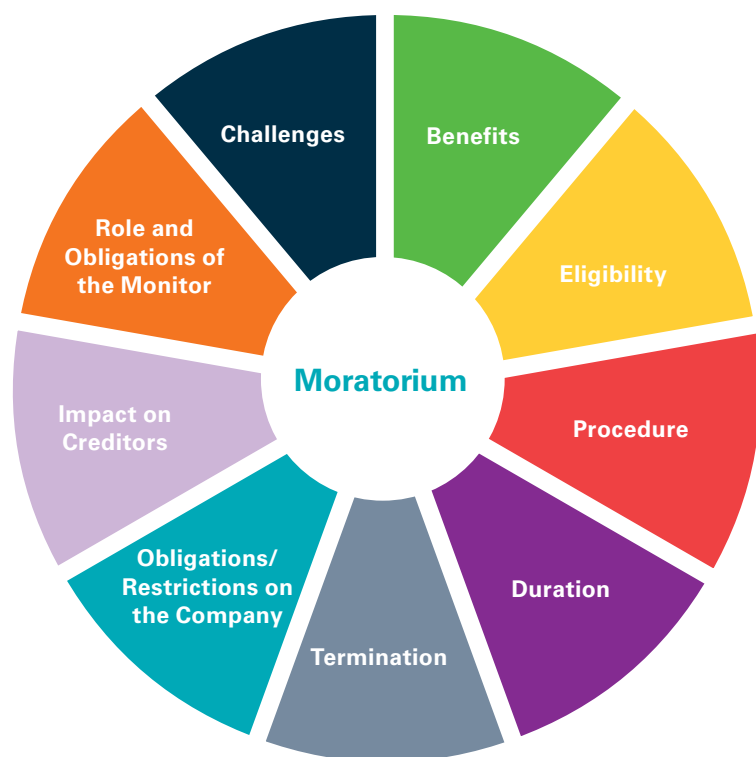


On 25 June 2020 the Corporate Insolvency and Governance Act (the Act) received Royal Assent. The Act makes both temporary and permanent changes to the UK insolvency laws.

As part of these measures, a ‘new debtor-in-possession moratorium’ has been introduced to existing legislation that will enable companies to have a minimum 20 business days breathing space without threat of creditor action. Under the moratorium, the day-to-day running of the business remains in the directors’ control, under the supervision of a licensed insolvency practitioner (the monitor) and subject to certain restrictions.

This note is not intended to, and does not, constitute legal advice and Squire Patton Boggs (UK) LLP accepts no liability for any losses occasioned to any person by reason of any action or inaction as a result of the contents of this note.



Benefits

- The moratorium is a stand-alone process and does not have to be a pre-cursor to a formal insolvency process.
- The directors remain in control of and continue to trade the company in the usual course of business (subject to monitoring by an insolvency practitioner), but must pay the business costs that accrue during the moratorium.
- Creditor pressure is removed.
- The company benefits from a payment holiday from certain debts; primarily trade creditors, tax liabilities and property costs.
- Most companies facing cash flow issues will be eligible.
- The procedure is intended to be streamlined and cost effective compared to other insolvency processes.
- There is no requirement to obtain secured creditor consent to the process.

Eligibility

All UK companies are prima facie eligible, if the company is, or is likely to become, unable to pay its debts as they fall due unless (a) specifically excluded (e.g. banks and other regulated entities) or (b) the company has been subject to a previous insolvency process in the last 12 months.

Procedure

The company and monitor file documents at court confirming that the company is, or is likely to become unable to pay its debts as they fall due and that it is “likely that the moratorium will result in rescue of the company as a going concern”.

For overseas companies, or those subject to a winding up petition, the company will have to make an application to court

The moratorium comes into effect upon filing the relevant documents at court or upon the court making an order.

Duration

The initial moratorium period lasts for 20 business days, commencing the day after the moratorium comes into force.

It can be extended by a further 20 business days by the directors or by up to 12 months with creditor and/or court approval and if the company proposes a CVA or “new” restructuring plan the moratorium period will automatically extend until the proposal is disposed of or plan approved.

Termination

The moratorium will end:

- Upon the expiry of 20 business days (unless extended);
- Automatically if the company enters into an insolvency process (e.g administration or CVA); or
- When the monitor files a notice at court to terminate the moratorium because:
 - the company has not paid debts payable in the moratorium period (see below for details of which debts remain payable); or
 - the monitor determines that the moratorium is no longer likely to result in the rescue of the company as a going concern



Obligations and Restrictions on the Company

During the moratorium period, the company is obliged to pay certain debts including:

- The monitor’s remuneration and expenses (although pre-moratorium remuneration and expenses are explicitly carved out);
- 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
- Debts or other liabilities arising under a contract or other instrument involving financial services. This means that the usual capital and interest payments due to lenders will likely still be payable (unless otherwise agreed with the lender).

The company/directors are also obliged to do the following:

- Provide and comply with requests for information from the monitor;
- Display the name of the monitor and that a moratorium is in force on its website(s) and business documents (e.g. invoices, orders form, business letters);
- Display notice of the moratorium at its business premises;
- Notify the monitor when the moratorium is extended or comes to an end; and
- Notify the monitor before taking any steps to enter insolvency proceedings.

During the period of the moratorium the company must not:

- Obtain credit over £500 (unless the creditor is informed a moratorium in force);
- Grant security over property, without the monitor’s consent;
- Enter into certain contracts (e.g. market contracts and financial collateral arrangements);
- Pay pre-moratorium debts exceeding £5,000 (or 1% of the value of all unsecured debts as at the start of the moratorium) without the consent of the monitor;
- Dispose of property subject to a security interest or hire purchase unless disposal is in accordance with the terms of the agreement or with the Court’s permission; or
- Dispose of any other property, unless: (i) the disposal is in the ordinary course of business; (ii) the monitor consents; or (iii) there is a court order.

Impact on Creditors

During the period of the moratorium, creditors cannot:

- Commence insolvency proceedings against the company; and
- Pre-moratorium creditors cannot apply to court to enforce their debt.

In addition, creditors cannot (without court consent):

- Take steps to enforce security or repossess hire-purchase goods;
- Commence or continue with legal processes (except certain employment claims); and
- Landlords cannot take steps to forfeit a lease.

The moratorium also suspends a secured lender's ability to crystallise its charge or appoint an administrator.

The position and rights of retention on title ("ROT") creditors is going to be a potentially challenging one. An ROT supplier is pre-moratorium creditor for which a payment holiday would apply and so wouldn't be able to enforce their ROT rights. Therefore the company could potentially be free to deal with the stock in the ordinary course of business, but wouldn't necessarily be obliged to pay the ROT supplier for that stock. The moratorium could have the (potentially unintended) consequence of the moratorium adversely affecting ROT creditors.

Role and Obligations of the Monitor

The monitor is not involved in the day-to-day decisions but must monitor the company's affairs in order to determine whether it remains likely that the moratorium will result in the rescue of the company as a going concern.

The monitor can sanction the disposal of the company's assets outside of the usual course of business, agree for the company to grant of security or pay pre-moratorium debts and is obliged to terminate the moratorium in certain circumstances.

Challenges

- A creditor, director, member of the company, any other person affected by the moratorium and the Pension Protection Fund (PPF) (where the company owes money to its defined benefit scheme) may apply to the court to challenge the moratorium on the grounds that an act, omission or decision of the monitor during a moratorium has unfairly harmed them.
- A creditor or member of the company and the PPF (where the company owes money to its defined benefit scheme) may apply to the court on the grounds that, as a result of an actual or proposed act (or omission) of the directors, the company's affairs have been managed in a way that has unfairly harmed them.
- Examples of where challenges may be brought could be by an ROT creditor (whose stock is being sold and they aren't proposed to be paid) or by a supplier who is being forced to continue to supply on unfavourable terms because their "ipso facto" termination clause is now invalid.



COVID-19 Temporary Provisions

Until 30 September 2020 the eligibility criteria is relaxed such that companies that are subject to a winding up petition or have been subject to a CVA, administration or another moratorium in the last 12 months will be eligible for a moratorium.

Also, if the financial position of the company has worsened due to COVID-19 the moratorium can still be extended provided (disregarding the worsened position) the moratorium would still likely result in the rescue of the company as a going concern.

Directors' Duties

Directors should be mindful that they comply with their directors' duties when considering a moratorium and a restructuring more generally, taking appropriate professional advice. We have produced a [quick guide](#) covering directors' duties, particularly in the context of COVID-19.

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