House of Commons Library

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Corporate Insolvency and Governance Act 2020

Contents

Summary

The Corporate Insolvency and Governance Act 2020 (CIGA 2020) received Royal Assent on 25 June 2020. Its measures fall into two sets: permanent measures to update the UK insolvency regime, and temporary measures to insolvency law and corporate governance to assist businesses during the pandemic.

Almost all its provisions commenced on 26 June 2020, but most temporary business protection measures had retrospective effect from 1 March 2020.

The permanent measures

The permanent insolvency measures in the Act (previously announced by the Government, and in development before Covid-19) mark a major change in UK insolvency law towards a business rescue culture more in line with U.S. insolvency (chapter 11). The new permanent measures are:

- A new restructuring plan to help viable companies struggling with debt obligations. Courts can sanction a restructuring plan (that binds creditors) if it is "fair and equitable". Creditors vote on the plan, but the court can impose it on dissenting creditors (known as "cross-class cram down"). Nine companies had used the new restructuring plan as of 31 August 2021;

- A free-standing moratorium to give UK companies a "breathing space" in which to pursue a rescue or restructuring plan. During this moratorium no creditor action can be taken against the company without the court's permission. The moratorium is overseen by a monitor (an insolvency practitioner) but responsibility for the day-to-day running of the company remains with the directors (a "debtor-in-possession" procedure). Thirteen companies had obtained the new moratorium as of 31 August 2021.

  Temporary modifications to the new (and otherwise permanent) moratorium procedure were made to relax the entry requirements during the pandemic. A company could enter a moratorium even if it was subject to an insolvency procedure in the previous 12 months; measures also eased access for companies subject to a winding up petition. The temporary moratorium rules expired on 30 September 2021.

- A prohibition on termination (or "ipso facto") clauses that are engaged when a company enters an insolvency procedure, a moratorium or begins a restructuring plan. The Act prevents suppliers from stopping

their supply while a company is going through a rescue process. The Act includes safeguards to ensure that continued supplies are paid for, and suppliers can be relieved of the requirement to supply if it causes hardship to their business. Small suppliers were exempt from the obligation to supply until 30 June 2021 to protect their business if necessary.

The temporary insolvency measures

The temporary insolvency measures in the Act sought to support businesses during the pandemic. These measures were:

- Suspension of serving statutory demands. Statutory demands were void if served on a company during the "relevant period" (between 1 March 2020 and 30 September 2021).

- Restrictions on winding-up petitions where unpaid debt is due to Covid-19. Winding-up petitions presented during the "relevant period" on the basis that a company is unable to pay its debts were reviewed by the court to determine the cause of non-payment. Where the unpaid debt was due to Covid-19, no winding up order could be made. These restrictions expired on 30 September 2021, but modified rules applied from 1 October until 31 March 2022. Between October 2021 and March 2022, winding-up petitions could only be presented: (i) in respect of debts of over £10,000; (ii) if the debtor had been given 21 days to respond with a proposal for repayment of the debt; and (iii) (for commercial rents only) if the debt wasn't related to coronavirus. These modified rules aimed to promote a gradual return to the normal regime.

- Suspension of the wrongful trading rules. The Act temporarily removes the threat of personal liability for wrongful trading from directors. The measure initially expired on 30 September 2020 but was then revived from 26 November 2020 to 30 June 2021.

The temporary corporate governance measures

The Act's temporary corporate governance measures sought to relieve the burden on businesses to allow them to focus their efforts on continuing to trade. Specifically, it:

- Temporarily gave companies (and other bodies) greater flexibility to hold Annual General Meetings (AGMs) and other meetings in a safe and practicable manner in response to the pandemic (e.g. virtual meetings). This measure applied retrospectively from 26 March 2020 to 30 March 2021. During this period directors were not exposed to liability for failing to hold an AGM in accordance with a company's constitution.

- Temporarily extended filing deadlines at Companies House. The Act provided for a temporary extension to the period allowed for the directors of a public company to comply with their obligation under section 441 of the Companies Act 2006 to deliver accounts and reports for a financial year to the Registrar at Companies House. The measure applied retrospectively from 26 March 2020 and expired on 5 April 2021.

The insolvency law measures in the Act apply to England and Wales, and partly to Scotland. The corporate governance measures on meetings and filings apply to the whole of the UK.

1 Background

1.1 Why the Act was introduced

Due to the global outbreak of Covid-19, many otherwise economically viable businesses experienced difficulties including mandatory closures, falls in consumer demand and delays in delivery of essential supplies.

The Department for Business, Energy & Industrial Strategy (BEIS) consulted in 2016 and again in 2018 on proposals to improve the UK's corporate governance and insolvency laws, aimed at ensuring high standards of behaviour in people who lead and control companies in, or approaching, insolvency.

In its first consultation in May 2016, "A Review of the Corporate Insolvency Framework"[1], BEIS consulted on a package of insolvency reforms intended to help businesses to continue trading through a restructuring process. Proposals included creating a company moratorium and developing a flexible restructuring plan. The consultation closed on 6 July 2016 and the Government published a summary of responses on 28 September 2016.[2] According to this summary, there was broad support for the principles behind the proposals. The Insolvency Service made a commitment to continue to liaise with stakeholders to refine its proposals.

On 20 March 2018, BEIS published a second consultation document, "Insolvency and Corporate Governance".[3] In the wake of major company failures (including Carillion), views were sought on proposals to: reduce the risk of major company failures through shortcomings of governance or stewardship; strengthen the responsibilities of directors of firms when they are in or approaching insolvency; and ensure a fair balance of interests for all stakeholders. The consultation also sought views on: sales of businesses in distress; reversals of value extraction schemes; investigations of the actions of directors of dissolved companies; the protection of company supply chains in the event of insolvency; and strengthening pre-insolvency corporate governance. This consultation closed on 11 June 2018.

1 The Insolvency Service, "A Review of the Corporate Insolvency Framework – A consultation on options for reform", May 2016, [online] (accessed 21 July 2020)

2 The Insolvency Service, "Summary of Responses: Review of the Corporate Insolvency Framework – A consultation on options for reform", May 2016, [online] (accessed 21 July 2020)

3 Department for Business, Energy & Industrial Strategy, Insolvency and Corporate Governance, 20 March 2018, [online] (accessed 21 July 2020)

On 26 August 2018, the Government published its response[4] to both the 2016 and 2018 consultations. The response announced plans to update the insolvency regime by introducing new restructuring procedures.

On 28 March 2020, Business Secretary Alok Sharma announced that the Government would introduce these permanent measures at the earliest opportunity together with temporary Covid-19 related measures intended to support continued trading through the current crisis to help companies avoid insolvency. On 23 April 2020, the Government announced other measures to protect companies from the aggressive use of statutory demands and winding-up petitions, particularly by commercial landlords.

The Corporate Insolvency and Governance Bill [HC 2019-21] was introduced in the House of Commons on 20 May 2020 and had its Second Reading on 3 June 2020. The Bill was fast-tracked through Parliament. In the Government's view, the measures contained in the Bill were urgently needed to support businesses during the coronavirus crisis, to give struggling but viable companies the flexibility and breathing space they needed to continue trading. There was cross-party support for the Bill.

The CIGA 2020 received Royal Assent on 25 June 2020. Its overarching objective is to support businesses and maximise their chances of survival, protect jobs, and support the country's economic recovery.

1.2 Extensions of the temporary measures

The temporary measures introduced by CIGA 2020 were initially due to expire on 30 September 2020. However multiple extensions of some of the Act's temporary measures have been made.

The legislation which implementation these extensions are:

- The Corporate Insolvency and Governance Act 2020 (Coronavirus) (Extension of the Relevant Period) Regulations 2020 (SI. 2020 No. 1031), which came into force on 29 September 2020;

- The Corporate Insolvency and Governance Act 2020 (Coronavirus) (Suspension of Liability for Wrongful Trading and Extension of the Relevant Period) Regulations 2020 (SI 2020 No. 1349), which came into force on 26 November 2020;

4 Department for Business, Energy & Industrial Strategy, Insolvency and Corporate Governance – Government Response, 26 August 2018, [online] (accessed 21 July 2020)

- The Corporate Insolvency and Governance Act 2020 (Coronavirus) (Extension of the Relevant Period) Regulations 2021 (SI. 2021 No. 375), which came into force on 26 March 2021;

- The Corporate Insolvency and Governance Act 2020 (Coronavirus) (Extension of the Relevant Period) (No. 2) Regulations 2021 (SI. 2021 No.718), which came into force on 22 June 2021; and

- The Corporate Insolvency and Governance Act 2020 (Coronavirus) (Amendment of Schedule 10) Regulations 2021 (SI. 2021 No. 1029), which come into force on 29 September 2021.

Further background information on the measures is provided in two separate Commons briefing papers: "Commons Library analysis of the Corporate Insolvency and Governance Bill [HC 2019-21]" (June 2020, section 2, pages 12-16) and "Corporate insolvency framework: proposed major reforms" (December 2019).

2 New permanent corporate insolvency measures

2.1 Overview

The permanent insolvency measures in CIGA 2020 added a corporate restructuring package to insolvency law, including a freestanding moratorium, a widening of the termination or "ipso facto" suspension provisions, and a new restructuring plan that sits alongside existing company voluntary arrangements (CVAs)[5] and schemes of arrangement.[6] The measures transform the way creditors and others interact with businesses in financial difficulty. In the Government's view, these measures gave companies the best chance of surviving the Covid-19 pandemic and beyond.[7]

The new rescue package introduced by the Act is based on the US Chapter 11 rescue procedure.[8] The EU introduced a similar company rescue package in its Restructuring Directive (2019/1023). These new standards represent a move for EU Member States further in the direction of debtor-in-possession-type insolvency regimes like chapter 11 in the United States. EU member states had to implement the Directive into national law by 17 July 2021.

5 A **company voluntary arrangement** (CVA) is a procedure under Part 1 of the Insolvency Act 1986 that allows a company to come to some other arrangement with its creditors over the payment of its debts. Often, a company will settle its debts by paying only a proportion of the amount owed to creditors. At present CVAs are used by companies seeking to restructure, but they cannot affect the rights of secured creditors or preferential creditors without their consent. Importantly, where a CVA proposal is made in respect of a "small company", the company can obtain a temporary, optional moratorium (i.e. stay on creditor action).

6 A **scheme of arrangement** is a compromise or arrangement between a company and its members or creditors (or any class of them) under Part 26 of the Companies Act 2006. It can be used to bring about a solvent reorganisation of a company or group structure as well as to effect insolvent restructurings by a wide variety of debt reduction strategies (such as a "debt for equity swap"). The main advantage of this statutory procedure is its flexibility – there are almost no restrictions on the nature of the arrangement that can be reached between the parties – but it also provides for court oversight and creditor protections.

7 Explanatory Notes, p.16

8 Chapter 11 refers to the chapter of the US Bankruptcy Code that sets out the statutory procedure for reorganisation proceedings under US bankruptcy law. (US bankruptcy law is a federal law that applies across all US states).

2.2 Statutory moratorium

Summary: statutory moratorium

The new statutory moratorium is a free-standing tool, not linked to any particular insolvency procedure. It is similar to the moratorium already available in an administration. It provides businesses with a statutory breathing space from creditors within which to formulate a rescue plan.

For as long as the moratorium applies, it prevents the enforcement of security, the commencement of insolvency proceedings or other legal proceedings against the company and forfeiture of a lease.

The moratorium lasts for an initial period of 20 business days, with directors able to extend for a further period of 20 business days without creditor consent, and with the possibility of further extensions (of up to one year or more) with the approval of creditors or the court.

Whilst the moratorium is in place, the business can trade in the ordinary course. With certain key exceptions, the company will not have to pay debts falling due prior to the moratorium but will have to pay debts falling due during the moratorium.

The moratorium can be used by UK companies of any size. However, it is not available to certain entities (e.g. financial services firms) or (generally) to companies that have already commenced winding-up proceedings.

Financially distressed companies are not obliged to use the new statutory moratorium; it is completely optional. For example, companies can still agree contractual or informal standstill agreements if they prefer.

To counter the effects of the pandemic, the Act temporarily relaxed certain conditions for obtaining a moratorium. Until 30 September 2021, a company could enter into a moratorium even if they have been subject to an insolvency procedure in the previous 12 months. Measures also eased access for companies subject to a winding-up petition.

The CIGA 2020 introduces a statutory moratorium, giving financially distressed but still viable companies breathing space in which to prepare to restructure, seek new investment, or pursue other rescue options. During this moratorium, no legal action can be taken by creditors against the company without leave (i.e. permission) of the court. This new statutory moratorium bears similarities to the already existing administration moratorium,[9] but is overseen by a "monitor" who must be a licensed insolvency practitioner.

According to BEIS, the aim of the new moratorium is to provide struggling companies with:

> "a streamlined moratorium procedure that keeps administrative burdens to a minimum, makes the process as quick as possible and does not add disproportionate costs on to struggling businesses."[10]

Which companies can apply for a moratorium?

Section 1 of the CIGA 2020 introduces new Part A1 to the IA 1986. This new part sets out details for determining whether a company is eligible for a moratorium, how a moratorium is obtained, the duration of a moratorium, the effects of a moratorium, and the role of the monitor.

The moratorium applies to all of the main incorporated forms.[11] All companies are generally eligible, except "excluded entities".[12] Excluded entities include those entities that currently have a specialist insolvency regime (such as insurance companies, banks, investment banks, investment firms, recognised investment exchanges and securitisation companies). Public private partnership project companies and certain overseas companies are also excluded from the moratorium regime.

An overseas company may be eligible for a moratorium, provided it has a "sufficient connection" with the UK - specifically, if the company is one which can be wound up under Part 5 of the IA 1986. It is anticipated that the courts will exercise the same discretion when considering such an application as they do when considering the winding-up of an overseas company.

BEIS has made it clear that the moratorium is intended to be used to help rescue a viable company in financial difficulty. It is not intended to simply delay the inevitable insolvency of a company that has no realistic prospect of survival. Therefore, companies cannot apply if at the date of filing for a moratorium:

- the company is already subject to a formal insolvency procedure (including a moratorium, administration, CVA or subject to a winding-up order) that is in force at the date of filing; or

9 Schedule B1 to the Insolvency Act 1986 contains the statutory moratorium that applies to an insolvent company in administration. The moratorium protects the company against creditor action (including the commencement of legal proceedings) except with the consent of the administrator or court.

10 Explanatory Notes, p.4 (para.6)

11 Regulations will apply for application of the moratorium to charitable incorporated organisations; co-operative and community benefit societies, and limited liability partnerships.

12 Schedule ZA1, inserted into the Insolvency Act 1986 by new Part A1

- in the previous 12 months, it has been subject to a moratorium, administration, CVA, or a winding-up order (although this restriction only applies after 30 September 2021 to account for the impact of the pandemic).

How does a company enter a moratorium?

There are two routes to enter a company statutory moratorium:

- First, by filing documents at court. Directors of an eligible company that is not subject to an outstanding winding-up petition,12F[13] and is not an overseas company, may obtain a moratorium by simply filing the relevant documents with the court.

- Second, by making an application to the court. Directors of an eligible company that is subject to an outstanding winding-up petition may apply to the court for a moratorium. The application must be accompanied by the relevant documents. The court will only grant a moratorium where it is satisfied that the moratorium would achieve a better result for the company's creditors as a whole than would be likely if the company were wound up without first being subject to a moratorium.

However:

- For a short period (until 30 September 2021), a company that is subject to a winding-up petition was able to obtain a moratorium by simply filing documents at court.

- A court order is not required if an administration application has been made or a notice of intention to appoint an administrator has been issued. In such circumstances, the company will be able to obtain a moratorium by filing relevant documents with the court.

- The directors of an eligible overseas company, not subject to an outstanding winding-up petition, must apply to the court for a moratorium for the company. There is no option to simply file the relevant documents with the court; the court must be satisfied that the overseas company is within the jurisdiction of the UK courts before granting it the protection of a moratorium.

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[13] For the purposes of this provision, a company is "subject to an outstanding winding-up petition if: (a) a petition for the winding-up of the company has been presented, and (b) the petition has not been withdrawn or determined

- Before a company can enter a moratorium, its directors must make a statement that the company is, or is likely to become, unable to pay its debts. Further, the monitor must make a statement that it is likely that a moratorium would result in the rescue of the company as a going concern. Both statements are intended to ensure the moratorium is used appropriately.

To help businesses survive the Covid-19 crisis, the Act initially contained a measure temporarily modifying the moratorium process, relaxing the criteria for the monitor to assess that the company is likely to be rescuable in order to enter a moratorium (or for a moratorium to continue). This temporary measure was not extended and ceased to have effect after 30 September 2020.

When does a moratorium come into effect?

The moratorium commences when either the relevant documents are filed with the court or, where a court order is required, when an order is made by the court.

Obligations to notify where moratorium comes into force

Notice requirements apply when instituting a moratorium. These include the requirement that as soon as reasonably practicable after receiving a notice from the directors that the moratorium has come into effect, the monitor (i.e. insolvency practitioner) must notify:

- the registrar of companies;
- all known creditors;
- in circumstances where the company is or has been an employer in respect of an occupational pension scheme (not a money purchase scheme), the Pensions Regulator; and
- in a case where the company is an employer in respect of such a pension scheme that is an eligible scheme within the meaning given by section 126 of the Pensions Act 2004, the Board of the Pension Protection Fund (PPF).13F[14]

How long will the moratorium last?

The moratorium lasts for an initial period of 20 business days (beginning with the business day after it comes into force). Directors can extend the moratorium for a further 20 business days (without the consent of the creditors) if they file a notice and certain other documents at court; this

[14] A notice must also be sent to the PPF where there is a restructuring plan (i.e. compromise or arrangement) under the new Companies Act 2006 provisions

cannot be done until the last five business days of the initial period of the moratorium. Any extension of the moratorium beyond 40 business days requires the consent of the creditors or the court. The maximum duration of a moratorium is 12 months from its commencement in the case of an extension made with creditor consent. However, it is possible for directors to apply to the court for a longer period or to request a further extension after the 12 months are over.

At each extension the directors must confirm that all moratorium debts[15] (and pre-moratorium debts[16] that are not subject to a payment holiday) have been paid as and when they fall due. In addition, the monitor must confirm that the moratorium is likely to result in the rescue of the company as a going concern.

What is the monitor's role?

The moratorium allows directors to be involved in the rescue of their own company since they retain responsibility for running the business on a day-to-day basis. Effectively, it is a "debtor-in-possession" procedure, with the company being the debtor. However, for the duration of the moratorium a monitor (a licensed insolvency practitioner) will be in place to properly assess the company's progress and to protect creditor interests. The monitor's role is limited to ensuring that the company complies with the requirements of the moratorium and approving sales of assets outside the normal course of business, as well as approving any grant of new security over the company's assets. The moratorium must end if it becomes apparent to the monitor that the company is unlikely to be rescued.

Crucially, the monitor is an officer of the court. A creditor (including, in certain circumstances, the Board of the PPF in place of trustees or managers of pension schemes), director, member of the company or any other person affected by the moratorium can challenge the monitor's actions if it unfairly harms their interests. If successful, the court will make appropriate remedial orders (but the monitor will not be liable to pay any compensation).

[15] A **moratorium debt** is any debt or other liability that the company becomes subject to during the moratorium (other than by reason of an obligation entered into prior to the moratorium) or to which the company may become subject after the end of the moratorium because of an obligation incurred during the moratorium (e.g. a debt arising from a new contract entered into by the company during the moratorium period)

[16] A **pre-moratorium debt** is any debt or other liability of the company that has fallen due prior to the commencement of the moratorium or which becomes due during the moratorium but under an obligation incurred by the company prior to the commencement of the moratorium, this would include obligations under contracts entered into pre-moratorium but where payments fall due post moratorium

What is the effect of the moratorium on creditors?

Effect of the statutory moratorium

(i) Effect of a moratorium on the ability to commence insolvency proceedings

Once in place, the moratorium prevents:

1. the presentation of a winding-up petition (except for petitions made by directors or certain public interest petitions);
2. the passing of a resolution for the voluntary winding-up of the company unless recommended by the directors;
3. the making of a winding-up order by the court, except on petition by the directors; and
4. the appointment of an administrator, the appointment of an administrative receiver, or the application of an administration order (except if made by the directors).

(ii) Effect of a moratorium on enforcement rights and legal proceedings

The moratorium prevents:

5. forfeiture of a lease by peaceable re-entry of business premises by a landlord;
6. the enforcement of security over the company's property except where security constitutes a collateral security charge or financial collateral, or security has been granted during the moratorium with the monitor's consent;
7. the repossession of goods under a hire-purchase agreement;
8. the commencement or continuation of legal process against the company and its property (with limited exceptions); and
9. the crystallisation of a floating charge or any imposition of a restriction on disposal of a floating charge asset.

However, on a creditor's application, the court can give permission to a creditor to take legal enforcement proceedings, but not if the sole purpose is to enforce a pre-moratorium debt for which the company has a payment holiday.

As outlined above, during the moratorium, no creditor legal action can be taken against the company. Except in certain circumstances (e.g. a director presenting a winding-up petition, or a public interest winding-up petition presented by the Secretary of State) no insolvency proceedings can be commenced against the company during the moratorium period. In practice this means that commercial landlords cannot exercise their rights of forfeiture over premises let to the company, certain goods cannot be repossessed and, crucially, third parties are prevented from beginning certain types of legal proceedings against the company.

However, creditors do have the benefit of the following safeguards:

- A moratorium must be supervised by a monitor (an insolvency practitioner) who must bring the moratorium to an end if the company does not abide by its rules.

- If the monitor becomes aware that any officer of the company has committed an offence in relation to the moratorium, the monitor must report the matter to the appropriate authority[17] and provide such information as that authority may require.[18]

- During the moratorium, a creditor or member of the company may apply to the court on the grounds that the company's affairs, business, and property are being or have been managed in a way that has unfairly harmed the interests of its creditors or members generally or some in particular; or that any act or proposed act or omission causes or would cause such harm. The court may make any order it thinks fit, including bringing the moratorium to an end, regulating the management of the directors, or requiring the directors to stop taking the action complained of.

- All suppliers must continue to be paid during the moratorium. If in any doubt, the monitor must bring the moratorium to an end or cancel the supply contract.

These safeguards are intended to stop any abuse of a moratorium and protect creditors' interests.

New criminal offences relating to fraud during and in anticipation of a moratorium, false representation to obtain a moratorium and other offences relating to a moratorium have been introduced.

[17] In the case of a **registered company** in England or Wales, the appropriate authority is the Secretary of State; in the case of a company registered in Scotland, it is the Lord Advocate

[18] In the case of an **unregistered company**, the appropriate authority is: (I) if it has a principal place of business in England and Wales but not Scotland, the Secretary of State; (ii) if it has a principal place of business in Scotland but not England and Wales, the Lord Advocate, and (iii) if it has a principal place of business in both England and Wales and Scotland, the Secretary of State and the Lord Advocate; (iv) if it does not have a principal place of business in England and Wales or Scotland, the Secretary of State.

New moratorium offences

A director or any other officer of the company will commit an offence if they make a false representation, or fraudulently do, or omit to do, anything, for the purpose of obtaining a moratorium or an extension. There are also general offences which include, during a moratorium or within 12 months leading up to a moratorium, an officer of the company:

1. concealing company property to the value of £500 or more,
2. concealing any debt due to or from the company,
3. fraudulently removing company property to the value of £500 or more,
4. concealing or destroying any document affecting or relating to the company's affairs,
5. or pawning, pledging or disposing of any property obtained on credit (unless it is in the ordinary course of business).

It is a defence to some of these general offences for a person to prove that they had no intent to defraud or, for other of the offences specified, that they had no intent to conceal the company's financial position.

What happens after the moratorium ends?

Although the aim of the moratorium is to facilitate company rescue, success is not guaranteed. There are several possible outcomes, for example:

- the company might recover without further action or process (e.g. the simple injection of new funds might be enough to rescue the company during the moratorium without having to enter any insolvency procedure);
- the sale and/or refinancing of the company outside insolvency;
- a company voluntary arrangement (CVA) is agreed between the company and its creditors (under part 1 of the IA 1986);
- a scheme of arrangement is agreed between the company and its creditors (under Part 26 of the Companies Act 2006); or
- a restructuring plan is implemented under the new Part 26A of the Companies Act 2006.

In addition, the monitor is obliged to bring the moratorium to an end in certain circumstances including if:

- the debtor company ceases, or is likely to be unable, to pay amounts falling due during the moratorium;
- the moratorium is no longer likely to result in a rescue of the company as a going concern; or
- the directors are not cooperating with the monitor to provide information.

2.3 New restructuring plan

To support viable companies struggling with debt obligations, the CIGA 2020 (section 7 and Schedule 9) introduces a new restructuring plan procedure (as new Part 26A to the Companies Act 2006). This new rescue procedure is in addition to the already existing creditor cooperation mechanisms – a Company Voluntary Arrangement (CVA)[19] and the scheme of arrangement.[20]

[19] For a definition of a company voluntary arrangement (CVA) see footnote 5

[20] For a definition of a scheme of arrangement see footnote 6

New Restructuring Plan: main features

Schedule 9 of the CIGA 2020 details the new restructuring plan..

1. Voting and court discretion

The terms of the restructuring plan require:

- creditor consent (with 75% approval required for each class of creditors); and
- court approval.

The court may sanction the restructuring plan, subject to certain criteria, even where not all classes of creditors vote for it. The conditions that need to be met are:

- the dissenting class may not be worse off than they would be in the event of the "relevant alternative", and
- a class with a genuine economic interest must have approved the restructuring plan (section 901G of the Companies Act 2006).

Cross class cram down provisions

- Dissenting creditors who vote against a restructuring plan will be bound by the plan if it is approved and sanctioned by the court. Secured creditors can also be bound.
- In effect, each affected creditor will have the opportunity to vote on the restructuring plan and, provided that one "in the money" class of creditors approves the plan and the plan delivers a better outcome than the next best alternative option (i.e. liquidation or administration), the plan will become binding on creditors in all classes if sanctioned by the court.
- The court's role is to consider whether the classes of creditors have been properly formulated; whether each creditor receives more under the plan than they would under the next best alternative; and whether the plan is fair and equitable.
- The new restructuring plan is very similar to the already existing scheme of arrangement procedure contained in Part 26 of the Companies Act 2006. Although schemes of arrangement can be effective in supporting the restructuring of a company (particularly in respect of large companies), it lacks the power to impose a restructuring plan on an entire class of dissenting creditors or members. This lack of a "cross-class cram down"

feature, puts it at a disadvantage compared to other countries' restructuring frameworks, including US Chapter 11.

- Without a "cross-class cram down" feature, a single class of creditors can block a scheme of arrangement from being agreed even when it is in the company's and creditors' interests. Alternatively, creditors could seek to unfairly benefit by "holding out" support unless they are offered more than they are due, based on what they would likely recover in the event of the company failing and entering insolvency procedure.

- Crucially, the new restructuring plan has the benefit of **cross-class cram down** provisions (a feature of US Chapter 11 bankruptcies) to help companies dealing with complex debt structures.

Who can propose a restructuring plan?

The Act allows for a restructuring plan to be proposed by the company or by any creditor or member. A plan can also be proposed by an insolvency practitioner (i.e. a liquidator or administrator of a company).

Who is eligible to apply?

All UK companies are eligible to apply for a restructuring plan provided that certain conditions are met. Some non-corporate entities, such as limited liability partnerships, and overseas companies with sufficient connection to the UK might also apply. However, the Secretary of State has the power to make regulations to exclude authorised persons (as defined under the Financial Services and Markets Act 2000 – broadly those providing financial services).

There are two conditions a company must meet in order to use a restructuring plan, namely:

- The company must have encountered or be likely to encounter financial difficulties that are affecting, or will or may affect, its ability to carry on business as a going concern.[21]

- A compromise or arrangement must be proposed between the company and its creditor or members (or any class of either); and the purpose of such compromise or arrangement must be to eliminate, reduce, prevent or mitigate the effect of any of the financial difficulties the company is facing.

[21] This is different to a scheme of arrangement, which can be proposed by a company in financial distress or a completely solvent company

What steps must be taken to obtain a restructuring plan?

In brief, the steps involved in obtaining a restructuring plan are as follows:

- Application to the court for leave (i.e. permission) to convene the class meetings to consider the restructuring plan.

- Creditors and members are divided into classes based on the similarity or otherwise of their rights prior to the restructuring plan. The court must approve the class formation.

- Every creditor or member of the company whose rights are affected by the compromise or arrangement must be permitted to participate in the meeting and vote on the plan.

- Each class will then vote on whether they accept the plan. At least 75% of creditors, by value, within a class must vote in favour, for that class to approve the restructuring plan.

- The court, however, has final approval. The court can sanction a restructuring plan, despite it not having been agreed by 75% in value of a class of creditors or a class of members ("the dissenting class"), if the following conditions apply:

  - The court is satisfied that if the plan were to be sanctioned, none of the members of the dissenting class would be any worse off than under a relevant alternative. The relevant alternative is whatever the court considers would be most likely to occur in relation to the company if the plan were not sanctioned;

    and

  - at least 75% by value of a class of creditor or members (i.e. one class) which would receive a payment or have a genuine economic interest if the relevant alternative were pursued, had still voted in favour of the plan.[22]

- A court approved restructuring plan will be binding on all creditors and members regardless of whether they, individually or as a class, approved the plan.

[22] Explanatory Notes, p.36

Cram-down provisions and other key features of the restructuring plan

An important feature of the new restructuring plan is that the court can impose (or "cram down") the plan on dissenting creditors provided that it is "fair and equitable". Cross-class cram-down provisions prevent dissenting classes of creditors or shareholders, particularly those with no genuine economic interest (i.e. those who would receive nothing if the company was to enter an insolvency procedure) from blocking a restructuring that is in the best interests of the company. The statutory safeguard is that the dissenting creditors must be no worse off than they otherwise would be in the next most likely outcome (i.e. in the event of the company entering an insolvency procedure).

The expectation is that the court will closely scrutinise a restructuring plan, especially where the cram-down mechanism is used. BEIS describes the court's involvement as follows:

> As in the case with Part 26 schemes of arrangement, the court will always have absolute discretion over whether to sanction a restructuring plan. For example, even if the conditions of cross-class cram down are met, the court may refuse to sanction a restructuring plan on the basis it is not just and equitable.[23]

Other features of the new restructuring plan to note are as follows:

- the plan sits alongside the already existing scheme of arrangement process;
- it is available to both solvent and insolvent companies (although the company must be in financial difficulties);
- it binds both secured and unsecured creditors (unlike a CVA); and
- the new moratorium can be used either prior to or simultaneously with a restructuring plan.

The Government hopes that the introduction of this new restructuring plan procedure will result in better outcomes for financially distressed companies attempting to restructure their debts in order to secure their long-term survival:

> With the option of using a Restructuring Plan and the court's ability to impose a CCCD [cross-class cram-down], a company will be able to achieve a restructuring that is fairer for all parties and will allow

[23] Explanatory Notes, p.36

the company to have an improved prospect of long-term survival with a more sustainable debt profile going forward.[24]

2.4 Termination clauses in supply contracts

Termination (or ipso facto) clauses in supply contracts

What is a termination or ipso facto clause?

1. Under common law, there is no right of termination of a contract in the event of insolvency or financial difficulty. This must be expressly provided for in the contract. Clauses in contracts which permit the termination of the contract by a party due to the insolvency or financial condition of another party are called termination or ipso facto clauses.

2. For a company in difficulty, the fact that supplies can suddenly stop because of the triggering of a termination or ipso facto clause, can jeopardise attempts to rescue the business. Alternatively, the supplier may hold the company to ransom, threatening to terminate the contract unless their pre-insolvency arrears are paid, and the terms of continued supply are made more favourable. This is also detrimental to corporate rescue.

What does the CIGA 2020 do?

- New measures contained in the CIGA 2020 prevent suppliers of goods and services from terminating, varying or exercising any right under a contract due to the other party having entered into an insolvency or restructuring procedure.

- The supplier will be forced to continue to supply the debtor on the same terms. However, there are significant safeguards to the operation of these provisions.

- Small suppliers were exempt from the obligation to supply until 30 June 2021 so that they can protect their business if necessary.

A prohibition on termination clauses that engage on insolvency

To maximise a company's chances of recovery, the CIGA 2020 (section 14, which inserts new part 233B into the IA 1986) provides that where a supply contract for goods or services includes a provision allowing the supplier to

[24] Insolvency Service and Department for Business, Energy & Industrial Strategy, "Guidance: Restructuring Plan", Gov.UK website, 5 June 2020, [online] (accessed 16 July 2020)

terminate the contract or “do any other thing”[25] such provision will cease to have effect when the company becomes subject to a relevant insolvency procedure. A relevant “insolvency procedure” includes where:

- a moratorium comes into force for the company under the new statutory moratorium procedure (see above);
- the company enters administration;
- an administrative receiver of the company is appointed;
- a company voluntary arrangement (CVA) takes effect in relation to the company;
- the company goes into liquidation or a provisional liquidator is appointed; or
- a convening order is made by the court in respect of a restructuring plan (see above).

This prohibition applies whether the termination or ipso facto clause in question operates automatically or requires an election to be made or notice given by the other party. Further, the Act provides that where the supplier was contractually entitled to terminate the contract or supply before the company went into an insolvency process (because of an event occurring before the insolvency process), the supplier cannot then exercise that termination right once the company is in the insolvency process.

It should be noted that the IA 1986 (section 233A(1)) already prohibits termination of a contract by utility, communications, and IT suppliers on the basis of an insolvency related term in their contract. However, the CIGA 2020 introduces additional provisions to the IA 1986 to widen the scope of the restrictions to supply contracts for all other types of goods and services (unless exempted).[26]

BEIS has given the following explanation as to the policy intention behind this measure:

> “[...] to help companies trade through a restructuring or insolvency procedure, maximising the opportunities for rescue of the company or the sale of its business as a going concern. The measures will complement the policy for a new moratorium and restructuring plan

[25] This would affect provisions such as the ability to charge default interest, acceleration, or any other contractual consequence

[26] New Schedule 4ZZA to the Insolvency Act 1986

> procedure, which are aimed at enhancing the rescue opportunities for financially distressed companies."[27]

Do the provisions apply to all entities?

Those in financial difficulty who might benefit from these provisions include:

- all the main incorporated forms;
- mutuals (including co-operatives and community benefit societies but not credit unions);
- limited liability partnerships; and
- other bodies and associations (whether incorporated or not).

Certain entities are excluded and will not be subject to the provisions where they themselves are in distress or where they are a supplier to a business in distress. These excluded entities, listed in the Act, are predominantly financial services (including deposit-taking and investment banks, insurance companies, hedge funds etc.) and essential services covered by pre-existing provisions of the IA 1986.[28]

Do the provisions apply to all types of contract?

The termination or ipso facto provisions of the CIGA 2020 apply only to contracts for the supply of goods and services. Financial contracts (e.g. loan agreements and financial leasing) are excluded from these provisions and can continue to be terminated or varied on the grounds of insolvency.

Obligation to continue supply

Where the Act's prohibition on termination or variation of a supply contract are in effect, the supplier must continue to supply the debtor on the same terms, thus enabling the struggling company to continue trading whilst it formulates a rescue plan. A supplier may only terminate the contract if one of the following applies:

- an officeholder (i.e. an administrator, administrative receiver, liquidator or provisional liquidator appointed over the insolvent company) agrees;
- where the company is subject to a moratorium, company voluntary arrangement (CVA), or Part 26A restructuring plan, and the company agrees; or

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[27] Explanatory Notes, p.8

[28] Exclusions will apply to financial services firms and contracts, public-private partnership project companies, utilities, communications and IT service providers that are already covered by section 223 and section 233A of the Insolvency Act 1986

- the court grants permission, being satisfied that the continuation of the contract would cause the supplier hardship.

If a supplier considers that the obligation to continue to supply is causing them undue **financial hardship**, they can apply to the court for permission to terminate the contract. The Act does not include a definition of "hardship". In considering an application, the court must assess:

- whether or not the supplier would be more likely than not to enter an insolvency procedure as a result of being compelled to continue supply; and

- whether exempting the supplier from the obligation to supply would be reasonable in the circumstances having regard to the effect of non-supply on the debtor company and the prospects of rescue.

The threshold is high; a supplier can only seek an exemption if continued supply threatens its own insolvency.

There was an exemption for small suppliers which expired on 30 June 2021. A business was deemed a small supplier if it met at least two of the following tests:

- the supplier's turnover is not more than £10.2 million (or an average of £850,000 each calendar month if the supplier is in its first financial year);

- the supplier's balance sheet total is not more than £5.1 million; and

- the number of the supplier's employees is not more than 50.

During the temporary exemption period, small suppliers could still rely on termination (ipso facto) clauses that would otherwise be invalid under the Act.

Payments owed to the supplier

A supplier cannot demand payment of outstanding pre-insolvency invoices as a condition of continuing supply. However, the supplier must be paid during the restructuring of the company.

The debtor must make payments for the continued supply that it is receiving and where the relevant insolvency procedure is administration, liquidation, provisional liquidation or administrative receivership, the appointed office holder (a licenced insolvency practitioner) must ensure that these amounts are paid as expenses of the procedure (i.e. ranking ahead of pre-insolvency unsecured and floating charge claims). If the company ceases to pay for goods and services during the insolvency procedure, this would usually give rise to a termination right, which could be exercised by the supplier; it is therefore in the interests of the debtor company to continue paying for the supplies that it requires.

3 Temporary corporate insolvency measures

The CIGA 2020 contains some temporary measures intended to support and protect viable businesses where their financial difficulties are attributable to the Covid-19 pandemic.

3.1 Suspension of wrongful trading

What is wrongful trading?

- The wrongful trading provisions are contained in sections 214 and 246ZB of the IA 1986 for liquidation and administration respectively in Great Britain and section 178 of the Insolvency (Northern Ireland) Order 1989 for liquidation in Northern Ireland.
- Directors are under a statutory duty to exercise reasonable care and skill in the management of the company.
- When a company is solvent, its directors are under a duty to act in the best interests of the company and its shareholders. When insolvent, directors have a duty to act primarily in the interests of the company's creditors.
- It is the director's responsibility to know whether the company is trading while insolvent. They must consider not only the company's balance sheet (and balance sheet solvency), but also the company's ability (actual and expected) to pay its debts as and when they fall due.
- Under **section 214** of the IA 1986, directors can be held personally and legally responsible for continuing to trade while insolvent. This is known as the offence of wrongful trading.
- Insolvency practitioners can apply to the court for a declaration that directors of a company in liquidation or administration are liable to personally contribute to the assets of the company. A declaration would be made where the directors allowed the company to continue trading beyond the point at which the insolvency procedure was inevitable and did not take steps to minimise potential losses to creditors.
- Only directors can be liable for wrongful trading (unlike fraudulent trading). "Director" is widely defined by the IA 1986 to include any person occupying the position of director, by whatever name called. This means that a "de facto" director or a shadow director may be liable for wrongful trading. The person must be a director of the company at the time they knew (or should have known) that there was no reasonable prospect of the company avoiding insolvent liquidation or insolvent administration. In other words, a director who resigns from office may still be liable for any wrongful trading that took place during their time in office.
- Dishonesty is not required; in other words, there is a lower burden of proof for wrongful trading than that required to prove fraudulent trading.

- Wrongful trading is a civil, not criminal, offence. A person held liable for wrongful trading may also be the subject of a disqualification order under the Company Directors Disqualification Act 1986.
- However, there is a statutory defence. A court will not make an order for wrongful trading if, knowing there was no reasonable prospect that the company would avoid going into insolvent liquidation or insolvent administration, the director took every step with a view to minimising the potential loss to the company's creditors as he ought to have taken (sections 214(3) and 246ZB(3) of the IA 1986).
- In many cases, it is directors' potential exposure to personal liability which influences the decision to put a company into liquidation.
- Further detailed information is provided in a separate Library briefing paper, "Company insolvency: potential liabilities of directors" (CBP 936).

The CIGA 2020 (section 12) temporarily amended the wrongful trading regime such that the court, in assessing whether a director should make a contribution to the assets of the company under the wrongful trading provisions, is to assume that the director is not responsible for any worsening of the financial position of the company or its creditors between **1 March 2020** and **30 September 2020**. This temporary measure applied to all the main incorporated forms and other bodies and associations (whether or not incorporated). However, financial services were excluded.

In respect of this suspension period (1 March 2020 to 30 September 2020), liquidators and administrators were not able to make a claim against an insolvent company's directors for any losses to the company or its creditors resulting from continued trading. In introducing this temporary measure, the Government said its intention was to stop a wave of insolvencies due to the Covid-19 crisis and remove the pressure on directors to preemptively close otherwise viable businesses and file for insolvency to avoid any personal liability risk. BEIS explained the policy rationale as follows:

> The objective of this measure is to remove the deterrent of a possible future wrongful trading application so that directors of companies which are impacted by the pandemic may make decisions about the future of the company without the threat of becoming liable to personally contribute to the company's assets if it later goes into liquidation or administration. This will in turn help to prevent businesses, which would be viable but for the impact of the pandemic, from closing".[29]

[29] Explanatory Notes, p.8

The suspension of personal liability for wrongful trading expired on 30 September 2020. No reason was given as to why the measure was not extended.

However, new regulations later revived this relief from personal liability for wrongful trading[30], so a suspension also applied for the period 26 November 2020 to 30 June 2021). The Regulations used the power in section 20 of the CIGA 2020 to modify the effect of **sections 214** and **246ZB** of the IA 1986.

There is a clear anomaly given that during the period between 1 October and 25 November 2020 there was no suspension of the wrongful trading provision. However, various insolvency commentators have suggested that in practical terms it appears unlikely that a claim would be pursued for this period in isolation.

It is important to note that all other director misconduct measures are unaffected by both the CIGA 2020 and the new Regulations. Actions against directors in respect of other misdemeanours under Insolvency or company law legislation (for example, fraudulent trading, claims in connection with transactions at an undervalue, preference, misfeasance, breach of duty) would continue to apply, as would the threat of director disqualification.[31]

3.2 Voiding of statutory demands and winding-up petitions (two measures)

Due to the pandemic, many companies became insolvent on a cash flow basis. A widely used debt enforcement option used by creditors owed £750 or more is to issue a statutory demand (i.e. a formal written demand) for payment of a debt within 21 days. Failure to comply with the statutory demand (assuming there is no legal right to refuse payment) can be relied upon by the creditor to trigger an insolvency process (i.e. the creditor can petition the court for a winding-up order on the grounds that the company is unable to pay its debts).

To stop a wave of insolvencies, the Government wanted to stop aggressive action by those creditors who are using statutory demands and winding-up petitions to recover debts against viable companies during the pandemic. Some commercial landlords were criticised for using statutory demands to coerce tenants into satisfying their rent payment obligations.

Schedule 10 of the CIGA 2020 introduces two separate temporary measures.

30 Regulations were laid before Parliament on 25 November 2020, subject to the "made affirmative" procedure. The statutory instrument came into force on 26 November 2020

31 There is a separate library briefing paper on "Company insolvency: potential liabilities of directors"(CBP 7936)

First, Schedule 10 provided that any statutory demand served on a company (registered or unregistered) during the "relevant period" (from **1 March** to **30 September 2021**)[32] was void and no petition for the winding-up of a company could have been presented on or after 27 April 2020 in respect of such a statutory demand.

A statutory demand served on a company during the "relevant period" was even in respect of a company not in financial difficulty or a company that is in financial difficulty for reasons other than Covid-19. CIGA 2020 did not actually prevent a statutory demand being made. Instead, during the relevant period, it prevented a creditor presenting a winding-up petition based on an unpaid statutory demand. In effect, there was little point in serving one.

Second, Schedule 10 restricts the circumstances in which winding-up petitions can be presented by creditors. During the "relevant period", a creditor could not present a winding-up petition in respect of an unpaid statutory demand or unsatisfied judgment debt unless that creditor had reasonable grounds for believing that:

- Covid-19 has not had a "financial effect" on the company; or
- the grounds for presenting the winding-up petition would have arisen (i.e. the company would not have paid the amount due in respect of the statutory demand or unsatisfied judgment debt) even if Covid-19 had not had a financial effect on the company.

The onus was on the creditor to present compelling evidence to show that the Covid-19 crisis has not had a financial effect on a company and that this is a reasonable belief. It follows that the court would refuse a winding-up petition if the company can show that the reason it is unable to pay its debts is due to the financial effects of the pandemic. In practice it was likely to be easier for a company subject to a winding-up petition to say that Covid-19 is the cause of its financial difficulties than it is for the petitioner (a creditor) to say that it is not.[33]

For the court, whether Covid-19 has had a "financial effect" on a company was a question of fact. However, given that the Covid-19 pandemic had far-reaching consequences for a wide range of UK businesses, the expectation was that the courts will take a broad interpretation of the term "financial effect" and assess each case on its own merits and facts.[34]

Paragraph 4 of Schedule 10 includes a provision to rectify situations where, following the announcement of the measure, but in advance of its enactment,

[32] The end date has been pushed back several times, most recently by The Corporate Insolvency and Governance Act 2020 (Coronavirus) (Extension of the Relevant Period) (No. 2) Regulations 2021 (S.I. 2021 No. 718)

[33] See for example, "Covid-19: Injunction restrains winding up petition for company", Simmons and Simons, 8 June 2020 [online] (accessed 21 July 2020)

[34] See the case of *Re A Company (Injunction to Restrain Presentation of a Petition) [2020] EWHC 1406 (Ch)*

a petition had been brought under the pre-existing law. Specifically, the court was given power to make a remedial order to restore the position as if the petition had not been presented.

The two temporary measures (i.e. void statutory demands and a conditional restriction on winding-up petitions) apply to all companies – there are no exceptions for "excluded entities". The Secretary of State had the power to change the duration of the temporary provisions by regulation made by statutory instrument, including extending the "relevant period" by up to six months in each case, if considered reasonable to deal with the effects of Covid-19.

Initially, these temporary measures were due to expire at the end of September 2020 but were extended on several occasions and eventually expired on 30 September 2021.

In September 2021 the Government announced that the restrictions on serving statutory demands would be allowed to expire on 30 September 2021, but a modified regime would put in place regarding the serving of winding-up petitions, from 1 October 2021 to 31 March 2022. This was intended to "protect companies from aggressive creditor enforcement whilst the economy opens up",[35] providing a gradual easing back towards the pre-pandemic position on winding-up petitions.

Temporarily, from 1 October 2021 to 31 March 2022, a creditor could not present a petition to court for the winding up of a company unless:

- the debt owed to the petititioner(s) was at least £10,000;
- the debtor had been given 21 days to respond with a proposal for repayment of the debt, and the creditor could state why any proposals received are not satisfactory; and
- (for commercial landlords only) the rental debt was not coronavirus-related

This was intended to "promote a gradual return to the normal functioning" of the regime on winding-up petitions.[36]

[35] Explanatory Memorandum, the Corporate Insolvency and Governance Act 2020 (Coronavirus) (Amendment of Schedule 10) Regulations 2021, p2

[36] Insolvency Service, Dear Insolvency Practitioner letter 136, September 2021, p3

4 Temporary corporate governance measures

The Act's temporary corporate governance measures were intended to increase the flexibility of companies during the pandemic, allowing them to focus time and resources on what is important in order to survive.

4.1 Holding of Annual General meetings (AGMs) and other meetings

AGMs and general meetings (GMs) are considered central to good governance. A company may be required by legislation or its constitution to take certain key decisions by passing a resolution of the members of the company (e.g. a change to the company's articles of association). Public companies can only pass a resolution of the members by holding a GM36F[37] and others may be required to do by their articles of association. Members also have the right to require directors to call a GM.[38]

Under section 336 of the Companies Act 2006, public companies have a statutory duty to hold an AGM within six months of the end of their financial year and private traded companies have a statutory duty to hold an AGM within nine months.[39] In addition, the company's own constitution may stipulate certain requirements for holding AGMs (e.g. that physical meetings be held in a certain place). Mutual societies and charitable incorporated organisations may also be required to hold an AGM, or other meetings, by legislation or their own constitution or rules. Pandemic-related restrictions made it difficult or impossible for some companies and other bodies to hold physical AGMs or other meetings in accordance with their constitution or rules. Some companies may have constitutions which allow flexibility in how AGMs are held - but not all.

For a temporary period, the Act gave companies and other qualifying bodies greater flexibility as to how AGMs and other meetings are held. Specifically, paragraph 3 of Schedule 14 to the CIGA 2020 allowed AGMs and other meetings to be held in a manner which is consistent with public health measures (for example, a "virtual" meeting with proxy or electronic voting) even if a company's constitution or rules would not normally allow it. Initially,

37 Section 281, Companies Act 2006

38 Section 303, Companies Act 2006

39 Failure to comply is a criminal offence under section 336, Companies Act 2006

this temporary measure applied from **26 March 2020** to 30 December 202039F[40] but the end was extended to **30 March 2021.**

Shareholder rights were preserved (e.g. voting rights were still retained, even if they were exercised virtually) and BEIS initially suggested companies consider holding "shareholder days" later in the year, so the board can engage with shareholders.[41]

Guidance on the holding of AGMs during the Covid-19 crisis was published by the Chartered Governance Institute.[42]

The Act temporarily extended the period for holding AGMs to 30 September 2020, meaning companies and other bodies could postpone their AGM beyond the deadlines contained in legislation or their constitution and rules. Directors would not be exposed to liability for failing to hold an AGM in accordance with a company's constitution. However, this measure was not extended and so from 1 October 2020, companies were no longer able to use CIGA 2020 to delay their AGM.

4.2 Filing requirements

Companies and other entities are required to make different filings by fixed deadlines at Companies House each financial year. Missing the deadline can result in a financial penalty. Given the trading difficulties presented by Covid-19, companies were already able to apply to Companies House for an automatic three-month extension to the deadline for filing their accounts. Over 50,000 companies had already done so before CIGA 2020.[43]

To offer additional support, the CIGA 2020 (section 38) temporarily extended the period within which a public company must file its annual accounts and reports at Companies House. For public companies with a filing deadline that fell between 26 March 2020 and 29 September 2020, the deadline was extended to the earlier of 30 September 2020 and 12 months from the end of the company's accounting period.

Section 39 of the Act gave a power to the Secretary of State to make regulations to temporarily grant further extensions to certain filing deadlines if required (as listed in section 40), provided the minister was satisfied that the need for change is urgent because of Covid-19. The provisions referred to in section 39(1) and listed in section 40 include, the filing of notices of change

40 This period can be further extended by up to 3 months at a time, up to 5 April 2021 at the latest

41 "BEIS issue Q&A on holding AGMs", ICAS, 28 April 2020, [online] (accessed 16 July 2020)

42 The Chartered Governance Institute, "AGMs and Impact of Covid-19", supplement guidance notes, 27 March 2020, [online] (accessed 16 July 2020)

43 Financial Conduct Authority, "Financial services exemptions in forthcoming Corporate Insolvency and Governance Bill", 14 May 2020 [online] (accessed 16 July 2020)

in directors,43F[44] confirmation statements,44F[45] and registration of charges.45F[46] However, the substituted period must not exceed:

- 42 days, in a case where the existing period is 21 days or fewer, and
- 12 months, in a case where the existing period is 3, 6 or 9 months.

The relaxation of these requirements was intended to negate the risk of directors incurring financial penalties or, in some cases, criminal sanctions which would otherwise apply. The Government also updated its Guidance for companies on applying for more time to file their accounts.46F[47]

Automatic extensions for confirmation statement filings, accounts filings and event-driven filings ceased to be in place after 5 April 2021. Companies must now file documents by the usual deadlines.

[44] Section 167, Companies Act 2006

[45] Section 853A(1), Companies Act 2006

[46] Section 859A, Companies Act 2006

[47] Companies House, "Applying for more time to file your company's accounts", last updated 26 June 2020 [online] (accessed 2 October 2020)

5 Power to amend corporate insolvency or governance legislation

The CIGA 2020 (section 20) contained a power to amend, or modify the effect of, corporate insolvency or governance legislation. This power allowed the Secretary of State to temporarily amend corporate insolvency and related legislation through regulations made by statutory instrument. Amendments made under the power contained within this provision could be made to both primary and secondary legislation (falling within the definition of "corporate insolvency or governance legislation"). However, under section 21, the Secretary of State could only make regulations if satisfied that they are expedient to achieve any of the following purposes:

(a) to reduce, or assist in the reduction of, the number of entities entering into corporate insolvency or restructuring procedures for reasons relating to the effects of coronavirus on businesses or on the economy of the UK;

(b) to mitigate or otherwise deal with the effect on corporate insolvency or restructuring procedures of any increase in the number of entities entering into these procedures for the reasons referred to in paragraph (a); or

(c) to mitigate the effect of the insolvency regime on the responsibilities of directors of those companies whose businesses are struggling due to the impact of the pandemic.

Section 22 imposed restrictions on the Secretary of State's use of this power to make regulations under section 20:

- The impact of any proposed amendments on any person (such as a creditor or employee) likely to be affected by them must first be considered;
- The temporary amendments made must be proportionate to the challenges presented;
- It must be that the amendment could not practicably be made without legislative change; and

- The provision may not be used where the proposed amendment could be made using existing provisions whilst still achieving the objective of legislating quickly.

In addition, amendments made under this provision could not create a criminal offence or a civil penalty, though they may modify the circumstances under which a person is guilty of an existing offence or civil sanction. The provision could not be used to create or increase a fee. Further, any changes made by this power must be kept under review by the Secretary of State and revoked if no longer needed or revised to take account of changing circumstances.

This power was time limited (clause 23). Initially, section 24(1) stated that the Secretary of State could not make regulations under section 20 after 30 April 2021. This date could be changed (i.e. if the impact of the pandemic was still being felt by business) but may not be extended beyond a year. Such an extension of up to a year could however be made more than once. The Government legislated to extend this date to **29 April 2022.** [48]

The Government justified creating this power on the basis that it is needed to help it to react quickly to the impact of the pandemic on businesses:

> Providing for temporary legislative change in this way will mean that the insolvency and business rescue regime may quickly react and adapt to deal with significant and potentially unexpected future challenges presented by the impact of the Covid-19 pandemic on business.
>
> Temporary amendments to legislation may be framed to give protection to companies which would be viable but for the effect of the pandemic, and to provide the regulatory support needed for their survival rather than being forced to enter insolvency proceedings. Changes may also allow for a temporary increase in flexibility in provisions within corporate insolvency and restructuring processes. This could be to mitigate the increased difficulty in adhering to those processes, such as meeting time limits, which may be caused by the impact of the pandemic. The provision could also be used to make temporary amendments to the insolvency related enforcement regime, to ensure that it remains fair and workable in the face of the impact of the pandemic on business. [49]

BEIS initially said there were no specific plans to use the power contained within this provision, but as the full extent of the impact of the pandemic on business becomes clear, it could be exercised to make urgent preventative or

48 See The Corporate Insolvency and Governance Act 2020 (Coronavirus) (Change of Expiry Date) Regulations 2021 (S.I. 2021 No. 441)

49 Explanatory Notes, p.9

mitigative amendments.[50] The powers have since been used multiple times (see **section 1.2** above).

A statutory instrument containing regulations to temporarily amend corporate insolvency or governance legislation under this provision would be subject to a "made affirmative" process, which means that the changes will be effective immediately upon the statutory instrument being made. According to BEIS, the use of this process is again justified by the need to react quickly to support businesses:

> This ["made affirmative" process] is necessary because the need for temporary amendments is in most cases likely to be pressing, and the time delay in seeking approval by both Houses of Parliament in the normal way could have a detrimental effect. The SI is however required to be laid as soon as possible after being made, and will require approval by both Houses within 40 sitting days, or the change will cease.[51]

Temporary changes made in this way could last for a maximum of 6 months but could be extended using a similar "made affirmative" process. However, the temporary changes could also be curtailed through a statutory instrument subject to a negative resolution process, and they had to be revoked or amended if it was clear that the impact of the pandemic had eased sufficiently.

[50] Ibid

[51] Explanatory Notes, p.10 (para.44)

6 Commentary and impact

6.1 Territorial extent

Section 48 in the CIGA 2020 sets out the territorial extent of the Act. The provisions in this Act either extend to the whole United Kingdom; to England and Wales and Scotland; to England and Wales only; to Scotland only; or to Northern Ireland.

Annex A in the Explanatory Notes to the Act, set out a useful table which summarises the position regarding territorial extent and application of the Act in the UK.

6.2 Effect of a moratorium or restructuring plan on the Pension Protection fund

The Pension Protection Fund (Moratorium and Arrangements and Reconstructions for Companies in Financial Difficulty) Regulations 2020[52] enables the Board of the PPF to exercise the creditor rights of scheme trustees during a moratorium or when a restructuring plan is proposed in relation to an employer of a PPF-eligible scheme.

The Regulations were considered necessary because neither moratoriums nor restructuring plans are qualifying insolvency events and so the provisions of the Pensions Act 2004, which would normally trigger the start of an assessment period (and the PPF's involvement), would not apply. However, Government amendments to the CIGA 2020 introduced several specific protections for pension schemes including new regulation-making powers to allow the PPF wider creditor rights under both these procedures. The Regulations introduce creditor rights for the PPF. They provide that:

- During any period in which a moratorium is in force in relation to a company, limited liability partnership (LLP) or charitable incorporated organisation (CIO) that is (or was at any time during the moratorium) the employer in respect of an eligible scheme, certain creditors' rights of the trustees are to be exercised by the PPF, to the exclusion of the trustees. The PPF must consult the trustees before exercising those rights; and

52 SI 2020/693

- When a compromise or arrangement (restructuring plan) is proposed in respect of a company or LLP that is the employer of an eligible scheme, the PPF may exercise certain rights exercisable by the trustees, as if it were a creditor of the company, in addition to the exercise of these rights by the trustees. However, the rights to vote in a meeting summoned under section 901C of the Companies Act 2006 are to be exercised by the PPF to the exclusion of the trustees. The PPF must consult the trustees before exercising this right.

The Regulations were made on 6 July 2020 and came into force on 7 July 2020. Urgency was said to be required to address the ongoing risk that a company could obtain a new moratorium or propose a plan to restructure its business without the PPF being able to intervene as a creditor to protect its interests.

6.3 Views of stakeholders

According to BEIS, the CIGA 2020 was broadly supported by businesses and by those involved in corporate restructuring and insolvency. A summary of stakeholders' views is provided in a separate Library briefing paper, "Commons Library analysis of the Corporate Insolvency and Governance Bill [HC 2019-21]" (section 6, pages 41 to 44).

By way of illustration, the Act was broadly welcomed by business bodies including the Institute of Directors and sector-specific organisations such as Hospitality UK. The Association of Business Recovery Professionals (R3) said the Act represented the biggest change to the UK's insolvency and restructuring framework for almost twenty years.[53] The Insolvency Lawyers' Association and the City of London Law Society welcomed the introduction of new tools (i.e. moratorium and new restructuring plan) into the UK's corporate rescue regime. Mark Phillips QC said the measures meant "everyone can now focus on how best to restructure debts and rescue struggling companies".[54] However, some commentators have suggested that the Act's permanent insolvency measures may be "too complex and disproportionately expensive for widespread use by SMEs," and as a result some SMEs may "continue to rely on other parts of the insolvency toolbox".[55]

During the Act's fast-tracked passage through Parliament, its measures were broadly supported by opposition parties. However, concerns were raised

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53 "The Corporate Insolvency and Governance Bill – R3 Response", Business Money, 21 May 2020, [online] (accessed 21 July 2020)

54 Financial Times, "Insolvency law shake-up to protect UK companies during pandemic", 20 May 2020, [online] (accessed 21 July 2020)

55 "Wrangling reform into the insolvency toolbox", Sarah Paterson & Mike Pink, R3 Recovery publication, summer 2019

about the scope of some of the provisions, particularly whether employee rights were sufficiently safeguarded, and measures which were absent from the Bill (and subsequently, the Act), including corporate governance and responsibility reforms.

6.4 Early impact

It is too early to properly assess CIGA's impact, because CIGA only came into force on 26 June 2020 and the Government has also been providing other support to businesses during the pandemic.

Insolvency Service statistics (to 31 August 2021) show that since CIGA came into force 13 companies had obtained a moratorium, and nine companies had used the restructuring plan available under CIGA. These may be an artificially low number of cases because of the other temporary support the Government provided to companies during the pandemic.

Moratorium

An analysis of the CIGA moratorium published on 31 March 2021 by international law firm Osborne Clark found there were some "inherent limitations" in the process:

- first, the moratorium only applies for 20 Business Days (extendable for a further 20 BD, with further extensions requiring creditor or court approval). This period "may not be enough to prepare an "oven ready" restructuring and rescue"; and

- second, bank debt, the moratorium monitor's costs, and debts of certain other companies are excluded from the moratorium payment holiday, which limits its usefulness. The analysis concludes that the moratorium might be most useful "when a restructuring is mostly agreed with a company's main stakeholders, and a further short period is needed to marshal others".

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Restructuring Plan

The first company to use the new Restructuring Plan was Virgin Atlantic Airways, and the airline said it was hopeful that the rescue deal would "put it on the path to profitability in 2022". The second company to use the new process was PizzaExpress.

However, the cross-class cram down was not engaged in the Virgin Atlantic or PizzaExpress restructurings, since all creditor classes approved the plan. It was, however, used in the third Restructuring Plan earlier this year, involving three UK subsidiaries of the DeepOcean group, a subsea services provider (which, for example, maintains and repairs underwater equipment used in the energy sector).

In the DeepOcean case, one class of creditor (unsecured creditors) did not vote in favour of a plan with the requisite 75% majority (with only 64.6% approving). Nonetheless, the court approved the plan and bound the dissenting class of creditors. Whilst this shows how the CIGA Restructuring Plan can be used for the benefit of a struggling company, it did not in this case lead to a rescue – the intention in using the Restructuring Plan was to allow for a solvent-wind down of certain companies rather than them being forced into insolvency which might have impacted the wider DeepOcean group.

International law firm Orrick wrote in October 2020 that the “ability to cram down dissenting creditor/member classes is a positive development and addresses an aspect of Schemes which has often been cited as a weakness”. However, they “expect that the cross-class cram down will result in an increase in valuation disputes with dissenting creditors seeking to demonstrate that the consideration they receive in the Restructuring Plan is less than they would receive in a “relevant alternative”. For these purposes, the court will have to be satisfied that the relevant alternative presented by the company is the most likely alternative to the Restructuring Plan”. An article (login required) titled “The impact of the Corporate Insolvency and Governance Act 2020 on drafting loan documentation and practice” published on 1 April 2021 (in the Journal of International Banking and Financial Law, written by lawyers at Stevens & Bolton LLP) concluded that “CIGA’s new restructuring tools have scarcely been used so far”. The low numbers of use “was attributed to the range of UK government support measures designed to see companies through the COVID-19 pandemic.”

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Prohibition on termination (or “ipso facto”) clauses in supply contracts

International law firm Allen & Overy published a briefing in September 2020 discussing the implications of the ban on termination clauses. The change was described as a “welcome addition” but they noted “it is unclear why this regime should apply where a company is in liquidation and some points require clarification, either by the government through guidance or by the courts through case law. A system more akin to that included in s 365 of the US Bankruptcy Code could have facilitated a fairer system.”

Suspension of wrongful trading

An opinion article in the FT from August 2020 by a director at consultancy firm Duff & Phelps said that the suspension of wrongful trading would help directors who may otherwise have started insolvency proceedings to avoid the threat of personal liability, and may “assist them to emerge intact on the other side of the COVID-19 pandemic”.

Originally, the suspension on wrongful trading lasted from 1 March to 30 September 2020. This then lapsed before a further suspension was introduced from 26 November. Law firm Lewis Silkin said the further suspension was “to be welcomed”, but said it was “unclear why the second period was not backdated to run seamlessly from the first”, arguing that the “resulting gap will increase complexity”.

Guidance published by BEIS in June 2020 gives an example case study of the type of business that the suspension of wrongful trading is intended to help. It uses the example of a pub which is forced to close by the pandemic.

Claims of wrongful trading appear to be bought rarely. The Government’s CIGA impact assessment published in April 2020 cites a statistic that there were only 29 reported wrongful trading claims between 1986 and 2014, with liability imposed in only 11 cases. Given these low numbers, it’s difficult to assess whether the suspension of wrongful trading claims has made a significant impact.

Restrictions on statutory demands and winding-up petitions

A briefing discussing the CIGA provisions on statutory demands and winding-up petitions by a barrister at Quadrant Chambers in October 2020 notes that “this provision is unlikely to have a far-reaching effect. This is because, unlike its equivalent in bankruptcy, the statutory demand has never been a central feature of corporate insolvency law”. However, on winding-up petitions, the briefing notes that “the circumstances in which such petition may be presented and a winding-up order made have been significantly curtailed” by CIGA.

The Government’s CIGA impact assessment noted that “businesses, particularly in the retail and hospitality sectors, are receiving statutory demands for payments of outstanding debts (primarily rents)” and that “some commercial landlords appear to be using statutory demands as a heavyhanded tactic to force tenants to pay rent and other debts despite the Government’s call for forbearance.” This provision is therefore intended to help “protect businesses from eviction by landlords”.

A November 2020 blog post by Helix Law solicitors noted that, because of the evidential burden created by CIGA (i.e. the need to show a court when seeking a winding-up order that coronavirus has not had a financial effect on the debtor, or that the debtor would be insolvent even if coronavirus had not occurred) “very few petitions have been presented since April and judicial consideration has been limited.”

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