An assessment of the UK restructuring moratorium

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Many jurisdictions have recently introduced reforms to their debt restructuring regimes in order to ensure that financially distressed but viable companies have effective tools to facilitate their rescue. The COVID-19 pandemic has intensified the need for such tools. The inclusion of a statutory stay is a consistent feature in these reforms. This article examines the introduction of a restructuring moratorium in the UK as part of its recent debt restructuring reforms, introduced by the Corporate Insolvency and Governance Act 2020. While moratoria can be potentially very valuable in promoting the rescue of a company or business, a balance is required between the benefits to the company and the creditors as a whole on the one hand and the rights of the individual creditors on the other. The success of the UK's restructuring moratorium in achieving a successful balance is assessed. Ultimately it is argued that the necessary balance does not seem to have been achieved and that the constraints and limitations placed on the moratorium, for creditor protection and other reasons, limit the potential value of this mechanism to a significant extent. Many companies will therefore have to continue to look elsewhere for protection from creditors seeking to disrupt their restructurings.

I. INTRODUCTION

In recent years many jurisdictions around the world have sought to ensure that their regimes provide an effective debt restructuring mechanism for financially distressed but viable companies. The paradigm situation is a debtor that is distressed and facing a liquidity crisis but whose underlying business is fundamentally sound. A sale of the business may not always be available, particularly during periods of macroeconomic uncertainty, and some form of debt restructuring can enable the company to avoid entry into a formal insolvency procedure. The importance of including such a mechanism within the toolkit of financially distressed companies was highlighted by the 2008 global financial crisis, and the financial distress caused by the COVID-19 pandemic has created additional urgency to this issue. Other factors have played a part too, including a measure of regulatory competition as jurisdictions around the world have started to unveil their debt restructuring proposals. There has also been increased political focus in the UK and

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elsewhere on rescuing companies, through indicators such as the World Bank's Doing Business figures.[1]

The US Chapter 11 regime has often been taken as the starting point for these debt restructuring reforms, and as a result there is considerable similarity in the core features of the reform proposals that have emerged around the world, namely that they are debtor-in-possession procedures which leave the directors in control rather than outsourcing the running of the company to a third party; they include the ability to proceed with the restructuring despite the objections of one or more classes of creditor (a cross-class cramdown)[2] and the mechanisms have access to a statutory stay. The inclusion of other components, such as measures to facilitate the provision of rescue finance, vary from jurisdiction to jurisdiction, but the statutory stay is a constant feature. During the period in which a restructuring is being negotiated and implemented, there is the potential for one or more creditors to disrupt the restructuring either by exercising their rights to demand payment or by seeking to put the company into liquidation. One way to address this possibility is to put some form of stay (or moratorium)[3] in place. A statutory stay can provide a breathing space for companies in financial distress by constraining creditors from such behaviour, thus giving the company time to deal with its difficulties.

A moratorium is fundamentally a legal intervention designed to promote the rescue of a company or business. Moratoria have existed as integral aspects of mechanisms such as US Chapter 11 and UK administration for some time. They are traditionally regarded as having two benefits. The first is to deal with the "common pool" problem.[4] If there is no stay, then creditors may seize assets that are useful or perhaps essential for the carrying on of the debtor's business and this could therefore jeopardise the prospects of a successful rescue. Central to this is the notion that a business consists of assets and relationships that are worth more collectively than if they are dissipated. The second benefit is that a moratorium can deal with the "anti-commons" problem, ie, it can block actions by individual creditors who are seeking to frustrate the wishes of the majority.[5]

1. These are produced annually. See eg, World Bank Group, *Doing Business 2020: Comparing Business Regulation in 190 Economies.* For discussion on the background to the Government Proposals in 2018, see S Frisby, "Of rights and rescue: a curious confluence" (2020) 20 JCLS 39.

2. The term "cramdown" indicates that the restructuring is being imposed despite the fact that one or more creditors have not consented to it, but this can take various forms. For example, schemes of arrangement allow the restructuring to go ahead despite the dissent of the minority of a class of creditors as long as all of the classes consent (a cramdown within a class). Most commonly, however, the term cramdown is used to mean that the restructuring can go ahead despite the dissent of one or more classes of creditor in certain circumstances (a cross-class cramdown), as can occur in US Chapter 11 and now in a restructuring plan under the Companies Act 2006, Pt 26A, following the CIGA. For discussion of the term "cramdown", see J Payne, "Debt restructuring in English Law: Lessons from the US and the need for reform" (2014) 130 LQR 282.

3. Different definitions of "moratorium" can be adopted. On one view, a moratorium is simply a period in which debts are not due and payable. However, a moratorium of this kind would be of relatively limited value to a company in a restructuring, since it would still leave open the possibility of a number of other ways in which a creditor could pursue its claims against the company in a manner which could be disruptive of the attempted restructuring, for example, by seeking to have the company wound up. The definition of "moratorium" adopted in the Insolvency Act 1986 focuses on a broader concept of a statutory stay, as discussed in Part III(1) *post*, which is likely to be more valuable to a company, and this is the sense in which the term "moratorium" is used in this article.

4. See TH Jackson, *The Logic and Limits of Bankruptcy Law* (Cambridge MA, 1986).

5. D Baird and R Rasmussen, "Anti-bankruptcy" (2010) 119 Yale LJ 648; R de Weijs, "Harmonisation of European insolvency law and the need to tackle two common problems: common pool and anticommons" (2012) 21 International Insolvency Rev 67.

A stay on creditor action can therefore promote the survival of the company, or its business, maximising returns for creditors, and benefiting other stakeholders, such as employees, who depend on the continued operation of the business.

Although the benefits of a moratorium have been understood for some time, until relatively recently they were not widely seen in a restructuring context. This is changing. The Singapore Companies (Amendment) Act 2017[6] and the EU Restructuring Directive[7] are two examples of recent debt restructuring reforms that have included a restructuring moratorium as part of the reform package. The reforms introduced in the UK by the Corporate Insolvency and Governance Act 2020 follow this approach. Until the 2020 Act, the options in the UK for companies undergoing restructuring to have access to a moratorium were very limited.[8] The idea that a broad restructuring moratorium should be introduced in the UK is not new.[9] Most recently it was raised in 2016 in a set of recommendations by the Insolvency Service as part of a broader reform package.[10] The Government responded favourably to these recommendations and published a set of reform proposals in 2018 which included a restructuring moratorium.[11] These proposals sat on the shelf until the financial distress created by the COVID-19 pandemic led to their inclusion in the Corporate Insolvency and Governance Act 2020 as part of a suite of permanent changes to the UK's restructuring regime, alongside a set of temporary changes intended to tackle the financial problems created by COVID-19. The 2020 Act introduces a number of measures intended to benefit financially distressed companies that face a liquidity crisis but are nevertheless worth rescuing, and includes two significant innovations. The first is the creation of a new restructuring procedure, a restructuring plan, which builds on the success of the UK scheme of arrangement found in Pt 26 of the Companies Act 2006.[12] The restructuring plan (sometimes called a "super scheme") is included in a new Pt 26A of the Companies Act 2006 and introduces the option for the restructuring to be imposed on one or more classes of dissenting creditors.[13] The second is the introduction of a standalone restructuring moratorium which can be used alongside existing restructuring mechanisms such as schemes of arrangement and Company Voluntary Arrangements (CVAs), as well as the new restructuring plan. The focus of this article is on this latter innovation.

6. Singapore Companies (Amendment) Act 2017, introducing ss 211A–211D of the Singapore Companies Act (and see now Singapore Insolvency, Restructuring and Dissolution Act 2018, ss 64–66).

7. Directive 2019/1023 on preventative restructuring frameworks, on discharge of debt and disqualifications, and on measures to increase the efficiency of procedures concerning restructuring, insolvency and discharge of debt, and amending Directive (EU) 2017/1132, Arts 6–7.

8. For example, the moratorium attached to CVAs related only to very small companies: Insolvency Act 1986, s.1A and Sch.A1. For further discussion see *post*, Part II.

9. See eg, Report of the Insolvency Law Review Committee, *Insolvency Law and Practice* (Cmnd 8558, 1982) (Cork Report), para.406.

10. Insolvency Service, *A Review of the Corporate Insolvency Framework: A Consultation on options for reform* (May 2016); and see Insolvency Service, *Summary of Responses—A Review of the Corporate Insolvency framework* (September 2016).

11. BEIS, *Insolvency and Corporate Governance: Government Response* (26 August 2018). The final version of the restructuring moratorium in the CIGA is not identical to either the Insolvency Service's proposals or those in the 2018 Government paper.

12. See J Payne, *Schemes of Arrangement: Theory, Structure and Operation*, 2nd edn (Cambridge, 2021).

13. *Ibid*, ch.5.8.

This article critically reviews the UK restructuring moratorium introduced in the 2020 Act. While a statutory stay can clearly provide benefits for the company and for stakeholders, if the company is able to use the breathing space to rescue itself or its business, these benefits occur at the expense of party autonomy since creditors are prevented from exercising their contractual and other rights. A balance is therefore required between the benefits to the company and the creditors/stakeholders as a whole, on the one hand, and the rights of the individual creditors, on the other. This is by no means a straightforward balance to achieve in practice and an integral aspect of an effective moratorium is a clear structure setting out a means to recognise and weigh these competing pressures. The efforts of the legislative provisions to get this balance right are assessed. The 2020 Act leaves a number of key issues undefined and much will depend on how the courts interpret and develop this mechanism. Ultimately it is argued that the necessary balance does not seem to have been achieved and that the constraints and limitations placed on the moratorium, for creditor protection and other reasons, limit the potential value of this mechanism to a significant extent. Many companies will have to continue to look elsewhere for protection from creditors seeking to disrupt their restructurings.

II. THE NEED FOR A RESTRUCTURING MORATORIUM IN THE UK

Creditors have the potential to disrupt a restructuring either by demanding payment of their debt or by commencing insolvency proceedings. The need for creditors to be constrained from such action is well understood in the context of insolvency law, as a means of keeping the business and assets together so that they can be sold for the highest possible price.[14] In the same way, a stay can be beneficial as a means of providing a breathing space for the company within which to reach an arrangement with its creditors and to keep the business and assets together long enough for a reorganisation to be effected. At its simplest this might merely prevent the creditor from enforcing its debt claim against the company for the period of negotiation. It is likely to be more valuable, however, if the stay also prevents the initiation of insolvency proceedings and other legal process, given the impact of the commencement of such proceedings on the position of managers, on counterparties, and on the company's goodwill. The stay could even be extended further, to include a constraint on the ability of the creditor to terminate its contract with the company in this period.

The need for some form of constraint on creditor action during a restructuring is generally acknowledged to be a core aspect of that process. US Chapter 11 is often regarded as the gold standard in terms of a mechanism for managing corporate reorganisation.[15] The statutory stay is a fundamental form of debtor protection within US Chapter 11. Immediately upon the filing of a bankruptcy petition, a moratorium automatically arises and stays all litigation and prevents the enforcement of judgments and of security without leave of the court.[16]

14. See, eg, T Jackson, "Bankruptcy, Non-bankruptcy Entitlements, and the Creditors' bargain" (1982) 91 Yale LJ 857; TH Jackson and RE Scott, "On the Nature of bankruptcy: An Essay on Bankruptcy Sharing and the Creditors' Bargain" (1989) 75 Virginia L Rev 155.

15. See E Warren and J Westbrook, "The Success of Chapter 11: A Challenge to the Critics" (2009) 107 Michigan L Rev 603.

16. 11 USC § 362(a). The stay is effective during the entire time the case is pending but creditors and other parties may make motions to lift or modify the stay: § 362(d).

Debtors are given the exclusive right to formulate a plan of reorganisation for 120 days from the date of filing. This period can be extended if sufficient reasons are established, up to a maximum of 18 months from the filing date.[17] The Chapter 11 regime also deals with the fact that many contracts contain "*ipso facto*" clauses allowing the supplier to terminate or modify long-term supply arrangements if the counterparty enters insolvency. The US regime restricts the ability of creditors to terminate their contracts on the basis of insolvency[18] and allows the debtor to "cherry-pick" among outstanding contracts, subject to certain safeguards. The US Chapter 11 regime has been very influential and jurisdictions around the world that have introduced new restructuring mechanisms or have amended their existing regimes have included a moratorium as a central plank in these reforms.[19] In the EU Restructuring Directive,[20] for example, a stay on actions against the debtor is a fundamental part of the regime. Similarly, Singapore's 2017 debt restructuring reforms also include a broad statutory stay as part of its restructuring reforms.[21]

Until 2020, only two options for a statutory stay existed in the UK for those involved in debt restructuring: the automatic statutory stay attached to administration[22] and the moratorium available for CVAs related to small companies.[23] Both involved a moratorium on enforcement of claims and on insolvency proceedings and other legal process. Neither moratorium was particularly beneficial from a debt restructuring perspective. Administration lacks many of the required components for a successful debt-restructuring mechanism.[24] It is not a debtor-in-possessions procedure,[25] and as an insolvency mechanism it brings with it the stigma of insolvency and it operates at a relatively late stage in the process compared to other available mechanisms, such as schemes of arrangement.[26] It also lacks the ability of other debt-restructuring mechanisms to cram down dissenting creditors, particularly secured creditors. While CVAs are potentially more valuable as a

17. 11 USC § 1121.

18. 11 USC § 365(e) and § 541(c).

19. For other examples, see eg Spanish Law 38/2011 of October 2011 and Law 4/2014 of 7 March, discussed in I Tirado, "Scheming against schemes: A New framework to deal with Business Financial Distress in Spain" (2018) European Company and Financial L Rev 516; and the Dutch scheme (Act on the Confirmation of Private Restructuring Plans, *Wet homologatie onderhands akkoord*).

20. EU Restructuring Directive 2019/1023, Arts 6–7. For discussion on the background to this directive, see H Eidenmüller and K van Zwieten, "Restructuring the European Business Enterprise: The EU Commission Recommendation on a New Approach to Business Failure and Insolvency" (2015) European Business Organization L Rev 625; G McCormack, "Corporate Restructuring Law—A second chance for Europe?" (2017) 42 European L Rev 532.

21. Singapore Companies (Amendment) Act 2017, introducing ss 211A–211D of the Singapore Companies Act (and see now Singapore Insolvency, Restructuring and Dissolution Act 2018, ss 64–66). See Meng Seng Wee, "The Singapore Story of injecting US Chapter 11 into the Commonwealth scheme" (2018) European Company and Financial L Rev 553; G McCormack and WY Wan, "Transplanting Chapter 11 and the US Bankruptcy Code into Singapore's restructuring and insolvency law: opportunities and challenges" (2019) JCLS 69. For discussion of the operation of the moratorium, see *Re IM Skaugen SE* [2019] 3 SLR 979. *Cf* the narrower moratorium that existed prior to 2017: Singapore Companies Act, s.210(10).

22. Insolvency Act 1986, Sch.B1, paras 42–43.

23. *Ibid*, s.1A and Sch.A1.

24. See, eg, Payne (2014) 130 LQR 282.

25. For discussion of debtor-in-possession versus creditor-in-possession procedures, see D Hahn, "Concentrated Ownership and Control of Corporate Reorganizations" (2004) 4 JCLS 117; S Franken, "Creditor- and Debtor-Oriented Corporate Bankruptcy Regimes Revisited" (2004) 5 EBOR 645.

26. The entry into administration will generally trigger cross-default clauses or contractual provisions for acceleration of liability, termination of the contract or the cessation of intellectual property rights; by contrast, the entry into other debt-restructuring mechanisms, such as schemes of arrangement, does not tend to operate as such a trigger.

debt-restructuring mechanism,[27] as they are a debtor-in-possession procedure, can operate at an earlier stage than administration, and can cram down the rights of the minority of unsecured creditors, they also face some limitations, in particular secured creditors cannot be bound without their consent.[28] Furthermore, the moratorium attached to CVAs existed only for very small companies indeed, a company being eligible if, in the year before filing for the moratorium, or the previous financial year, the company satisfied two or more of the following: it had a turnover of less than £6.5 million per annum, had fewer than 50 employees or had a balance sheet total that did not exceed £3.26 million.[29] For larger CVAs there was no moratorium available. There was also no moratorium attached to schemes of arrangement, which in the last 20 years have become the predominant mechanism for large debt restructurings, either as a standalone mechanism or when twinned with pre-pack administration.[30] The latter mechanism involves a transfer of the assets of the company to a new company (newco) by means of a pre-pack administration in combination with the senior creditors swapping their debt in the original company (oldco) for equity or debt in newco via the scheme of arrangement, the out of the money creditors and members being left behind in oldco. This is a means of rescuing the business (rather than the company) and although it has some downsides, including the tax and other potential disadvantages of transferring the assets in this way, the benefits it provides, in particular the *de facto* cross-class cramdown it facilitates, has led to its popularity as a restructuring tool for English and foreign companies.[31]

The lack of a moratorium attached to schemes of arrangement and most CVAs left companies potentially exposed during the period while the restructuring was negotiated and implemented. Alternatives to a statutory moratorium have therefore developed to fill this gap. First, the creditors can agree a contractual standstill arrangement, where they voluntarily commit to refrain from exercising their contractual rights in these ways. This can work well where small homogeneous groups of creditors are involved in the restructuring. Many restructuring schemes of arrangement, for example, exclude the trade creditors and involve only the finance creditors, and this increases the chance of agreeing a standstill arrangement between this smaller group of creditors, many of whom are repeat-players. However, where numbers grow, and creditors become more heterogeneous, such agreements become more difficult.[32] In addition, the existence of a market for distressed debt in the UK has meant that creditors unhappy with the restructuring are able to sell their debt rather than challenge the proposed restructuring or enforce their debt.[33] Second, the scheme of arrangement or CVA can be twinned with administration to access the

27. See eg *Discovery (Northampton) Ltd v Debenhams Retail Ltd* [2019] EWHC 2441 (Ch).

28. Insolvency Act 1986, s.4(3).

29. The protection available under this moratorium was analogous to that which takes effect on administration. See Insolvency Act 1986, Sch.A1 (repealed by CIGA, Sch.3 para.2).

30. For discussion, see Payne (2014) 130 LQR 282; Payne, *Schemes of Arrangement: Theory, Structure and Operation*, 2nd edn (2021), [5.4.3]; S Paterson, "Bargaining in Financial Restructuring: Market Norms, Legal Rights and Regulatory Standards" (2014) 14 JCLS 333; S Paterson, "Debt Restructuring and the Notions of Fairness" (2017) 80 MLR 600.

31. For discussion, see eg *Re Rodenstock GmbH* [2011] EWHC 1104 (Ch); *Re Gansewinkel Groep BV* [2015] EWHC 2151 (Ch); *Re Noble Group Ltd* [2018] EWHC 2911 (Ch).

32. See, eg, S Paterson, "Rethinking the Role of Corporate Bankruptcy Theory in the Twenty-First Century" (2016) 36 OJLS 697.

33. *Ibid*.

statutory stay attached to that mechanism, but this can have implications for the timing of the restructuring. Third, the court can be asked to exercise its discretion to grant a stay in order to protect a restructuring. This practice has developed in relation to schemes of arrangement.[34] Indeed, on some occasions the sole purpose of the scheme is to impose a moratorium against enforcement action by creditors in order to provide an opportunity for the negotiation of the restructuring to take place, and the courts have accepted that this is a valid use of a scheme.[35]

The idea of introducing a restructuring moratorium has been around for some time.[36] The Cork Report raised it as an issue in 1982,[37] and the Company Law Review also acknowledged that this was an issue requiring attention, but stated that, as an insolvency law issue, it fell outside the Review's terms of reference.[38] The issue was considered again in 2009–10 by the Insolvency Service in their consultation document on corporate rescue, which recommended the introduction of a restructuring moratorium,[39] although ultimately no change resulted from these proposals.[40] In May 2016, the Insolvency Service put forward a new set of proposals, which again included the introduction of a restructuring moratorium.[41] To understand the revival of these proposals just five years after they had been dropped, attention can be given to the increased political focus in the UK and elsewhere on rescuing companies in the intervening period and, perhaps more pertinently, the fact that after a period of dominance for the UK as a restructuring centre, other jurisdictions, such as Singapore, started to introduce their own restructuring regimes with the potential to rival the UK debt-restructuring regime, one of the core elements of these being some form of statutory stay. The Insolvency Service's document led to the

34. *Sea Assets Ltd v PT Garuda Indonesia* (27 June 2001) Unreported, discussed in G Moss, "Scheme of arrangement: a recent example" (2003) 16(1) *Insolvency Intelligence* 6. See also *Bluecrest Mercantile BV; FMS Wertmanagement AÖR v Vietnam Shipbuilding Industry Group* [2013] EWHC 1146 (Comm), in which the judge agreed to a stay of proceedings under CPR r.3.1(2)(f) pending consideration of a proposed scheme of arrangement, on the basis that the scheme had a reasonable prospect of success.

35. See eg *Re Metinvest BV* [2016] EWHC 79 (Ch); *Re DTEK Finance Plc* [2016] EWHC 1083 (Ch). A similar approach has been followed in Australia: *Re BIS Finance Pty Ltd* [2017] NSWSC 1713 [24–27].

36. For discussion see Payne (2014) 130 LQR 282.

37. Report of the Insolvency Law Review Committee, *Insolvency Law and Practice* (Cmnd 8558, 1982) (Cork Report), para.406.

38. Company Law Review, *Modern Company Law for a Competitive Economy—Final Report*, URN 01/943, 2001 (CLR, *Final Report*), para.13.11.

39. Insolvency Service, *Encouraging Company Rescue—A Consultation* (London: DTI, June 2009); Insolvency Service, *Encouraging Company Rescue—Summary of Responses* (London: DTI, November 2009), paras 24–6; Insolvency Service, *Proposals for a Restructuring Moratorium—A Consultation* (London: DTI, July 2010).

40. The Insolvency Service reported that the responses to its 2010 consultation paper did not support the need for urgent change: "[i]t is generally felt that the existing UK insolvency framework is coping and adapting well to the challenges that the current round of restructurings are posing, and the urgency of the case for introducing a new moratorium is not fully made out": Insolvency Service, *Proposals for a Restructuring Moratorium—Summary of Responses* (London: DTI, May 2011), 5. One explanation for this view is that creditors can agree a standstill arrangement amongst themselves. An alternative explanation is that the development of the distressed debt market in the UK in the last decade or so means that financial creditors who no longer wish to remain invested in a company can exit without needing to go through the process of enforcing their claim against the company.

41. Insolvency Service, *A Review of the Corporate Insolvency Framework: A Consultation on options for reform*, (May 2016); and see Insolvency Service, *Summary of Responses—A Review of the Corporate Insolvency framework* (September 2016).

publication of a set of Government proposals in 2018.[42] These proposals were in abeyance for 18 months, but the COVID-19 pandemic and the financial distress it generated brought this issue back onto the legislative agenda. The Corporate Insolvency and Governance Act 2020 includes a number of significant responses to the corporate financial distress. Some are temporary and aim to deal directly with some of the immediate concerns created by the COVID-19 pandemic.[43] Other changes, including the introduction of the restructuring moratorium, are permanent and are based on the proposals in the 2018 Government paper.

In putting in place a restructuring moratorium, the Government faced a number of significant challenges. The starting point for development of the restructuring moratorium was the existing moratorium in existence for administration and, to a lesser extent, the stay that attaches to US Chapter 11. However, the procedures to which the restructuring moratorium can attach (the restructuring plan, schemes, and CVAs) are not identical to those other processes and these distinctions need to be taken into account if the restructuring moratorium is going to achieve its goals. For example, administration is a collective process in which all of the creditors of the company must be involved. By contrast, it is an important and valuable aspect of schemes of arrangement that companies do not need to deal with all (or even a significant proportion) of their creditors in a scheme. In particular, creditors can be excluded from a scheme where their rights are unaffected by the scheme.[44] Schemes of arrangement can, and generally do, deal with only a subset of creditors and thus any standstill arrangements only need to constrain this subset of creditors. The ability to exclude creditors similarly exists in relation to the new Part 26A restructuring plans.[45]

A second difficulty for the Government is that it set itself an ambitious goal: "the introduction of a moratorium with a clearly defined and streamlined entry process should reduce the cost of restructuring and will be accessible to companies of any size. This will aid company rescue by giving companies time and space to consider available options when it is most needed".[46] Notably, therefore, the aim is for this restructuring moratorium to aid "companies of any size". It is increasingly recognised that formal insolvency regimes tend to be designed with large businesses in mind, and as a result do not work well for micro, small or medium-sized enterprises (SMEs).[47] The procedural requirements and costs involved often make them unsuitable for small companies. A good example of this in practice is the moratorium that was available for small companies undergoing a CVA prior to the 2020 Act. Even CVAs involving companies within the eligible group rarely made use of a moratorium. For example, of the 552 CVAs commenced in 2013 involving companies in England and Wales, 514 were small or micro companies but only

42. See BEIS, *Insolvency and Corporate Governance: Government Response* (26 August 2018).

43. Similar measures were introduced elsewhere, see, eg, Australian Coronavirus Economic Response Package Omnibus Act 2020; New Zealand COVID-19 Response (Further Management Measures) Legislation Act 2020; Singapore COVID-19 (Temporary Measures) Act 2020.

44. See eg *Re Bluebrook Ltd* [2009] EWHC 2114 (Ch); [2010] 1 BCLC 338.

45. See *Re Virgin Atlantic Airways Ltd* [2020] EWHC 2376 (Ch).

46. BEIS, *Insolvency and Corporate Governance: Government Response* (26 August 2018), para.5.13.

47. See eg UNCITRAL Working Group V (Insolvency Law), *Insolvency of Micro, Small and Medium-Sized Enterprises* (2018).

eight of these used the small company moratorium.[48] Cost and complexity were factors in this outcome. Yet, in order to justify the inroads into creditors' rights which a moratorium involves, some form of judicial or other oversight, coupled with rights for creditors to challenge the moratorium and other forms of minority protection, is almost inevitable in order to prevent abuse. These features will inevitably add cost and complexity which move the procedure beyond the reach of most SMEs. To square this circle and provide a quick, cheap and simple procedure which benefits companies but avoids any possibility of abuse of the minority is a commendable aim but certainly not a straightforward one.

Third, at the core of any moratorium is the need for the provisions to find a balance between the curtailment of individual rights and the benefit to the creditors as a whole. This raises a number of issues. The curtailment of creditor rights can be justified only where the company is economically viable; if the company's only option is liquidation, any delay to allow companies to survey their options needlessly dissipates assets that could be used to pay the creditors. The moratorium therefore needs to accommodate only financially distressed but viable companies and the legislative provisions need to find a way to distinguish such companies. Second, and allied to this, the time at which the moratorium is available is important. Given that the curtailment of creditor rights is justified by the overriding goal of corporate rescue, the use of the moratorium before that time, ie in a wholly solvent situation, would be an unacceptable interference with creditor rights. At the same time, leaving it until the company is insolvent before a moratorium can come into effect is also potentially problematic. Even before the company is insolvent, creditors may be concerned about a possible future insolvency and may be inclined pre-emptively to enforce their claims in order to avoid being bound into a procedure alongside other creditors and denied their individual rights. Sophisticated creditors may use this knowledge to threaten action in order to extract gains in this period at the expense of less sophisticated creditors.[49] Early attention to financial distress, before the company is insolvent, can be beneficial in facilitating a rescue for the company or its business and CVAs, schemes and restructuring plans can all be utilised before a company is insolvent. Identifying the right time for the operation of a moratorium is therefore key. Similarly, determining the length of time for the moratorium to exist without creditor consent or court-approved extensions is important: it needs to be long enough to allow a restructuring to be negotiated and implemented, but no longer than that—finding a "one size fits all" answer to this is particularly difficult given the wide range of companies potentially within the ambit of the provisions. Finally, creditors need to be provided with the opportunity to challenge the moratorium should abuse of other inequity arise, but again this depends on the grounds for challenge being appropriate: too wide risks opening up the anti-commons problem again, but too narrow risks leaving minority creditors potentially unprotected. The role of the court in holding the ring between the different constituencies is crucial.

48. See P Walton, C Umfreville, L Jacobs, Report for R3: *Company Voluntary Arrangements: Evaluating Success and Failure* (May 2018). This is consistent with earlier studies: G Cook, N Pandit, D Milman and A Griffiths, *Small Business Rescue: A Multi-Method Empirical Study of Company Voluntary Arrangements* (London: ICAEW, 2003); A Walters and S Frisby, "Preliminary report to the Insolvency Service into outcomes in company voluntary arrangements" (2011) available at www.ssrn.com/abstract=1792402.

49. H Eidenmüller, "Trading in Times of Crisis: Formal Insolvency Proceedings, Workouts, and the Incentives for Shareholders/Managers" (2006) 7 EBOR 239.

A further issue for the UK restructuring moratorium is that, as at the point it was introduced, effective alternatives have been developed for many companies undergoing a debt restructuring. If the restructuring moratorium is not to be redundant it has to demonstrate that it can provide a better, quicker and cheaper solution than these alternatives.

III. THE RESTRUCTURING MORATORIUM

The Corporate Insolvency and Governance Act 2020 introduces a new Pt A1 to the Insolvency Act 1986.[50] This provides a restructuring moratorium that is standalone and is not a pre-cursor to an insolvency process, although it can be used in that way.[51] In contrast to the moratorium attached to administration, the restructuring moratorium is debtor-in-possession and allows directors to continue to run a company, subject to the appointment of a licensed insolvency practitioner (the monitor) and certain other restrictions. As with administration, however, the stigma of insolvency is likely to attach to this mechanism. The objective of the moratorium is to provide protection to the company from adverse creditor action for a short period whilst the directors attempt to restructure and rescue the business.[52]

There are two ways that a company can enter a restructuring moratorium: an in-court and an out-of-court process. The out-of-court process involves directors filing relevant documents at court and is similar to the current process for appointing administrators out of court, but unlike the administration process no prior notice is required to be given to floating charge holders before the directors file for a moratorium. The out-of-court process will usually only be available to a company if it is not subject to an outstanding winding-up petition and is not an overseas company.[53] By contrast, where there is an outstanding winding-up petition or where the company is an overseas company, the in-court process must be used.[54] Where the company is subject to an outstanding winding-up petition, the court may make an order for a moratorium only if it is satisfied that a moratorium 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).[55]

The documents that need to be filed for the out-of-court process and that will accompany an application for the in-court process are the same. They include: statements from the directors that they wish to obtain a moratorium and that they are of the view that the company is or is likely to become unable to pay its debts; and statements from the

50. CIGA, ss 1–6 and Schs 1–8, which introduces new provisions into the Insolvency Act 1986 (for Great Britain) and into the Insolvency (Northern Ireland) Order 1989 (for Northern Ireland).

51. By contrast, the Singapore reforms target schemes of arrangement more specifically and the enhanced moratorium focuses on that mechanism. See Singapore Insolvency, Restructuring and Dissolution Act 2018, ss 64–66.

52. This period can be longer if the restructuring moratorium is used in connection with a scheme or CVA.

53. Insolvency Act 1986, Pt A1, Ch.2, s.A3. However, to make the procedure more accessible to companies dealing with the COVID-19 situation, companies which were not overseas companies, but were subject to a winding-up petition, were able to use the out-of-court process: see CIGA, Schs 4 and 8.

54. *Ibid*. Part A1, Ch.2, ss A4–A5.

55. *Ibid*. Part A1, Ch.2, s.A4(5). In the alternative, the court may make any other order which the court thinks appropriate (s.A4(4)(b)); for example, the court may make an order for the company to be wound up or for the company to enter into administration if there is no benefit to the company in having a moratorium first.

monitor(s) that they are qualified and consent to act, that the company is eligible and that in the monitor's view it is likely that the moratorium will result in the rescue of the company as a going concern.[56]

The restructuring moratorium can be used alongside various restructuring mechanisms including schemes of arrangement, CVAs, and restructuring plans. The small company moratorium for CVAs is abolished.[57] Consequently, the restructuring moratorium can be used alongside these mechanisms in certain circumstances, but it need not be. The optional nature of this moratorium stands in contrast to the administration moratorium and the Chapter 11 moratorium, both of which arise automatically. This optionality is beneficial, as some distressed companies may be wary of announcing moratorium protection because of the unwanted publicity this may draw to their financial position.[58] There are also reasons why companies making use of a CVA, scheme or restructuring plan to restructure their debts may not wish to make use of the moratorium, but will continue to make use of the alternatives on offer, as discussed in this section.

1. The effect of the moratorium

The effect of the restructuring moratorium is to impose both a constraint on the ability of creditors to assert their debt claims against the company and a constraint on initiating insolvency proceedings and other legal processes,[59] complemented by restraints on *ipso facto* clauses, as discussed below. A company subject to a moratorium will obtain the benefit of a payment holiday from certain pre-moratorium debts. Pre-moratorium debts are: (a) any debts or liabilities to which the company becomes subject before the moratorium comes into force; or (b) any debt or liability to which the company has become or may become subject during the moratorium by reason of any obligation incurred before the moratorium.[60] However, there are a number of pre-moratorium debts that are still required to be paid, including the monitor's remuneration and expenses, goods or services supplied during the moratorium, rent (for the moratorium period), wages, salary and redundancy payments (not limited to those falling due during the moratorium) and amounts payable in respect of debts or liabilities arising under a contract or other instrument involving financial services.[61] These carved-out debts will reduce the benefit of the restructuring moratorium in practice.

The other category of debts that must be paid in the moratorium period are moratorium debts, ie, any debt or other liability to which a company becomes subject during the moratorium other than by reason of an obligation incurred before the moratorium came into force, and any debt or other liability to which the company has become or may become subject after the end of the moratorium by reason of any obligation incurred in the moratorium. Any unpaid moratorium debts and some pre-moratorium debts without

56. *Ibid*. Part A1, Ch.2, s.A6.
57. CIGA, Sch.3, para.2.
58. The enhanced moratorium introduced into the Singapore scheme regime in 2017 likewise does not arise automatically.
59. Insolvency Act 1986, Pt A1, Ch.4.
60. Insolvency Act 1986, Pt A1, Ch.4, s.A18(3).
61. *Ibid*.

a payment holiday, described as "priority pre-moratorium debts", then get super priority in an insolvency occurring within 12 weeks of the end of the moratorium.[62] There was discussion following the publication of the Corporate Insolvency and Governance Bill whether lenders would be able to use contractual rights to accelerate a loan during a moratorium.[63] Acceleration of a bank loan would be likely to lead to the termination of the moratorium by the monitor, given that the company would in almost all cases be unable to pay the accelerated liability. The accelerated debt would then acquire super priority status in a subsequent insolvency or restructuring procedure. The relevant provisions were debated at length in the House of Lords and amendments were introduced to the Bill.[64] As a result, it is clear under the Act that lenders can accelerate loans in the moratorium if they have the contractual right to do so,[65] but that "relevant accelerated debt" will not be "priority pre-moratorium debt" for the purposes of super priority in a subsequent insolvency or restructuring procedure.[66] This means that, for the moratorium to be fully effective, the company will need to have the support of its lenders, and possibly enter into some form of waiver or standstill agreement with them. This potentially limits the benefits and widespread use of the restructuring moratorium.

During the moratorium period, various actions of creditors are prevented. Unlike moratoria adopted elsewhere in recent years, which allow the stay on enforcement actions to be either general (affecting all creditors) or targeted towards individual creditors,[67] the UK restructuring moratorium affects all creditors and does not have the option of excluding certain creditors, for example smaller creditors, those in financial difficulties themselves, or other creditors on whom the burden of the moratorium might fall disproportionately.[68] It also fails to account for debt restructurings carried out via a scheme or restructuring plan involving only a subset of creditors. The restructuring moratorium is thus relatively inflexible, and this inflexibility will limit its potential usefulness to companies in financial distress. For this reason, amongst others, negotiating standstill arrangements with the subset of sophisticated creditors involved in a scheme may well remain a more valuable option for companies than this moratorium.

During a moratorium, creditors cannot petition for the winding-up of the company; no resolution for the winding-up of the company may be passed by the shareholders other than if recommended by the directors; no application for administration may be made other than by the directors; no notice of intention to appoint an administrator by the holder of a qualifying floating charge can be lodged at court; and no administrative receiver may be appointed.[69] These restrictions do not bind the directors, so they remain able to take these steps. In addition, the following restrictions on enforcement and legal proceedings against the company are included: no right of forfeiture can be exercised in relation to

62. Insolvency Act 1986, s.174A.

63. Corporate Insolvency and Governance Bill, HL Bill 114(a) Amendments for Report, 17 June 2020; available at https://publications.parliament.uk/pa/bills/lbill/58-01/114/5801114(a).pdf.

64. See Hansard, House of Lords, 23 June 2020, vol.804, cols 135–178.

65. See the discussion of *ipso facto* clauses, *post*, text accompanying fnn 76–95.

66. See Insolvency Act 1986, s.174A(3)–(4).

67. See eg, EU Restructuring Directive (EU) 2019/1023, Art.6(3).

68. Other jurisdictions operate a more flexible approach to this issue, see eg the Canadian approach described in J Sarra, *Rescue! The Companies' Creditors Arrangement Act*, 2nd edn (Canada, 2013).

69. Insolvency Act 1986, Pt A1, Ch.4, s.A20.

premises occupied by the company;[70] no enforcement of security over the company's property is possible, subject to specified exceptions;[71] no repossession of goods;[72] no "legal process" can be issued or continued against the company or judgments enforced;[73] and no notice of the crystallisation of a floating charge may be given during the moratorium, nor any other event occur that would have the same effect as such a notice.[74] The company may borrow and incur credit provided it discloses that there is a moratorium, and it may grant security over property provided the monitor consents.[75] These provisions broadly track the restrictions that exist in the administration moratorium.

A further constraint during the restructuring moratorium is a restriction on the ability of creditors to terminate their contracts with the company "by reason of" (or "*ipso facto*") insolvency. The *ipso facto* provision applies in the event that a company enters a "relevant insolvency procedure",[76] defined to include a moratorium (including therefore the restructuring moratorium), administration, a CVA, liquidation, or a restructuring plan.[77] Schemes of arrangement are not included in this list, however, despite the close procedural ties between schemes and restructuring plans, which are included. If the concern was to exclude wholly solvent schemes from the ambit of this provision, this could have been dealt with in the legislation. In the Australian *ipso facto* provisions, for example, which do include schemes, the legislation restricts the provisions to circumstances in which the scheme is being used "for the purpose of the body avoiding being wound up in insolvency".[78] The inclusion of liquidation in this list is also somewhat odd. Since the purpose of this provision is to aid the rescue of a company as a going concern or of its business, permitting such interference in contractual rights is not justified in a typical liquidation where the business ceases to trade almost immediately. It is notable that winding-up is excluded from the list of relevant processes to which the *ipso facto* provisions attach in other jurisdictions.[79]

The provisions dealing with *ipso facto* clauses are intended to deal with the difficulty that companies in distress can face whereby suppliers stop or threaten to stop supplying the company. Those suppliers may rely on the right to terminate the contract because of the insolvency, and may use this threat to require the payment of all arrears as the price for continued supply and/or to change the terms of the contract with the company, perhaps by increasing prices for the goods or services. This can make the ongoing trading of the

70. *Ibid*, Pt A1, Ch.4, s.A21(1)(a).
71. *Ibid*, Pt A1, Ch.4, s.A23.
72. *Ibid*, Pt A1, Ch.4, s.A21(1)(d).
73. *Ibid*, Pt A1, Ch.4, s.A21(1)(e). However, this does not apply to employment disputes.
74. *Ibid*, Pt A1, Ch.4, s.A22. These restrictions can be overcome with the permission of the court, save that no application to court can be made for permission to enforce a pre-moratorium debt to which the payment holiday applies or to crystallise a floating charge. Unlike administration, there is no provision whereby the monitor can grant their consent to such proceedings during the moratorium.
75. *Ibid*, Pt A1, Ch.4, ss A25, A26. There is some ambiguity as to whether new security granted by a company during a moratorium can be enforced. While the Act states that such security may be enforced if the monitor consented to the grant of the security, the relevant provision also refers back to the overall prohibition on enforcement of security. This seems to indicate that a new as well as an existing security holder cannot enforce during the moratorium, but the drafting is unclear.
76. Insolvency Act 1986, s.233B(1).
77. *Ibid*, s.233B(2).
78. Australian Corporations Act 2001, s.415D(5), inserted by Treasury Laws Amendment (2017 Enterprise Incentives No.2) Act 2017.
79. See eg, Singapore Insolvency, Restructuring and Dissolution Act 2018, s.440(6)

business, or the sale of the business as a going concern, more challenging and potentially reduces the return to creditors. Pre-2020, the Insolvency Act 1986 prevented utilities and IT systems suppliers from terminating supply upon insolvency.[80] The restrictions introduced by the 2020 Act are much wider and apply to all suppliers of goods and services (with some limited exceptions). The 2020 Act therefore seeks to maximise the opportunities for the rescue of businesses reliant on the continuation of supply agreements. This change to the law mirrors approaches that have been adopted elsewhere.[81] The US Chapter 11 regime, for example, restricts the ability of creditors to terminate their contracts on the basis of insolvency[82] and the EU Restructuring Directive requires Member States to put in place "rules preventing creditors to which the stay applies from withholding performance or terminating, accelerating or, in any other way, modifying essential executory contracts to the detriment of the debtor, for debts that came into existence prior to the stay, solely by virtue of the fact that they were not paid by the debtor".[83] Singapore has also introduced a provision to restrict the rights of creditors to terminate on insolvency.[84]

The *ipso facto* regime introduced by the 2020 Act has two main effects.[85] First, a supplier's contractual right to terminate on the grounds of insolvency is permanently switched off as from the date of the relevant insolvency procedure. The prohibition is on termination or "any other thing"[86] by reason of insolvency, and so also prohibits amending payment terms, for example by increasing prices. Second, a supplier's contractual right to terminate on the grounds of any pre-insolvency events of default are temporarily suspended until the relevant insolvency procedure comes to an end (unless the company exits into a subsequent insolvency procedure).

The 2020 Act provides that the prohibition of termination on the basis of insolvency covers *all* contracts for the supply of goods and services other than contracts excluded from the operation of the section. The prohibition applies only to contracts for the supply of goods and services. The *ipso facto* regime is therefore narrower than its US Chapter 11 counterpart, which generally applies to all executory contracts (subject to carve-outs).[87] The categories of supplier and categories of contract which are excluded are set out in the Insolvency Act 1986, Sch.4ZZA.[88] Excluded suppliers are predominantly suppliers

80. See Insolvency Act 1986, s.233 and The Insolvency (Protection of Essential Supplies) Order 2015 (SI 2015/989).

81. In Australia see Australian Corporations Act 2001, ss 415D, 434J and 451E, inserted by Treasury Laws Amendment (2017) Enterprise Incentives (No. 2) Act 2017.

82. 11 USC §365(e) and §541(c). For discussion see *In re Lehman Bros Holdings Inc* (2016) 533 BR 476 (Bankr. SDNY).

83. EU Restructuring Directive (EU) 2019/1023, Art.7(4). The recitals to the Restructuring Directive list examples of essential supply contracts to which this would be of particular importance, such as supply of gas, electricity, water, telecommunication and card payment services (see recital 41).

84. See Singapore Insolvency, Restructuring and Dissolution Act 2018, s.440. This is modelled on a similar regime in Canada: Canadian Bankruptcy and Insolvency Act 1985, s.65.1 and Canadian Companies' Creditors Arrangement Act 1985, s.34.

85. See Insolvency Act 1986, s.233B(3)–(4).

86. *Ibid*, s.233B(3)(b).

87. See 11 USC §365(e). The regime in Singapore is also broader than the UK regime: Singapore Insolvency, Restructuring and Dissolution Act 2018, s.440. See also EU Restructuring Directive (EU) 2019/1023 Art.7(4), which refers to "executory contracts" (rather than contracts for the supply of goods and services) but qualifies this by including only "essential executory contracts".

88. See CIGA, Sch.12.

of financial services such as banks and insurers. Excluded contracts largely relate to financial services.[89]

It is clear that constraints on *ipso facto* clauses can be beneficial to companies in financial distress, but, as discussed, there is a balance to be struck between the benefits of company rescue and imposing restrictions on freedom of contract. A measure of creditor protection is built into these provisions. There is no requirement for the insolvency practitioner to supply a personal guarantee, but the payments accruing will be expenses of the insolvent estate, or debts which would be payable in full in a moratorium period or whilst the restructuring plan is being prepared. There are also three exceptions, whereby termination by a supplier on account of an insolvency event will be permitted: (i) with the consent of an office holder (ie, an administrator or liquidator) or the company itself, if it is subject to debtor-in-possession proceedings, such as a restructuring plan or a CVA;[90] (ii) with the approval of the court, where continuation of the contract would cause the supplier hardship;[91] and (iii) if a post-insolvency event of default occurs giving rise to a new event of default, such as non-payment.[92] These forms of creditor protection are important, but will need to be developed. The concept of "hardship", for example, is not defined within the Corporate Insolvency and Governance Act 2020 and it will therefore be for the courts to establish this threshold. It may be that the courts will apply the concept of balance that they have developed in relation to creditor challenges to the administration moratorium, whereby the hardship to the individual creditor is balanced with the benefits to the creditors as a whole in light of the overarching aim of securing the rescue of the company or business. A high hurdle is imposed for the individual creditor: the court will relax the prohibition where it is demonstrated that it would be "inequitable" for the prohibition to apply.[93] If a similar threshold is applied to this scenario, it is likely that "hardship" would be interpreted to mean the possible insolvency of the supplier if it is forced to continue to supply.

Notably, the *ipso facto* regime does not provide for circumstances in which an office holder does not want to continue taking supply of certain goods or services, unlike its Chapter 11 counterpart.[94] Under the UK *ipso facto* regime, suppliers contracted to supply goods or services will be under a statutory duty to continue performing their contractual obligations, regardless of the office holder's intentions or ability to pay for the goods or services.[95] As there is no requirement for the company to assume or reject contracts within set time periods, suppliers could be left with a period of uncertainty where they cannot terminate. A further area of potential uncertainty exists around the ability of the

89. A short-term exclusion was also inserted into the Act to deal with small suppliers in the COVID period: CIGA, ss 15, 19.

90. Insolvency Act 1986, s.233B(5)(a)–(b).

91. *Ibid*, s.233B(5)(c).

92. *Ibid*, s.233B(6). A similar hardship provision is to be found in Singapore (Singapore Insolvency, Restructuring and Dissolution Act 2018, s.440(4)) and in Canada (for discussion, see *Toronto-Dominion Bank v Ty (Canada) Inc* (2003) 42 CBR (4th) 142; 2003 CanLII 43355; Adrienne Ho, "The treatment of *Ipso Facto* Clauses in Canada" (2015) 61 McGill LJ 139).

93. See *Re Atlantic Computer Systems Plc* [1990] BCC 859, 880, *per* Nicholls LJ.

94. 11 USC §365.

95. By contrast, it appears to be well established in Canada that the statutory provisions grant a supplier the right to demand immediate cash payments for the supply of goods and to resist being compelled to supply goods on credit, regardless of the terms of the contract: *HSBC Canada v Tri-Tec Industries Ltd*, 22 CBR (5th) 120; 2006 CarswellOnt 3174; Adrienne Ho, "The treatment of *Ipso Facto* Clauses in Canada" (2015) 61 McGill LJ 139.

company or officeholder to enforce the provisions against an overseas company, or in relation to a contract which is not governed by English law, which will require guidance from the courts.

2. Balancing the benefits of rescue with minority rights

Clearly a moratorium can be valuable from a company's perspective during the period that a restructuring is negotiated and put in place, but from the creditors' perspective a moratorium can pose a threat, as it may be misused by companies. Given that they involve a significant constraint on creditors' legal rights, they can be justified only where the imposition can be regarded as beneficial to the creditors as a whole, in order to rescue a viable but financially distressed business. One concern is that they can be used by directors to prop up a company which is not economically viable and is not capable of rescue, and the moratorium simply prolongs the moment when the company's difficulties are dealt with, while the company continues to lose money in the meantime. Another is that directors of viable companies may utilise a restructuring to shake off liabilities which the company is capable of meeting. A number of protections are introduced by the Corporate Insolvency and Governance Act 2020 to deal with these concerns.

One relates to the length of the moratorium: the moratorium automatically ends 20 business days from the day after the moratorium comes into force.[96] This can be extended by a further 20 business days without creditor consent and can be extended for up to 12 months with the consent of creditors and/or a court order.[97] The moratorium will automatically be extended in some cases (such as where the company proposes a CVA) or brought to an end if the company enters into an insolvency process, for example upon the appointment of administrators or liquidators.[98] The initial period of 20 business days is a very short period of time for a company to negotiate and be ready to implement a substantive restructuring. Therefore, it seems likely that the majority of moratoria will be extended and last at least 40 business days. This is much shorter than the three-month period proposed by the Insolvency Service,[99] and it is short compared with the length of moratoria available elsewhere in the world. The EU Restructuring Directive, for example, includes a moratorium with an initial four-month period, extendable up to 12 months.[100] There is clearly a concern to protect creditors by not having an overly long moratorium, but this needs to be weighed against the value of the mechanism as a breathing space for companies within which to negotiate the restructuring. It remains to be seen whether the

96. Insolvency Act 1986, Pt A1, Ch.3, s.A9.

97. *Ibid*, Pt A1, Ch.3, ss A10–A13.

98. *Ibid*, Pt A1, Ch.3, ss A14–A16. In addition, the monitor is obliged to end the moratorium in certain circumstances, for example, if the company fails to pay certain debts due during the moratorium (such as trade or finance creditors or wages) or the monitor determines that the moratorium is no longer likely to result in the rescue of the company as a going concern.

99. Insolvency Service, *A Review of the Corporate Insolvency Framework: A Consultation on options for reform* (May 2016), para.7.7. The Government's response reduced this to 28 days renewable for a further period of 28 days without creditor consent: BEIS, *Insolvency and Corporate Governance: Government Response* (26 August 2018), paras 5.49, 5.55.

100. EU Restructuring Directive (EU) 2019/1023, Arts 6(6), 6(8).

period provided in the 2020 Act will be sufficiently valuable for companies, particularly those contemplating complex restructurings.

Further creditor protections are put in place via eligibility requirements. As a requirement of obtaining a moratorium, directors have to state that, in their view, the company is, or is likely to become, unable to pay its debts.[101] This may be regarded as being particularly targeted at the second concern raised above (that directors of viable companies may utilise a restructuring to shake off liabilities which the company is capable of meeting). This is balanced by the requirement that the proposed monitor state that in its view it is likely that a moratorium would result in the rescue of the company as a going concern,[102] which is targeted at the first concern above, namely that directors may seek to use the moratorium to prop up unviable companies. It is not clear how much work the monitor is expected to undertake to form the view that the moratorium is likely to result in the rescue of the company as a going concern. It is likely that the boundaries of this test will need to be established by the court. Although the impetus behind this requirement is laudable, there is a danger that this requirement will set a high bar. There is inherent uncertainty around debt restructuring, especially in times of macroeconomic uncertainty, such as that created by the COVID-19 pandemic, and too stringent an application of this test may mean that this moratorium is unavailable for companies with a chance of success. Although an amendment was tabled in the House of Lords to lower this high threshold from "would" to "could", this amendment was withdrawn without a vote.[103]

A further form of protection is that no application can be made if the company has entered into a moratorium in the previous 12 months without an order of the court.[104] In addition, the moratorium is not available to certain companies, such as banks, insurance companies and companies involved in certain financial market transactions.[105] This is broadly sensible, given that companies such as banks are subject to their own special resolution regimes. The list of excluded companies is broader than this, however. Notably, any company that is party to a capital market arrangement is also excluded.[106] This is defined to include arrangements of more than £10m which involve a party providing security to a trustee or agent, or guaranteeing or providing security in respect of the performance of obligations of another party, under a capital market investment, including rated/listed bonds.[107] These exclusions mean that many large corporates who are party to bond financing arrangements will not be able to benefit from the restructuring moratorium, and will have to continue to find other ways to protect themselves during a restructuring, such as by negotiating a consensual standstill.

The appointment of a monitor is also part of the creditor protection package. Monitors have a range of functions, including bringing the moratorium to an end by filing a notice at court if they think that the moratorium is no longer likely to result in the rescue of the

101. Insolvency Act 1986, Pt A1, Ch.3, s.A6(1)(d).
102. *Ibid*, Pt A1, Ch.3, s.A6(1)(e).
103. See Corporate Insolvency and Governance Bill, HL Bill 113(a) Amendments for Committee, 10 June 2020; available at https://publications.parliament.uk/pa/bills/lbill/58-01/113/5801113(a).pdf.
104. Insolvency Act 1986, Sch.ZA1 para.1.
105. *Ibid*, Sch.ZA1.
106. *Ibid*, Sch.ZA1 para.13.
107. *Ibid*, Sch.ZA1 paras 13–14.

company as a going concern; the objective of rescue has been achieved; they are unable to carry out their functions as the directors have not provided them with the relevant information; or because the company is unable to pay moratorium debts which have fallen due or pre-moratorium debts for which the company does not have a payment holiday.[108] The Act also introduces a number of mechanisms whereby the actions of a monitor or company directors may be challenged[109] and a number of new offences are created including the offence of fraud during or in anticipation of a moratorium.[110]

The ability of creditors and others to challenge the moratorium is a potentially important form of protection. There is no time limit for these challenges, so an application may be made during the moratorium or after it has ended.[111] The first basis of challenge relates to actions of the monitor: creditors, directors, members of the company or any other person affected by the moratorium can apply to the court on the ground that an act, omission or decision of the monitor during a moratorium has unfairly harmed the applicant.[112] The second raises the possibility of challenge against the directors' actions: creditors or members of the company can apply to the court on the ground that the company's affairs, business and property are being or have been managed in a way that has unfairly harmed the interests of its creditors or members generally or some in particular, or that any act or proposed act or omission causes or would cause such harm.[113] The court is in both cases given broad powers to make any order it thinks fit, including bringing the moratorium to an end.[114]

Earlier versions of the restructuring moratorium provided multiple grounds for challenge, based on the qualifying conditions not being met, or the company's being ineligible, or unfair prejudice to creditors.[115] In the final version of these provisions the opportunity to challenge the moratorium on the grounds of ineligibility or non-compliance with the qualifying conditions is dropped and the focus is instead on unfair harm (rather than unfair prejudice) as the sole ground of complaint against actions of the monitor or directors. Although the 2018 Government proposals envisaged taking a similar legislative approach as adopted in administration, so that "the same principles will apply in a case of a creditor applying to court to have a moratorium lifted",[116] this does not seem to fit with the provisions as enacted. Where a creditor applies for the lifting of the moratorium in administration, the court engages in a process of balancing the interests of the individual creditor with those of the creditors and stakeholders as a whole, against the backdrop of the purposes of administration.[117] The language of "unfair harm" does not seem to be in keeping with this process, particularly the challenge against directors, which refers to

108. *Ibid*, Pt A1, Ch.5, s.A38(1).
109. *Ibid*, Pt A1, Ch.6.
110. *Ibid*, Pt A1, Ch.7.
111. *Ibid*, Sch.A1, ss A42(3) and A44(2).
112. *Ibid*, Sch.A1, s.A42(1)(2).
113. *Ibid*, Sch.A1, s.A44(1).
114. *Ibid*, Sch.A1, ss A42(4)(5) and A44(3)(4).
115. BEIS, *Insolvency and Corporate Governance: Government Response* (26 August 2018), para.5.39.
116. *Ibid*, para.5.40.
117. See eg, *Re Atlantic Computer Systems Plc* [1990] BCC 859. The approach has been to view this right to challenge in the context of administration as giving leave "to enable the court to relax the prohibition where it would be inequitable for the prohibition to apply" (at 880, *per* Nicholls LJ). As Sandra Frisby has pointed out, it is difficult to see how this threshold can be met during the very short initial period of the moratorium (40 days maximum): Frisby (2020) 20 JCLS 39, 58.

the corporate action causing harm to "the interests of its creditors or members generally or some in particular". If the unfair harm is experienced by all of the creditors/members, then the kind of balancing action engaged in by the courts in the context of administration cannot take place. Despite the change of terminology to "unfair harm", this language instead seems more reminiscent of the "unfair prejudice" claim under the Companies Act 2006, s.994, which allows a shareholder to petition the court for an order on the basis "that the company's affairs are being or have been conducted in a manner that is unfairly prejudicial to the interests of members generally or of some part of its members (including at least himself)".[118] These cases engage in a close analysis of the facts of each case and are notoriously time-consuming. The grounds for challenge of the restructuring moratorium are therefore going to require development by the courts to clarify precisely the basis on which creditors can bring a claim.

Although the provisions of the Corporate Insolvency and Governance Act 2020 are based on the Government proposals of 2018, there are some important differences. For instance, the 2018 proposals were somewhat unclear as to just what "rescue" meant in this context, specifically whether it was corporate or business rescue that was envisaged. The Act clarifies that it is corporate rescue that is intended; for instance, the monitor needs to take the view that a moratorium for the company will result in the rescue of *the company* as a going concern.[119] The focus on corporate rescue is unfortunate. The benefits of thinking more holistically about what rescue means are well understood. As the Cork Report recognised, "society has no interest in the preservation or rehabilitation of the company as such".[120] The focus on corporate rescue therefore seems to be a retrograde step. The requirement that a rescue of the company, rather than the business, as a going concern is likely will mean that the moratorium cannot be used to stabilise a company's position in preparation for a sale of the business, whether through a pre-pack administration or otherwise. This suggests that the moratorium will be unsuitable for use where a scheme is twinned with a pre-pack administration, given that this involves the transfer of the assets of the company or group to a new entity.

In another change from the initial Government proposals, the timing of the availability of the moratorium has shifted. The test introduced by the 2020 Act is that the company is, or is likely to become, unable to pay its debts, ie, is already insolvent on a cash flow basis, or is likely to become so. In the 2018 proposals, one of the eligibility requirements was that the company be "prospectively insolvent", ie, it would become insolvent if no action were taken, but companies that were already insolvent were excluded.[121] The Government's proposal therefore contained a tricky test for directors, since directors would have to apply for the moratorium at the point at which insolvency was inevitable, but before it had occurred, which would have been a potentially challenging call. Moving away from this test was sensible, but the inclusion of cash flow insolvent companies in the

118. Companies Act 2006, s.994(1).

119. The Insolvency Service's consultation in 2016 seemed to envisage rescue as meaning corporate rescue rather than business rescue: see Insolvency Service, *A Review of the Corporate Insolvency Framework: A Consultation on options for reform* (May 2016), para.7.21.

120. Report of the Insolvency Law Review Committee, *Insolvency Law and Practice* (Cmnd 8558, 1982) (Cork Report), para.193.

121. See BEIS, *Insolvency and Corporate Governance: Government Response* (26 August 2018), paras 5.28–5.29.

2020 Act brings its own challenges. From the creditors' point of view the concern is likely to be that a moratorium will lead to potential abuse, as directors delay the commencement of insolvency proceedings. Presumably the short time frame of the moratorium and the need for rescue to be judged "likely" by the monitor both at the start and throughout the moratorium are intended to alleviate these concerns. It may be said that it also potentially undermines the drive to get directors to tackle the company's problems in a timely fashion. As regards the part of the test that focuses on companies being "likely" to become unable to pay their debts, much will depend on how this phrase is interpreted by the courts. Getting this wrong could lead to the exclusion of financially troubled companies, which might benefit from a moratorium without there being any real prospect of abuse. For example, while some schemes are used to deal with companies that are actually insolvent or on the brink of insolvency, many operate at an earlier stage in a company's financial difficulties and it seems that such schemes will not be able to make use of this restructuring moratorium.

IV. CONCLUSION

The idea behind the restructuring moratorium, to provide companies with the time and space they need to deal with their financial difficulties, is creditable. However, it is only viable companies that should be given this benefit. The moratorium included in the 2020 Act and in particular the inclusion of the significant constraints on *ipso facto* clauses, represents a significant inroad into the party autonomy which is "at the heart of English commercial law".[122] Of course statute can make inroads into this autonomy, which is just what the 2020 Act has done, but this must be justified, the justification in this instance being the rescue of economically viable companies to the benefit of the creditors and stakeholders generally. Where liquidation is the only outcome, the suspension of such rights for a period for companies to consider their position is not justifiable, which is why the inclusion of liquidation on the list of "relevant insolvency procedures" is problematic. At the same time, use of the eligibility requirements may not work effectively to target only viable companies. While companies incapable of rescue should not have access to the moratorium, it is unduly restrictive to require that rescue be guaranteed, given the inherent uncertainty of debt restructuring, particularly in difficult economic conditions. The test established in the Act is that the monitor must state that in its view it is likely that a moratorium *would* (not could) result in the rescue of the company as a going concern.[123] The court will need to establish the boundaries to this test; but there is a danger that this requirement will set a high bar and that some financially distressed companies may be excluded where there is a chance of rescue and the risk of abuse is low.

The Government stated its aim that the restructuring moratorium would be available to companies "of any size". In reality this is not the case. SMEs, though not technically excluded, are not likely to make use of this mechanism. The moratorium for small

122. *Belmont Park Investment Pty Ltd v BNY Corporate Trustee Services Ltd* [2011] UKSC 38; [2012] 1 AC 383, [103], *per* Lord Collins.

123. Insolvency Act 1986, Pt A1, Ch.3, s.A6(1)(e).

companies undergoing CVAs was not much used, owing to the cost and complexity involved. For companies to access the small company moratorium, nominees had to be prepared to state from the outset that the CVA had a reasonable prospect of being approved and implemented, and that the company was likely to have sufficient funds available during the moratorium to enable it to carry on business.[124] In order to be in a position to make these statements nominees needed to engage in due diligence and consultations with the company's creditors and suppliers. This work involved time and expense, and it was generally more cost-effective (and easier) for a small company to use liquidation to save some of the business rather than attempt to save the company. Another explanation for the lack of uptake for the small company moratorium in CVAs is that the reasonably simple capital structures of these companies, having only a single secured lender and relatively few major creditors, facilitated the negotiation of standstill arrangements between the creditors. These factors are likely to apply equally to the restructuring moratorium. Despite the Government's aspirations in this regard, this moratorium seems unlikely to benefit smaller companies. This is a nettle that still needs to be grasped. A great deal of work has been done in recent years to move away from a "one size fits all" approach and to consider solutions to deal with financial distress in smaller companies.[125] Another approach is needed in the UK to help micro, small and medium-sized companies seeking some form of rescue. More surprising perhaps, is the fact that the moratorium is unlikely to be available, or valuable, for many larger companies seeking to restructure their debt. This is both because of the time period for the moratorium (only 40 days without court or creditor approval), which is a short period in which to conclude a complex restructuring, and because of the exclusions built into the provisions. In particular, the wide carve-out for any company that is party to a capital market arrangement will exclude numerous businesses which have bond financings. A further potential constraint on the value of the restructuring moratorium for large businesses with a cross border element is that the recognition of the moratorium abroad is untested (and it is notable that the administration moratorium does not have extra-territorial effect). This is in contrast to the moratorium attached to Chapter 11, for example, which has worldwide effect, and the moratorium introduced in the 2017 Singapore reforms also expressly dealt with this issue.[126]

Other aspects of the restructuring moratorium also seem likely to limit its value to companies, including: the focus on corporate rather than business rescue; the fact that lenders can accelerate loans in the moratorium if they have the contractual right to do so (albeit that the accelerated debt will not be a "priority pre-moratorium debt" for the purposes of super priority), meaning that companies are likely to need the support of those lenders for the moratorium to be fully effective; the fact that the moratorium cannot be

124. *Ibid*, Sch.A1, para.6(2) (now repealed).

125. See UNCITRAL Working Group V (Insolvency Law), *Insolvency of Micro, Small and Medium-Sized Enterprises* (2018); R Mokal et al, *Micro, Small, and Medium Enterprise Insolvency: A Modular Approach* (Oxford, 2018).

126. In contrast to the US worldwide moratorium, which is automatically extra-territorial and worldwide in scope, in Singapore the court can order the moratorium to have extra-territorial effect and apply to acts taking place in Singapore or elsewhere only if the creditor is in Singapore or within the jurisdiction of the Singapore courts: Singapore Insolvency, Restructuring and Dissolution Act 2018, s.64(5)(b). For discussion, see *Re Zetta Jet Pte Ltd* [2019] SGHC 53.

targeted at certain creditors but must affect all creditors; and that the moratorium operates at a relatively late stage, requiring as it does that the company is already insolvent on a cash flow basis, or is likely to become so, thus reducing the opportunities for directors of a viable company to head off insolvency and preserve the firm's value as a going concern.

There is no doubt that restructuring mechanisms, including the moratoria that attach to them, can be misused by companies and powerful financial creditors.[127] However, while the concerns about protecting the minority from abuse are clearly very important, the balance may have tipped too far in these provisions, rendering the restructuring moratorium less valuable for companies than might have been hoped. Those engaged in schemes may continue to seek the assistance of the courts, and it is to be hoped that a similar discretion may be exercised by the courts in the context of restructuring plans. It is likely that many companies will continue to make use of existing tools for resolving their difficulties, including negotiating standstill arrangements with existing creditors, and the existence of an active distressed debt trading market provides an alternative route for lenders who do not wish to support the proposed restructuring. Of course, changes in the distressed debt market or in the willingness of the courts to exercise their discretion in this regard might mean that the deficiencies in the restructuring moratorium become more of a concern.

127. For a discussion of this in the context of US Chapter 11, see eg DG Baird and RK Rasmussen, "Chapter 11 at Twilight" (2003) 56 Stanford L Rev 673.