent for making certain payments and disposals.
- During the period of the moratorium the company must be in a position to pay its moratorium debts, failing which the monitor is under an obligation to bring the moratorium to an end by filing a notice with the court. The monitor must also bring the moratorium to an end if of the view that it is no longer likely to result in the rescue of the company as a going concern.

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- Various protections for creditors, members and other affected parties shall be introduced to ensure the directors manage the company's affairs, business and property appropriately during the moratorium. These include the introduction of new offences for acts done during or at any time in the previous 12 months of the moratorium, and obtaining the moratorium by false representation or fraud.

*The moratorium does not apply to the following: insurance companies, banks, electronic money institutions, investment banks and investment firms, companies party to market contracts or subject to market charges, participants in designated systems, payment institutions, operators of payment systems and infrastructure providers, recognised investment exchanges, clearing houses and CSDs, securitisation companies, parties to capital market arrangements, public-private partnership project companies and overseas companies with corresponding functions.

New Restructuring Plan

- Schedule 9 of CIGB inserts a new Part 26A into the Companies Act 2006 ("**CA06**"). Part 26A introduces a new procedure: the much-anticipated 'Restructuring Plan'.

- There are two pre-conditions to using the Restructuring Plan. First, that 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."

- Secondly, that the compromise or arrangement is proposed between the company and (i) its creditors, or any class of them; or (ii) its members, or any class of them; and that the purpose of the arrangement or compromise is to "eliminate, reduce or prevent, or mitigate the effect of, any of the financial difficulties".

- Broadly, the Restructuring Plan procedure is intended to follow the process for approving a scheme of arrangement (i.e. approval by creditors and then sanction by the court). More detailed commentary will follow in the coming week, but one notable difference from the scheme process is that there is no requirement for a majority in number of creditors in any given class to vote in favour. The required majority is simply "a number representing 75% in value of the creditors or class of creditors".

- As discussed in previous updates (see Weil's Restructuring Watch update dated 28 August 2018), another key element of the Restructuring Plan is that it introduces a "cross-class cram down" that will allow dissenting classes of creditors or members to be bound. This is not possible under a scheme of arrangement.

- Cross-class cram down is subject to two conditions. First, the court must be satisfied that "if the compromise or arrangement were to be sanctioned under section 901F, none of the members of the dissenting class would be any worse off than they would be in the event of the relevant alternative". Secondly, the court must be satisfied that "that the compromise or arrangement has been agreed by a number representing 75% in value of a class of creditors or (as the case may be) of members, present and voting either in person or by proxy at the meeting summoned under section 901C, who would receive a payment, or have a genuine economic interest in the company, in the event of the relevant alternative."

- The 'relevant alternative' (ie the comparator) is defined as "whatever the court considers would be most likely to occur in relation to the company if the compromise or arrangement were not sanctioned."

*As drafted, the Restructuring Plan will apply to authorised persons pursuant to the Financial Services and Markets Act 2000, although the

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Secretary of State has reserved its position to regulate to disapply the provisions to authorised persons at a later date.

Temporary prohibition on winding up

- Schedule 10 of the CIGB prevents the presentation of a winding up petition by a creditor during the period beginning 1 March 2020, ending on the later of (i) 30 June 2020; or (ii) the date falling one month after the coming into force of the Schedule (the **"Relevant Period**"). Winding-up petitions based on non-payment of a statutory demand served within the Relevant Period (and therefore which may resultantly be presented after the Relevant Period) are also prohibited.

- This prohibition will not apply where the petitioning creditor has reasonable grounds for believing that the coronavirus has not had a financial effect on the company, or that the facts that gave rise to the grounds of the winding-up petition would have arisen even if the coronavirus had not had a financial effect on the company.

- Where a petition presented during this period has resulted in a winding up order being made, which would not have been made if the provisions of the CIGB had been in force, the court may make such order as it thinks appropriate to restore the position to what it would have been if the petition had not been presented.

- The commencement of winding up will be from the date of the winding-up order, rather than the date that the petition was filed thereby allowing the company to engage in its normal trading once a petition has been presented without further involvement of the court.

Suspension of liability for wrongful trading

- Section 10 of CIGB suspends liability for wrongful trading between 1 March 2020 and the later of (i) 30 June 2020; or (ii) the date falling one month after the coming into force of CIGB (the "**Suspension Period**").

- This means that when a court is considering whether to order that a director should contribute to the company's assets under the wrongful trading provisions, it will not take into account any "worsening" of the company's financial position during the Suspension Period.

- The CIGB allows for the end of the Suspension Period to be extended for up to six months using secondary legislation.

Termination clauses in supply contracts

- The CIGB will insert a new s233B into the Insolvency Act 1986 to the effect that provisions of supply contracts for goods and services that allow automatic termination or give rise to the supplier's right to terminate due to the company becoming subject to a moratorium or a relevant insolvency procedure (which includes administration, CVA, or liquidation) (so called *Ipso facto* clauses) cease to have effect, unless the supplier is caused hardship (as determined by the court).

- The prohibition on the enforcement of *Ipso facto* clauses will not apply where the supplier is a small entity* and the company becomes subject to a relevant insolvency procedure during the period commencing the day the provision comes into force and ending on the later of (i) 30 June 2020; or (ii) the date falling one month after the coming into force. For these purposes a supplier will qualify as small entity if:

1. in respect of a supplier not in its first financial year at the relevant time, it meets at least two of the following conditions in relation to its most recent ended financial year:

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i. turnover of £10.2m or less (proportionately adjusted if the most recent financial year was not 12 months);

ii. balance sheet assets of £5.1m or less; and

iii. it has no more than 50 employees (calculated on an average basis for the financial year);

2. in respect of a supplier in its first financial year at the relevant time, it meets at least two of the following conditions:

i. average turnover for each complete month in the supplier's first financial year is not more than £850,000

ii. the aggregate of amounts which would be shown in a balance sheet is no greater than £5.1m; and

iii. it has no more than 50 employees (calculated on an average basis for that year).

*Being a company, LLP, other association or body of persons whether or not incorporated, and an individual carrying on a trade or business

Changes to meeting and filing requirements

- As set out in Schedule 14 of CIGB, between 26 March 2020 and 30 September 2020, certain meeting requirements will be relaxed (again, the CIGB makes provision for this to be extended by way of secondary legislation if needs be). By way of example, a general meeting can now be held "without any number of those participating in the meeting being together at the same place" (Schedule 14, section 3(5) CIGB).

- In addition, the CIGB grants the Secretary of State the ability to extend certain filing deadlines. This includes, for example, the deadline for registering a charge as set out in section 859A of the CA06.

If you would like more information about the topics raised in this briefing, please speak to your regular contact at Weil or to any of the authors listed below.

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