

Pandemic-driven changes raise ethical concerns

The current principles-based insolvency code of ethics cannot deal with new threats in relation to IPs' behaviour. IPs need to be given more specific and nuanced guidance, argue **Lézelle Jacobs** and **Donna McKenzie Skene**

It was evident from the start of the Covid-19 pandemic that the insolvency profession had an unmistakable role to play in assisting debtors and creditors to maintain some sort of order in the chaotic fallout that resulted from it. It could even be argued that IPs were fulfilling an essential service, especially where their work related to the administering of estates of debtors that are regarded as essential or critical.

However, one thing was clear – insolvency practice also had to adapt to the changed environment. The measures put in place to ensure the safety of the public had an unprecedented impact on the world of the IP.

This article has two main aims: first, to look at three main aspects relating to insolvency practice to highlight issues that have arisen due to the changes made as a result of the pandemic; second, to highlight professional standards issues that should attract attention in a post-pandemic world.

Insolvency law and practice

In order to support businesses experiencing financial distress during the pandemic, several measures were introduced, including temporary restrictions on the use of statutory demands and certain winding-up petitions, the suspension of wrongful trading provisions, and even special measures on evictions, as well as enhanced financial support to companies by way of the bounce back loan and furlough schemes.



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Another momentous development was the enactment of the Corporate Insolvency and Governance Act 2020 (CIGA). CIGA has been described as the most significant change to the UK's corporate insolvency regime in 20 years. The three permanent CIGA measures are: the new restructuring plan (RP) under Part 26A of the Companies Act 2006; the standalone moratorium under Part A1 of the Insolvency Act 1986 (the Act); and the restriction on contractual termination (ipso facto) clauses under s 233B of the Act.

The clear aim of all the measures above was the fiscal survival of persons and entities. Moreover, what most of these measures have in common is that they reflect a more communitarian approach to insolvency than the usual creditor-oriented approach. The plight of debtors, their management and their employees were given priority, whilst creditors, and especially financial creditors, were required to be patient.

As a matter of policy, the question could be asked whether the enhanced realisation during the pandemic that corporate insolvency affects more than just the creditors is something which ought to be retained post-pandemic.

Practical considerations

The pandemic gave rise to numerous practical issues in relation to the normal operation of insolvency procedures, from the inability of IPs to physically attend business premises, take control of assets, books and records, and interview directors and others in person, to the inability to access courts, and other relevant institutions and bodies in the normal way and to comply fully – or at all – with legislative provisions or best practice guidance.

In order to address these issues, most jurisdictions took steps to ameliorate the position. In England and Wales, for example, temporary practice directions were issued to adapt certain aspects of insolvency procedures which could no longer operate normally. These included provisions relating to the filing of notice to appoint an administrator and



Ethical IPs are key in chaotic insolvency situations and during the pandemic insolvency situations were complicated even further. The vulnerability that arose during the pandemic emphasised the importance of trustworthy and competent office holders ”

notice of appointment of an administrator; remote hearings; pending petitions and applications; winding up and bankruptcy petitions; urgent hearings; and statutory declarations. Some of these changes have now been made permanent.

IPs had to come to terms with the provisions (both temporary and permanent) brought about by CIGA. Companies House also introduced temporary measures for the electronic filing of documents. These have not been made permanent, but the ongoing wider review on corporate transparency and register reform may result in greater use of electronic filing in future.

Other practical steps to assist IPs during the pandemic included the development of a new standard form Covid CVA proposal and accompanying standard conditions by R3, and the development of a protocol on 'light touch' administration by the Insolvency Lawyers Association and City of London Law Society.

Some of these measures, such as the increased use of electronic filing and the move to remote meetings of creditors, can be seen as a trend to extend the use of technology in insolvency processes, which was already ongoing. This, together with the fact that some of them have been or are being made permanent, suggests that they