KIRKLAND & ELLIS

Corporate Insolvency and Governance Act

Major UK Restructuring & Insolvency Reforms — Effective June 2020

At a Glance

The Corporate Insolvency and Governance Act 2020 (the "**Act**") was enacted on 25 June, implementing landmark measures to improve the ability of companies to be efficiently restructured. It is hoped that it will 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. The vast majority of the Act's provisions are effective from 26 June.

This analysis summarises our initial thoughts on key aspects of the Act. Of course, early cases will be key in clarifying parameters.

LEARN MORE

Kirkland & Ellis held an introductory webinar with expert panellists[1] discussing key provisions of the Bill, and its likely market impact, on 28 May.

WATCH THE SEMINAR

The Act introduces:

- **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 September 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

Pre-pack reform: The Act also revives the power of the Secretary of State, by further regulation, to prohibit, or impose requirements in respect of, pre-pack sales by administrators to connected parties. That power will now expire on 30 June 2021.

Differences from draft Bill: The Corporate Insolvency and Governance Bill (the **"Bill"**) was first published on 20 May 2020. It was pushed through Parliament on an accelerated timetable, with minimal opportunity for market comment or amendments. Accordingly, there are only minimal differences between the Bill and the Act, which we flag in this deck. Annex A provides a summary of the key differences.

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.

1. Paul Bannister, Head of Policy at The Insolvency Service; Russell Downs, PwC; Mark Phillips QC, South Square; Kate Stephenson, Kirkland & Ellis.

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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 US Chapter 11 proceedings.

The new plan sits 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 has been inserted into the existing Companies Act 2006 — alongside, and frequently **mirroring, provisions for schemes of arrangement.**[1] The addition of **cross-class cram-down** to impose a restructuring on dissenting stakeholders addresses 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.

1. Legislation relating to schemes of arrangement can be found in Part 26 of the Companies Act 2006. The Act inserts the restructuring plan provisions as new Part 26A of the Companies Act. A note on terminology: the new practice statement governing court applications under Parts 26 and 26A refers to existing schemes of arrangement as "Part 26 schemes" and the new restructuring plan as "Part 26A schemes".

OUTLINE

RELEVANT ANNEXES

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

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

Financial Condition

The company[1] 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 mirrors that for schemes of arrangement, i.e., it turns on whether the company has a "sufficient connection" to this jurisdiction[2], and does 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[3], 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 D 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.

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1. The Limited Liability Partnerships (Amendment etc.) Regulations 2020 were enacted on 26 June to extend the provisions of the Act (including access to the plan) to LLPs, with appropriate adjustments.
2. 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.
3. The Act 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 be 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).[1]

Post-moratorium plan

Where a convening application is made within 12 weeks after the end of the new stand-alone moratorium, any creditors in respect of moratorium debts, or “priority pre-moratorium debts”, may not participate in the vote and may not be compromised under the plan without their consent. See this page for further consideration.

1. **Aircraft-related interests:** the Bill had provided that creditors with certain registered aircraft-related interests could not participate in the vote nor be compromised under the plan — or a scheme of arrangement — without their consent. These provisions do not appear in the Act.

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.

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.

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 Act.

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.

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

The court also has discretion to decline to sanction a plan if it is not “**just and equitable**”. This requirement does not appear in the legislation itself but in the explanatory notes to the Act. It is not clear to what extent this will be similar to the “fairness” requirement for schemes of arrangement.

- A proposed scheme of arrangement is considered “fair” if it is such that an intelligent and honest stakeholder, a member of the class concerned and acting in respect of their interest, might reasonably approve. That test also makes clear that the scheme proposed need not be the only fair scheme, or even, in the court’s view, the best scheme. The court can draw considerable comfort from the fact that — before it is asked to sanction the scheme — the scheme must have been approved by the requisite majorities in *every* class.
- In contrast, the ability to cram-down non-consenting classes under a restructuring plan places a much greater responsibility on the court to consider whether or not the plan is “just and equitable”. 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 Act 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) and guarantors, governing law of debt, jurisdictions where key assets are located).

Tax

The Act 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.

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

Pension Stakeholders

Where the relevant debtor is or has been an employer in respect of an defined benefit pension scheme, the Act[1] and related Regulations[2] provide that:

- the Pensions Regulator and (in certain cases) the board of the Pension Protection Fund (the “**PPF**”) must be sent any document required to be sent to creditors in respect of the proposed plan; and
- the PPF may exercise the rights of the pension scheme trustees as creditors under the proposed plan, as if it were a creditor of the company.

The PPF may exercise such rights in addition to the exercise of those rights by the trustees (e.g. in attending stakeholder meetings) – but where the PPF exercises the right to vote on a plan, this operates to the exclusion of the pension trustees’ voting rights, and it must first consult the trustees.

No other conditions apply before the PPF may exercise the trustees’ rights, and it is not restricted to exercising such rights in any particular period.[3]

The PPF’s power to exercise creditor rights applies even though the restructuring plan is not one of the qualifying insolvency events that trigger a “PPF assessment period” (the period during which a pension scheme is assessed to determine whether the PPF should assume responsibility for it; the start of an assessment period is the “tipping point” at which the PPF automatically assumes creditor rights of the pension scheme trustees).[4] For a plan, the PPF’s exercise of creditor rights is at the PPF’s election, not automatic (as with, e.g., a company voluntary arrangement).

The PPF has yet to publish guidance on the approach it will adopt to restructuring plans. However, we expect it will be similar to the guidance as to the PPF’s approach to company voluntary arrangements.[5]

This gives the PPF a seat at the negotiating table in relevant circumstances. It does not — of itself — prevent pension liabilities from being compromised under a plan.

However, the PPF entry criteria generally exclude pension schemes where a compromise agreement has been reached between scheme trustees and the employer concerning a s75 debt. This potentially raises a difficult issue for a court asked to cram down a plan on a dissenting pension creditor, if the effect of sanction would be to deny the scheme access to the PPF.

1. These rights were not included in the draft Bill.
2. The Pension Protection Fund (Moratorium and Arrangements and Reconstructions for Companies in Financial Difficulty) Regulations 2020, effective 7 July 2020. The Regulations must be approved by Parliament within 40 days in order to continue to be effective; we anticipate Parliament will approve the Regulations in their current form, without amendment.
3. The Act provided that the Regulations could specify such conditions / applicable period, but no such limitations appear in the Regulations.
4. For more information, see the PPF’s guidance on insolvency and the assessment period.
5. Guidance here, which sets out the PPF’s extensive expectations as to the principles with which it expects a proposal to comply, and the matters it expects employers to show they have addressed, in order for the PPF to vote in favour of a proposal.

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 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 focusing 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. As a result, we may see the court taking a more robust approach, requiring similarly-positioned stakeholders to vote in the same class.[1]

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.)

1. In contrast to the position taken in certain schemes of arrangement, e.g., Lehman Brothers International (Europe) (2018) and Stemcor (2016).

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 interest 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 or not the plan is “just and equitable”; if not, the court may decline to exercise its discretionary power of sanction.

LEARN MORE

Kirkland & Ellis held a “deep dive” webinar with expert panellists (Tom Smith QC, South Square; Alastair Beveridge, AlixPartners; Chad Husnick and Kate Stephenson, Kirkland & Ellis) discussing cross-class cram-down under the plan, on 18 June.

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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 this page).

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.

We are concerned that:

- **the broad capital markets exclusions render most bond issuers / guarantors ineligible for the moratorium;**
- **the payment holiday in respect of bank facilities is very limited; and**
- **acceleration is permitted during the moratorium[1], and in practice would likely require termination of the moratorium.**

Additional Comments

- 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**.
- Certain of the moratorium conditions are temporarily eased during the COVID-19 emergency.[2]
- The initial duration of the moratorium — 20 business days — will be extremely tight, if not impossibly short, to negotiate a substantive restructuring.
- Provisions as to enforcement of security granted during the moratorium (with the monitor’s consent) appear unclear.

OUTLINE

RELEVANT ANNEXES

- Annex E: New Creditor Hierarchy

1. Although an amendment was tabled in the House of Lords to prevent acceleration, the amendment was defeated.
2. Until 30 September 2020 (subject to possible extension of up to six months): 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 COVID-19; companies will not be ineligible for a moratorium on the grounds that they have been subject to a recent insolvency procedure.

“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[2] 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 securitisation companies, 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.[3]

Commencement and Court Involvement

Generally, eligible companies[4] can initiate the moratorium simply by filing the relevant documents with the court.

If the company is subject to an outstanding winding-up petition[5], or is an overseas company, it must instead apply to court for the moratorium.

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

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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. Although an amendment was tabled in the House of Lords to lower this high threshold from "would" to "could", the amendment was withdrawn without a vote.
3. 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.
4. The Act allows for the moratorium to be made available to limited liability partnerships by further regulation. The Limited Liability Partnerships (Amendment etc.) Regulations 2020 were enacted on 26 June to extend the provisions of the Act (including access to the moratorium) to LLPs, with appropriate adjustments.
5. In which case, 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” for which a company has a payment holiday during the moratorium and “moratorium debts” (see next two pages);
- 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;
  - most[1] floating charges may not be crystallised by the floating charge-holder;[2]
  - no landlord may exercise any forfeiture rights; and
  - no steps may be taken to repossess goods under any hire-purchase agreement.

LEARN MORE

Kirkland & Ellis held a “deep dive” webinar with expert panellists (Richard Fisher QC, South Square; Gavin Maher, Deloitte; Kate Stephenson and Karim Kassam, Kirkland & Ellis) discussing the moratorium, on 25 June.

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1. Security financial collateral arrangements, collateral security, market charges and system charges are excluded from the non-crystallisation provisions. These exclusions were not present in the draft Bill.
2. Provisions in floating charges (other than those in expressly excluded categories) which provide for crystallisation or impose limitations on asset disposals during the moratorium will also be void.

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

PRE-MORATORIUM DEBTS

Debt / liability existed before moratorium began (or becomes due during moratorium but under obligation incurred pre-moratorium)

WITH A PAYMENT HOLIDAY

All pre-moratorium debts except those excluded (right)

WITHOUT A PAYMENT HOLIDAY

- Debts or liabilities arising under a contract involving financial services
- Goods and services supplied during moratorium
- Rent in respect of a period during moratorium
- Employees’ wages, salary & redundancy payments
- Monitor’s remuneration and expenses during moratorium

MORATORIUM DEBTS

New debt / liability to which company becomes subject during moratorium (or post-moratorium, because of obligation incurred during moratorium)

NO PAYMENT HOLIDAY

COMPANY’S ABILITY TO PAY RESTRICTED, UNLESS MONITOR CONSENTS

Creditors cannot generally enforce, though there is an important exception for the enforcement of financial collateral arrangements

COMPANY IS EFFECTIVELY REQUIRED TO PAY[1]

- **Super-priority** if unpaid and, within 12 weeks following end of moratorium, company enters administration / liquidation (ranking behind fixed charge creditors but ahead of expenses, floating charge security and preferential creditors)
- Any scheme / CVA / restructuring plan in that 12 week period **cannot compromise such liabilities without consent** (and such creditors are prohibited from voting on such a scheme or restructuring plan, although not a CVA)
- **However**, financial debt accelerated during the moratorium[2] **does not** obtain that super-priority or protection from compromise[3]

1. The monitor must terminate the moratorium if they think that the company is unable to pay any such debts that have fallen due. 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 (except where the extension is triggered by a CVA proposal or restructuring plan / scheme of arrangement — see next page). Creditors in respect of such amounts may seek court permission to enforce their rights in respect of such debts.
2. More precisely: in the period from the date on which the monitor made their statement that, in their view, it was likely that the moratorium would result in the rescue of the company as a going concern, and ending with the last day of the moratorium.
3. This is a significant departure from the initial drafting of the Bill, and a welcome fix to what could otherwise have posed a risk of creditors “gaming” the moratorium, by accelerating to achieve super-priority / protection from compromise.

“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 (namely, moratorium debts, and pre-moratorium debts for which the company does not have a payment holiday during the moratorium — see this page).

Notice and Publicity

All known creditors, Companies House and (in certain circumstances) pensions stakeholders, 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.)
- **Duty to terminate**: in certain circumstances, as noted on previous page.
- **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.

Official guidance for monitors on the role is here.

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:** the company is effectively required, during the moratorium, to pay moratorium debts and a wide range of pre-moratorium debts for which the company does not have a payment holiday, including accelerated financial debt — see this page
- **Priority / protection from compromise for certain debts in subsequent proceedings:** see this page and Annex E
- **Limitations on extensions:** requirement for moratorium debts, and pre-moratorium debts for which the company does not have a payment holiday, to be discharged as a condition to most[1] extensions
- **Restrictions on obtaining credit:** during the moratorium, the company may not obtain credit[2] ≥£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 permitting 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)
- **Pension protections:**[3]
  - Pensions stakeholders must receive notices / documents in relation to a moratorium in respect of a relevant employer
  - The PPF has the right to challenge the monitor’s or directors’ actions during the moratorium, as if it were standing in the shoes of the pensions trustees / managers as a creditor
  - The PPF also has the right[4] to vote as a creditor on a potential extension to the moratorium or (further to a court order in response to a challenge to directors’ actions) participate in a creditor vote (on such matters as the court may direct). This operates to the exclusion of the pension trustees’ voting rights[5], and the PPF must first consult the trustees

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1. Except where the extension is triggered by a CVA proposal or restructuring plan / scheme of arrangement — see this chart.
2. This expressly includes trade credit where the company is paid in advance for the supply of goods or services.
3. These provisions were not included in the draft Bill.
4. The Pension Protection Fund (Moratorium and Arrangements and Reconstructions for Companies in Financial Difficulty) Regulations 2020, effective 7 July 2020. The Regulations must be approved by Parliament within 40 days in order to continue to be effective; we anticipate Parliament will approve the Regulations in their current form, without amendment.
5. Unlike the PPF’s exercise of creditor voting rights under a plan, which operate at the PPF’s election, the PPF “stepping into the shoes” of the pension trustees’ creditor rights in a moratorium appears to be automatic (albeit subject to the requirement to consult the trustees first).

Continuity of Supplies: Restrictions on *Ipso Facto* Clauses

Overview

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 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, or impose altered terms, solely on the basis of the insolvency of the counterparty — in contracts for the supply of goods or services.

The Act includes 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 US 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 provisions cover only supplier arrangements, not general commercial contracts. This is a significant divergence from the US (and Australian) regimes, and appears to be policy-based.

Protected Contracts / Exclusions

The new regime prohibits 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 rules do 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.

Cape Town Convention interests (related to aircraft equipment) are expressly excluded.[2]

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).
2. This provision was not included in the draft Bill.

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 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 Act does provide a power for the Secretary of State to make transitional provisions.

COVID-19 Breathing Space: Temporary Safeguards[1]

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

The Act introduces 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 Act 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 Act imposes restrictions on the court's jurisdiction to make a winding-up order.[2]
- 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.
- The winding up petition will remain private until the court has concluded that it is likely it will be able to make a winding up order having regard to the coronavirus test (or further order).[3]

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 legislation applies to all companies (not only tenants) and winding-up petitions brought by any creditor (not only landlords).

Timing

This suspension applies to winding-up petitions presented from 27 April to 30 September, and to statutory demands made between 1 March and 30 September — subject to possible extension of up to six months, if the Secretary of State considers it reasonable to do so to mitigate an effect of COVID-19.

"CRAR"

The Government has announced plans to enact secondary legislation to prevent landlords using commercial rent arrears recovery (CRAR) before 30 September, unless at least 189 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.

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1. Under the draft Bill, these temporary provisions were due to expire on 30 June 2020, or one month post-enactment, but now extend to 30 September 2020, subject to further extensions.
2. 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".
3. Under the Insolvency Practice Direction relating to the Act.

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) that there was no reasonable prospect of avoiding such proceedings, unless (in the interim) they took every step to minimise potential losses to creditors.

The Act 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 September 2020 (subject to possible extension of up to six months, if the Secretary of State considers it reasonable to do so to mitigate an effect of COVID-19).

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 Act 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 Act 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 until 30 September (subject to amendment).

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

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).

The Act grants 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 and 30 September).

The Act also provides 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.

Annex A

What changed in Parliament?[1]

	DRAFT BILL	FINAL ACT
Restructuring Plan: ***Aircraft-Related Interests***	Creditors with aircraft-related interests could not be compromised by a restructuring plan (and would also be excluded from compromise under a scheme of arrangement, a departure from existing law)	Does not exclude creditors with aircraft-related interests from being compromised by a restructuring plan or a scheme
Moratorium: ***Accelerated Debt***	Financial creditors who accelerated their debts during the moratorium could arguably obtain super priority for those debts in an administration or liquidation commencing within 12 weeks of the end of the moratorium Such debts would also be protected from compromise without the relevant creditor's consent in a restructuring plan, CVA or scheme commencing within the same period	► Creates a new category of "priority pre-moratorium debts". This excludes accelerated financial debt, which will not get super priority or protection from compromise. However, such amounts will still be classified as "pre-moratorium debts without a payment holiday" and will (effectively) need to be paid during a moratorium ► Gives the Secretary of State further power to change the definitions of "moratorium debts" and "priority pre-moratorium debts"
Plan / Moratorium: ***Pensions Stakeholder Protections***	No specific protections	► Requires notification of the Pensions Regulator and Pension Protection Fund of key events in a moratorium or restructuring plan of a relevant employer ► Enables the PPF to stand in the shoes of pension scheme trustees to challenge the monitor's or directors' actions during the moratorium ► Reserve powers permit subsequent regulation to provide for the PPF to exercise the rights of the pension scheme trustees as creditors under a proposed plan or in a moratorium
Ipso Facto **Clauses:** ***Aircraft-Related Interests***	International interests in aircraft equipment (under the Cape Town Convention) were potentially subject to the new restrictions on termination of contracts for the supply of goods and services	Expressly excludes Cape Town Convention interests from the restrictions on termination of contracts for the supply of goods and services

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1. This is a non-exhaustive list of the key changes introduced during the Parliamentary process, as compared to the draft Bill published on 20 May.

What changed in Parliament? (cont.)

	DRAFT BILL	FINAL ACT
Temporary Measures: *Extended Expiry*	The following temporary measures introduced as a response to the COVID-19 pandemic were due to expire one month post-enactment (subject to extension by up to six months): ► relaxation of wrongful trading provisions; ► temporary ban on the use of statutory demands and winding-up petitions; ► wider access to the moratorium; and ► small suppliers temporarily excluded from the *ipso facto* restrictions	Extends these temporary measures, which will now expire on 30 September 2020 (subject to extension by up to six months, **if** the Secretary of State considers it reasonable to do so to mitigate an effect of coronavirus)
Pre-packs: *Revival of Reserve Power to Reform*	Not addressed in the draft Bill	Revives the reserve power of the Secretary of State to prohibit, or impose requirements or conditions in relation to, pre-pack sales to connected parties — this power expired in May 2020, and will now expire in June 2021
Delegated Powers: *Curtailed*	Extensive “Henry VIII” powers for the Secretary of State to make additional regulations without Parliamentary scrutiny	Powers somewhat curtailed

Annex B

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-plan 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

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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% by value 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 C

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 D 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

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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 or a counter 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, and time-limited), 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 (except where the application for a convening hearing is made within 12 weeks of the end of any stand-alone moratorium, in which case creditors in respect of moratorium debts or priority pre-moratorium debts may not participate in the vote, nor be compromised under the plan unless they consent) ▸ 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

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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 The court may decline to exercise its discretion to sanction the plan if it does not consider it "just and equitable" 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 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 ► whether the plan is "just and equitable"	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"

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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 US 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 D 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 D

New Restructuring Plan Procedure: Indicative Timeline

Note: no express timeline is provided in the Act

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.

VARIABLE TIME PERIOD

Pre-launch negotiation; finalisation of documentation; lock-up arrangements

Preparatory steps for notices to stakeholders

DAY 1

Application for convening hearing

Initial notice to stakeholders

WEEK 2

Convening hearing

Plan documents sent to stakeholders; notice of meetings

WEEK 5

Stakeholder meetings

WEEK 6

Sanction hearing

Sanction order filed

FAIR NOTICE — 21 DAYS

EFFECTIVE DATE

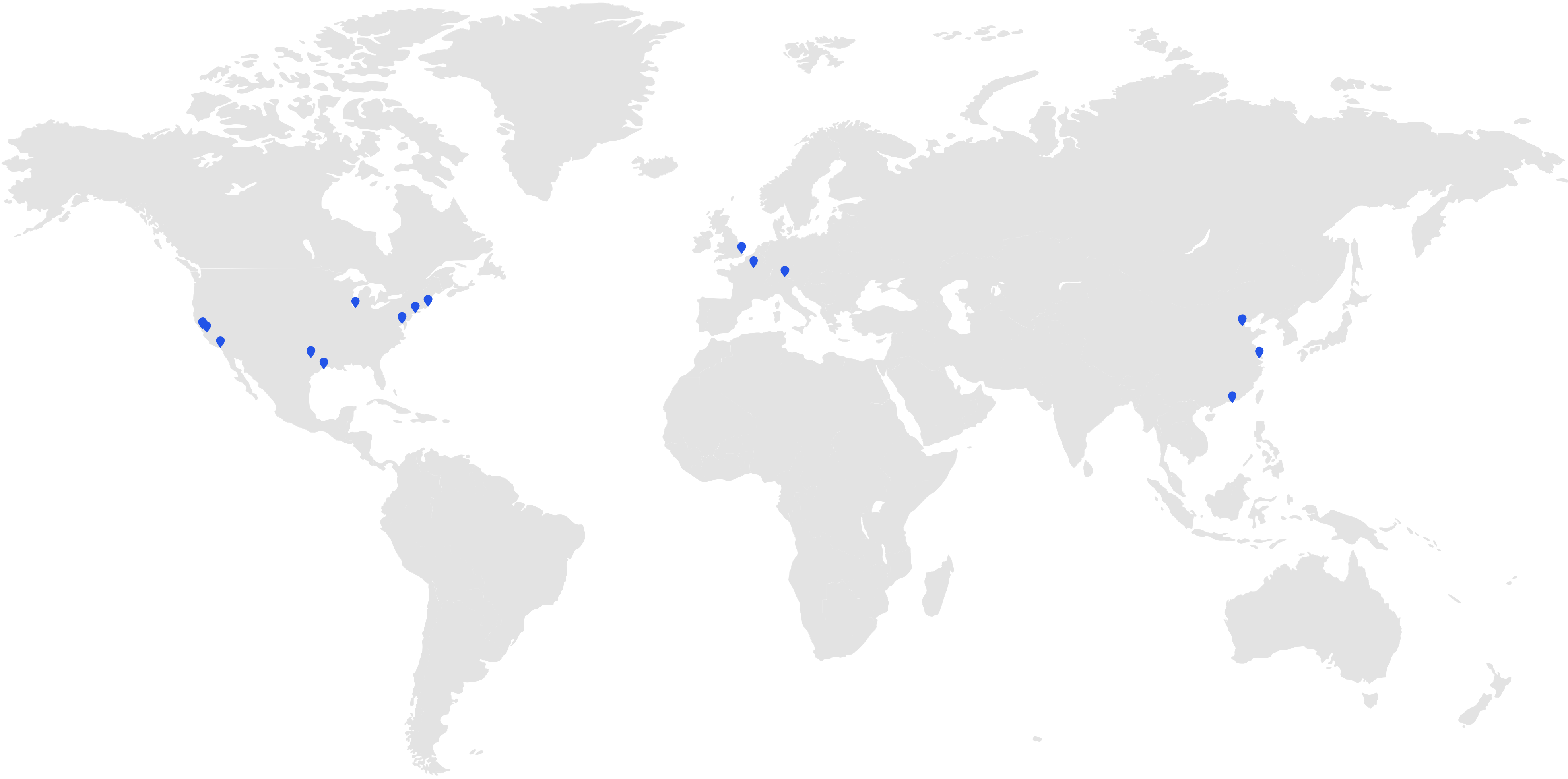
Annex E

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 priority pre-moratorium debts[1]
- 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)[2]
- 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. This effectively excludes any pre-moratorium financial debt accelerated during the moratorium.
2. 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.

International Reach



Beijing	Dallas	London	New York	San Francisco
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