The Corporate Insolvency and Governance Act 2020 (the "Act")

The Corporate Insolvency and Governance Bill 2020 received Royal Assent on 25 June 2020 and the Act came into force on 26 June 2020. The Act introduces significant permanent changes to the existing insolvency and restructuring regime in the UK along with some temporary measures designed to support businesses during the coronavirus pandemic.

MORATORIUM

A significant permanent change is the introduction of a new standalone moratorium, which affords greater protection to companies experiencing financial difficulty by giving them time to restructure or seek new investment, without the threat of action by creditors. It is available to most types of company (with the exception of certain types of company, including insurance companies, banks, electronic money institutions, investment banks and firms and parties to capital market arrangements). Directors continue to run the business during the moratorium under the supervision of a qualified insolvency practitioner, who is appointed to act as a 'monitor'. A moratorium is obtained by a company filing specified documents at court, including a statement by the directors that the company is, or likely to become, unable to pay its debts as fall due, accompanied by a statement from the monitor confirming that the moratorium is likely to result in the rescue of a company as a going concern. The moratorium has an initial period of 20 business days and can be extended, after 15 business days, for a further period of 20 business days without consent, or for a longer period up to a year or more with the consent, of the creditors or the court.

TERMINATION CLAUSES (IPSO FACTO CLAUSES)

In another permanent change, the Act prohibits suppliers from using termination clauses or doing "any other thing", pursuant to the terms of their supply contracts, in respect of its customers who have become subject to an insolvency or restructuring procedure (including the new moratorium and restructuring plan). The new measure applies not only to essential supplies (such as utilities, telecoms, IT) but extends to all supplies of goods/services (although there are carve-outs for regulated entities, financial and insurance companies). In relation to the customer, the measure applies where:

(a) a moratorium comes into force for the company under the new moratorium procedure;
(b) the company enters administration;
(c) an administrative receiver of the company is appointed;
(d) a company voluntary arrangement takes effect in relation to the company;
(e) the company goes into liquidation or a provisional liquidator is appointed; or
(f) a convening order is made by the court in respect of a restructuring plan.

This means that once a customer has become subject to insolvency, a supplier will temporarily lose the right to terminate the supply contract, even if the customer is in breach of its payment obligations, and must continue with performance of the contract. The supplier cannot vary the terms of the contract, e.g. to increase the price of future supplies or insist on payment of previous invoices and outstanding sums as a condition of continued supply. It is possible for a supplier to terminate the contract with the consent of the customer or the relevant office holder (administrator, administrative receiver, liquidator or provisional liquidator) or with the permission of the court (which can grant a hardship order), if it is satisfied the supplier will suffer undue financial hardship if it continues to supply. There is no definition of 'hardship' and further guidance is required, but the most obvious examples might be where the supplier can demonstrate that it is experiencing cashflow issues that impact its ability to produce the goods or provide the services and/or is on the verge of insolvency itself. In addition to termination, the supplier is restricted from doing 'any other thing' - which is very broad and covers any other contractual rights or consequences that the supplier might exercise/invoke when an insolvency procedure is entered into, for example changing pricing or payment terms or charging default interest or acceleration.

In practice in has been suggested that the risk to the supplier will be limited:

- For moratorium, the debtor should continue to make payments for continued supplies as they fall due during the moratorium, otherwise the moratorium will end. If a debtor enters into administration or liquidation within 12 weeks of the end of the moratorium, unpaid moratorium debts and pre-moratorium debts without a payment holiday (which include goods/services supplied during the moratorium) are given a priority ranking and will be paid out after fixed charges but ahead of IP expenses.
- For administration, liquidation, provisional liquidation or administrative receivership, the IP must ensure that payments for continued supplies are made as expenses of the insolvency procedure and therefore rank above pre-insolvency unsecured and floating charge claims.
- In other insolvency proceedings, for instance a CVA, a restructuring or purchase of the business or other rescue strategy is likely, such that the debtor continues trading solvently and avoids insolvency proceedings.

During the COVID-19 emergency, until 30 September 2020, there is a temporary exclusion applicable to 'small' suppliers, who are defined as those who meet at least two of the following three criteria in respect of their most recent financial year:

(i) annual turnover no more than £10.2m;
(ii) balance sheet of no more than £5.1m;
(iii) fewer than 50 employees.

WINDING-UP PETITIONS AND STATUTORY DEMANDS

The Act temporarily prohibits any winding up petitions being filed in relation to statutory demands that have been served during the relevant period, i.e. between 1 March 2020 and 30 September 2020.

It also prevents creditors from filing a winding up petition unless the creditor confirms to the court that it believes that either:

(a) coronavirus has not had a financial effect on the debtor company, or;
(b) debtor would have been unable to pay its debts even if coronavirus had not had a financial effect on it.

The requirement of a “financial effect” appears to have a low threshold - it is met if the debtor’s financial position has worsened as a consequence of coronavirus or other reasons relating to coronavirus.

Furthermore, winding up orders made on or after 27 April, but before 26 June 2020 when the Act came into force, will be void.

WRONGFUL TRADING

There is a temporary suspension of the wrongful trading provisions contained in the Insolvency Act 1986, intended to protect company directors by imposing a presumption that the directors are not responsible for the deterioration of a company's financial position (i.e. by an increase in the company's net liability to its creditors) during the period 1 March 2020 to 30 September 2020. It only applies in relation to potential liability for wrongful trading during the COVID-19 crisis, but would not apply to liability for a breach of directors' duties generally or fraudulent trading.

RESTRUCTURING PLAN

In a permanent change to insolvency law, the Act introduces a new restructuring procedure, similar to the existing scheme of arrangement that will:

- bind both secured and unsecured creditors
- require the approval of a minimum of 75% in value in each class of those voting
- feature a cross-class cram down, whereby dissenting classes of creditors will be bound if the court considers that it is fair and equitable, and is satisfied that they are in no worse position than they would be if an alternative insolvency procedure was pursued.

The intention is to facilitate the rescue of more companies using this procedure. Both solvent and insolvent companies qualify and may propose the new restructuring plan to their creditors.

ANNUAL GENERAL MEETINGS (AGMS) AND GENERAL MEETINGS (GMS)

Companies are temporarily permitted to hold closed AGMs and GMs, conduct business and communicate with members electronically, even where the company's constitution does not allow this. The measure also permits extensions to the deadline for holding an AGM, so that where the deadline expires during the period 26 March 2020 to 30 September 2020, the company has until 30 September to hold their AGM.

The temporary period begins on 26 March 2020 and ends on 30 September 2020, and it may be extended by 3 months at a time but cannot be extended beyond the end of the current financial year.

COMPANIES HOUSE FILING REQUIREMENTS

The Act empowers the Secretary of State to issue regulations extending the deadlines applicable to the filing of the following documents, under the Companies Act 2006:

- accounts
- annual confirmation statements
- notices of related relevant events (e.g. changes to company directors)
- registration of charges.

Late filing of these documents can attract fines, criminal sanctions for directors, and lead to the company being struck off the register.

Although extensions are already offered, the Secretary of State may extend the period further, but must not exceed:

- 42 days, where the existing period is 21 days or fewer, and
- 12 months, where the existing period is 3, 6 or 9 months.

This is a temporary measure during the COVID-19 emergency.