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Holding back the tide – the extension of reliefs for businesses

Recent months have brought unprecedented challenges to businesses, with no sector immune to the economic repercussions of the pandemic. Yet despite headline news of certain high-profile restructurings and insolvencies, such as Virgin Atlantic, Debenhams, and Edinburgh Woollen Mill, it seems the emergency measures implemented by the UK Government have, to a degree, staved off wide spread economic collapse that may otherwise have been inevitable. The extent to which these measures have simply mitigated or delayed the deluge will be revealed in the coming months when the temporary measures, several of which were recently extended, are withdrawn and companies are able to assess their position.

Whatever the economic fallout, understanding the current legal landscape can enable you to take steps to protect your interests and mitigate the possibility that the financial difficulties of a struggling counterpart might contaminate the economic health of your own company.

What are the key changes to the law in 2020?

The Corporate Insolvency and Governance Act came in to force on 25 June 2020 and contains permanent and temporary measures emphasising the 'rescue culture' that many feel, even pre-COVID-19, were overdue. While the permanent measures focus on providing companies with time, space and tools to remodel their business into financially viable operations, it is the temporary measures that are specifically aimed at alleviating the acute pressure brought by the pandemic.

Which temporary measures have been extended?

In summary, the following measures, initially drafted to expire on 30 September 2020, have been extended:

- Creditors are restricted from filing statutory demands and winding-up petitions except in limited circumstances where COVID-19 is not the cause of the company's inability to pay. This has been extended to 31 December 2020.
- Small business suppliers remain exempt from the prohibition on enforcement of *ipso facto* (i.e. insolvency termination) clauses until 30 March 2021 mitigating the risk, for the time being, of debilitating exposure to an insolvent counterpart.
- Commercial leases cannot be forfeited on grounds of non-payment of rent (or other sums) due between 26 March 2020 and 30 March 2021. The ability to forfeit on other grounds enshrined in the lease remains unaffected.
- Relaxation, until 31 March 2021, of the entry criteria to obtaining a moratorium: (1) allowing a company to obtain a moratorium where it has been subject to an insolvency procedure in the previous 12 months, and (2) allowing companies subject to a winding-up petition to obtain a moratorium by filing papers at court.
- The temporary modifications in relation to company meetings allowing for flexibility to hold statutory meetings virtually has been extended to 30 December 2020.

In addition, from 1 December 2020 crown preference will be reinstated in the order of priorities, meaning that in any distribution of assets in the insolvency of a UK entity, HMRC will rank ahead in priority to a floating charge-holder in respect of certain taxes. This means that lenders' positions will be diluted to a degree and there is a possibility that this will catalyse some decisions prior to 1 December.

How to use this time to protect your position

In the period of time that these extensions afford, here are some things to consider, and steps to take, that could mitigate against the coming tide:

- Even in circumstances where a creditor believes they have grounds to petition for the winding up of a company on the basis of a non-COVID 19 related debt, it is prudent to consider whether it is worth the additional time and expense necessary to convince the court of that fact before the petition can be heard. Shortening payment deadlines, capping inventory availability and considering requesting guarantees from related companies are sensible ways to reduce and protect against financial exposure to a vulnerable company without cutting off its blood supply.
- Small suppliers who qualify for exemption from the *ipso facto* changes will still be able to rely on those clauses to terminate contracts for several months yet, enabling them, for the time being, a little more control over their exposure to struggling companies.
- For those suppliers who do not fall within the exemption, the general ban on enforcement of *ipso facto* clauses does not prevent termination for a breach occurring **during** insolvency proceedings (such as administration or liquidation) and therefore a supplier looking to terminate a contract might look to argue that the relevant event, or entitlement, arose post-insolvency. Conducting a review of your existing termination clauses to ensure they are sufficiently widely drafted will afford protection.
- The reinstatement of crown preference means lenders with the benefit of a floating charge should consider taking steps to monitor the borrower's exposure to HMRC.
- As the change to the order of priority effects insolvencies commencing on or after 1 December 2020, those creditors without the benefit of floating charge should bear in mind that lenders may push the button sooner in order to preserve their advantageous position.

Brexit

Although dwarfed in the news throughout this year by the global pandemic, Brexit looms in the UK's immediate future and is likely to cause further disruption and difficulties for business adding, in turn, to the financial stress that many are already suffering. In addition, the law relating to cross-border elements of insolvency and the relative harmony provided by it may well be disturbed by the UK's exit from the EU.

If you would like to discuss any aspect of the recent chances to the Restructuring and Insolvency landscape, the likely impact of Brexit in this area, and how these changes might impact your and your counterparts' business, please do not hesitate to contact a member of the Restructuring & Insolvency team.

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