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INSOLVENCY LAW IN THE SPOTLIGHT: THE UK RESPONSE TO THE FINANCIAL IMPACT OF COVID-19

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Across the world, businesses and governments are grappling with the financial impact caused by COVID-19. One response has been the provision of financial support to businesses by government. Another focus has been insolvency law, with various initiatives being proposed to enable businesses to avoid insolvency proceedings due to what is hoped to be a temporary hit from COVID-19 disruption.

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The UK government announced a package of measures on 28 March 2020 in relation to UK insolvency law, which included a relaxation of the rules on wrongful trading (see our article on this measure **here**) and the implementation of legislative proposals to reform UK insolvency law previously made in 2018. This article will discuss the usefulness of those reform proposals and set them in the context of two other initiatives from the UK insolvency community in response to COVID-19.

The 2018 proposals consisted of (1) a new moratorium to help business rescue, (2) a prohibition on the termination of contracts for the supply of goods or services due to insolvency proceedings and (3) a new restructuring plan that would enable cross-class cram down of dissenting creditors. The proposed reforms are far reaching and, as is clear from the government's 2018 consultation document, raise complicated issues on which there is no consensus amongst experts and users of insolvency law. Therefore, a key question is whether these proposals can be enacted quickly enough to be useful in the current crisis. Though, perhaps an even more concerning question is: will the finally enacted legislation provide for a balanced and effective set of rules?

To pick one aspect of the reform proposals, the new moratorium will only be available for solvent companies and, even then, will only apply for an initial period of 28 days (extendable to 56 days, or longer if that extension is approved by creditors or by the court). Whether a moratorium of such restricted scope can be of real use to a business facing financial difficulties is debatable and there is some scepticism in the insolvency profession as to whether the new moratorium will be much used in practice. Against that, legitimate concerns have been raised in relation to the protection of creditors during the moratorium that argue against a more expanded scope.

The concerns in relation to the new moratorium, coupled with the fact that the new restructuring plan is an incremental development and similar to two restructuring procedures that already exist (the company voluntary arrangement and scheme of arrangement), suggest that the government's efforts would be better spent on easier, quicker wins.

One such win has been suggested in a paper produced by the Insolvency Law Committee of the City of London Law Society. Published shortly before the government's announcement, this paper made proposals in relation to wrongful trading. More notably, it also made two proposals for companies to benefit from a moratorium to prevent action by creditors. The first proposal was for a moratorium to prevent the presentation of a winding up petition by a creditor in circumstances where the directors of a company have made a "COVID-19 declaration". The second proposal was to make available to companies impacted by COVID-19 the interim moratorium that is part of the administration regime. Both proposals could be implemented quickly by building on existing statutory provisions.

Another development is a briefing note on Saving Livelihoods prepared by the Technical Committee of the Insolvency Lawyers' Association ("ILA"). Entitled "Changing the Narrative around Administration", it advocates the use of administration as a rescue process, the purpose for which it is primarily designed and the objective an administrator is required to pursue if reasonably practicable. This purpose is contrasted to the recent use of administration as a quasi-liquidation, which has led to a common perception that administration inevitably means the end of the company (discussed in our article on the collapse of Thomas Cook **here**).

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The ILA note's most significant contribution is the reminder that administration, in the right circumstances, can function as a form of debtor-in-possession procedure. Although an administrator cannot delegate his or her statutory powers to a company's directors, they can leave much of the running of the company in the hands of existing management who know the business best and are unlikely to have been culpable for the company's financial difficulties due to COVID-19. To this end, the note is accompanied by a model Consent Protocol, which could be used by an administrator to consent to the directors continuing with certain management powers.

Initiatives around insolvency law are clearly needed so that the short-term impact COVID-19 may have on businesses that would otherwise be viable does not result in a wave of avoidable insolvencies. Whilst the UK government's proposals may only partially achieve this objective (and even then only after some delay), the insolvency profession in the UK is showing plenty of initiative and its characteristic flexibility of thought to propose solutions to meet the unique challenges businesses now face.

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