By Ian G. Williams

COVID-19, the U.K. Perspective: Challenging Times for U.K. PLC

Editor's Note: *A new ABI International Committee project has been compiling various countries' responses to COVID-19 on the Global Insolvency website (globalinsolvency.com/covid19).*

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It is a question of scale, as this "sceptred isle" is 40 times smaller than the U.S. Eleven of the states of the U.S. have sufficient land mass to accommodate the whole of the U.K., England, Scotland, Wales and Northern Ireland. There are around 68 million people, whereas the U.S. has around 331 million people. This article is current as of late March 2020; what the position will be when you read this remains to be seen. The U.K.'s Prime Minister and Secretary of State for Health have tested positive for the coronavirus. We are in lockdown with all but essential businesses closed, and people are confined to their houses, only being allowed to leave for very limited reasons. Schools, colleges and universities are all closed. What will become of U.K. PLC, and what can we, as restructuring professionals, do to help?

On March 11, 2020, the Chancellor of the Exchequer, Rishi Sunak, set out the government's budget proposals. It was really two budgets rolled into one: the "normal" budget, setting out the country's short- and medium-term tax and spending plans, and an "extraordinary" budget, dealing with the effects and prospective consequences of COVID-19. For the "normal" budget, the economic forecasts upon which it was based[1] were prepared before any significant effect of the coronavirus was accounted for. Consequently, those forecasts were out of date as soon as they were published.

Therefore, the core issue is whether this is a short-term event, in which case all is well and good, but if it is not, the forecasts will be well wide of the mark, likely leading to a significant budget deficit. Then there is Brexit. The European Union's chief negotiator, Michel Barnier, has the coronavirus, and the EU countries, like the U.K., currently have other priorities. Consequently, it seems unlikely that any "deal" with the EU will be concluded by the end of this calendar year, not that this was ever likely in any event, some would say. This might actually be of benefit to the economy, as the short-term (at least) effects of Brexit were not thought to be beneficial. Thus, we face many challenges. The Chancellor's "give away" budget, which saw him announce £18 billion in spending pledges, was more in line with Labour Party policy than the (usually) more prudent financial planning of the Conservative Party.[2]

In terms of COVID-19, the Chancellor announced an initial spend of around £12 billion[3] to support businesses and employees, and has this week announced a further set of measures to assist the self-employed, such as payments to employers to enable them to continue to pay part of their employees' salaries; deferred tax payments; suspensions of property rates for nurseries, retail, hospitality and leisure businesses; protection from eviction for commercial tenants; business-interruption loan schemes, which will support smaller enterprises with access to loans, overdrafts, and invoice finance and asset finance of up to £5 million for up to six years; the Corporate Finance Facility, through which the Bank of England will buy short-term debt from larger companies; and amendments to the statutory sick-pay system.

For businesses, however, the "devil will be in the details," and throughout this week, civil servants have been scurrying around issuing protocols and guidelines, then revising them and re-issuing them. Advisors have been waiting anxiously by their computers trying to make sense of what has been produced so that they can advise their clients accordingly. The issue is getting people to stay at home, and that is easier said than done when there is inherent uncertainty over the financial sustainability of family units. It is to be expected.

While these are exceptional circumstances by modern standards, at least since the end of World War II, there is no political will to make non-means-tested or otherwise analysed payments to people or businesses. Understandable as that is, in the author's view it will inevitably lead to social unrest unless things normalize pretty quickly.

At present, business focus is on understanding, then (if applicable) accessing, such support as is available. As time moves on, and support for whatever reason is not available, is insufficient or is simply not available quickly enough, attention will then shift to an examination of the core options for affected businesses moving forward. As is often the case with corporate

1 And which show a surplus.

2 As former U.K. Prime Minister Teresa May remarked in the budget debate.

3 *See* Institute for Fiscal Studies, *available at* www.ifs.org.uk (unless otherwise specified, all links in this article were last visited on March 30, 2020).

recovery in the U.K., engagement with advisors comes too late in the day to maximize their impacts, and the same will be true here. But come it will, and we need to be ready.

Businesses are being encouraged to file for protection under our administration system sooner rather than later, although it remains to be seen whether they will do so. Remember, however, that the *quid pro quo* for no (or little) court supervision of the process and a moratorium is the effective removal of the directors from control and the substitution of a licenced insolvency practitioner in their place. That is the "usual" way in which things are approached to cover off long-established creditor-focused sensibility that the parties in control of an entity when it gets into trouble should not be left in charge of sorting it out. The U.K. Insolvency Lawyers' Association published a paper[4] in which it suggested that the current circumstances warrant a change of approach to this, and leaving the directors in *situ* alongside the administrator is sustainable given that the causes of distress "arise out of the wholly exceptional circumstances of the COVID-19 crisis."

A draft consent protocol has been produced, which can be adopted to reflect the administrators' consent to allow the directors to continue to trade the business of the company subject to certain conditions. This is undoubtedly an innovative approach, but insolvency practitioners and their firms are highly regulated, and they may take some persuading, so it just is not that simple. The so-called "soft touch" administration has never really taken off since the *Federal Mogul*[5] and *Railtrack*[6] days, and in those cases, the directors stayed in place for particular reasons. The current crop of businesses will be mainstream businesses under severe liquidity pressure that do not lightly lend themselves to the "soft touch" process.[7] Trading in administration is rare because of the risks and costs associated with it, and there is nothing to insulate the administrator from liability for losses and increased costs and possible third-party liability. It remains to be seen how this will work out in practice.

It is undoubtedly the case that the U.K. has an excellent "toolbox" for restructuring, and while the European Union (EU) transition arrangements[8] remain in place, we remain part of the EU Regulation regimes to facilitate U.K./EU restructuring of businesses in distress. It is no secret that this author has felt for some time that the U.K. needed what could be called a chapter 11 "light" regime to run alongside its existing tools. The word "light" is there to denote the need to strip out some of the costs from the chapter 11 system. The more-extensive moratorium afforded by the automatic stay (particularly in relation to so-called *ipso facto* clauses[9]) would be a welcome addition to our "toolbox." The author has watched with interest the introduction of the Small Business Reorganisation Act (SBRA),[10] which seeks to bring a cheaper/quicker chapter 11 process to small and medium-sized enterprises in the U.S. The members and contributors to the ABI Commission should be rightly pleased with their role in getting this piece of legislation enacted. It remains to be seen how well the SBRA fares in the current crisis and its performance will undoubtedly be the subject of scrutiny in many jurisdictions including the U.K.

A sense is that, like the support announced by the government, bringing everything together in a timely fashion is going to be hard to achieve. Indeed, the government has announced the temporary suspension of the "wrongful trading provisions retrospectively from 1 March 2020 for three months for company directors so they can keep their businesses going without the threat of personal liability."[11] This was unexpected and is likely to have minimal effect. The government has also said that it is looking to introduce new legislation incorporating its response to the consultation exercise released in 2018.[12] What there does seem to be no dispute about is that nothing is going to happen quickly, as the government's time will naturally be focused on combating the coronavirus, which might be a good thing. In addition, one has to question whether the consultation response is ready for legislation in any event, given the current resourcing in the Insolvency Service. So, for current purposes, it looks like we are left with the existing toolkit.

The banks will likely have to be "persuaded" by the government to step up to the mark quickly and discard their post-financial-crisis, overly conservative approach to lending, or many businesses will not survive. While the author wholly supports those who strongly advocate that it is our job as restructuring professionals to "save livelihoods,"[13] it is suspected that this will be easier said than done because of the pace of events. It does not mean we should not try, however.

Money is undoubtedly going to be tight, so are debtors and creditors going to now come running to the professions for advice (other than for how to access government schemes), or are they going to sit tight and see how the land lies? A line (one that is probably blurred) is being drawn between businesses wholly and exclusively damaged by the lockdown, and those with systemic problems to which the lockdown has exponentially added. This might see many retail and leisure-sector businesses not reopening and thus prospectively being liquidated at some point. Save where there is a pressing need for action, the author suspects that businesses will hunker down, as best they can, at least until the end of April, maybe somewhat longer if the experts are right about the length of the lockdown.

The author thinks that creditors will adopt a "blood out of a stone" approach and bide their time, too. Also, the logistics of creditor action are obviously more difficult and restricted

4 "Changing the Narrative Around Administration," Insolvency Lawyers Ass'n, *available at* ilauk.com/docs/ILA.v_.1.ChangingtheNarrativeAfter260320Call_.pdf.

5 Federal Mogul Group filed for chapter 11 protection in October 2001 to protect itself from massive liabilities from asbestosis claimants. The U.K. Turner & Newall Co., part of the Federal Mogul Group, filed for administration, but the underlying business was allowed to continue operating with minimal attention from the administrators while funds were being channelled into the litigation trust for the benefit of the asbestosis claimants.

6 Railtrack owned the railway track, signals, level crossings and tunnels following the privatisation of British Rail. It was placed into administration in 2001 in a way that allowed the railways to continue to operate despite the financial problems of the operator.

7 It is noted that in the recently filed *Debenhams* case, it is the intention of the administrators to adopt the consent protocol.

8 The withdrawal agreement states that the recast European Insolvency Regulation ((EU) 1215/2012) will apply to insolvency proceedings opened before the end of the transition period on Dec. 31, 2020.

9 The U.K. government's response to the Insolvency and Corporate Government review suggested that it would legislate to prohibit the enforcement of certain contractual-termination clauses.

10 For more on this legislation, *see* ABI's SBRA Resources website at abi.org/sbra.

11 Government Press Release dated March 28, 2020.

12 Department for Business, Energy and Industrial Strategy, *Insolvency and Corporate Governance; U.K. Government Response*, Aug. 26, 2018.

13 *See* Mark Phillips, QC 3-4 South Square on LinkedIn: "The [National Health Service] is saving lives. We now need to save livelihoods."

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in some instances, as previously mentioned. There is no light at the end of the tunnel as of now, so there are plenty of reason to keep one's powder dry. This author does not believe we will see businesses filing until that time when they can more clearly assess available options.

The greatest cleanser ever invented is, of course, capitalism. Strong businesses will survive, and weak ones will not, notwithstanding how hard we try. Liquidation, having its routes in ancient times,[14] is often pushed to one side as being detrimental to the culture of enterprise, but is it? It is not complex and protects creditors from dubious antecedent transactions, but crucially, it does recycle assets at market value — whatever that might be. With the availability of financing, new businesses will be born, and that might be the best we can hope for. The choice remains as to whether to use government monies to protect and support existing businesses or launch new ones; perhaps a case-by-case approach is merited, but again, will that not be light-footed enough? Undoubtedly, the lockdown will kill certain businesses; retail and hospitality will be hit hard, but demand will dictate whether such businesses are reincarnated as a result of a process or otherwise.

What seemed clear recently is that U.S. President Donald Trump did not seem inclined to allow the U.S. economy to crash because of COVID-19, particularly given that this is an election year, but that might not be something he can control. There are voices over here, too, even from vulnerable classes of people, who believe that the damage caused by the lockdown is disproportionate to the predicted damage to life and limb from COVID-19. Oh, for a crystal ball! abi

14 Early evidence of liquidation-type procedures can be found as far back as the 100 B.C. in Ancient Rome with the "Rutilian procedure," a procedure for possession and sale of the property of a debtor who had fraudulently concealed himself from creditors.

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