

Corporate Insolvency and Governance Act 2020

Changes made in the passage from
Bill to Act

Tom Astle and Joe Bannister


2 July 2020

Introduction and agenda

- Only those amendments proposed by the government made it into the Act
- Amendments include:
 - Removal of a number of the “Henry VIII” powers;
 - Extension of the temporary measures and temporary changes to the permanent measures to 30 September 2020
- Amendments for further consideration today:
 - Accelerated debt and super-priority;
 - The capital market exemptions
 - Pre-packs;
 - Pensions;
- Speakers today and practicalities
- Other materials on topic: <https://www.engage.hoganlovells.com>

Recap as to what is in the Act

- Temporary Covid 19 measures:
 - Suspension of Winding Up Petitions, now through to 30 Sept 2020
 - Effective suspension of wrongful trading, now also through to 30 Sept 2020
- Changes to Insolvency law:
 - Ipso Facto – insolvency termination clauses in supply contracts no longer operable (subject to many exceptions)
 - New “Moratorium Process” introduced (20BD+ “pre-insolvency” procedure, we will talk to this in more detail)
 - New “Restructuring Plan” mechanism introduced, with cross class cramdown possibility



Moratoriums and
Accelerated debt

Moratorium recap

- Available to “Eligible Companies”. Excludes PPPCo entities, obligors on listed bonds, banks and other financials.
- Initial period of 20BDs filed by directors, with extension via:
 - Directors without creditor consent (20BD max)
 - Directors with creditor consent (indefinite)
 - Court application (indefinite)
 - Duration of any Scheme or CVA that has been launched
- “Monitor” put in place to provide a level of oversight
- Moratorium extends to security enforcement (other than on financial collateral). New ipso facto provisions also engaged. Debt can be accelerated however, and set-off exercised.
- Debts falling due in that period have super priority ranking in subsequent process.

Obligations not caught by moratorium

- No payment holiday during the moratorium for pre-moratorium "debts or other liabilities arising under a contract or other instrument involving financial services"
 - Other pre-moratorium debts which have no payment holiday :
 - amounts payable for the monitor's remuneration or expenses;
 - goods or services supplied during the moratorium;
 - rent payable for a period during the moratorium;
 - wages and salary to the extent they relate to a period of employment during the moratorium (including payments to a occupational pension scheme); and
 - redundancy payments.
- “Contracts or other instruments involving financial services” are listed in new Schedule ZA2 (Schedule 2 of the CIGA) and include contracts for lending, derivatives, spot contracts and agreements forming part of an arrangement involving the issue of a capital markets investment

Super priority

- In any insolvency in following 12 weeks, super priority for :
 - Moratorium debts (ie created and falling due during moratorium); or
 - Pre-moratorium debts for which no payment holiday (ie obligations created pre moratorium , falling due in moratorium for which no payment holiday, and all unaccelerated financial debts)
 - Priority pre-moratorium debts (ie debts in the previous bullet but excluding accelerated debts)
- Failure to pay any of the three if due prevents the directors from extending the moratorium and may cause the monitor to terminate the moratorium
- Priority pre-moratorium debts have a veto on CVA, scheme of arrangement or restructuring plans affecting them if proposed within 12 weeks of the end of a moratorium
- However “relevant accelerated debts” cease to be priority pre-moratorium debts, ie debts that were not set to mature in the moratorium period

Accelerated debt (cont)

- So for creditors with financial debt, some pros and cons:
 - Moratorium will give period of stability for group to try to launch CVA, Scheme, Plan, or do a consensual deal; but
 - Creditors cannot instigate, or prevent directors instigating the process, and all debts falling due during the moratorium process (broadly) will sit ahead of floating charges
- Strategic question then comes whether to accelerate or not:
 - Once accelerated, moratorium cannot be extended without payment (or rescheduling)
 - Will lose the special veto right on Schemes, CVAs, or Restructuring Plans (albeit may be able to block or avoid these anyway under usual principals).
- RCFs will cause challenges if they rollover during moratorium period – will be priority pre-moratorium debts (provided you don't accelerate!). Accordingly retain special veto on subsequent Schemes, CVAs, or Restructuring Plans, and need to be paid (but will be drawstopped) prior to any extension



Capital markets exemptions

Capital markets exemptions

- Broadly, a company which is party to a capital market arrangement under which someone incurs a liability of at least £10m and which involves the issue of a capital market investment is ineligible for the moratorium
- However, the definitions are also used to define:
 - those contracts which will not benefit from a payment holiday during the moratorium; and
 - Those contracts which are not affected by the prohibition on termination clauses in insolvency.
- In the Bill, the description was “a capital market arrangement within the definition under paragraph 13(2) Schedule ZA1”
 - Could be read as including *all* agreements benefitting from a guarantee or security
- In the Act this changed to “an agreement which forms part of an arrangement involving the issue of a capital market investment”
 - Covers secured and unsecured debt, but the debt instrument either has to be rated, listed, traded (or designed to be rated, listed or traded), or bonds or commercial paper issued to professional, high net worth or sophisticated investors.



Pre-packs

Pre-packs to connected parties

- Significant debate in the Lords in particular about pre-packs
- Some calls for absolute prohibition, some comment that changes to SIP16 are answer
- Small Business Enterprise and Employment Act 2015: power to make regulations prohibiting or imposing requirements or conditions on sales by an administrator to a connected party
- “Pre-pack Pool” regime created under this, but is voluntary
- Power expired on 25 May 2020 but was revived under the CIGA, now expires at the end of June 2021



Pensions

Concerns

- Restructuring plan:
 - Could be used to cram down company obligations to a pension scheme
 - Not an “insolvency event” triggering a PPF assessment period
- Moratorium
 - Payments during the moratorium for “wages or salary” do not have a payment holiday
 - “Wages or salary” include “a contribution to an occupational pension scheme”
 - Unclear whether this includes all payments into the scheme, including pursuant to a schedule of contributions
 - Also not an “insolvency event”
- Priority
 - Certain unsecured debts would receive super-priority on any administration or liquidation which commences within 12 weeks of the end of a moratorium

Proposals

- Concerns partially alleviated by removing accelerated financial debts from the list of debts that get super-priority.
- Some of the proposed amendments which didn't make it through included:
 - Providing that a company should be excluded from being eligible for the moratorium if it had outstanding pension payments;
 - Making it a condition that had to be met before the court could sanction any plan that all obligations of the company to any pension scheme have priority over all other creditors in the proposed compromise or arrangement; and
 - Providing that in the moratorium, where directors can apply for permission to sell a secured asset, the court should not be able to consent to disposal of an asset charged to pension trustee without consent of PPF.

Amendments

- Moratorium
 - Information rights
 - tPR must be informed if a company which is or has been an employer enters a moratorium or a moratorium is extended or terminated or if changes are made to the monitor;
 - The PPF must be informed in the same circumstances if the company is an employer in respect of an eligible pension scheme
 - Ability to challenge: where the pension scheme trustees are creditors of the company, the PPF can challenge director or monitor conduct on the basis of unfair harm
 - Additional powers: the Act gives power to the SoS to make regulations providing that the PPF can vote on a moratorium extension or a creditor decision following a court order either in substitution for or in addition to the trustees of the scheme
- Restructuring plan:
 - Information rights: tPR and the PPF must be sent any notices and other documents that have to be sent to other creditors;
 - The SoS can make regulations providing that the PPF can exercise any rights that could have been exercised by the trustees as creditors of the company



Conclusion



Speaker CVs

Tom Astle

Partner, Head of Restructuring, London

Tom is head of our restructuring team in London, and works for credit funds and investment bank special situation desks involved in domestic and multi-jurisdictional special situation lending and restructurings. The majority are implemented with successful negotiation of a consensual solvent solution, although he has regularly used pre-packaged administration, and/or Schemes of Arrangement, to deliver his clients' preferred solution.

Representative experience includes:

- DTEK: advising lender group on c€300m exposure to Ukrainian energy group
- Casual Dining group: advising super senior lender to UK group holding three prominent casual dining businesses
- Fortenova: advising debt fund on refinancing of the Fortenova group's €1.2bn existing facilities via a secured private note issuance
- Thomas Cook plc: acting for providers of c€500m bonding, in connection with the ultimately abortive restructuring
- Agrokor: acting for ad hoc bond committee, subsequently €1bn DIP funding providers, negotiation of the settlement plan, and UK Scheme
- Autobar/Pelican Rouge: advising for an investment bank advancing €100m of super senior working capital into this restructuring
- Apcoa: acting for the Agent in structuring of the scheme of arrangement in this leading case
- Polestar Printing: acting for the lenders in restructuring of their uni tranche facility and subsequent pre-pack administration
- Infrastructure: acting for special situation desks on the restructuring and debt for equity swap of a European infrastructure project
- Sepura Plc: advising FTSE listed corporate on liquidity funding, debt restructuring and subsequent takeover by strategic Chinese buyer
- Acting for a fund in delivering the West Cornwall Pasty Company business through a pre-packaged process to take ownership
- Advising listed UK/US group AEA Technology plc on accelerated M&A process and sale, including compromise arrangements with the PPF, pension trustees, and secured lender
- Advising the senior lender syndicate to Peacocks, and acting for the administrators on subsequent trading administration and sale of over 900 stores
- Advising administrators on the £3.2bn pre-packaged administration of major music group, EMI



T: +44 20 7296 5603

E: tom.astle@hoganlovells.com

Rankings:

Leading Individual – Legal 500 2020

Ranked – Chambers UK 2020

Accolades

"a dynamic and diligent trusted adviser" - Legal 500 2020

The "detail-oriented, smart and responsive" Tom Astle has a growing profile for his skill in high-profile, often multi-jurisdictional restructurings. Clients report: "He's very robust in his legal analysis and very commercial with it." Others note: "He is commercially aware, gives valuable insight and has great deal experience." – Chambers UK 2019

Joe Bannister

Partner, business restructuring and insolvency London

Joe Bannister is a seasoned, international, restructuring and insolvency lawyer. For more than 30 years, Joe has helped the entire range of restructuring stakeholders to address and resolve the most difficult restructurings and insolvencies. He has experience across all industry sectors, and has dealt with cases in the UK, Europe, Asia and the US. Joe is a member of the City of London Law Society Insolvency Sub Committee. He has a deep interest in legislative reform most recently advising clients on and contributing through to the discussions and development to the 2020 Insolvency Bill.

Joe's international assignments have encompassed a number of offshore jurisdictions, including Bermuda, the BVI, Cayman Islands, Cyprus, Mauritius and the Isle of Man. He has particular expertise (and interest) in diversified industrial and automotive cases and in cross border and financial services cases, including insurers and banks.

Joe has worked at Hogan Lovells and its predecessor firms for his entire career. Joe is admitted as a solicitor in both London and Hong Kong, where he worked between 1998 and 2002 and again in 2014 and 2015 as the partner in charge of the firm's business restructuring and insolvency practice in Hong Kong and China. He is widely recognised as a leading practitioner in directories such as Chambers and Legal 500.

Representative experience includes:

- Advising a major international bank on the workout and recovery of a US\$3.5 billion facility owed by an international energy and steel group in Hong Kong, Singapore, London and India
- Advising a major motor manufacturer as a creditor of various distressed suppliers; the Liberty and Amtek Groups, JVM Castings, Collins & Aikman, Visteon Group Schefenacker and others, including the negotiation of funding arrangements both outside and within formal insolvency proceedings and negotiating the pre-packaged sale of the business, assets and undertakings of distressed suppliers on terms acceptable to OEM clients.
- Acting as UK counsel to the Official Committee (the "Committee") of asbestos creditors in the formulation of company voluntary arrangements ("CVAs") for Turner & Newall Limited and its subsidiaries and co-ordinating that work with parallel Chapter 11 proceedings.
- Advising the Nortel group pension trustees.
- Advising Ataer holdings, one of the bidders for the British Steel group
- Advising a creditor on the protection of its rights in relation to the LDK Solar Group schemes of arrangement, both in Hong Kong and Cayman.
- Acting in the administrations of home improvements and fashion businesses and companies in the leisure and hospitality sectors, both in relation to trading issues and on the sale of the businesses, assets and undertaking of the companies concerned.
- Advising on a number of insurer insolvencies and insurer solvent schemes of arrangement including Orion and London & Overseas Insurance; including designing a cut-off scheme to accelerate the conclusion of this long running and complex insolvency.
- Advising the Icelandic Government in relation to the Icelandic financial crisis including the capital reorganisations of Iceland's three principal banks.
- Acting for the administrators of Lehman Brothers Holdings Plc in the evaluation and settlement of liabilities to subordinated creditors through a combination of negotiation and court proceedings.



T: +44 20 7296 2900

E: joe.bannister@hoganlovells.com

Rankings:

Ranked – Chambers UK 2020

Leading Individual – Legal 500 2020

Accolades

Sources say that Joe Bannister is a "great technical lawyer who is very knowledgeable." He has a wealth of experience advising on a wide array of restructuring and insolvency matters both domestically and internationally. Chambers UK 2019

Joe Bannister...has experience advising on matters involving offshore jurisdictions and is adept at handling schemes of arrangement. Clients say: "He is approachable, very experienced and infinitely professional." – Chambers UK 2020



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