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Financial Restructuring Group

Client Alert

UK government's new Corporate Insolvency and Governance Bill – implications for the aviation industry

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On 20 May 2020, the Corporate Insolvency and Governance Bill had its first reading in the House of Commons. This is the bill that enacts many of the measures referenced in the government's announcements earlier this year. Alongside some temporary Covid-19 response measures, the Bill introduces several permanent changes that will have a significant impact on the range of options available to creditors and debtors in distressed situations.

A summary of the core elements of the Bill can be found in our Client Alert here. In this note, we summarise some aspects of the Bill which will have specific ramifications for the aviation industry.

Schemes & Restructuring Plan

The Bill introduces a new restructuring plan, which allows a company encountering financial difficulties to propose a compromise or arrangement with its creditors and/or members to address its financial difficulties. This "restructuring plan" will look a lot like the existing scheme of arrangement, with a few key differences. The restructuring plan is targeted at companies in financial distress – the company 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. It is intended to eliminate, reduce or prevent, or mitigate the effect of, any of those financial difficulties.

The fact that the restructuring plan is modelled on the existing scheme of arrangement provisions will bring a significant degree of comfort, as existing case law will, to a large extent, remain relevant. The key difference between the "old" and "new" schemes is that the new regime introduces a cross-class cram-down, allowing a scheme to be sanctioned even where one voting class has not approved the proposal at its scheme meeting.

A number of the features of the new scheme will be welcomed by the restructuring community as addressing failings of the old regime, which were often dealt with by sandwiching together different processes with consequent increased cost and complexity. However, the lack of protections for dissenting or "out of the money" classes – in particular the omission of any protection akin to the absolute priority rule under Chapter 11 – is a cause for concern.

A further, unexpected, novelty introduced by the Bill is that the restructuring plan, and the existing scheme of arrangement framework, would not be available in respect of creditors with “aircraft-related interests”. An aircraft-related interest is a registered interest within the meaning of the International Interests in Aircraft Equipment (Cape Town Convention) Regulations 2015 (S.I. 2015/912). The net effect of these provisions, if enacted, would be to deprive companies with aircraft assets in financial distress of a valuable tool to restructure outside of a formal insolvency process.

From a debtor’s perspective and from the perspective of creditors whose claims do not have the benefit of the protection of the Cape Town Convention this is a concerning development, as it was not part of the original consultation on the proposals, and may have a significant impact on the way restructurings of UK airlines and aircraft leasing companies may be effected now and in the future. However, from the perspective of financiers of UK airlines and aircraft leasing companies and lessors to UK airlines who have Cape Town interests in their aircraft assets, this is likely to be seen as welcome, as it gives increased protection to such interests and increases their leverage in a restructuring scenario. Regardless, we consider that there is a material possibility that given the issues affecting the aviation industry and airlines in particular at the present time, it may be that this provision in the Bill is reconsidered as the Bill makes its way through the various readings in Parliament

Insolvency termination clauses

The Bill also introduces provisions restricting a supplier of goods or services to a company who is subject to an insolvency procedure from terminating that contract, or conditioning future performance on the payment of existing debts. Although similar provisions had been introduced in respect of “essential” suppliers in the context of administration, the provisions set out in the Bill would go further in terms of the range of suppliers and circumstances in which they would apply.

The Bill covers both “insolvency” termination clauses – where the contract or supply are terminable as a result of the occurrence of a specified insolvency event – but also suspends termination rights that have arisen prior to any filing (regardless of the grounds) for the duration of the relevant insolvency procedure. The range of procedures includes true “insolvency” – such as administration and liquidation, but also covers the new moratorium, the new restructuring plan, and company voluntary arrangements.

There are some protections for suppliers, including an ability to apply to court to allow termination on grounds of hardship. There is also a temporary suspension with respect to small suppliers, which will last until the later of 30 June 2020 or 1 month after the Bill comes into force

Moratorium

Adding to the range of permanent “protective” measures is the introduction of a new moratorium available to a company which is, or is likely to become, unable to pay its debts. The moratorium is intended to create breathing room for the company – with a payment holiday in respect of certain pre-moratorium debts, and a stay on legal proceedings and security enforcement during the moratorium period.

The moratorium is a “debtor-in-possession” procedure, leaving the company’s management and directors to run the business, subject to the oversight of a “monitor”. The monitor is an insolvency practitioner but, in this role, performs a light-touch supervisory function, essentially tasked with monitoring that it is and remains likely that the moratorium would result in the rescue of the company as a going concern.

The moratorium lasts for an initial period of 20 business days, but is extendable by another 20 business days by the company. Further extensions beyond this period require creditor consent, or court intervention.

Temporary measures

In addition to the longer-term changes to the insolvency regime outlined above, the Bill also introduces a number of shorter-term Convid-19 responses. These include:

- Temporary suspension of directors' potential personal liability for wrongful trading in certain circumstances, from the period 1 March 2020 to 30 June 2020 (or one month after the Bill takes effect, if later); and
- Temporary suspension of ability of creditors to present winding up petitions and statutory demands in certain circumstances. The provisions will have retrospective effect, with it being regarded as having come into force on 27 April 2020, and will last until 30 June 2020 (or one month after the Bill comes into force).

Please feel free to discuss any aspect of this Client Alert with your regular Milbank contacts or any member of our Financial Restructuring Group.

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