# IMPORTANT UK RESTRUCTURING AND INSOLVENCY CHANGES ANNOUNCED

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**UK Restructuring & Insolvency Alert**

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The UK government announced on 26 August 2018 that it will legislate to change aspects of the UK restructuring and insolvency systems. The reforms are a response to recent high-profile domestic corporate insolvencies and the various issues highlighted in those matters. Overall, the proposals appear to be more favourable to debtors, as opposed to creditors. The reforms are potentially wide-ranging; however the exact legislative timetable is unclear and we will keep you updated in further alerts.

## HEADLINE CHANGES:

- greater accountability for directors of distressed and dissolved companies
- prohibiting suppliers from terminating contracts on the grounds of insolvency
- a new moratorium procedure
- a new standalone restructuring procedure

## GREATER ACCOUNTABILITY FOR DIRECTORS

There will be a new liability for parent company directors selling a subsidiary if that subsidiary subsequently enters an insolvency process within 12 months of sale; the condition being that the directors will not be liable if they had a reasonable belief (at the time of the sale) that the sale would likely deliver a 'no worse' outcome for the subsidiary's stakeholders than if it had been placed into a formal insolvency process. Whether a belief is reasonable will take into account any steps the director has taken, including considering professional advice on the impact of the sale and engaging with major stakeholders in the sale negotiations. Failure to do so may lead to director disqualification proceedings.

The director disqualification process will also be extended so that former directors of dissolved companies may be investigated in relation to their conduct. This process will include the ability to pursue action against an individual without the prior restoration of the dissolved company to the register. In particular, instances of directors repeatedly dissolving companies and leaving behind debts and other liabilities will be carefully scrutinised.

## PROTECTIONS REGARDING SUPPLIERS OF GOODS AND SERVICES/LICENCES

Contractual termination provisions for suppliers of goods and services and for contractual licences will no longer allow a supplier/licensor to terminate on grounds that the other party has entered a formal insolvency process, a pre-insolvency moratorium process or the new restructuring procedure. However, this prohibition will not prevent termination for reasons of non-payment or other termination provisions upon notice or under fixed term contracts. A supplier can apply to court to be exempted from this prohibition if it can establish a significant adverse effect on its own business as a result of having to continue to supply.

## NEW MORATORIUM PROCEDURE

A brand new preliminary moratorium will be available to all solvent companies to give them time to consider restructuring options for rescue, much as in the current administration procedure. Despite the moratorium, the company must continue to pay its debts as they fall due. A company is eligible to apply for the moratorium if it will become insolvent if action is not taken, but which is not yet insolvent and is able to carry on business and meet current obligations and expenses during the moratorium. Also, the company must have the prospect of agreeing a compromise or arrangement with its creditors on the balance of probabilities (as determined by a monitor). The monitor will be a licensed insolvency practitioner who must notify all creditors of the procedure. The monitor will not be able to take an administration or liquidation appointment with the company for 12 months but can act as the nominee or supervisor of a subsequent company voluntary arrangement (CVA).

The monitor must agree to any disposals by the company outside of its ordinary course of business. An initial 28 day moratorium period is extendable by the monitor for a further 28 days (and can be extended further if approved by more than 50% of secured creditors by value and more than 50% of unsecured creditors by value). Creditors may object to the moratorium through the court and may do so at any time during the moratorium period.

## NEW STANDALONE RESTRUCTURING PROCEDURE

The reforms propose a new standalone procedure whereby a company can propose a restructuring plan to its creditors. Solvent and insolvent companies will be able to use the process. The new restructuring procedure will closely resemble the existing scheme of arrangement (SoA) procedure and therefore SoA case law will be applied in its interpretation. This new procedure is in addition to the existing provisions on SoAs and CVAs. The courts will be heavily involved in examining and approving a proposal. It is for the company to propose plans it thinks will be acceptable to creditors. Creditors and shareholders can submit counter-proposals.

The approval of more than (a) 75% in monetary value and (b) at least 50% in number of creditors who vote on the proposal will be required in each class of creditor; plus, more than half in aggregate of the value of unconnected creditors (in each class) must vote in support.

Significantly, the new procedure will allow for a cross-class cramdown of dissenting creditors. Dissenting classes of creditors, most importantly those who are 'out of the money,' may be bound to an arrangement that is in the best interests of all stakeholders.

The new procedure adopts a variation on the Absolute Priority Rule familiar, although not identical, to that contained in a U.S. Chapter 11 proceeding. A dissenting class of creditor must be satisfied in full before a more junior class receives or retains anything under the restructuring plan. However, the court may approve a plan which departs from this absolute priority approach where it concludes as follows: (a) it is necessary in order to achieve the aims of the restructuring, (b) is just and equitable in all the circumstances, and (c) at least one class of creditors who will not be paid in full has voted in favour of the plan, as per the rule under the US Bankruptcy Code.

It will not be necessary to have an official overseeing the plan in every case and there will be no maximum period over which the plan must be implemented.

## CONCLUSION

The reforms aim to tackle perceived 'injustices' highlighted by newsworthy insolvencies in the UK in the past few years. A number of details remain to be clarified (for example, the extent to which non-UK companies can take advance of the new restructuring procedure). In addition, the utilisation of the new moratorium procedure may be limited given its defined time period and the need for the publicity of a company rescue. We will keep you updated in further alerts as the proposals are finalised and enacted.

# KEY CONTACTS

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