

Proposals for a Restructuring Moratorium A Response

General comments

I make three general comments

First, the above paper is in many respects extraordinary in that it says a great deal but with a lack of precision in many respects that makes it difficult to grasp the intention of the proposal or the kind of company or situation which it aims to address.

I give the following examples:

- (a) Para (i) page 5 refers to “negotiated restructuring of...debts” which is fine as a general term but requires some clarification in the context of the introduction of a formal court procedure. It gives rise to the question whether we are talking about a formal approach that involves the interests of all creditors or simply classes of creditors or, as is implied, something less formal and therefore potentially vague. The foregoing comment is reinforced by the reference to “a contractual compromise” in para (iv).
- (b) Para (vi) refers to companies that are “failing or...already insolvent” in contrast to the kind of company likely to use the procedure envisaged; yet surely in the majority of cases almost any company requiring a moratorium will be insolvent (either at the time or prospectively on the basis of its contingent liabilities) or it would not be requiring any restructuring of its debt obligations. If it is not in trouble what would be the justification of a moratorium at all? There would be no threat to stave off. If it is in trouble why cannot it use existing procedures?
- (c) It would appear that although the proposal is primarily intended to deal with the affairs of companies with large numbers of creditors and complex financing arrangements (see paras. 2.5 and 2.9, remarks in the summary, *et passim*) in fact very few companies would be precluded from using it. If that is so it is just another procedure to add to the existing ones but for no real specific purpose.
- (d) The eligibility criteria (or at least the first criterion) are vague. Is the proposal aimed at a situation where the “core business” is viable (para 3.9) or must the whole of the business be viable as implied elsewhere (e.g. para 3.15)? What is meant by “core business”? This is potentially quite important.

Secondly, matters are asserted without being properly backed by evidence, so that the paper proceeds on bases the justification for which must be in doubt. Again by way of example:

- (a) there is an implication that the introduction of the moratorium will make things less costly and less complex (para (i) page 5); such evidence as is put forward appears to be speculative;
- (b) the expectation that not all companies needing to restructure would necessarily apply for a moratorium is no doubt true; but it is hard to imagine that the number of applications will not be significant. If that is so, then extra costs

must necessarily be incurred. Why would insolvency practitioners not resort to it as a general (and potentially costly) tool?

- (c) There is an implication that the fact that there are large numbers of creditors is a special feature meriting special consideration for the proposed regime. However, schemes of arrangement and administrations frequently involve dealing with very large numbers of creditors, often financing/secured creditors. It is hard to understand why the consideration features in the paper at all.

This brings me to my third point. There is already in existence a wide array of insolvency procedures that adequately cover all the needs supposedly identified in the paper, notably administration and schemes, both formal and informal (with or without the benefit of an administration order). It is hard to understand why anything new is required, alternatively why it could not be covered by a simple or modified extension of the existing CVA moratorium

Questions

As is becoming increasingly common in consultations, the real questions are not asked, questions that presuppose an answer are, and in some cases the questions contain multiple propositions which do not permit of a yes/no answer. The result is that one is driven to answer in an unhelpful way and is left with the feeling that the consultation is not real. Again I give two obvious examples. Why not ask (a) is this needed at all and (b) do you think it will add to or decrease costs?¹ The failure to ask questions as straightforward as these is depressing.

Q1 : Do you agree with the expected costs and benefits of the proposals, as set out in the Impact Assessment ? Are there other benefits or costs that you believe should also be considered ?

No and no.

Q2 : Do you agree that in order to help safeguard creditors' rights, a company should not be eligible for a moratorium if there is an outstanding petition for winding-up unless it has a statutory compromise proposal (a scheme of arrangement or CVA) that it is ready to put to creditors ?

Subject to my general point above, yes.

Q3 : At the pre-proposal stage, do you agree that the two proposed qualifying conditions provide the right balance in ensuring that a moratorium is only available to companies where the core business is viable but there is nevertheless a need to restructure their debts ?

No. The qualifying conditions are too vague.

¹ Q 1 is worded so as to avoid the question I put.

Q4 : Where a company has a proposal for a CVA or Scheme of Arrangement and wishes to apply for a moratorium (or extend the existing moratorium), do you agree that provided the existing statutory conditions are met the only additional qualifying condition that should apply is that the company is likely to have sufficient funds to carry on its business ?

No. Much more stringent conditions should be imposed (e.g. as to viability of any proposal, lack of prejudice to creditors or any class, costs and so on).

Q5 : Do you agree that any extension of the moratorium during the period when a compromise proposal is still being negotiated should require a further court hearing ?

Yes.

Q6 : We would welcome views on whether an additional court hearing should be required for the extension of a moratorium to cover the formal approval of a CVA proposal.

If this proposal is implemented it should only be on the basis of very strict court control.

Q7 : Do you agree that the proposed role of the monitor, together with the rights of creditors and the obligations on the directors, strikes the right balance in safeguarding the interests of creditors and deterring abuse, without imposing disproportionate costs or impeding the objectives of the moratorium?

This question contains multiple propositions so the answer I must give is no. It seems highly likely that the costs will be disproportionate. The scope for abuse is huge.

Q8 : Do you agree with the proposals for treatment of moratorium debts in a subsequent CVA, and in any distribution undertaken in an administration or liquidation that immediately follows a moratorium?

No. There should not be any if the second qualifying condition is adhered to.

Stephen Baister
Chief Bankruptcy Registrar
Royal Courts of Justice
Strand
London WC2A 2LL

30 July 2010