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THE CORPORATE INSOLVENCY AND GOVERNANCE BILL 2020

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THE COMPANY MORATORIUM

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Biography

Anna is regularly instructed on behalf of creditors officeholders and debtors in both corporate and personal insolvency matters, in an advisory and representative capacity. She frequently acts in Insolvency Act applications brought by or against officeholders, including cases involving breach of duty and misfeasance by directors and transactional avoidance proceedings, disputed debts and injunctive relief in respect of winding up petitions. Anna is instructed by HMRC in a variety of insolvency and related matters as a member of the Attorney General's panel.

Introduction

The Bill

1. The Corporate Insolvency and Governance Bill 2020 (“**the Bill**”) consists of 6 insolvency measures and 2 corporate governance measures. This section of the handout looks at one of the most anticipated of the insolvency measures; the company moratorium. This is one of the proposed changes to the insolvency regime that is intended to be permanent, rather than a temporary Covid-19 related measure.
2. Companies will be able to apply for a moratorium, which will prevent creditors from taking enforcement action for a specified period. This is intended to give the company breathing space in which to explore restructuring options under the supervision of a “monitor”. The focus of the moratorium provisions is on rescue and restructure.
3. The provisions on company moratoriums in Great Britain are found in sections 1 to 3 of the Bill (sections 4 to 6 make similar provisions for Northern Ireland). The substantive provisions relating to the proposed company moratorium are set out in section 1 of the Bill, which proposes to introduce new sections A1 to A53 into the Insolvency Act 1986 (“**IA 1986**”), before Part 1 but within the First Group of Parts. References in this section of the handout to “sections” are to the proposed new sections in the IA 1986 that would be introduced by the Bill.

Preliminaries

Structure of the statutory provisions

4. Section A1 provides an overview of the moratorium and sets out the structure of the proposed statutory provisions on the moratorium:

- a. Chapter 1 consists of section A1 and section A2, the latter of which introduces Schedule ZA1 (which sets out the criteria for eligibility to participate in the moratorium regime);
- b. Chapter 2 (sections A3 to A8) sets out how an eligible company may obtain a moratorium;
- c. Chapter 3 (sections A9 to A17) sets out for how long a moratorium has effect, including the extension and termination provisions;
- d. Chapter 4 (sections A18 to A33) sets out the effects of a moratorium on the company and its creditors;
- e. Chapter 5 (sections A34 to A41) contains provisions about the monitor;
- f. Chapter 6 (sections A42 to A44) contains provisions about challenges;
- g. Chapter 7 (sections A45 to A47) contains provisions about new statutory offences; and
- h. Chapter 8 (sections A48 to A53) contains miscellaneous and general provisions, including special provisions for certain kinds of company and definitions.

Terminology: pre-moratorium and moratorium debts

5. The terms "*pre-moratorium debt*" and "*moratorium debt*" feature heavily in the Bill and are defined in section A51:
 - a. "*pre-moratorium debt*" means:
 - i. any debt or other liability to which the company becomes subject before the moratorium comes into force; or
 - ii. any debt or other liability to which the company has become or may become subject during the moratorium by reason of any obligation incurred before the moratorium comes into force.
 - b. "*moratorium debt*" means:

- i. any debt or other liability to which the company becomes subject during the moratorium, other than by reason of an obligation incurred before the moratorium came into force; or
 - ii. any debt or other liability to which the company has become or may become subject after the end of the moratorium by reason of an obligation incurred during the moratorium.

6. A liability in tort or delict is a "*pre-moratorium debt*" if either:
 - a. the cause of action has accrued before the moratorium comes into force; or
 - b. all the elements necessary to establish the cause of action exist before the moratorium comes into force except for actionable damage.

7. A liability in tort or delict is a "*moratorium debt*" if either:
 - a. the cause of action has accrued during the moratorium; or
 - b. all the elements necessary to establish the cause of action exist before the moratorium comes to an end except for actionable damage.

Obtaining a moratorium

Eligibility: companies qualifying for the moratorium

8. The eligibility requirements are set out in the proposed new Schedule ZA1 (introduced by section A2). This is covered earlier in the handout.

Procedure for entry into moratorium

9. The procedure for entry into a moratorium is dealt with in Chapter 2 (sections A3 to A8).

English company not subject to winding up petition

10. An eligible company that is not (a) the subject of a winding up petition; or (b) an overseas company may obtain a moratorium by filing the documents set out at section A6 (the "**Relevant Documents**") at Court (section A3).

Overseas company not subject to winding up petition

11. Where an eligible company is not subject to an outstanding winding up petition but is an overseas company, the directors may apply to the court for a moratorium order, enclosing the Relevant Documents. On hearing the application the court may make a moratorium order or make any other order which the court thinks appropriate. There is no requirement that the court must be satisfied that a moratorium for the company would achieve a better result for the company's creditors as a whole than would be likely if the company were wound up (section A5).

Company subject to winding up petition

12. Where an eligible company is subject to an outstanding winding up petition, the directors may make an application to court for a moratorium (attaching the Relevant Documents). On hearing the application the court may make an order that the company should be subject to a moratorium, or make any other order which the court thinks appropriate. The court may make a moratorium order only if it is satisfied that a moratorium for the company would achieve a better result for the company's creditors as a whole than would be likely if the company were wound up (without first being subject to a moratorium) (s.A4).
13. The Relevant Documents are (section A6(1)):
 - a. a notice that the directors wish to obtain a moratorium,
 - b. a statement from a qualified person ("the proposed monitor") that the person:
 - i. is a qualified person, and
 - ii. consents to act as the monitor in relation to the proposed moratorium.
 - c. a statement from the proposed monitor that the company is an eligible company,

- d. a statement from the directors that, in their view, the company is, or is likely to become, unable to pay its debts, and
- e. a statement from the proposed monitor that, in the proposed monitor's view, it is likely that a moratorium for the company would result in the rescue of the company as a going concern.

Duration and extension of moratorium

Commencement

- 14. Pursuant to section A7(1), the moratorium comes into force either upon the filing of the Relevant Documents (where the company is not an overseas company and is not subject to an outstanding winding up petition), or upon the making of a moratorium order (where the company is an overseas company or is subject to an outstanding winding up petition and an application to court is required).
- 15. The appointment of the monitor takes effect upon the moratorium coming into force (section A7(2)).
- 16. As soon as reasonably practicable after a moratorium for a company comes into force, the directors must notify the monitor of that fact (section A8(1)). Failure to do so without reasonable excuse will constitute an offence by the director(s) (section A8(4)).
- 17. As soon as reasonably practicable upon being notified, the monitor must inform the registrar of companies and every creditor of the company of whose claim the monitor is aware that a moratorium has come into force. Failure to do so without reasonable excuse will constitute an offence by the monitor (section A8(5)).

Duration

- 18. Pursuant to section A9(1), a moratorium ends at the end of the initial period unless it is extended, or comes to an end sooner. The initial period is the period of 20 business days beginning with the business day after the day on which the moratorium comes into force (section A9(2)).

19. A moratorium may not be extended once it has come to an end (section [A9\(5\)](#)). Where application of two or more of the provisions relating to extension and termination would produce a different length of moratorium, the provision that applies last is to prevail (irrespective of whether that results in a shorter or longer moratorium (section [A9\(6\)](#)).

Extension

20. The period of the moratorium may be extended in the following ways:

Initial extension of 20 days by directors without creditor consent (section [A10](#))

21. During the initial period, but after the first 15 business days of that period, the directors may extend the moratorium for a further 20 days by filing with the court:
- a. a notice that the directors wish to extend the moratorium;
 - b. a statement from the directors that all moratorium debts and pre-moratorium debts for which the company does not have a payment holiday during the moratorium that have fallen due have been paid or otherwise discharged;
 - c. a statement from the directors that, in their view, the company is, or is likely to become, unable to pay its pre-moratorium debts; and
 - d. a statement from the monitor that, in the monitor's view, it is likely that the moratorium will result in the rescue of the company as a going concern (section [A10\(1\)](#)).
22. On filing the abovementioned documents with the court, the moratorium is extended so that it ends 20 business days after the end of the initial period (section [A10\(3\)](#)). No creditor consent is required.

Extension by directors with creditor consent (section [A11](#))

23. At any time after the first 15 days of the initial period, the directors may extend the moratorium up to 12 months by filing the documents required for an extension under section A10 and a statement from the directors that creditor consent to extend the moratorium to a revised date has been obtained (section [A12\(1\)](#)). The revised date must be not more than one year beginning with the date of the initial period (section [A12\(3\)](#)). The effect of this is that the moratorium will be extended to the revised date.
24. A moratorium may be extended in this way more than once (section [A11\(4\)](#)).
25. Creditor consent for the purposes of section [A11](#) is defined in section [A12](#). What is required is the consent of "*pre-moratorium creditors*", made using a qualifying decision procedure. Section [A12\(4\)](#) defines "*pre-moratorium creditor*" as a creditor in respect of a pre-moratorium debt for which the company has a payment holiday during the moratorium (see section [A18](#)), and which has not been paid or otherwise discharged.

Extension by court on application of directors (section [A13](#))

26. At any time after the first 15 business days of the initial period, the directors may apply to the court for an order that the moratorium be extended to a specified date. The application must be accompanied by the same documents as required for an application under section [A10](#). On hearing the application the court may make an order that the moratorium be extended to such date as is specified in the order, or make any other order which the court thinks appropriate (section [A10\(4\)](#)). In deciding whether to make an order to extend the moratorium the court must, in particular, consider the interests of pre-moratorium creditors and the likelihood that the extension of the moratorium will result in the rescue of the company as a going concern.
27. A moratorium may be extended under this section more than once (section [A13\(8\)](#)).

28. The effect of making an application under this section will be to automatically extend the moratorium to the date when the application is dealt with (or withdrawn) (section [A13\(7\)](#)).

Extension while CVA proposal pending (section [A14](#))

29. Where the directors make a proposal under Part 1 (company voluntary arrangements) and the moratorium is due to end before the proposal is disposed of, the moratorium will continue in force until the proposal is “disposed of” (as defined in section [A14\(3\)](#)).

Extension by court in course of other proceedings (section [A15](#))

30. This provision would allow the court to extend the moratorium where an application is made to sanction a scheme of arrangement pursuant to s.896 or a restructuring plan under the proposed new 901C(1) Companies Act 2006.

Effect of moratorium

31. The main effects of a moratorium for a company are dealt with in Chapter 4 of the Bill.

Publicity about moratorium

32. Pursuant to section [A19](#), during a moratorium the company must display/publish certain “*required information*” (namely the fact that the company is in a moratorium and the name of the monitor):
- a. in any premises where business of the company is carried on and to which customers of the company or suppliers of goods or services to the company have access (section [A19\(1\)](#));
 - b. on any website of the company (section [A19\(2\)](#)); and
 - c. in any business document issued by or on behalf of the company (section [A19\(3\)](#)). “Business document” is defined as an invoice, order for goods or services, business letter and order form, whether in hard copy, electronic or other form (section [A19\(6\)](#)).

33. A failure to comply with this requirement will result in the company committing an offence. Any officer of the company who without reasonable excuse authorises or permits the contravention commits an offence (section A19(5)).

Payment holiday in respect of pre-moratorium debts

34. Pursuant to section A18(3), "*pre-moratorium debts for which a company has a payment holiday during a moratorium*" are pre-moratorium debts that have fallen due before the moratorium, or that fall due during the moratorium, except in so far as they consist of amounts payable in respect of:
- a. the monitor's remuneration or expenses (not including remuneration in respect of anything done by a proposed monitor before the moratorium begins);
 - b. goods or services supplied during the moratorium;
 - c. rent in respect of a period during the moratorium;
 - d. wages or salary arising under a contract of employment
 - e. redundancy payments, or
 - f. debts or other liabilities arising under a contract or other instrument involving financial services.
35. There is no payment holiday in respect of these excepted pre-moratorium debts, or moratorium debts. The company will be expected to continue to pay such debts as and when they fall due and a failure to do so is likely to lead to the termination of the moratorium and/or a failure to extend the moratorium.

Winding up petitions and insolvency proceedings

36. Pursuant to section A20, insolvency proceedings against the company cannot be instigated/determined during the moratorium. In particular:
- a. no petition may be presented for the winding up of the company, except by the directors (section A20(1)(a)). This does not apply to

“excepted petitions”, defined in section A20(3) as public interest winders under section 124A, winding up of an SE under section 124B and winding up of an SCE under section 124C, or a petition under section 367(3)(b) FSMA 2000;

- b. no resolution may be passed for the voluntary winding up of the company under section 84(1)(a) (expiration/dissolution of company pursuant to its articles) (section A20(1)(b));
- c. a resolution for the voluntary winding up of the company under section 84(1)(b) may be passed only if the resolution is recommended by the directors (section A20(1)(c));
- d. no order may be made for the winding up of the company, except on a petition by the directors (this does not apply to “excepted petitions”) (section A20(1)(d));
- e. no administration application may be made in respect of the company, except by the directors (section A20(1)(e));
- f. no notice of intention to appoint an administrator of the company under paragraph 14 or 22(1) of Schedule B1 may be filed with the court (section A20(1)(f)); and
- g. no administrator of the company may be appointed under paragraph 14 or 22(1) of Schedule B1, and no administrative receiver of the company may be appointed (section A20(1)(g)&(h)).

Notification of insolvency procedures

37. Section A24 will requires the directors of a company to notify the monitor before presenting a winding up petition, making an administration application or

appointing an administrator under para 22(2) of Schedule B1 during a moratorium. Failure to comply without reasonable excuse is an offence.

Restrictions on enforcement and legal proceedings

38. Section A21 prohibits the following enforcement steps being taken without the permission of the court during the moratorium:

- a. a landlord or other person to whom rent is payable may not exercise a right of forfeiture by peaceable re-entry in relation to premises let to the company (section A21(1)(a));
- b. no steps may be taken to enforce any security over the company's property except steps to enforce a collateral security charge or security created or otherwise arising under a financial collateral arrangement (section A21(1)(c));
- c. no steps may be taken to repossess goods in the company's possession under any hire-purchase agreement (section A21(1)(d)); and
- d. no legal process (including legal proceedings, execution, distress or diligence) may be instituted, carried out or continued against the company or its property, except employment tribunal proceedings or any legal process arising out of such proceedings, or other proceedings involving a claim between an employer and a worker (section A21(1)(e)).

39. Some restrictions are placed on when an application may be made to the Court for permission to take an enforcement step:

- a. An application may not be made for permission to enforce a pre-moratorium debt for which the company has a payment holiday during the moratorium (section [A21\(2\)](#)); and
 - b. An application may not be made for permission with a view to obtaining the crystallisation of a floating charge, or the imposition, by virtue of provision in an instrument creating a floating charge, of any restriction on the disposal of any property of the company (section [A21\(3\)](#)).
40. Permission of the Court may be given subject to conditions (section [A21\(4\)](#)).
41. Section [A22](#) applies where there is an uncrystallised floating charge on the property of a company for which a moratorium is in force. During the moratorium, the holder of the floating charge may not give any notice which would have the effect of causing the floating charge to crystallise, or causing the imposition, by virtue of provision in the instrument creating the charge, of any restriction on the disposal of property of the company.
42. Pursuant to section [A23](#), security granted by a company during a moratorium in relation to the company may be enforced only if the monitor consented to the grant of security under section [A26](#).

Restrictions on transactions

Obtaining credit

43. Section [A25](#) will establish restrictions on a company obtaining credit during a moratorium. During a moratorium, the company may not obtain credit to the extent of £500 or more from a person unless the person has been informed that a moratorium is in force in relation to the company (section [A25\(1\)](#)).
44. This includes:

- a. entering into a conditional sale agreement in accordance with which goods are to be sold to the company (section [A25\(2\)\(a\)](#));
 - b. entering into any other form of hire-purchase agreement under which goods are to be bailed to the company (section [A25\(2\)\(b\)](#)); and
 - c. being paid in advance (whether in money or otherwise) for the supply of goods or services (section [A25\(2\)\(c\)](#)).
45. Contravention of these restrictions by the company is an offence and any officer of the company who without reasonable excuse authorised or permitted the obtaining of the credit commits an offence (section [A25\(3\)](#)).

Granting security

46. Pursuant to section [A26](#), during a moratorium, the company may grant security over its property only if the monitor consents (section [A26\(1\)](#)). The monitor may give consent only if the monitor thinks that the grant of security will support the rescue of the company as a going concern (section [A26\(2\)](#)). In deciding whether to give consent, the monitor is entitled to rely on information provided by the company unless the monitor has reason to doubt its accuracy (section [A26\(3\)](#)). If the company grants security over its property during the moratorium otherwise than as authorised, the company commits an offence, and any officer of the company who without reasonable excuse authorised or permitted the grant of the security commits an offence (section [A26\(4\)](#)).

Other transactions

47. Section [A27](#) sets out an absolute prohibition on a number of other restrictions on specific transactions that a company in moratorium may not enter into, such as market contracts and financial collateral arrangements.

Restrictions on payments and disposal of property

Payment of pre-moratorium debts

48. Section A28 will establish restrictions on payment of certain pre-moratorium debts. Section A28(1) provides that, during a moratorium, the company may make one or more “*relevant payments*” to a person that (in total) exceed the “*specified maximum amount*” only if: (a) the monitor consents; (b) the payment is in pursuance of a court order, or (c) the payment is required by sections A31(3) (payment to discharge secured sum) or A32(3) (payment to discharge sum secured under hire-purchase agreement).
49. “*Relevant payments*” means payments in respect of pre-moratorium debts for which the company has a payment holiday during the moratorium. The “*specified maximum amount*” means an amount equal to the greater of £5000, and 1% of the value of the debts and other liabilities owed by the company to its unsecured creditors when the moratorium began, to the extent that the amount of such debts and liabilities can be ascertained at that time (section A28(2)).
50. The monitor may give consent to payments in excess of the specified maximum amount only if the monitor thinks that it will support the rescue of the company as a going concern (section A28(3)). In deciding whether to give consent the monitor is entitled to rely on information provided by the company unless the monitor has reason to doubt its accuracy (section A28(4)). If the company makes an unauthorised payment the company commits an offence, and any officer of the company who without reasonable excuse authorised or permitted the payment commits an offence (section A28(5)).

Disposal of company property

51. Section A29 will establish restrictions on disposal of company property. During a moratorium a company may dispose of its property only as authorised by the section.
52. In the case of property that is not subject to a security interest, the company may dispose of the property only if:

- a. the disposal is made in the ordinary way of the company's business;
 - b. the monitor consents (the monitor may give consent only if the monitor thinks that it will support the rescue of the company as a going concern); or
 - c. the disposal is in pursuance of a court order (section A29(2)).
53. In the case of property that is subject to a security interest, the company may dispose of the property if the disposal is in accordance with:
 - a. Section A31(1) (permission of the court to dispose of property subject to a security interest as though it were not subject to the security interest); or
 - b. the terms of the security.
54. If the company disposes of its property during the moratorium otherwise than as authorised by section A29, the company commits an offence, and any officer of the company who without reasonable excuse authorised or permitted the disposal commits an offence (section A29(6)).
55. Section A31 will establish a power, during a moratorium, for a company to obtain the permission of the court to dispose of property that is subject to a security interest as if it were not subject to the security interest. The court may give permission only if the court thinks that it will support the rescue of the company as a going concern (section A31(2)).
56. Where the court gives permission other than in relation to a floating charge, the company must apply the following towards discharging the sums secured:
 - a. the net proceeds of disposal of the property; and
 - b. any money required to be added to the net proceeds so as to produce the amount determined by the court as the net amount which would be realised on a sale of the property in the open market by a willing vendor (section A31(3)).

57. Where property subject to a floating charge is disposed of the holder of the floating charge has the same priority in respect of acquired property (meaning property of the company which directly or indirectly represents the property disposed of) as they had in respect of the property disposed of (section [A31\(5\)](#)).
58. Where the court makes an order giving permission under section [A31\(1\)](#), the directors must, within the period of 14 days a copy of it to the registrar of companies (section [A31\(7\)](#)). Failure to do so without reasonable excuse is an offence (section [A31\(8\)](#)).

Disposal of hire-purchase property

59. Section [A30](#) will establish restrictions on the disposal of hire-purchase property. Section [A32](#) permits, with the permission of the court, the disposal of hire purchase property as if it belonged to the company subject to certain conditions.

Effect of contravention

60. A contravention of sections [A19](#) and [A25-32](#) by a company will not make any transaction void or unenforceable or affect the validity of any other thing ([s.A33](#)).

Provision of information to monitor

61. Pursuant to section [A36](#), the monitor may require the directors of the company to provide any information required by the monitor for the purpose of carrying out the monitor's functions.
62. Failure to comply with this requirement may result in the monitor being under an obligation to terminate the moratorium (section [A38](#)).

Termination of moratorium

63. The moratorium will terminate automatically upon expiry of the initial period or any extended period, but may also be terminated in the ways set out below.

Termination on entry into insolvency procedure (section A16)

64. The moratorium will terminate upon the company entering into a court-sanctioned scheme of arrangement or restructuring plan or a “*relevant insolvency procedure*”, defined in section A16(3) as being a voluntary arrangement, administration, commencement of the interim administration moratorium, or liquidation.

Termination by monitor (section A38)

65. The monitor must bring a moratorium to an end by filing a notice with the court if:
- a. the monitor thinks that the moratorium is no longer likely to result in the rescue of the company as a going concern;
 - b. the monitor thinks that the objective of rescuing the company as a going concern has been achieved;
 - c. the monitor thinks that, by reason of a failure by the directors to comply with a requirement to provide information under section A36, the monitor is unable properly to carry out the monitor’s functions; or
 - d. the monitor thinks that the company is unable to pay moratorium debts or pre-moratorium debts for which the company does not have a payment holiday during the moratorium, that have fallen due.

Termination by court (sections A42 & A44)

66. The court has the power to terminate a moratorium upon:

- a. an application by a creditor, director or member of the company or any other person affected by the moratorium made under section A42; or
- b. an application made by a creditor or member of a company made under section A44. For further detail see “Challenges” section below.

67. Section A17 sets out the obligations on directors and monitors to notify certain persons when the moratorium comes to an end. Failure to comply with those requirements without reasonable excuse will result in the director or monitor committing an offence.

The Monitor

68. The moratorium is a “debtor in possession” regime, during which the directors retain control of the company. The monitor performs a supervisory/oversight role.
69. The monitor is an officer of the court (section A34). In the original plans for the Bill, any professional could have taken the role of monitor, however (it is understood largely due to feedback from the insolvency profession) the monitor is now required to be an insolvency practitioner.
70. During a moratorium, the monitor is required to monitor the company’s affairs for the purpose of forming a view as to whether it remains likely that the moratorium will result in the rescue of the company as a going concern (section A35). An act of the monitor is valid in spite of a defect in the monitor’s appointment or qualification (section A41).
71. The monitor may apply to the court under section A37 for directions about the carrying out of the monitor’s functions.

72. The court may make an order pursuant to section A39 authorising the appointment of a qualified person to act as the monitor in relation to a moratorium instead of, or in addition to, a person who already acts as the monitor, or an order providing that a person ceases to act as the monitor. Such an application may be made only upon an application by the directors or the monitor (i.e. not by creditors or contributories) (section A39(3)).

Challenges

73. Chapter 6 establishes three forms of statutory challenge that may be made in respect of a moratorium.

Challenge re. monitor

74. Section A42 will allow a creditor, director or member of the company or any other person affected by the moratorium to apply to the court on the ground that an act, omission or decision of the monitor during a moratorium has unfairly harmed the interests of the applicant. An application under subsection may be made during the moratorium or after it has ended.
75. The court may: (a) confirm, reverse or modify any act or decision of the monitor; (b) give the monitor directions; or (c) make such other order as it thinks fit (but may not order the monitor to pay any compensation). In making an order the court must have regard to the need to safeguard the interests of persons who have dealt with the company in good faith and for value (section A42(7)).

Challenge re. remuneration

76. The monitor's fees and expenses are a contractual arrangement between the company and the monitor. However, section A43 provides that the rules may confer on an administrator or liquidator of a company the right to apply to the court on the ground that remuneration charged by the monitor in relation to a prior moratorium for the company was excessive.

Challenge re. directors

77. Section A44 will establish a right of creditors and member to apply to the court for an order on the ground that during a moratorium, the company's affairs, business and property are being or have been managed by the directors in a manner which has unfairly harmed the interests of its creditors or members generally or of some part of its creditors or members (including at least the applicant), or any actual or proposed act or omission of the directors during a moratorium causes or would cause such harm. An application may be made during the moratorium or after it has ended.
78. On an application the court may make such order as it thinks fit, including: (a) regulating the management by the directors of the company's affairs, business and property during the remainder of the moratorium; (b) requiring the directors to refrain from doing or continuing an act complained of by the applicant or to do an act which the applicant has complained they have omitted to do; (c) requiring a decision of the company's creditors to be sought (using a qualifying decision procedure) on such matters as the court may direct, or (d) bringing the moratorium to an end and make such consequential provision as the court thinks fit. In making an order the court must have regard to the need to safeguard the interests of persons who have dealt with the company in good faith and for value.

Offences

79. In addition to the new statutory offences for non-compliance by companies, directors and monitors that are referred to above, the Bill will create new freestanding offences:
- a. Section A45 will establish a new offence of fraud during or in anticipation of moratorium;
 - b. Section A46 will establish a new offence of false representation to obtain a moratorium; and
 - c. Section A47 will place obligations on the monitor where it appears that any past or present officer of the company has committed an offence in connection with the moratorium.

Contractual terms in floating charges

80. Section A50 will provide that a provision in an instrument creating a floating charge is void if it provides for the obtaining of a moratorium, or anything done with a view to obtaining a moratorium, to be:
- a. an event causing the floating charge to crystallise;
 - b. an event causing restrictions which would not otherwise apply to be imposed on the disposal of property by the company; or
 - c. a ground for the appointment of a receiver.

Conclusion

81. The proposed company moratorium places emphasis on rescue and restructure as an alternative to formal insolvency and offers a welcome new addition to the insolvency toolkit. By giving companies the necessary time and breathing space to refinance, restructure, achieve a sale of the business or enter into a scheme of arrangement, voluntary arrangement or a new restructuring plan, it is hoped that the moratorium will allow the rescue and restructure of viable companies at proportionate cost. It is likely to be utilized heavily by companies to provide a period in which to formulate CVA proposals, give notice to creditors and go through the decision procedure.
82. That being said, there is a risk that the debtor in control model of the moratorium will allow for abuse. If not properly administered, there is a risk that the moratorium could end up being used as a tool to further delay payment of creditors and to stave off inevitable entry into liquidation. It also remains to be seen whether the moratorium will offer a more cost effective (and less stigmatised) alternative to administration.

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