CORPORATE INSOLVENCY AND GOVERNANCE BILL FAST-TRACKED THROUGH PARLIAMENT

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The Corporate Insolvency and Governance Bill was introduced to the House of Commons on 20 May 2020. The Bill had its second reading in the House of Commons and cleared all remaining stages on 3 June 2020 before being brought to the House of Lords later the same day. The second reading in the House of Lords took place on 9 June. On 4 June the House of Lords resolved that the Bill would be taken through its remaining stages on Tuesday 23 June, thirty-four days after its introduction to the Commons. The committee stage will take place in the House of Lords on 16 June.

The Bill has 47 clauses and 14 schedules. It is 233 pages long and is likely to have a very significant impact on the practice of corporate insolvency in the United Kingdom. According to para 1 of Explanatory Notes produced upon the Bill being brought from the House of Commons on 3 June 2020 [HL Bill 58-EN (2019-21)], its overarching aim is to "*to provide businesses with the flexibility and breathing space they need to continue trading*" during the challenges created by the COVID-19 pandemic. "*The measures are designed to help UK companies and other similar entities by easing the burden on businesses and helping them avoid insolvency during this period of economic uncertainty*". The entire Bill has been fast-tracked because its provisions are aimed at creating an environment where companies are supported in surviving the pandemic emergency with a view to continuing as going concerns (ibid. paras 78-96).

The permanent measures introduced by the Bill are innovative and far-reaching, but it should be understood that they are not newly devised. Rather, their implementation has been brought forward in response to the Covid-19 pandemic and its serious economic impact. The Government consulted on the permanent measures in the Bill in 2016 and 2018 and published a response to those consultations on 26 August 2018, indicating a plan to take the proposals into legislation: *Department for Business, Energy and Industrial Strategy, Insolvency and Corporate Governance: Government Response, 26 August 2018*. In brief, the three principal permanent measures are:

- A new Part A1 of the Insolvency Act 1986 ("the 1986 Act") providing a procedure for the invoking of a statutory moratorium on enforcement action protecting companies in financial distress (without necessarily being insolvent) that wish to explore rescue options instead of commencing insolvency proceedings. There is presently no such free-standing moratorium available for UK companies. This new debtor-in-possession procedure – the company being the debtor – involves oversight of the moratorium by a licensed insolvency practitioner who acts as "*monitor*" subject to the directors remaining in day-to-day control. The Bill does not require pursuit of any particular outcome at the point at which the moratorium is invoked although obvious possible outcomes include recovery or sale outside of an insolvency procedure, a CVA or scheme of arrangement or a restructuring plan under the new Part 26A of the Companies Act 2006 ("the 2006 Act").
- Under the new Part 26A of the 2006 Act, new arrangements are provided for the purpose of restructuring companies in financial distress, in particular a procedure for overruling dissenting classes of creditors with a new so-called "cross-class cram-down" procedure. The cross-class cram-down procedure will allow a company to obtain a restructuring if it can prove to the court that the arrangement would (a) benefit and is supported by 75% of one class of creditors, and (b) that none of the members of a dissenting class of creditors would be worse off financially under the restructuring plan than they would otherwise have been. (The procedure derives its name from the fact that one class of creditors

can prevail over the dissenting votes of another other at the relevant meeting). The new restructuring procedure has the advantage over the existing CVA procedure under Part I of the 1986 Act of being able to affect the rights of secured and preferential creditors without their consent. Although the new procedure bears similarities to the existing scheme of arrangement procedure, it will also be capable of binding dissentient classes of creditors and members to a restructuring plan.

- Restrictions on contractual supplier termination clauses through new provisions extending ss.233 and 233A of the 1986 Act imposing restrictions on the use of contractual clauses that ordinarily enable suppliers to discontinue contractual services on account of pre-insolvency default (typically non-payment) on supply contract arrangements.

Briefly, the temporary measures introduced by the Bill will: (a) suspend temporarily with retrospective effect from 1 March 2020 the wrongful trading provisions in s.214 of the 1986 Act; (b) prohibit temporarily winding-up petitions based on statutory demands and prevent winding-up orders being made as a result of Covid-19 financial difficulties; (c) introduce a power to amend legislation relaxing temporarily filing requirements; and (d) provide the temporary extension of time periods for filing and the providing of information to Companies House.

In its report published on 12 June 2020 the House of Lords Constitution Select Committee expressed the view that, while temporary measures to respond to the COVID-19 pandemic may meet the threshold of urgency and exceptional circumstances to warrant fast-tracking, it is inappropriate for the permanent changes proposed in this Bill to be fast-tracked. In particular, the Bill includes provisions which apply retrospectively. Such provisions are generally regarded as inconsistent with the rule of law and are "*inherently constitutionally suspect*". The Committee recommends changes to ameliorate the effects of these provisions and calls on the Government to justify their retrospective application, including an assessment of their compliance with the rule of law. It remains to be seen whether these concerns are acted upon in the course of the fast-track procedure adopted by both Houses.

What will be the newly enacted Corporate Insolvency and Governance Act 2020 will be the subject of a webinar presented by Louis Doyle QC of kings Chambers and Mark Cawson QC of Exchange Chambers, chaired by the Vice-Chancellor, Mr Justice Snowden, on Thursday 25 June 2020 at 4.30pm-5.30pm. This will be followed by a series of webinars dealing with discrete issues raised by the Bill and related matters. To sign up, please contact the Northern Chancery Bar Association and the Northern Circuit Commercial Bar Association Administrator, Sara Brett (sarabrett@hotmail.com), who will then provide you with joining details. There is no charge.

To receive a guide to the Corporate Insolvency and Governance Act 2020 by Louis Doyle QC following its enactment please email marketing@kingschambers.com