KIRKLAND & ELLIS

25 MAY 2020

Corporate Insolvency and Governance Bill Published

Major UK Restructuring & Insolvency Reforms Imminent

At A Glance

The UK Government published the draft Corporate Insolvency and Governance Bill on 20 May, which will implement landmark measures to improve the ability of companies to be efficiently restructured, reinvigorate UK rescue culture and support the UK's economic recovery.

It also includes temporary measures to alleviate pressure arising from the COVID-19 crisis.

Separately, the draft Finance Bill makes two changes impacting on the restructuring and insolvency market.

This analysis summarises our initial thoughts on key aspects of the Bill (and relevant parts of the Finance Bill), which may evolve as they proceed through Parliament.

Of course, early cases will be key in clarifying parameters.

The Corporate Insolvency and Governance Bill (the "**Bill**"), once enacted, will introduce:

- **Restructuring plan:** a new flexible cross-class cram-down "restructuring plan" procedure
- **Moratorium:** a new stand-alone moratorium to help business rescue
- ***Ipso facto* (termination) clauses:** measures to prevent suppliers from relying on termination clauses in contracts solely by reason of the counterparty's insolvency
- **Temporary suspension of winding up petitions, statutory demands and wrongful trading:** the temporary suspension of winding-up petitions and statutory demands where a company's inability to pay is the result of COVID-19, and temporary amendments to wrongful trading provisions — to 30 June 2020, with a power for further extensions
- **AGMs:** temporary provision for virtual AGMs and general meetings, given current restrictions on public gatherings
- **Filing requirements:** temporary provision for further extensions to filing deadlines at Companies House

We understand the Bill will now proceed through Parliament on an accelerated timetable (which leaves minimal opportunity for market comment). We understand Parliament will debate the Bill from 3 June. Exact implementation timing remains uncertain; we anticipate late June.

We welcome the reforms in the draft Bill, many of which were first announced in August 2018 (see our *Alert*) and are being fast-tracked in light of the economic impact of COVID-19.

The reforms will help ensure the UK's insolvency regime retains its world-leading position and reinvigorate UK rescue culture, while temporary measures will provide welcome breathing space through the COVID-19 emergency.

Separately, the draft **Finance Bill** provides for:

- **HMRC to rank as a preferential creditor** in respect of certain taxes
- **potential personal liability of directors for taxes** in certain circumstances involving insolvency or potential insolvency

Contents

The Corporate Insolvency and Governance Bill

KIRKLAND & ELLIS

The Game-Changer: New "Restructuring Plan"

The new, flexible procedure is modelled on schemes of arrangement, but with the key addition of cross-class cram-down — drawing inspiration from U.S. Chapter 11 proceedings.

The new plan will sit alongside schemes and company voluntary arrangements as a central tool in the UK's restructuring toolkit. Like schemes (but unlike CVAs), restructuring plans will be able to compromise dissenting **secured creditors**.

The new procedure will be inserted into the existing Companies Act 2006 — alongside, and frequently **mirroring, provisions for schemes of arrangement.** The addition of **cross-class cram-down** to impose a restructuring on dissenting stakeholders will address an often-cited limitation in the existing UK restructuring toolkit.

The plan offers the possibility of compromising **operational as well as financial creditors**, in a shift of approach for English restructuring law.

We expect the tool to play a role on **international restructurings:** non-English companies may use the new procedure, provided they have a sufficient connection to this jurisdiction. However, given restructuring procedures are now being introduced across Europe, there will likely be less need for European debtors to avail themselves of English proceedings in future. There will be no automatic recognition of plans under the European Insolvency Regulation.

The **75% approval threshold** is notably higher than the 2/3 required under US Chapter 11 proceedings or the new Dutch scheme of arrangement (both of which are also available to foreign companies).

There is **no formal provision for post-petition financing.** New funding must comply with permissions under existing debt documentation (unless of course approval for new funding is granted under the plan itself). However, we understand the Government is considering the introduction of additional debtor-in-possession financing provisions in due course.

OUTLINE

RELEVANT ANNEXES

- Annex A: comparison of the new restructuring plan against existing English restructuring processes
- Annex B: comparison of the new restructuring plan against US Chapter 11 proceedings
- Annex C: indicative timeline

The Game-Changer: New "Restructuring Plan" (cont.)

Financial Condition

The company must have encountered, or be likely to encounter, financial difficulties that are affecting (or will or may affect) its ability to carry on business as a going concern. The company need not be insolvent to propose a plan.

Eligibility

Eligibility for the new framework will mirror that for schemes of arrangement, i.e., turn on whether the company has a "sufficient connection" to this jurisdiction[1], and not necessarily require the company to have its centre of main interests here. There is a power for secondary legislation to exclude certain companies, such as those providing financial services.

Who May Propose a Plan?

As with schemes of arrangement:

- the company, any creditor or shareholder (or a liquidator or administrator) may apply to court to convene meetings to vote on a plan; but
- in practice, we expect the vast majority of plans to be proposed by the company.

Content of Plan

The restructuring plan is designed to be extremely flexible. The plan need simply have the purpose of eliminating / reducing / preventing / mitigating the effect of the company's financial difficulties (actual or likely). We expect this broad test to be simple to satisfy in practice.

The procedure will be able to facilitate a wide range of potential restructurings, including, e.g., "amend & extend" transactions, debt for equity swaps[2], change of management etc.

Process

Procedure will broadly mirror that of schemes of arrangement:

- plan proponent formulates proposals for a restructuring plan and stakeholder classes, and applies to court for convening hearing
- convening hearing, at which the court may convene stakeholder meetings
- notice of stakeholder meetings and explanatory statement
- stakeholders vote
- sanction hearing, at which the court may sanction the plan

Annex C provides an indicative timeline.

Court Involvement

As with a scheme:

- the court's involvement will safeguard stakeholders' rights; and
- the court will have absolute discretion as to whether to confirm a plan.

1. A narrower definition applies to separate powers for the court to facilitate reconstruction or amalgamation (the provisions of which are beyond the scope of this deck), which apply only to companies incorporated under the Companies Act.
2. The Bill inserts a special exception to pre-emption rights for an allotment of shares carried out as part of a plan.

The Game-Changer: New "Restructuring Plan" (cont.)

Voting

Who can vote?

- Every creditor or shareholder whose rights are affected by the plan must be permitted to vote.
  - This potentially includes non-financial creditors, e.g., trade creditors, if their rights are affected by the plan.
  - This raises questions as to how broadly courts will interpret the question of stakeholders' rights being "affected" by the plan.
  - We expect the court to focus on whether or not stakeholders' strict legal rights are affected, rather than broader commercial interests.
- However, an application can be made to exclude classes of creditors/shareholders from voting where the court is satisfied that "none of the members of that class has a **genuine economic interest** in the company".
  - This raises issues as to when stakeholders will held to have a "genuine economic interest" — which of course may differ depending on competing valuations.
  - There is long-standing authority that "out of the money" creditors need not be invited to vote on a scheme of arrangement; we expect courts to draw on that in interpreting this provision.
  - We expect the court to evaluate the interests of members of the class in that capacity, rather than taking account of, e.g., cross-holdings for the purposes of this test.

Class constitution

- Stakeholders will vote on the company's proposed plan in separate classes.
- Class constitution provisions closely resemble those for schemes of arrangement.
- Accordingly, we expect the court to apply the same test when determining class constitution: stakeholders should vote in the same class where their rights are "not so dissimilar as to make it impossible for them to consult together with a view to their common interest".
- Again, this involves examining parties' strict legal rights, rather than broader commercial interests.

Voting threshold

- For a class of stakeholders to approve the plan, at least 75% in value, of those voting, must vote in favour.
- Crucially, the plan may still be confirmed by the court even where certain classes do not vote in favour — see next page.
- Unlike a scheme of arrangement, there is no requirement for a majority in number to vote in favour.
- Contrary to earlier indications, there is no sub-test requiring a particular proportion of unconnected creditors to approve the plan (as in a CVA).

Special cases: Different rules apply:

- where a moratorium has been in place within the preceding 12 weeks (in which case, essentially, creditors in respect of moratorium debts, or in respect of pre-moratorium debts for which the company has not had a payment holiday, may not participate in the vote); and
- in cases involving registered aircraft-related interests.

The Game-Changer: New "Restructuring Plan" (cont.)

Cross-Class Cram-Down

Crucially, the plan may still be confirmed by the court even where one or more classes do not vote in favour, provided:

- the court is satisfied that none of the members of the dissenting class(es) would be any worse off under the plan than they would be in the event of the "relevant alternative"
  - the "relevant alternative" is whatever the court considers would be most likely to occur if the plan were not confirmed — which is akin to the assessment the court undertakes when considering a scheme of arrangement, and gives the court wide discretion as to the appropriate comparator; and
- at least one class (whether creditors or shareholders) who would receive a payment, or have a genuine economic interest in the company, in the event of the relevant alternative, has voted in favour.

Clearly, determining the appropriate "relevant alternative" — and valuing stakeholders' realisations in that scenario — will be critical. The appropriate alternate comparator will depend on the facts of the case.

The court may be asked to consider different potential alternatives and conclude which is most likely, and then to consider valuation evidence in that scenario.

Earlier hints of using certain Chapter 11-inspired terms, e.g., a modified version of the absolute priority rule[1], or requiring at least one "impaired class" to vote in favour, do not appear in the draft Bill.

This offers much greater flexibility for a potential plan – but also places significant responsibility on the court to consider fairness of the plan, when deciding whether to sanction it.

This aspect of the reforms has the potential to engage the English courts in determining valuation disputes akin to those seen in Chapter 11 proceedings, but which have rarely been seen under English law to date.

Early cases will be critical to determine the parameters of these provisions.

See further "Leverage Points".

1. Seen in Chapter 11, the absolute priority rule requires a dissenting class of stakeholders to be satisfied in full before a more junior class may receive any distribution or keep any interest under the plan (subject to exceptions). Adaptations that had been mooted for use under the new English plan included exceptions where necessary to achieve the aims of the restructuring and just and equitable in the circumstances.

The Game-Changer: New “Restructuring Plan” (cont.)

Third Party Releases

There is no express provision in the Bill permitting the release of claims against third parties under a plan.

However, it is well-established in the context of schemes of arrangement that the court has jurisdiction to sanction arrangements releasing not only claims against guarantors and claims closely connected to scheme creditors, but also more broadly, e.g., potential claims against advisors involved in the scheme (provided the relevant claim to be released is not merely tangential to the scheme).

As a starting point, we expect the English court to accept it has a similar level of jurisdiction in respect of a proposed restructuring plan.

Cross-Border Recognition

Recognition of the plan in other jurisdictions may be a major issue in practice. Unlike in US Chapter 11, there is no express provision for the English court’s orders to have extra-territorial effect.

There will be no automatic recognition of the plan under the European Insolvency Regulation.

Effectiveness depends on national law in each relevant jurisdiction and (generally) is likely to be easier to obtain where the company’s centre of main interests is here.

Other jurisdictions may be more likely to grant recognition for a plan than a scheme of arrangement, given the requirement for the company to be experiencing financial difficulties (which — even though the plan sits within the Companies Act — may prompt other jurisdictions to consider it as something closer to an insolvency proceeding).

As with schemes, we expect the court to require evidence as to the likelihood of recognition of the plan in all key jurisdictions (e.g., jurisdiction of incorporation of the company (where non-UK), jurisdiction of incorporation of guarantors, governing law of debt, jurisdictions where key assets are located).

Tax

The Bill also contains consequential amendments to UK tax legislation which, amongst other things, should mean that any (accounting) income arising as a result of the release of debts under the new restructuring plan process will qualify for certain UK tax exemptions in the same way as debt released in, for example, a CVA or administration.

New “Restructuring Plan”: Leverage Points

INTRODUCTION

Naturally, stakeholders’ leverage will depend hugely on the circumstances, and certain battlegrounds will emerge only once the new restructuring plan is implemented and road-tested.

Following are initial thoughts on aspects of the plan which offer the greatest scope for parties to exercise leverage. Of course, the court retains absolute discretion as to whether to confirm a plan.

Stakeholder Identification and Class Composition

A plan may compromise operational creditors such as landlords and suppliers, as well as financial creditors. This raises the prospect of wider-ranging restructurings than the (often wholly-financial) restructurings previously seen under English law – representing a step closer to US Chapter 11. It is for the plan proponent to determine whose rights should be affected by the plan.

We expect English courts to draw on existing case law for schemes of arrangement in determining whether the plan proponent’s proposed class composition is appropriate, by focussing on stakeholders’ strict legal rights to be affected by the plan, and the new rights to which they will become entitled under the plan.

In schemes, the modern trend is to resist any tendency to increase the number of classes, for fear that fragmenting creditors into multiple classes gives each class an (unwarranted) power to veto the scheme. This will be less relevant under the new restructuring plan procedure, as the provision for cross-class cram-down means a separate class will no longer have a right of veto. If anything, it may be in the plan proponent’s interests to fracture classes more readily, to increase chances of at least one class approving the plan.

We expect the court to consider any collateral interests or motivations stakeholders may have when it considers whether to sanction the plan.

The plan need not be put to a class of creditors/shareholders if the court is satisfied that none of the members of that class has a genuine economic interest in the company. This raises the prospect of debate as to whether a class does have such an interest. Although cross-class cram-down provisions enable the company to compromise dissenting classes, it is clear the company need not even allow junior classes, e.g., out-of-the-money shareholders to vote if they do not have a “genuine economic interest” in the company.

(We expect the court to evaluate the interests of members of the class in that capacity, rather than taking account of cross-holdings for the purposes of this test.)

New “Restructuring Plan”: Leverage Points (cont.)

Cross-Class Cram-Down

This represents a ground-breaking change in the English restructuring & insolvency toolkit.

We anticipate these provisions will offer the greatest degree of potential leverage for the company and its stakeholders (and the greatest scope for potential challenges).

- Has at least one class that would receive a payment, or have a genuine economic interest in the company, in the event of the relevant alternative, voted in favour of the plan?
- This will require the court to consider whether or not the plan proponent’s suggested “relevant alternative” is appropriate and consider valuation evidence — and potentially competing valuations — to determine which class(es) would receive a payment / have a genuine economic in the appropriate alternative scenario.
- **The provisions potentially allow, e.g., senior creditors to compromise / ”flush” junior creditors without the senior class themselves being materially compromised by the plan** — in contrast to the (somewhat-criticised) requirement for an “impaired class” in Chapter 11.
- **There is no express requirement for a plan to respect the established stakeholder hierarchy** (i.e., provide greater recoveries(/post-plan rights) for senior classes than junior classes).
- **Cram-up? The provisions theoretically allow the court to approve a plan which is approved by, e.g., junior creditors, but not senior creditors** (provided senior creditors receive at least what they would in the relevant alternative, and the juniors would also have recovered something in that scenario).
- We nonetheless expect the court to scrutinise the overall fairness and reasonableness of the proposed plan when considering whether to exercise its power of sanction.

New “Restructuring Plan”: Leverage Points (cont.)

Engineering Jurisdiction

TBC whether / to what extent foreign companies will be able to engineer the “sufficient connection” required for eligibility for the new plan.

Historically, many companies have, e.g., shifted their centre of main interests to the UK, or incorporated an English co-borrower, specifically in order to propose a scheme of arrangement (or CVA / administration). This is especially so where the debtor’s home jurisdiction lacked a viable restructuring procedure. As a starting point, we expect the court to accept forum selection of this kind for the new procedure — subject to the same considerations as for schemes of arrangement.

However, as noted, given restructuring procedures are now being introduced across Europe, there may be less need for European debtors to avail themselves of English proceedings in future.

Formulation of Plan and Garnering Support

Given disclosure requirements, we expect the vast majority of plans to be proposed by the company itself (rather than a creditor or shareholder). As noted, the restructuring plan is designed to be extremely flexible, enabling a wide variety of possible restructuring measures — and it is for the plan proponent to determine exactly what restructuring terms get put to the vote.

We expect companies to seek support for their proposed plan in advance of formally launching it — as reflected in current market practice in seeking lock-up agreements prior to launch of schemes of arrangement / other restructuring processes.

Enforcement of Security

The company may or may not file for the stand-alone moratorium in parallel with proposing a plan (subject to eligibility, which notably excludes any company party to a capital markets arrangement — see page 14).

However, even if the company does obtain a moratorium, the initial period is short and there are key exceptions to the moratorium, including the enforcement of financial collateral arrangements — including, e.g., security over shares. This represents a major potential leverage point for secured creditors with a qualifying financial collateral arrangement.

Funding

There is no specific provision for debtor-in-possession funding. Where a company requires additional liquidity through the process, this will need to be approached in the usual way by assessing assets available for security and whether any permissions should be sought to create additional capacity / consent to new security, etc.

We expect in practice existing senior creditors will be likely to seek to fund the process themselves.

“Hold the Ring”: New Moratorium

A new, stand-alone moratorium will prevent creditors from taking enforcement action, to allow the company a formal breathing space to propose and pursue a rescue plan.

The moratorium provides a payment holiday for certain types of pre-moratorium debts as well as post-moratorium debts.

We are concerned that the payment holiday in respect of bank facilities is very limited, and that the broad capital markets exclusions (as drafted) will render bond issuers ineligible for the moratorium.

Additional Comments

- Certain of the moratorium conditions are temporarily eased during the COVID-19 emergency.[1]
- The initial duration of the moratorium — 20 business days — will be extremely tight, if not impossible, to negotiate a substantive restructuring.
- The moratorium is only available where it is (and remains) likely that the moratorium will result in the rescue of the company as a going concern. The availability of the new restructuring plan increases the probability of rescue of the company itself going forward — but we still consider this a **high bar to satisfy in practice**.
- Provisions as to enforcement of security granted during the moratorium (with the monitor’s consent) appear unclear.

1. Until 30 June 2020 or one month following the entry into force of the Bill (subject to possible extension of up to six months), e.g., companies may file for a moratorium even where they are subject to an outstanding winding up petition (without needing to apply to court, as will be usual thereafter); the usual condition that the moratorium be “likely to result in the rescue of the company as a going concern” is relaxed, by providing for the ability to disregard any worsening of the company’s financial position for reasons relating to the coronavirus; companies will not be ineligible for a moratorium on the grounds that they have been subject to an recent insolvency procedure.

OUTLINE

RELEVANT ANNEXES

- Annex D: New Creditor Hierarchy

“Hold the Ring”: New Moratorium (cont.)

Eligibility

- **Financial condition and prospect of rescue:** The moratorium will be available to companies that are, or are likely to become, unable to pay their debts.[1]

  A statement from a licensed insolvency practitioner — who serves as a “monitor” — is required, stating that, in their view, it is likely that the moratorium would result in the rescue of the company as a going concern (and that the company is eligible for the moratorium, among other matters). This is a high test to satisfy, especially given the inherent uncertainty of restructuring / insolvency cases, which is further exacerbated in the current market.

- **Exclusions:** Certain companies are excluded e.g., those subject to a current or recent insolvency proceeding (within the past 12 months), certain financial institutions and any company that is party to a **capital market arrangement.**

  This is defined to include arrangements >£10m which involve a party providing security to a trustee/agent, or guaranteeing (or providing security in respect of) the performance of obligations of another party, under a capital market investment (including rated / listed bonds).

- **The effect of this wide carve-out is to exclude numerous businesses which have bond financings – which includes many businesses in the retail, hospitality & consumer-facing sectors, most/all of whom face unprecedented challenges as a result of COVID-19.**

- **Overseas companies:** The moratorium is also available for overseas companies, upon application to court.[2]

Commencement and Court Involvement

Generally, eligible companies can initiate the moratorium simply by filing the relevant documents with the court.

If the company is subject to an outstanding winding up petition, the directors must instead apply to court to make a moratorium order.[3]

If the company is an overseas company, it must seek a court order for the moratorium.

The process will otherwise occur out of court (unless a court order is sought for extension).

1. This represents a welcome shift from the proposals announced in 2018, which envisaged the moratorium would be available only to companies which were ***not*** already insolvent (but were instead in a state of “prospective insolvency”) and which had sufficient funds to meet their current obligations and those falling due throughout the moratorium. It was widely recognised in the market that these eligibility criteria — if pursued — would have rendered the moratorium unworkable.
2. Eligibility conditions apply as for the winding up of unregistered companies; this includes a requirement that the company must have a “sufficient connection” with England and Wales.
3. The order can only be granted if the court is satisfied that a moratorium for the company would achieve a better result for creditors (as a whole) than would be likely if the company were wound up (without first being subject to a moratorium).

“Hold the Ring”: New Moratorium (cont.)

Scope

The moratorium will affect both secured and unsecured creditors, such that (amongst other things, and subject to certain exceptions):

- restrictions apply to the payment or enforcement of certain “pre-moratorium debts” and “moratorium debts” (see next page), for which a company has a payment holiday during the moratorium;
- no winding up petition may be presented or winding up order made;
- no administration may be commenced; and
- except with court permission (which cannot be sought to enforce a pre-moratorium debt for which the company has a payment holiday):
  - no steps may be taken to enforce security - with an important exception for the enforcement of financial collateral arrangements, such as security over shares;
  - no proceedings/legal process may be commenced or continued against the company or its property;
  - no floating charge may be crystallised by the floating charge-holder[1];
  - no landlord may exercise any forfeiture rights; and
  - no steps may be taken to repossess goods under any hire-purchase agreement.

1. Provisions in floating charges which provide for crystallisation or limitations on disposals of assets upon a moratorium (or the company taking preparatory steps for a moratorium) will be void.

“Hold the Ring”: New Moratorium (cont.)

Meaning of “Pre-Moratorium Debts” and “Moratorium Debts”

Moratorium debts, and pre-moratorium debts for which the company has a payment holiday during the moratorium, consist of amounts that fall due before or during the moratorium[1], **except** amounts payable in respect of:

- debts / liabilities arising under a contract / instrument involving financial services — which is defined to include:
  - contracts “for the provision of financial services consisting of lending” (among other things) – including bank facilities
  - capital market arrangements — unhelpfully, the drafting appears to capture any arrangement involving a guarantee or grant of security by a party for another’s obligations — irrespective of whether the arrangement actually relates to a “capital market investment”. We fear this cannot be what is intended
  - any contract secured by a financial collateral arrangement
- goods / services supplied during the moratorium
- rent in respect of a period during the moratorium
- wages / salary / redundancy payments
- the monitor’s remuneration / expenses (but only from commencement of the moratorium)

What Happens to Pre-Moratorium Debts and Moratorium Debts?

During the moratorium, because the company does not have a payment holiday in respect of such debts:

- such amounts *may* be paid without the consent of the monitor (or the court)
- such amounts *must* be paid as a condition to most extensions[2]
- creditors in respect of such amounts may seek court permission to enforce their rights in respect of such debts (see previous page)

This effectively means that the company will need to repay the specified categories of such debts in most cases[2], where the moratorium extends beyond the initial period of 20 business days.

This severely limits the breathing space offered by the moratorium in practice.

1. Or referable to obligations incurred in those periods.
2. Except where the extension is triggered by a CVA proposal or restructuring plan / scheme of arrangement — see next page.

“Hold the Ring”: New Moratorium (cont.)

Duration and Extension

The initial moratorium period will be 20 business days. The moratorium can be extended in the following circumstances.

	EXTENSION BY DIRECTORS; NO CREDITOR CONSENT	EXTENSION BY DIRECTORS; WITH CREDITOR CONSENT	EXTENSION BY COURT ON APPLICATION OF DIRECTORS	EXTENSION WHILE CVA PROPOSAL PENDING	EXTENSION BY COURT WITHIN SCHEME / RESTRUCTURING PLAN
Period	20 business days after initial period ends	Max one year after initial period ends; possibility of multiple extensions	No max. period; possibility of multiple extensions	Until date on which the CVA is “disposed of”[1] (Moratorium terminates upon CVA taking effect)	Until such date as court orders (Moratorium terminates upon court sanction of scheme / restructuring plan)
Conditions	► Directors state that all moratorium debts, and all “pre-moratorium debts” for which the company does not have a payment holiday, have been paid / discharged during the moratorium ► Directors state company is / is likely to become unable to pay its pre-moratorium debts ► Monitor states it is likely that the moratorium will result in rescue of company as a going concern (together, the **Qualifying Conditions**)	Qualifying Conditions, plus consent of pre-moratorium creditors via a qualifying decision procedure[2] (and director statement that the requisite creditor consent has been obtained)	Qualifying Conditions, plus statement from directors as to whether pre-moratorium creditors have been consulted on the application (and if not, why not) Court will consider interests of pre-moratorium creditors and likelihood that extension will result in company’s rescue as a going concern	Automatic where directors make a CVA proposal	Court has discretion to order extension of moratorium where the company applies for order to convene meetings in respect of a scheme of arrangement or restructuring plan

1. I.e., the CVA is approved and takes effect; the CVA proposal is withdrawn; both the creditors’ and shareholders’ decisions reject the CVA proposal; or the creditors’ and shareholders’ decisions differ and the period for an application to court (essentially, asking the court to determine whether to approve or set aside the CVA) expires without an application (or such an application is brought but withdrawn / disposed of).
2. Requisite consent threshold: majority (in value) of secured pre-moratorium creditors **and** majority (in value) of unsecured pre-moratorium creditors — but vote fails if majority of unconnected secured creditors, or unconnected unsecured creditors, vote against the extension.

“Hold the Ring”: New Moratorium (cont.)

Termination

The moratorium will terminate:

- at the end of the moratorium period, unless extended (see previous page);
- if a restructuring plan or scheme of arrangement is sanctioned, or a CVA takes effect;
- if the company enters administration (or files a notice of intention to do so, or an administration application is pending) or enters liquidation; or
- if terminated by the monitor, if the monitor thinks:
  - the moratorium is no longer likely to result in the rescue of the company as a going concern;
  - the rescue objective has been achieved;
  - the monitor is unable to carry out their functions; or
  - the company is unable to pay certain debts that have fallen due.

Notice and Publicity

All known creditors, and Companies House, must receive notice of the moratorium coming into force, any extension, and termination. The moratorium must be publicised, including on the company’s website and at any business premises to which customers or suppliers have access.

Power to Dispose of Secured Property

With the court’s permission, the company may dispose of secured property during the moratorium (as if it were unsecured). The court may only grant permission where it considers it will support the rescue of the company as a going concern. Protections apply as to the application of proceeds of sale in favour of the secured creditors.

“Hold the Ring”: New Moratorium (cont.)

Role of Monitor

A licensed insolvency practitioner must serve as “monitor” during the moratorium to protect creditors’ interests, in the ways listed below. The directors otherwise continue to run the business.

- **Eligibility:** The monitor must verify, at the outset, that the company is eligible for the moratorium.
- **Prospect of rescue:** The monitor must verify that it is likely that the moratorium would result in the rescue of the company as a going concern. (This must be stated at the outset of the moratorium and as a condition to most[1] extensions, and the monitor must terminate the moratorium if they consider the condition is no longer met.)
- **Monitor’s consent required for certain transactions**: including the following, to which the monitor may consent only if they consider doing so will support the rescue of the company as a going concern:
  - grant of new security;
  - payment of certain pre-moratorium debts (over £5,000 or 1% of the company’s unsecured liabilities, whichever is greater); and
  - disposal of any asset outside the ordinary course of business.
- **Power to request information:** The monitor has a broad power to request information from directors (which directors are required to provide).
- **Duty to report directors** if monitor considers they have committed an offence (see “New sanctions”).
- **Officer of the court:** The monitor is an officer of the court, which means they owe duties to the court and the administration of justice.
- **Power of termination**: as noted on previous page.

1. Except where the extension is triggered by a CVA proposal or restructuring plan / scheme of arrangement — see this chart.

“Hold the Ring”: New Moratorium (cont.)

Stakeholder Protections

These include:

- **Safeguards derived from the monitor’s role:** see previous page
- **Wide exceptions to payment holiday:** i.e., expect company to pay for goods/services, rent etc. in respect of the moratorium period — see this page
- **Priority for moratorium debts on subsequent liquidation:** super-priority for unpaid moratorium debts, and unpaid pre-moratorium debts that the company was required to pay during the moratorium, where winding up proceedings are begun within 12 weeks following termination of moratorium — see Annex D
- **Limitations on extensions:** e.g., requirement for (a) moratorium debts and (b) pre-moratorium debts for which the company does not have a payment holiday, to be discharged as a condition to extension
- **Restrictions on obtaining credit:** during the moratorium, the company may not obtain credit[1] ≥£500 unless the person extending the credit has been informed that a moratorium is in force — reducing the likelihood of the company incurring additional debts, and ensuring new prospective creditors only extend credit with their “eyes open” to the moratorium, not inadvertently
- **Right to challenge:**
  - right to challenge monitor’s or directors’ actions on the grounds of (actual or prospective) “unfair harm” to the applicant
  - potential right for a subsequent administrator / liquidator to challenge monitor’s remuneration as excessive (if so provided by secondary legislation)
- **Safeguards for the enforcement of financial collateral arrangements**
- **New sanctions** to deter abuse of the moratorium by dishonest / reckless directors, e.g., new offence of concealing or fraudulently removing company property or concealing information (during or in the 12 months prior to the moratorium)

1. This expressly includes trade credit where the company is paid in advance for the supply of goods or services.

Continuity of Supplies: Restrictions on *Ipso Facto* Clauses

When a company enters an insolvency or restructuring procedure, suppliers often either stop or threaten to stop supplying the company, which can jeopardise attempts to rescue the business.

New rules will extend the UK's existing "essential supplies" regime[1] to prohibit the enforcement of so-called *ipso facto* clauses — i.e., clauses allowing one party to a contract to terminate solely on the basis of the insolvency of the counterparty — in contracts for the supply of goods or services.

The proposals include safeguards, e.g., a supplier can be relieved of the requirement to supply if it causes hardship to its business. There is also a temporary exemption for small company suppliers during the COVID-19 emergency.

Overriding contractual termination provisions in this way represents a marked change from the usual approach in English law, which is to uphold parties' freedom of contract.

This draws inspiration from U.S. Chapter 11 proceedings and is designed to preserve a business's operational capabilities (and, by extension, value for stakeholders) through a restructuring.

Critically, however, the UK proposals cover only supplier arrangements, not general commercial contracts. This is a significant divergence from the U.S. (and Australian) regimes, and appears to be policy-based.

Protected Contracts / Exclusions

The new regime will prohibit reliance on *ipso facto* clauses in contracts for the supply of goods and services.

Exceptions expressly carve out financial services contracts and persons involved in financial services.

As a result, the new rule will not apply, e.g., to an RCF agreement so as to require lenders to continue to "supply" (i.e., fund commitments under) the RCF – i.e., draw-stops based on insolvency events of default will continue in force.

Grounds Restricted

The rules restrict termination not only on the grounds of existing UK insolvency proceedings, but also the new restructuring plan procedure and the new moratorium.

The rules do not restrict termination clauses triggered by a scheme of arrangement.

The rules also restrict termination on the grounds of pre-existing termination rights which arose (but were not exercised) before the insolvency trigger event.

1. Under sections 233 and 233A Insolvency Act 1986, which preserve continuity of supplies only of essential services (such as electricity, water and IT services).

Continuity of Supplies: Restrictions on *Ipso Facto* Clauses (cont.)

Actions Restricted

The rules restrict not only termination of the contract, but also termination of the supply.

The supplier may not make payment of outstanding amounts (in respect of supplies made prior to the insolvency trigger) a condition of continuing supply.

The rules also include anti-avoidance provisions to restrict reliance on a provision allowing the supplier to "do any other thing" because of the insolvency trigger – e.g., to increase pricing or require payment on delivery (which would of course exacerbate liquidity issues).

Supplier Protections

The supplier may terminate the contract if the relevant insolvency officeholder (or company) consents. As a safeguard of last resort, suppliers can apply to court to be relieved of the requirement to supply if it causes financial hardship to their business.

There is also a temporary exemption for small company suppliers during the COVID-19 emergency.

Termination on Other Grounds Remains Possible

In contrast to the position under Chapter 11, suppliers will retain the ability to terminate contracts on any other ground permitted by the contract – *except* where the ground had already arisen prior to the insolvency trigger.

This could permit termination, e.g.:

- based upon a condition relating to the counterparty's financial condition (provided that the relevant ground had not already arisen prior to the insolvency trigger);
- for non-payment of supplies made following the insolvency trigger[1];
- upon notice; or
- for breach of the underlying contract.

Suppliers Only — Not Customers

The restrictions apply only to suppliers; they do not prevent customers taking their business elsewhere.

No Transitional Provisions

The reforms capture existing and new contracts; no transitional provisions.[2]

Practical Considerations on a Restructuring

Where a restructuring involves a transfer of Oldco's business/assets to Newco (e.g., via a pre-pack administration, restructuring plan, or otherwise), these provisions do not compel suppliers to agree to supply Newco. A transitional services agreement might assist in the interim in such cases.

1. NB the supplier cannot make payment of outstanding amounts in respect of supplies made *prior* to the insolvency trigger a condition of continuing supply – as noted.
2. Although the Bill does provide a power for the Secretary of State to make transitional provisions under the Bill.

COVID-19 Breathing Space: Temporary Safeguards

Temporary ban on statutory demands and winding up orders where a company cannot pay its bills owing to coronavirus

The Bill will enact a temporary measure — first announced on 23 April — to safeguard companies against debt recovery actions during the COVID-19 pandemic, and allow companies opportunity to reach agreements with the wider body of creditors.

Overview

- The Bill temporarily voids statutory demands issued against companies during the COVID-19 emergency.
- A creditor may only present a winding up petition where the creditor has "reasonable grounds" to believe that either:
  - coronavirus has not had a "financial effect" on the company (i.e., company's financial position worsens in consequence of, or for reasons relating to, coronavirus – a notably low threshold); or
  - the relevant insolvency condition — e.g., cash flow or balance sheet insolvency — would have arisen anyway, irrespective of the financial effect of coronavirus on the company.
- Even where such a winding up petition is presented, the Bill imposes restrictions on the court's jurisdiction to make a winding up order.[1]
- We envisage it will be difficult in practice for the court to determine whether or not the company's state of insolvency would have arisen anyway, absent the effects of coronavirus.

Scope

When announced, this measure was expressed to be about protecting commercial tenants from landlords, "to ensure the minority of landlords using aggressive tactics to collect their rent can no longer do so while the COVID-19 emergency continues". However, the draft legislation applies to all companies (not only tenants) and winding up petitions brought by any creditor (not only landlords).

Timing

This suspension will apply to winding-up petitions presented from 27 April to 30 June, and to statutory demands made between 1 March and 30 June — in each case, subject to possible extension.

"CRAR"

The Government has announced plans to enact secondary legislation to prevent landlords using commercial rent arrears recovery (CRAR) unless at least 90 days of unpaid rent is owed.

Impact

- This measure will provide much-needed breathing space for many UK businesses, whilst increasing pressure on companies' landlords and other creditors (and their respective financial obligations).
- However, the legislation leaves open other potential avenues of recourse for landlords, such as drawing on rent deposits, making demands under guarantees, or pursuing an administration application (in court).
- It will be interesting to see whether this measure might be lifted in multiple phases, with different dates for different sectors, in accordance with the phased lifting currently envisaged for lockdown restrictions.

1. Specifically, where (i) a petition has been presented; and (ii) the company is deemed unable to pay its debts; but (iii) it appears to the court that coronavirus had a financial effect on the company (pre-petition), the court may only make a winding up order if satisfied that the ground on which the company is deemed unable to pay its debts "would have arisen even if coronavirus had not had a financial effect on the company".

COVID-19 Breathing Space: Temporary Safeguards (cont.)

Temporary amendments to liability for wrongful trading

Wrongful trading rules provide for potential personal liability for directors where a company has entered insolvent administration or liquidation and the director already knew (or ought to have concluded) there was no reasonable prospect of avoiding such proceedings, unless (in the interim) they took every step to minimise potential losses to creditors.

The Bill temporarily amends wrongful trading provisions to discount potential liability for directors for any worsening of the company's financial position in the period between 1 March and 30 June 2020 (subject to extension).

Plans to amend wrongful trading provisions were originally announced on 28 March. However, this is not the complete "switch off" of wrongful trading provisions that many in the market had anticipated, based on the Government's announcements.

Nonetheless, the amendment offers welcome breathing space for directors to continue to trade through the current market dislocation.

Notably, the change does not apply to certain excluded companies, including parties to capital markets arrangements. For these purposes, the £10m threshold (applicable for eligibility for the moratorium) does not apply — i.e., **wrongful trading provisions are not suspended for companies which are party to any qualifying capital market arrangement** (broadly defined).

This is a major exception for companies (and directors) who may have been operating on the basis that wrongful trading provisions had already been switched off — given the Government announced that this provision would be back-dated to 1 March.

The amendment does not alter other rules of law which protect stakeholders from directors' conduct, including the general duty of directors to promote the success of the company (including taking into account creditors' interests in the "zone of insolvency") as well as rules on fraudulent trading, misfeasance and transactions defrauding creditors.

AGMs and Filing Deadlines

The Bill also includes temporary provisions designed to ease corporate governance pressures on companies in the current, COVID-19-impacted, market.

General Meetings

Given current restrictions on public gatherings, the Bill temporarily allows UK companies that are under a legal duty to hold an AGM or GM to hold a meeting by other means (including by way of "virtual only" meetings), even if their constitution would not normally allow it.

Specifically, shareholders retain the right to vote at any such meeting, but they do not have the right to attend in person, to participate beyond voting or to vote by any particular means.

These relaxations are backdated, so as to apply to any meeting held from 26 March 2020 until 30 September 2020 (subject to amendment).

Further, companies under a duty to hold an AGM at some point during the period of 26 March 2020 to 30 September 2020 are granted the ability to delay their AGM until the end of that period (subject to possible further extension).

This provision will provide comfort to companies who have already postponed AGMs (which were due to be held on or after 26 March) in anticipation of this legislation coming into force, and will allow them a limited period after the Bill is passed to hold their AGMs using the new flexibilities outlined above.

Filing Requirements

UK companies are required to make various filings by fixed deadlines at Companies House each year. Missing the deadline automatically results in a financial penalty (and can technically result in criminal liability in certain cases).

Companies House has already made arrangements for UK companies to apply for a three month extension to their accounts filing deadline (if they are unable to meet that deadline owing to COVID-19). Over 50,000 companies have taken advantage of this flexibility already.

The Bill seeks to offer additional flexibility by:

- granting public companies an automatic, immediate extension to the deadline by which they must file their accounts and reports with Companies House (where such accounts are required to be filed on a date that occurs between 25 March 2020 and 30 September 2020); and
- providing the Secretary of State with the power to make further extensions to certain key filing deadlines at Companies House--which includes the deadline for private companies to file their reports and accounts.

Finance Bill Measures: Two Important Reforms for the UK Restructuring / Insolvency Market

Timing: The Finance Bill is currently making its way through Parliament and is not expected to become law before July 2020.

HMRC as Preferential Creditor

Essence of reform

HMRC will become a secondary preferential creditor for debts in respect of VAT and other "relevant deductions", from 1 December 2020.[1] It remains possible that this measure may be deferred given the current market.

Details

On the face of the Finance Bill, historic tax debts will be included, without time limit or cap. However, the Finance Bill permits the Treasury to enact secondary legislation to specify a reference period, such that only amounts referable to that period will rank as a secondary preferential debt.[2]

Secondary legislation will specify what qualifies as a "relevant deduction". This is expected to include PAYE income tax, employee national insurance contributions, student loan deductions and construction industry scheme deductions.

Other considerations:

- Penalties and interest will not form part of HMRC's preferential claim.
- The measure will have no effect on insolvency proceedings commencing before 1 December 2020.
- HMRC's preferential status will apply over all floating charges, whether created before or after December 2020.
- The new creditor hierarchy is summarised in Annex D.

Impact

The controversial reintroduction of HMRC's priority status (last seen in 2003) is expected to reduce returns for floating charge and unsecured creditors.

In turn, this may reduce appetite for lending and increase funding costs for UK companies, and lead to greater recourse to fixed charge and asset-based lending.

There is also concern that the proposed reform will give HMRC too much influence in insolvency processes. For example, the use of a company voluntary arrangement to compromise HMRC will become substantially more difficult, given constraints on compromising preferential debts within a CVA unless the preferential creditor consents.[3] The government has attempted to address these concerns, but it is clear HMRC's interests may not be aligned with those of other creditors and it may now hold a de facto veto in certain scenarios.

HMRC will still share in the prescribed part (set aside from floating charge realisations for unsecured creditors) in respect of their non-preferential claims (e.g., for corporation tax) — effectively giving HMRC a second bite at the cherry.

1. Section 95, Finance Bill 2020.
2. Section 96, Finance Bill 2020.
3. Section 4(4) Insolvency Act 1986.

Risk of Directors' Liability in "Tax Abuse" Cases

Essence of reform

Directors may be held personally liable for a company's tax liabilities where HMRC considers that avoidance or evasion has taken place, or where they have evidence of "phoenixism".[1] The measure aims to ensure that genuine insolvencies are not caught, with the added safeguard of an appeal right.

Details

Individuals may be held jointly and severally liable for amounts due to HMRC, in certain cases of:

- tax avoidance or tax-evasive conduct, where the company engaging in the conduct in question is subject to an insolvency procedure (or there is a serious possibility of it becoming so);
- repeated insolvency and non-payment; and
- cases involving a penalty for facilitating tax avoidance or evasion, where the company is subject to an insolvency procedure (or there is a serious possibility of it becoming so).[2]

Further details are provided in Annex E.

Historic tax liabilities[3] and penalties[4] (i.e., those arising before the date the Finance Bill is passed) will fall outside the scope of the legislation.

The government is clear that the majority of insolvencies arise as a consequence of genuine financial difficulties, and that this reform is targeted at the minority that seek to misuse insolvency to avoid meeting their tax liabilities. Nonetheless, these measures will increase the pressure on those running distressed companies, and tax diligence expectations, at what is already a difficult time for all involved.

1. "Phoenixism" is the practice of running up liabilities in a limited liability entity, then avoiding paying them by making the company insolvent — and setting up a new company carrying on broadly the same business (often to repeat the practice).
2. Section 97 and Schedule 12, Finance Bill 2020.
3. Specifically, the Finance Bill excludes (a) any tax liability that relates to a period ending prior to the Finance Bill's enactment, and (b) any tax liability (other than one that relates to a period) arising from an event or default occurring before that day: section 97(2).
4. Specifically, the Finance Bill excludes any penalty in respect of which the determination to impose the penalty, or the commencement of relevant tribunal proceedings, occurs prior to the Finance Bill's enactment: section 97(4).

Annex A

Key UK Restructuring Processes: Compare and Contrast

PROCESS	IN / OUT OF COURT	SCOPE	ELIGIBILITY	CONTROL	OTHER KEY CONSIDERATIONS
New Restructuring Plan	Two court hearings required — convening hearing and sanction hearing	Allows company to compromise creditors (both secured and unsecured) and shareholders Expect stakeholders to be segregated into classes based on their current rights and potential outcomes for them post-scheme For a class of stakeholders to approve the plan, at least 75% in value, of those voting, must vote in favour Cross-class cram-down possible: plan may be confirmed by the court even where one or more dissenting classes (subject to conditions)	No need to demonstrate insolvency, but does require evidence of actual or likely financial difficulty Open to domestic and foreign companies which can demonstrate sufficient connection with England (which we expect to include e.g., English law governed debt or centre of main interests ("**COMI**") in England) If a non-English company uses a plan, obtaining recognition of the proceedings in home jurisdiction will be key	Proposal may be launched by the company or any creditor or shareholder (among others), as with schemes — but we expect the proposal will usually be launched by the company in practice (as with schemes)	Court exercises a discretionary power to approve the terms of the plan — not a "rubber stamp" Potential to combine with new stand-alone moratorium New procedure — untested — especially provisions around cross-class cram-down Valuation likely to be key Court will consider the "relevant alternative" counterfactual to the plan, in cases involving cross-class cram-down We expect court to consider fairness, class composition and jurisdiction — as in a scheme
Scheme of Arrangement	Two court hearings required — convening hearing and sanction hearing	Allows company to compromise creditors (both secured and unsecured) and shareholders Stakeholders are segregated into classes based on their current rights and potential outcomes for them post-scheme Each class must vote in favour of the scheme — at least 75% in value and a majority in number, of those voting, in each class	No need to prove insolvency and not an insolvency proceeding (but will require analysis of the alternate comparator if the scheme is not to go ahead, which will often be insolvency) Open to domestic and foreign companies which can demonstrate sufficient connection with England (e.g., English law governed debt or COMI in England) If a non-English company uses a scheme, obtaining recognition of the proceedings in home jurisdiction is key	Proposal invariably launched by the company in practice Typically only launched following extensive commercial negotiations leading supportive creditors to sign a lock-up agreement and carefully scrutinise the company's actions	Court exercises a discretionary power to approve the terms of the scheme — not a "rubber stamp" Each class of creditors voting must vote in favour of the scheme (no cross-class cram-down); potential to combine with pre-pack to "flush" junior stakeholders Key issues for the court include: (i) appropriate constitution of creditor classes; (ii) jurisdiction of the court; (iii) overall fairness and reasonableness of the process; and (iv) the majority of creditors supporting the scheme not oppressing the (dissenting) minority

(continued on following page)

Key UK Restructuring Processes: Compare and Contrast (cont.)

PROCESS	IN / OUT OF COURT	SCOPE	ELIGIBILITY	CONTROL	OTHER KEY CONSIDERATIONS
Company Voluntary Arrangement	Out of court (unless challenged)	Allows company to compromise unsecured creditors — requires creditor support on a single vote. Secured / preferential creditors cannot be compromised without their consent Typically used to compromise leasehold obligations; used in only a limited number of financial restructurings (often owing to CVA's inability to compromise dissenting secured creditors) Vote successful if supported by at least 75% in value of creditors (and >50% of unconnected creditors) who vote	No need to prove insolvency (although is a formal insolvency proceeding) Must be EEA-incorporated - *main proceedings if English COMI; otherwise, secondary proceedings* Or have COMI in a Member State + UK establishment - *secondary proceedings*	Proposal launched by the company but supervised by an insolvency practitioner to ensure it is implemented correctly Cannot be creditor-led	If creditors vote in favour of the proposal, it becomes effective but remains open to challenge for a limited period The two fundamental grounds of challenge are: (i) material irregularity (procedural unfairness); and (ii) unfair prejudice to specific creditors
Pre-packaged Administration	Typically out of court	Allows for the company's business / assets to be sold by an insolvency practitioner in a pre-arranged commercial deal (e.g., to equitise debt) or to leave behind burdensome liabilities in the previous corporate structure (e.g., leases, employees, existing shareholder structure etc.)	No need to prove insolvency, depending on who initiates (although is a formal insolvency proceeding) Must be EEA-incorporated - *main proceedings if UK COMI; otherwise, secondary proceedings* Or have COMI in a Member State + UK establishment - *secondary proceedings*	May be creditor-led: prepacks may be initiated by the company / directors, or a holder of a "qualifying floating charge" on an out of court basis, or by any creditor (among others) on application to court The administrator implements the sale and is a key stakeholder, typically involved in the proposal pre-appointment (then the prepack sale occurs immediately post-appointment)	Introduces a statutory moratorium (against Oldco) — but provides little protection against counterparties exercising contractual termination rights The administrator is an officer of the court and has a duty to act in the best interests of creditors (as a whole) Release of fixed charge security needs consent / court order No way to compel third parties to agree to transfer of contracts to Newco

Annex B

UK Restructuring Plan vs. US Chapter 11: Compare and Contrast

	NEW UK RESTRUCTURING PLAN	US CHAPTER 11 PROCEEDINGS
Court Process	In court — two court hearings: ► convening hearing: plan proponent applies to court to convene stakeholder meetings ► sanction hearing: court has discretion whether to sanction Otherwise, out of court See Annex C for indicative timeline	In court — court-supervised process Various court hearings to approve a variety of motions, e.g., "first day" hearing to enable business operations to continue (including DIP financing), follow-on hearings, plan confirmation hearing — number of hearings depends on circumstances / complexity of the case
Scope	Allows company to compromise liabilities (secured and unsecured) and shareholders May — but need not — implement operational changes Flexible options: plan may provide for: ► payment of classes of claims; ► sale of all or part of the debtor's assets; ► exit financing; ► capital restructuring including possible issuance of new debt or equity securities; ► resolution of corporate issues, including cancellation of shares securities and amending constitutional documents; and/or ► possible releases and indemnification	As left, but broader provisions to facilitate greater degree of operational restructuring — see, e.g., below, "Treatment of Contracts"
Eligibility	No need to demonstrate insolvency, but does require evidence of actual or likely financial difficulty Open to domestic and foreign companies which can demonstrate sufficient connection with England (which we expect to include e.g., English law governed debt or COMI in England) If a non-English company uses a plan, obtaining recognition of the proceedings in home jurisdiction will be key, as court orders do not expressly purport to have extra-territorial effect	No need to demonstrate insolvency Famously low jurisdictional threshold; includes where debtor has a place of business or property in the US (e.g., cash in a US bank account or location of stock certificate) US courts have long relied on "property" element of the test to establish broad jurisdiction over foreign companies Court orders expressed to have extra-territorial (global) effect

(continued on following page)

UK Restructuring Plan vs. US Chapter 11: Compare and Contrast (cont.)

	NEW UK RESTRUCTURING PLAN	US CHAPTER 11 PROCEEDINGS
Control	We expect proposal typically to be launched by the company — although also possible for creditors or shareholders to make a proposal Management / board stay in control and debtor continues business operations No requirement for appointment of a supervisor / trustee	Debtor typically commences process by filing a voluntary petition for relief — although also possible for creditors to file involuntary petitions against debtors (in certain circumstances) Management / board stay in control and debtor continues business operations — though court approval required for most major business decisions, e.g., sale of assets / entry into new financing arrangements 120-day "exclusive period" for debtor to propose a plan — subject to extension to a date not beyond 18 months after the petition date. Once exclusivity lapses, any party may propose a competing plan Where fraud or misconduct are alleged, the Bankruptcy Court may appoint a trustee; however, appointment of a trustee is not common
Moratorium	Potential to combine with new stand-alone moratorium (not automatic), although we expect many companies at the top end of the market to be ineligible for the moratorium in practice Certain exceptions, including enforcement of financial collateral arrangements	Automatic moratorium, prohibiting creditors and other parties from taking any action, absent court authority, to collect a pre-petition debt Limited exceptions, including certain government actions and initiation of post-petition lawsuits on account of post-petition claims
Approvals *Subject to cross-class cram-down — see next page*	Class voting ► For a class of stakeholders to approve the plan, at least 75% in value, of those voting, must vote in favour ► Every creditor or shareholder whose rights are affected by the plan must be permitted to vote ► However, an application can be made to exclude classes of creditors/shareholders from voting where the court is satisfied that "none of the members of that class has a genuine economic interest in the company"	Class voting ► Classes that are receiving some — but not full — recovery, are "impaired" and entitled to vote ► For a class of claims to approve the plan, at least 2/3 in value and >1/2 in number of voting creditors must vote in favour ► For a class of equity interests to approve the plan, at least 2/3 in amount of voting interests must vote in favour ► Classes that receive a 100-percent recovery are "unimpaired" and are automatically presumed to accept the plan ► Classes that do not receive any recovery at all are deemed to automatically reject the plan ► Administrative and priority creditors do not vote

(continued on following page)

UK Restructuring Plan vs. US Chapter 11: Compare and Contrast (cont.)

	NEW UK RESTRUCTURING PLAN	US CHAPTER 11 PROCEEDINGS
Cross-Class Cram-Down	Cross-class cram-down possible: plan may be confirmed by the court even where one or more dissenting classes, provided: ► the court is satisfied that none of the members of the dissenting class would be any worse off under the plan than they would be in the event of the "relevant alternative"; and ► at least one class (whether creditors or shareholders) who would receive a payment, or have a genuine economic interest in the company, in the event of the relevant alternative, has voted in favour We expect the court — when considering the exercise of its discretion to sanction the plan — to require the plan to be fair and reasonable Potential to engage the English courts in determining valuation disputes akin to those seen in Chapter 11 proceedings	Cross-class cram-down possible: plan may be confirmed by the court even where one or more dissenting classes (provided at least one class of impaired creditors votes in favour, and subject to safeguards) Plan must be "fair and equitable" and not "discriminate unfairly" ► A plan is fair and equitable to a class so long as the class receives the full present value of its claim, or no junior class receives anything on account of its claims (the "absolute priority rule") ► The "unfair discrimination" test prevents creditors (and interest holders) with similar legal rights from receiving materially different treatment under a plan absent a compelling justification
Treatment of Contracts	No specific regime for treatment of contracts, but: ► company may compromise non-financial contracts within its plan ► new rules will restrict reliance on *ipso facto* clauses in contracts for the supply of goods and services	Debtor has flexibility to assume, assume and assign, or reject all unexpired leases and executory contracts with court approval, subject to certain limitations In general, executory contracts are contracts where material obligations remain to be performed on both sides Debtor must continue to perform post-petition, unless it rejects relevant agreement Reliance on *ipso facto* clauses restricted in all contracts
Court Approval / Challenges	Court expected to consider (among other things): ► whether plan complies with the Bill/Act ► jurisdiction ► class composition ► voting / approvals — including whether plan satisfies requirements for "cram-down", if applicable ► whether classes were fairly represented by those who voted ► fairness	Court will consider (among other things): ► whether plan complies with the Bankruptcy Code ► jurisdiction ► whether plan has been proposed in "good faith" ► proper disclosure ► voting / approvals — including whether plan satisfies requirements for "cram-down", if applicable ► whether plan is feasible ► whether plan is in the "best interests of creditors"

(continued on following page)

UK Restructuring Plan vs. US Chapter 11: Compare and Contrast (cont.)

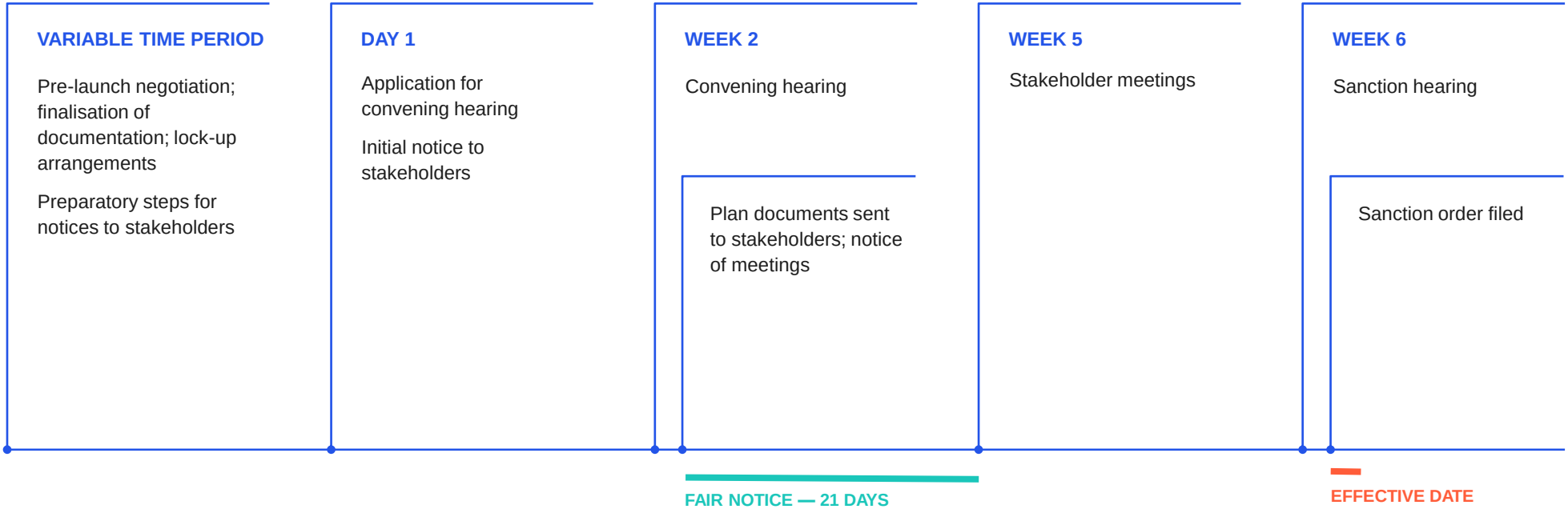
	NEW UK RESTRUCTURING PLAN	US CHAPTER 11 PROCEEDINGS
Post-petition financing	No formal provision for post-petition financing. New funding must comply with permissions under existing debt documentation (unless of course approval for new funding is granted under the plan itself) However, we understand the Government is considering the introduction of additional debtor-in-possession financing provisions in due course	Debtor-in-possession financing possible, to fund operations during Chapter 11 Court may grant a DIP lender a priming lien — superior to pre-existing liens — if other lienholders consent or debtor can show (a) other lienholders are adequately protected and (b) DIP financing was not available on more favourable terms (e.g., on an unsecured or junior lien basis)
Costs	Costs potentially lower than in Chapter 11	Administrative costs of Chapter 11 can be significant
Disclosure / Publicity	We anticipate increased disclosure obligations and scrutiny (by stakeholders, the supervisor (where relevant), the court and, in some cases, the media) The company must provide a detailed explanatory statement in respect of the plan We expect the court to require a similar level of disclosure to a scheme of arrangement — including, e.g., fees — and likely enhanced valuation evidence (as compared to a scheme)	Increased disclosure obligations and scrutiny (by stakeholders, the U.S. Trustee, Bankruptcy Court and, in some cases, the media) Each filing entity must file details of assets, liabilities, creditors, executory contracts, unexpired leases etc. and statement of financial affairs. These are cumbersome and time-consuming
Timing	No express timeline provided; we expect it to mirror that of schemes of arrangement — see Annex C Unlike in Chapter 11, the company (or other plan proponent) cannot commence proceedings without having prepared a plan in advance	Varies widely, and depends on whether the Chapter 11 is: ► traditional or “free-fall” — i.e., debtor enters proceedings without an agreed path to emergence ► pre-arranged — i.e., debtor has negotiated plan with certain creditors pre-filing, or ► pre-packaged — i.e., debtor has solicited and obtained acceptances of plan pre-filing ► Pre-arranged and pre-packaged cases are usually faster and cheaper than “free-fall” cases
Certainty	New procedure — untested — especially provisions around cross-class cram-down	Tried and tested procedure with extensive case law Pre-arranged / pre-packaged cases are more certain than traditional, “free-fall” Chapter 11s, given (certain) creditors already on board with debtor’s plan

Annex C

New Restructuring Plan Procedure: Indicative Timeline

Note: no express timeline is provided in the Bill.
The following indicative timeline is suggested based on Kirkland's extensive experience of schemes of arrangement, and represents an expedited basis.

Duration of the hearings, and the requisite period for the court to consider its judgment, will be longer in the event of a contested plan.



Annex D

New Creditor Hierarchy (Simplified)

- Proceeds of fixed charge assets to fixed charge-holders
- Prescribed fees / expenses of the official receiver
- **New:** where winding up proceedings are begun within 12 weeks following the end of any (new, stand-alone) moratorium — unpaid moratorium debts, and unpaid pre-moratorium debts that the company was required to pay during the moratorium
- Expenses of the insolvency procedure, to the relevant counterparty
- Preferential debts:
  - contributions to occupational pension schemes
  - employee remuneration and accrued holiday entitlements (capped)
  - debts owed to the Financial Services Compensation Scheme
  - deposits covered by the Financial Services Compensation Scheme
  - other eligible deposits (in excess of deposits covered under the Financial Services Compensation Scheme)
- **Forthcoming:** for insolvency proceedings opened on or after 1 December 2020 — certain HMRC debts: amounts owed to HMRC in respect of VAT and other relevant deductions
- **Recently increased:** "Prescribed part", set aside for unsecured creditors from realisations from floating charge assets (up to a maximum of £600,000 or — where relevant floating charge was created on or after 6 April 2020 — £800,000)[1]
- Proceeds of floating charge assets (less preferential debts and the "prescribed part") to floating charge-holders
- Unsecured creditors
- Statutory interest
- Subordinated creditors
- any surplus to shareholders

1. Under The Insolvency Act 1986 (Prescribed Part) (Amendment) Order 2020. The increased amount also applies where the relevant floating charge was created before 6 April 2020 if a later floating charge (over any of the company's assets) ranks equally or in priority.

Annex E

Conditions for the Issue of a Joint Liability Notice

This Annex details:

- the three categories of circumstances in which HMRC may issue a joint liability notice to an individual in respect of certain taxes or penalties, under the Finance Bill 2020;
- what conditions must be satisfied; and
- the amounts for which the individual may be held liable.

In each case, the individual recipient has a right of review and a right of appeal.

Tax avoidance and tax evasion cases

An authorised HMRC officer may issue a joint liability notice to an individual where it appears to the officer that each of the following conditions is met:

- The company has engaged in tax avoidance or tax-evasive conduct;
- The company is subject to an insolvency procedure[1], or there is a serious possibility that it will become so;
- The person:
  - was responsible for the company's conduct, or knowingly[2] benefited[3] from it, when the individual was a director or shadow director of the company, or a participator in the company; or
  - took part in, enabled or facilitated the company's conduct, when the individual was a director or shadow director of the company, or took part in management of the company;
- There is (or is likely to be) a tax liability referable to the avoidance or evasive conduct; and
- There is a serious possibility that some or all of that tax liability will not be paid.

The **effect of the notice** is to render the individual jointly and severally liable with the company (and any other individual given such a notice) for the relevant tax liability.

1. This includes schemes of arrangement, liquidation (including members' voluntary liquidations in certain circumstances), administration, company voluntary arrangements, receivership, administrative receivership and companies struck off the register, as well as foreign insolvency procedures / schemes which "correspond" to their UK counterparts. This could raise some interesting cases for courts to consider whether foreign proceedings "correspond" to UK equivalents. **Notably, it does not currently include the new restructuring plan procedure —** but this may be amended as the Finance Bill proceeds through Parliament**.**
2. The legislation treats the individual as knowing anything that the individual could reasonably be expected to know.
3. The legislation extends the meaning here to cover benefits received by the individual's connected persons.

Conditions for the Issue of a Joint Liability Notice (cont.)

Repeated insolvency and non-payment cases

An authorised HMRC officer may issue a joint liability notice to an individual where it appears to the officer that each of the following conditions is met:

- In the five years prior to the notice, the person was a director, shadow director or participator of at least two companies which became subject to an insolvency procedure[1] within that period and owed amounts to HMRC or, e.g., had failed to submit a relevant return;
- Another, new, company carries on a business that is the same as, or similar to, that of at least two of the insolvent companies;
- The person has been connected to the new company (i.e., is a director or shadow director of the company, or a participator in the company, or takes part in management of the company) within the five years prior to the notice; and
- At least one of the old companies that became insolvent has an unpaid tax liability, and the total unpaid tax liability of the old companies is more than £10,000 and represents >50% of the total amount of those companies' liabilities to their unsecured creditors.

The notice cannot be issued more than two years after HMRC first became aware of the relevant facts.

The **effect of the notice** is to render the individual jointly and severally liable with:

- the new company (and any other individual given such a notice) for:
  - any tax liability of the new company on the day of the notice; and
  - any such liability which arises in the following five years, provided the notice remains in effect; and
- the old company (and any other individual given such a notice), if it has a tax liability on the day of the notice.

Forthcoming guidance is expected to provide that this power will not be used in respect of "turnaround specialists" whose connection with the companies is part of a genuine attempt to save the company. However, this continues the current (unfortunate) trend in drafting tax legislation widely such that it captures both "in scope" and "out of scope" behaviours and then relying on guidance or similar to provide "reassurance" that out of scope cases will not be pursued.

1. See footnote 1 on previous page.

Conditions for the Issue of a Joint Liability Notice (cont.)

Cases involving penalty for facilitating avoidance or evasion

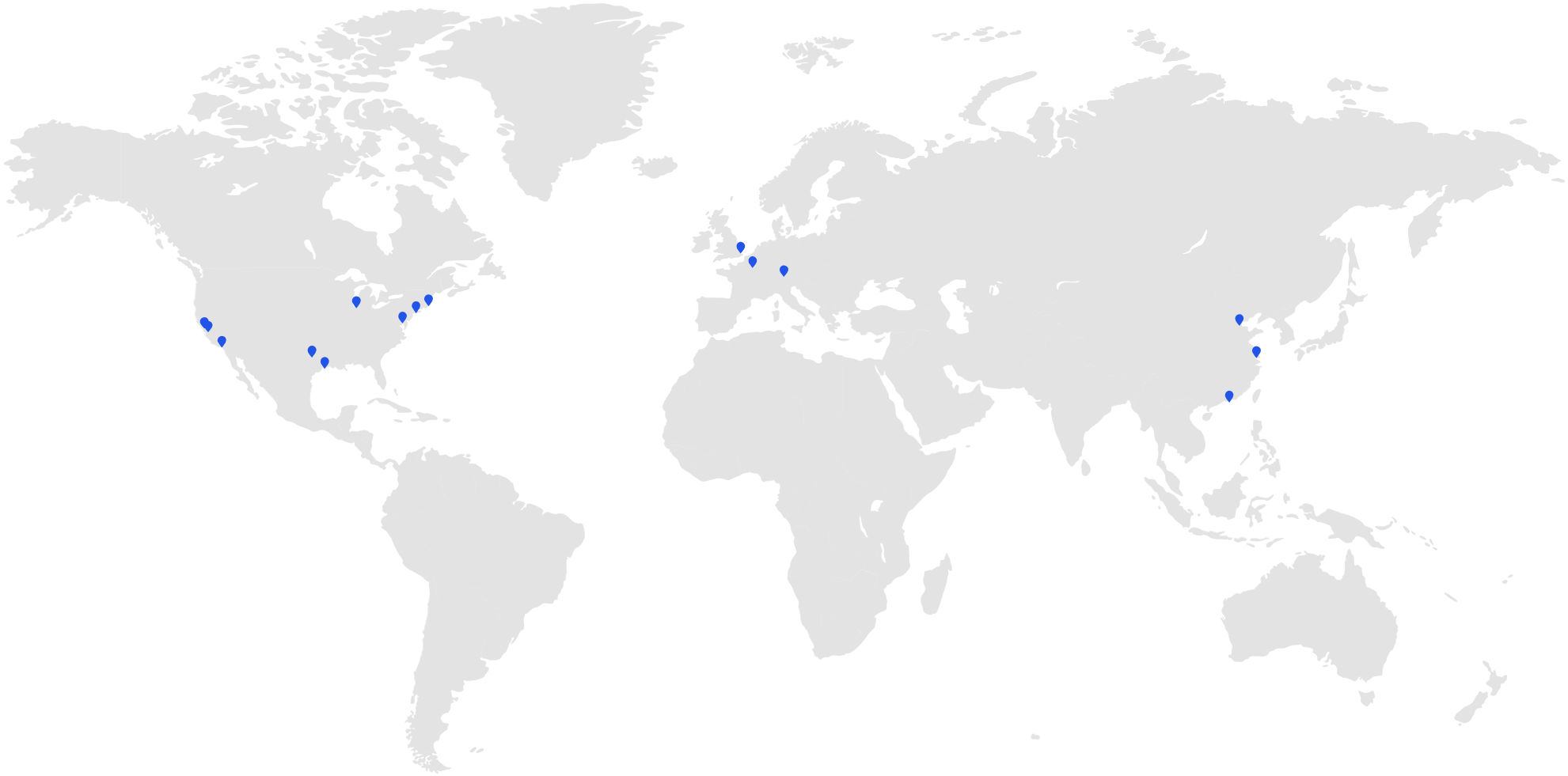
An authorised HMRC officer may issue a joint liability notice to an individual where it appears to the officer that each of the following conditions is met:

- HMRC has imposed a penalty under certain specified tax provisions, such as penalties for promoters of tax avoidance schemes or enablers of offshore tax evasion (or proceedings have been commenced before the First-tier Tribunal for the imposition of such a penalty);
- The company is subject to an insolvency procedure[1], or there is a serious possibility that it will become so;
- The individual was a director or shadow director of the company, or a participator in the company, at the time of the act/omission in respect of which the penalty was imposed (or proceedings for the penalty were commenced); and
- There is a serious possibility some or all of the penalty will not be paid.

The **effect of the notice** is to render the individual jointly and severally liable with the company (and any other individual given such a notice) for the amount of the penalty.

1. See footnote 1 here.

International Reach



Beijing	Dallas	London	New York	San Francisco
Boston	Hong Kong	Los Angeles	Palo Alto	Shanghai
Chicago	Houston	Munich	Paris	Washington, D.C.