CLIFFORD

CHANCE

A ROUND UP OF RESTRUCTURING DEVELOPMENTS IN 2020

DECEMBER 2020

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1. NEW RESTRUCTURING PLAN

Effective from 26 June, the Corporate Insolvency and Governance Act introduced both permanent and temporary reforms to the existing insolvency and companies legislation to bolster the UK's rescue culture and to help businesses 'bounce back' from the adverse financial distress caused by the covid-19 pandemic.

Arguably the more useful addition to the existing regime is the introduction of a new compromise procedure, commonly dubbed a Part 26A restructuring plan. It is modelled on a Part 26 scheme of arrangement, but goes further by permitting one class of creditors voting by a 75% majority to bind other classes to an arrangement to eliminate, reduce, prevent or mitigate the effects of any financial difficulties with the court's approval (cross class cram down).

Recent restructuring plans have not needed to rely upon cross class cram down for the purposes of approval. Nonetheless, they have been carefully scrutinised by the court to ensure that they comply with the court procedure and principles of fairness.

For more detail, please see our separate briefing. For a comparison between the Dutch, German and English schemes see our recent briefing.

2. STANDALONE MORATORIUM

The new standalone moratorium provides a greater "debtor-in-possession" focus to UK restructuring law. It goes further than the administration style moratorium and the "small company" moratorium which it replaces by providing eligible companies with a payment holiday for certain payments and protection from proceedings including enforcement of security, legal proceedings and/or insolvency proceedings.

The standalone moratorium has an initial duration of 20 business days, extendable to 40 business days provided certain debts falling due have been repaid or further possible extensions with creditor consent or court approval.

For more detail, please see our separate briefing.

3. IPSO FACTO PROHIBITION ON TERMINATION BASED ON INSOLVENCY EVENTS

An ‘ipso facto’ provision was introduced to the Insolvency Act 1986, prohibiting enforcement of termination clauses in contracts for supply of goods and services, by suppliers, on the ground that a counterparty has entered into a formal insolvency procedure, the new standalone moratorium, or a Part 26A restructuring plan. This prohibition also applies to varying any rights or exercising such rights in the event of a formal insolvency procedure.

This means for the duration of the above proceedings the supplier will have to continue supplying the good or service to the counterparty on the same contractual terms without any guarantee of payment for any arrears. There are, however, exceptions to the ability to rely on termination provisions in respect of a long list of specified entities and arrangements.

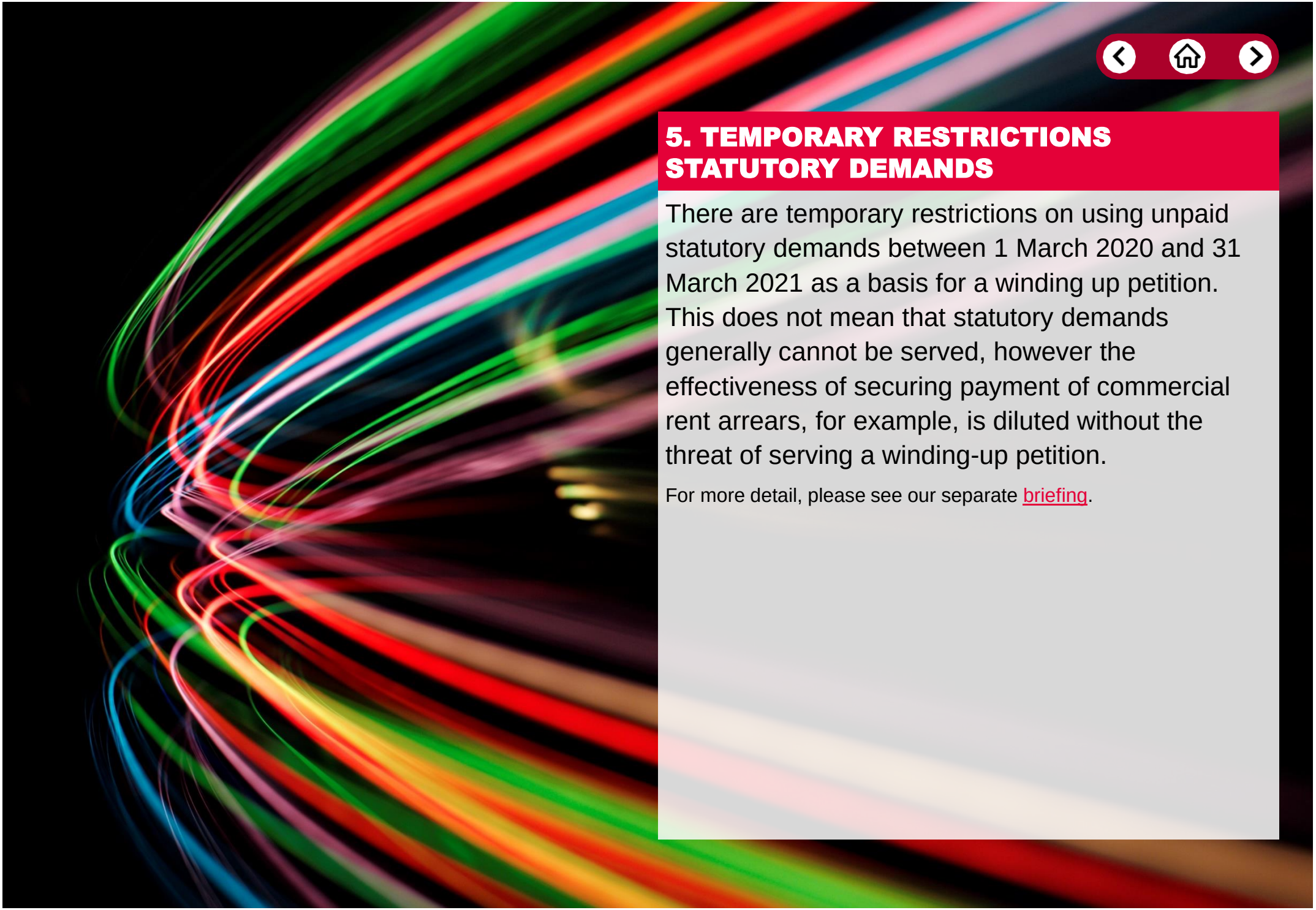
For more detail, please see our separate briefing.

4. TEMPORARY RELAXATION OF WRONGFUL TRADING

A temporary suspension on existing insolvency provisions that might otherwise impose personal liability on directors for continuing to trade while their business is in financial distress was brought into effect on 1 March 2020 to 30 September 2020. The government announced that it would reinstate the temporary suspension with effect from 26 November until 30 April 2021.

While this alleviates the pressure on directors from personal liability for wrongful trading for distress caused by the impact of the pandemic, the temporary suspension does not mean directors are absolved from compliance with their other duties and disqualification regimes and so directors should continue making decisions carefully, seeking professional advice where necessary.

For more detail, please see our separate briefing.



5. TEMPORARY RESTRICTIONS STATUTORY DEMANDS

There are temporary restrictions on using unpaid statutory demands between 1 March 2020 and 31 March 2021 as a basis for a winding up petition. This does not mean that statutory demands generally cannot be served, however the effectiveness of securing payment of commercial rent arrears, for example, is diluted without the threat of serving a winding-up petition.

For more detail, please see our separate briefing.

6. TEMPORARY RESTRICTIONS ON WINDING UP PETITIONS

Winding up petitions are restricted more generally from being presented to the court between 27 April and 31 March 2021, as extended, unless it can be established that the financial effect on the company is unrelated to the coronavirus pandemic. While therefore the measure has the effect of protecting companies from aggressive creditor enforcement action from covid-19 related debts, it does not prevent creditors from enforcing other remedies, nor does it impact their ability to claim late payment interest in accordance with contractual provisions.

For more detail, please see our separate briefing.

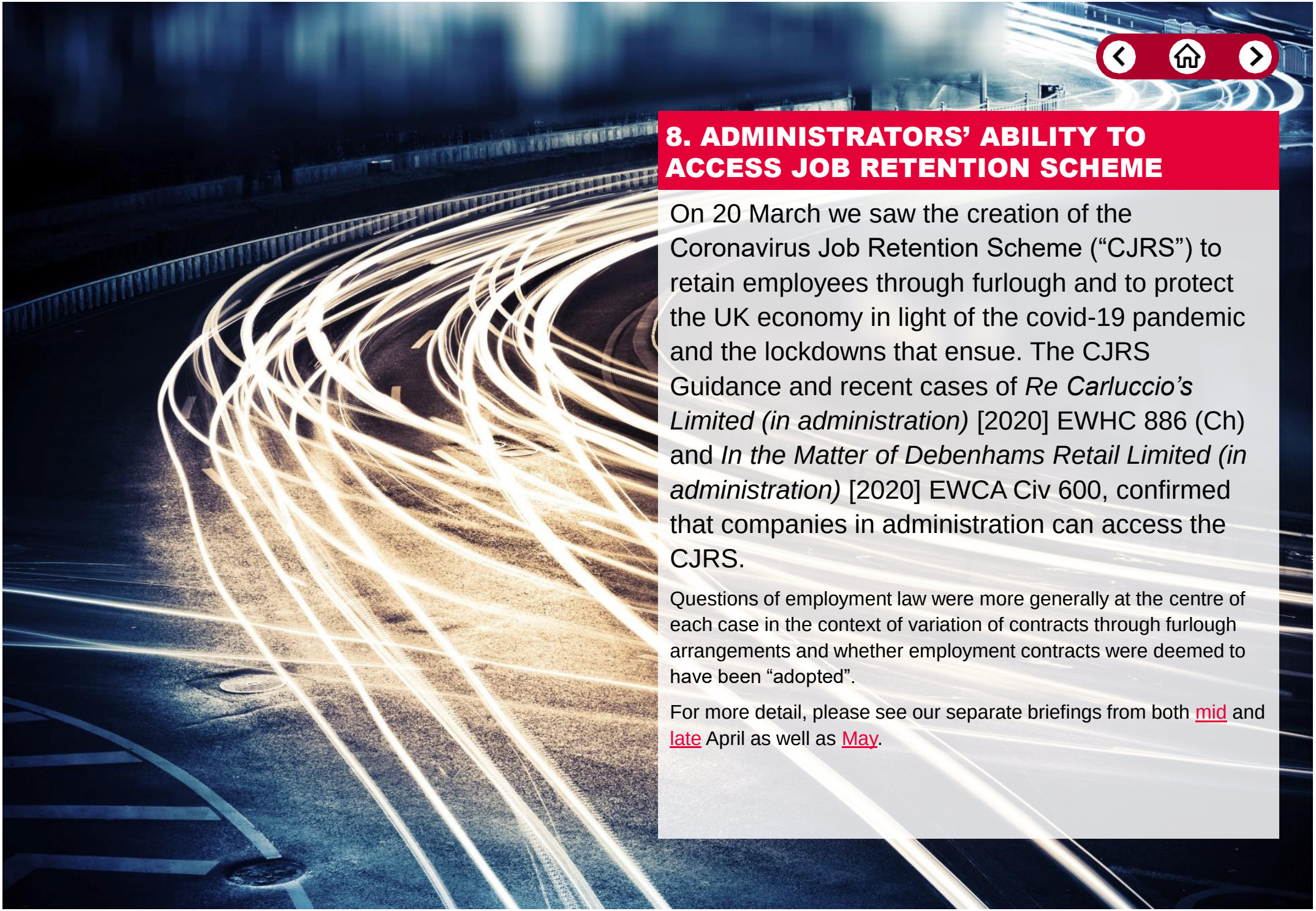
7. TEMPORARY RESTRICTIONS ON FORFEITURE

A moratorium against landlords forfeiting commercial leases for rent arrears was initially due to end on 30 June 2020, it has since been thrice extended, first to 30 September 2020, to 31 December 2020 and now to 31 March 2021, the latter being described as the "final extension".

Business tenants will welcome the further breathing space provided by the latest extension to allow them to reach arrangements with their landlords over rent to enable viable businesses to continue to operate.

Against this backdrop, the government has announced an extensive consultation on landlord and tenant legislative reform.

For more detail, please see our separate briefing.



8. ADMINISTRATORS' ABILITY TO ACCESS JOB RETENTION SCHEME

On 20 March we saw the creation of the Coronavirus Job Retention Scheme ("CJRS") to retain employees through furlough and to protect the UK economy in light of the covid-19 pandemic and the lockdowns that ensue. The CJRS Guidance and recent cases of *Re Carluccio's Limited (in administration)* [2020] EWHC 886 (Ch) and *In the Matter of Debenhams Retail Limited (in administration)* [2020] EWCA Civ 600, confirmed that companies in administration can access the CJRS.

Questions of employment law were more generally at the centre of each case in the context of variation of contracts through furlough arrangements and whether employment contracts were deemed to have been "adopted".

For more detail, please see our separate briefings from both mid and late April as well as May.

9. INCREASE IN PRESCRIBED PART (6 APRIL 2020)

On 6 April the upper cap of the prescribed part was increased from £600,000 to £800,000 by the Insolvency Act 1986 (Prescribed Part) (Amendment) Order 2020. The prescribed part allocates a proportion of the floating charge realisations to be distributed to unsecured creditors.

10. PARTIAL RESTORATION OF CROWN PREFERENCE

On 1 December the Crown's status as a preferential creditor in the order of distribution in insolvency proceeds was partially restored by the Insolvency Act 1986 (HMRC Debts: Priority on Insolvency) Regulations 2020.

This means while HMRC continues to rank behind fixed charge holders and expenses, it now ranks ahead of floating charge holders and unsecured creditors for the following taxes collected and held by businesses on behalf of their employees and customers: i) VAT; ii) PAYE Income Tax; iii) employee National Insurance contributions; iv) student loan deductions; and v) Construction Industry Scheme deductions.

This change therefore reflects a partial restoration of Crown preference since HMRC's position prior to 2003 was as a secondary preferential creditor for all unpaid taxes, not just the ones mentioned above. What is also important to note is that the change applies to all insolvency proceedings commenced after 1 December 2020 even where the floating charge was created prior to that date, having retrospective application in this respect.

For more detail please see our separate briefing.

11. GERMAN RESTRUCTURING SCHEME

In 2021, we will see the introduction of a German restructuring scheme in accordance with the European Directive on preventive restructuring frameworks 2019/1023, allowing for the implementation of an innovative and efficient pre-insolvency restructuring measure. This represents an impressive stride towards international best practice. The new German restructuring scheme allows for the possibility of proposing a restructuring plan to cram down dissenting creditors and shareholders, akin to the UK's Part 26A restructuring plan.

Accordingly, the new restructuring scheme represents a vital step towards the successful creation of an out-of-insolvency restructuring regime in Germany and it provides an efficient tool for the implementation of restructurings with the support of a creditor majority.

For more details, see our separate briefing. For a comparison between the Dutch, German and English schemes see our recent briefing.

12. DUTCH RESTRUCTURING SCHEME

From 1 January 2021, the long-awaited Dutch restructuring scheme will be made available to companies which has the possibility of cramming down a dissenting class of creditors or shareholders. It will therefore be similar to the UK's Part 26A restructuring plan.

The Dutch scheme relies on a majority threshold of two thirds of the value of claims who vote. For debtors with their COMI in the Netherlands, the Dutch restructuring scheme will also benefit from automatic recognition under the European Insolvency Regulation.

For more details, see our separate briefing. For a comparison between the Dutch, German and English schemes see our recent briefing.

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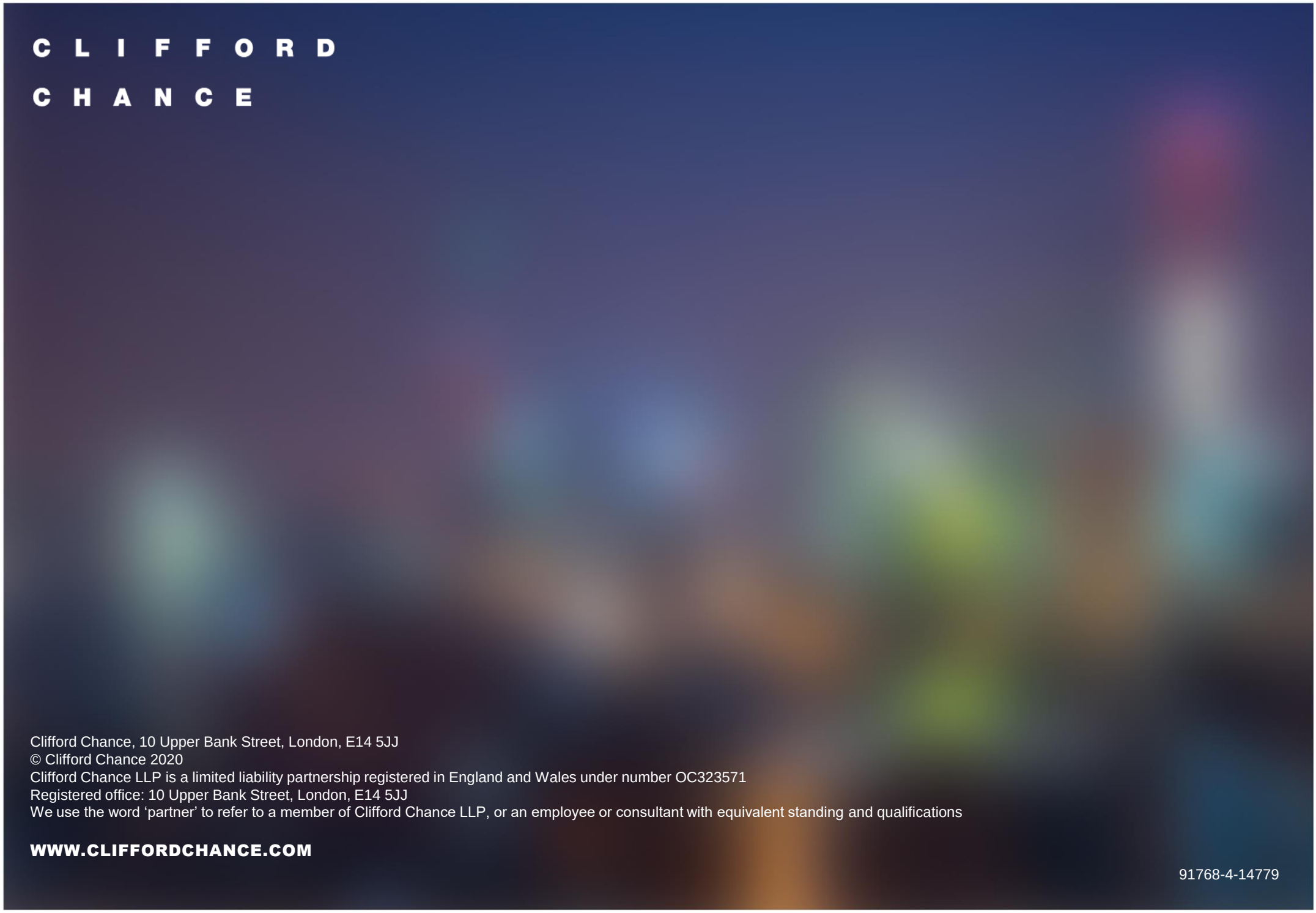
BUCHAREST	HONG KONG	MOSCOW	PRAGUE	SYDNEY	RIYADH[2]

1. Clifford Chance has a best friends relationship with Redcliffe Partners in Ukraine.
2. Clifford Chance has a co-operation agreement with Abuhimed Alsheikh Alhagbani Law Firm in Riyadh.



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