Part 2: A New Chapter

Long-term effects of the Corporate Insolvency and Governance Bill

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Shooting at a moving target…

- 20 May 2020 – introduced to Commons
  - All readings in one day
  - No real debate/discussion of amendments
- 3 June 2020 – introduced to House of Lords
  - No substantial amendments
- 9 June 2020 – second reading in Lords
  - Intervention from Lord Hope
- 16 June 2020 – committee stage (Lords)
- 23 June 2020 – third reading (Lords)

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Outline

- Part 1 (10 June 2020) covered general application and COVID-related measures
  - https://www.guildhallchambers.co.uk/events-and-seminars.html
- This webinar considers:
  - Long-term effects
  - Comparing and contrasting with US Chapter 11
- Moratoriums
  - Role of the monitor
- Restructuring plans ('Super Schemes')
- Ipso facto clauses

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Key Issues

- Importing legislation is the easy part…
  - …importing culture is more difficult
  - Rescue culture or delaying the inevitable?
- Moratorium
  - Limited in availability and scope compared with US automatic stay
- Super Schemes
  - Scope for change is dramatic
  - Dependent on judicial approach to confirmation
- Ipso facto clauses
  - Big details left to be filled in by judges

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Availability of moratoriums

- After Covid ‘longstop’…
- Requires monitor statement
  - Does not directly matter what monitor ‘thinks’
    - cf. Sch B1, para 3(3), (4)
  - ‘Objective 1’ test: sA6(1)(e) (next slide)
    - Cf. Sch B1, para 3(1)(b), (c)
  - How likely is ‘likely’? ‘*could*’ or ‘*would*’?
    - *Harris Simons Construction Ltd* [1989] 1 WLR 368
    - ‘reasonable prospect’ in Sch A1, para 6(2)(a)
- Places monitor in a difficult position
  - Moratorium ends when ‘likelihood’ ceases: ssA9/A38

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Tests for monitor vs court

ssA6(1)(e), A10(1)(d), A11(1)(d), A13(2)(d) (statement from monitor)
a statement from the proposed monitor that, in the proposed monitor's view, it is likely that a moratorium for the company would [will] result in the rescue of the company as a going concern.

sA4(5) (where company is subject to winding-up petition)
The court may make an order under subsection (4)(a) only if it is satisfied that a moratorium for the company would achieve a better result for the company's creditors as a whole than would be likely if the company were wound up (without first being subject to a moratorium).

sA13(5) (where extension is sought from court)
In deciding whether to make an order under subsection (4)(a) the court must, in particular, consider the following… the likelihood that the extension of the moratorium will result in the rescue of the company as a going concern.

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Duration of moratoriums

- 20 business days as standard: sA9(2)
  - 20 more with further application: sA10(3)
- Not an end in itself
  - Apart from rescue/turnaround cases
  - Cf. Experience with Schedule A1
- Extension with creditor consent? (sA11)
  - Seems unlikely in majority of cases. Why delay?
  - Possible exception for ‘friendly’ creditors (and risk of abuse)
- Court extension (sA13 or sA15 (w/ Part 26A)
  - How will judges approach this issue?
  - ‘Creditor first’ or ‘admin extension’?

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Compared with the automatic stay…

Automatic stay in chapter 11 …

- … is triggered by bankruptcy filing and is not available outside bankruptcy proceeding
- … covers most prepetition actions against the debtor, with few exceptions
- … lasts for the full duration of the bankruptcy proceeding
  - Debtor's exclusive right to propose plan for first 120 days, may be extended up to 18 months; often much quicker in practice

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Compared with the automatic stay…

The moratorium…

- … embodies a latent ‘creditor-first’ approach?
  - Amendments tabled in Commons for 30 days
  - Balancing interests of creditors/debtors (Lord Hope)
- … offers little possibility for ‘trading out’ of insolvency?
  - Unlikely with just 20 or 40 days
  - Availability of DIP financing? (sA51(2))
    - New s174A, amend to s175
- … evinces a distrust of directors?

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Role of the monitor

- *Sui generis* position
  - Quasi-nominee/supervisor
  - No parallel in US proceedings
    - Closest analogues are trustees and examiners, but rarely appointed in large chapter 11 cases
    - Cf. special managers in England and Wales
- Distrust of insolvent company management?
- Limited role but bears responsibility for
  - Starting and ending moratorium
  - Certifying sale of property
  - Does NOT replace director

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Monitor shielding

- Entitled to rely on information given
  - Same as for IVA/CVAs?
  - If reliance can be given to director statements, is the monitor necessary?
    - Uneasy mismatch with trust/distrust when information goes from director -> monitor -> court
- Immunity?
  - Criminal liability only for notification offences
  - Not liable to pay compensation: sA42(4)(c)
  - But even for sales of company property?
  - Undue safeguarding of monitor
    - Cf. IA 1986 s212(1)(a)? sA44 for directors?
    - Sch A1, para 27(3)

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Part 26A – Super Schemes

- Cribbing from Chapter 11?
  - Intended to include secured creditors
    - Chapter 11 includes both secured and unsecured creditors, with protection for security rights
    - Radical departure from previous norms: e.g. IA 1986 s269
  - Differing vote share requirements
    - Chapter 11 requires 2/3 in amount and 1/2 in number to avoid cramdown; 75% in Part 26A
    - No requirement by number (s901G(1))
  - Judicial approval central to efficacy
    - No rubber-stamp of cramdown or ‘cram-up’
  - What is the ‘relevant alternative’?
    - US ‘alternative’ remains liquidation

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Questions on Part 26A

- Where does this leave CVAs? Pre-packs?
  - 2019: 351 CVAs of 17,224 insolvencies (c. 2%)
  - Pressure off pre-packs?
- Failure of legislation or result of culture?
- Impact on rates of lending?
- What will the approach of judges be?
  - Embedded in culture of ‘creditors first’ and ‘secured creditors to the front’?
  - American judges take macroeconomic/ debtor-focused approach
    - Will judges here do the same?

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International Recognition of Part 26A

- Applies worldwide
  - Extending the ‘long arm’ of Schemes of Arrangement
- An ‘insolvency process’ for the purpose of EU Regulation on Insolvency Proceedings?
  - Annex A currently omits Schemes
- Atlantic pivot post-Brexit?
  - Both countries have adopted UNCITRAL Model Law
  - Scope for automatic recognition of Part 26A in US Chapter 15?

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Ipso facto clauses

- Efficacy only heightened with longer stay
  - Allows for ‘trading out’ of difficulty
  - How will this work with moratoriums of 40 days?
  - What if contract is to pay in 30 days?
    - Supplier may have obligation, but what are the consequences of breach?
- Excepted companies quite large
  - £10.2m turnover; £5.1m balance sheet; 50 emps
- Big gaps to be filled in by courts
  - ‘Any other thing’? s233B(3)
    - Guarantors? Group companies?
  - ‘Hardship’ in s233B(5)(c)?

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Remaining uncertainty

- Further amendments?
- Future legislation based on trajectory of the pandemic?
- Henry VIII powers?
  - Covered in Part I
  - Defer substantial discretion to executive
  - No US agency analogue

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Some preliminary conclusions…

- Moratorium provisions too limited to effect change, facilitate balance sheet restructuring
  - Limited in availability and time
- Are monitors necessary?
  - Especially in light of judicial oversight
  - A difficult role to play, but ‘immunity’ unjustified
- Super schemes show most potential for change
  - But dependent on shift in culture and judicial attitudes for rescues to become normal

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Thank you

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