

NEW CORONAVIRUS LEGISLATION GIVES BUSINESSES MORE BREATHING SPACE

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On 29 September 2020 the [Corporate Insolvency and Governance Act 2020 \(Coronavirus\) \(Extension of the Relevant Period\) Regulations 2020](#) came into force. To keep this snippy, we’ll refer to these new Regulations as “CIGAR”.

CIGAR prolongs some of the temporary provisions introduced by [The Corporate Insolvency & Governance Act 2020](#) (CIGA), which came into force earlier this year. These temporary provisions were largely aimed at mitigating the effects of coronavirus for struggling businesses. Given that the UK is now experiencing a second wave, the extension of these temporary provisions ushered in by CIGAR are designed to provide businesses with more breathing space.

The main changes covered by CIGAR are summarised below.

STATUTORY DEMANDS AND WINDING-UP PETITIONS – MEASURES EXTENDED TO 31 DECEMBER 2020

The relevant period for the restrictions on the use of statutory demands and the presentation of winding-up petitions has been extended to 31 December 2020. In summary, creditors cannot seek to wind-up a company on the basis of an outstanding statutory demand served during the period beginning with 1 March 2020 and ending on 31 December 2020. In practice, a creditor can only present a petition to wind up a company during this period where they have reasonable grounds for believing that COVID-19 has not had a financial impact on the company, or that the company would have been unable to meet the demand even if coronavirus had not had a financial effect on it.

TERMINATION BY SUPPLIERS – EXEMPTION FOR “SMALL SUPPLIERS” – MEASURES EXTENDED TO 30 MARCH 2021

Section 14 of CIGA introduced a permanent prohibition on “ipso facto” provisions but with a temporary exemption for small suppliers. In summary, CIGA prevents a supplier from terminating a supply contract where the counterparty enters into a relevant insolvency procedure. However, under section 15 of CIGA, there was a temporary exemption from these prohibitions for “small suppliers” (essentially any supplier which can satisfy two of the following criteria in its most recent financial year: (i) turnover of no more than £10.2m; (ii) a balance sheet total of no more than £5.1m; and (iii) no more than 50 employees). Thanks to CIGAR, small suppliers who meet this criteria can continue to exercise their “ipso facto” rights until 30 March next year.

VIRTUAL GENERAL MEETINGS – MEASURES EXTENDED TO 30 DECEMBER 2020

The relaxation of the requirements for general meetings (as set out in Schedule 14 of CIGA), enabling companies to hold them virtually, will now continue until 30 December 2020.

COMPANY MORATORIUM FOR RESTRUCTURING – MEASURES EXTENDED TO 30 MARCH 2021

One of the core features of CIGA (aside from the restriction on enforcing “ipso facto” clauses as mentioned above and the introduction of a new restructuring plan procedure which isn’t affected by CIGAR) was the introduction of a standalone moratorium. This is a permanent change to English insolvency law, but as introduced under CIGA there was a temporary relaxation of some of the conditions which need to be satisfied in order to commence such a moratorium.

Under CIGAR, the period during which those temporary modifications apply has now been extended until 30 March 2021. In outline, the modifications which benefit from the extension provide that directors of a company subject to an outstanding winding-up petition must use the out-of-court filing process to obtain a moratorium (as opposed to an application to the court). In addition, during this extended period, a company can enter into a moratorium even where it has been subject to an insolvency procedure in the preceding 12 months.

In addition to the above, the Corporate Insolvency and Governance Act 2020 (Coronavirus) (Early Termination of Certain Temporary Provisions) Regulations 2020 came into force on 1 October 2020 and serve to switch off certain temporary provisions originally introduced under CIGA which relate to the new standalone moratorium. For example, this means that as from 1 October, when applying for a moratorium, the necessary statement by the proposed monitor that the moratorium is, in the monitor’s opinion, likely to result in a rescue of the company as a going concern no longer has to be qualified by the words “or would do so if it were not for any worsening of the financial position of the company for reasons relating to coronavirus”.

It is worth noting that these modifications will not apply to moratoria which have already entered into force, or for which any application to court has been made but not disposed of prior to 1 October this year.

ANYTHING MISSING?...WRONGFUL TRADING

Notably, CIGAR does not extend the temporary suspension of the wrongful trading laws that was introduced by CIGA but which fell away at the end of September. Under section 12 of CIGA, in making any determination of the contribution (if any) to a company’s assets that it is proper for a director to make, the court is to assume that the director is not responsible for any deterioration in the financial position of the company or its creditors during the period between 1 March and 30 September this year.

In practice, some were rather sceptical as to how much protection the temporary relaxation of the wrongful trading laws really afforded to directors, bearing in mind that the general director duty to have regard to the interests of creditors where a company is or is likely to become insolvent continued, as did the misfeasance and fraudulent trading regimes (not to mention the potential for directors to still be subject to disqualification proceedings or compensation orders). Our previous commentary on this topic can be found [here](#).

Tim Carter, Co-head of restructuring and insolvency at Stevens & Bolton, comments that:

"These extensions come as no surprise - the continued restrictions imposed by the government due to the ongoing pandemic have done nothing to alleviate the pressure for businesses, struggling or not. The government’s website - announcing the new extending measures (which can be found [here](#)) - cites comments from the Business Minister Lord Callanan of wanting to create certainty for businesses and to allow them “to not only allow them to come through this testing period, but also to plan, adapt and build back better”.

It remains to be seen whether these measures are sufficient to achieve that bold aim, and the extent to which we will yet see further extensions.

Certainly commercial landlords might disagree with the Business Minister's statement. The extensions - restricting their use of the winding up process and equally their inability to forfeit for non-payment of rent or other sums due under the lease (which has also been extended to the end of this year) – stack the odds against them. Whilst the Code of Practice encourages tenant businesses to pay their rent when they can do so, it has no real bite and therefore landlords remain bereft of any government-backed counterbalancing measures which could financially serve to assist them in 'this testing period'."

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