



Enterprise

CHAMBERS

STOP PRESS!

GOVERNMENT EXTENDS RESTRICTIONS ON STAT. DEMANDS AND WINDING UP PETITIONS & OTHER COVID-RELATED MEASURES UNDER CIGA 2020

**Legal Update by Kavan Gunaratna
Barrister, Enterprise Chambers on 24.9.20**

Introduction

1. The Government has today (Thursday 24.9.20) brought into force a new statutory instrument to extend the operation of several key Covid-related restrictions and measures that were enacted in the Corporate Insolvency and Governance Act 2020 (“**CIGA 2020**”). These were due to expire next Wednesday 30.9.20, but will now expire on one of three new dates as noted below. The new statutory instrument is known as The Corporate Insolvency and Governance Act 2020 (Coronavirus) (Extension of the Relevant Period) Regulations 2020 S.I. 2020/1031 (“**the Extension Regs**”); its operative provisions are in reg. 2.
2. There are 7 key points for practitioners to now note, as follows. **The busy reader may just read the coloured sub-headings below, whilst those interested in the detail may read the full text.**

(1) Not all the Covid-related provisions have been extended: in particular, the “suspension of liability for wrongful trading” has not been extended

3. The Extension Regs do not enact a blanket extension of all the temporary Covid-related provisions that were enacted in CIGA 2020. The notable exception relates to the so-called temporary “suspension of liability for wrongful trading” (a misnomer given the actual text) which was enacted in section 12 of CIGA, broadly speaking to provide company directors with some comfort in respect of their potential exposure for wrongful trading under sections 214 or 246ZB of the Insolvency Act 1986. That temporary suspension is still set to expire at midnight on Wednesday 30.9.20 without any extension beyond that date.
4. See also paragraph 16 below in relation to a second Statutory Instrument which the Government is about to bring into force to terminate some of the temporary Covid-related provisions relating to the new Moratorium procedure.

(2) There are now 3 different sets of expiry dates for these extended provisions

5. The Extension Regs do not provide for a single new expiry date for the various Covid-related restrictions and measures which they extend. Rather, they create 3 different expiry dates (30.12.20, 31.12.20 and 30.3.21) for the 4 groups of Covid-related measures which they extend, as noted below.

(3) The restrictions on stat. demands and petitions are now in place until 31.12.20

6. The restrictions on stat. demands and creditors winding up petitions (which are contained in Schedule 10 of CIGA 2020) have been extended by 3 months and will now be in place until midnight on 31.12.20. Whilst some other measures (as noted below) have been extended by 6 months, the Government states that it has “recognised that this temporary measure is a significant intervention into the normal working of insolvency law, in particular the rights of creditors and consequently, any single extension of this measure should be of a shorter duration” (see para. 7.3 of its Explanatory Memorandum).
7. Accordingly:
 - 7.1. Stat. demands served between 1.3.20 and 31.12.20 (inclusive) can never be relied upon to support any petition presented to the court (ignoring petitions presented before 28.4.20): CIGA 2020 Schedule 10 para 1. As a reminder, the restrictions on reliance on stat. demands apply irrespective of whether Covid had any financial impact on the debtor company whatsoever; even if a company was entirely unaffected by Covid, it will still be able to rely on these restrictions, which are presumably designed to be simple and more straightforward in that sense. Nor is there any use in a creditor serving a stat. demand before the end of this calendar year and then ‘sitting’ on it until New Year’s day 2021: that simply will not work based on the mechanics of Schedule 10 para. 1.
 - 7.2. Between 27.4.20 and 31.12.20 (inclusive), creditors may not present a winding up petition against a debtor company, without ‘reasonable grounds for believing’ that it would be deemed insolvent even if Covid hadn’t had a financial effect on it: CIGA 2020 Sched. 10 para. 2 (or 3 for unregistered companies) and 21(1). Moreover, the court may only make a winding up order if the judge is him/herself satisfied that the company would be deemed insolvent even if Covid hadn’t had a financial effect on it: *ibid* para. 5 (or 6 for unregistered companies). As a reminder, the new procedural requirements that operate during this period are set out in the new Practice Direction on CIGA 2020, published on 2.7.20 and in para. 19(3) of Sched. 10 to the 2020 Act.
8. For further detail, please refer to our previous webinar notes on the new restrictions.

(4) The dispensation from seeking validation orders will be in place until 31.12.20

9. The Extension Regs change the meaning of the “relevant period” (defined in para. 1 and 21(3) of Schedule 10 of CIGA 2020) for all purposes within that Schedule. A secondary consequence of this will be to extend the period during which validation orders are unnecessary for companies which are subject to winding up petitions.
10. Accordingly, a company which is subject to a winding up petition presented between 27.4.20 and 31.12.20 (inclusive) will not have to apply for any validation orders under section 127 of the Insolvency Act 1986: see the modifications in that respect which are enacted in paragraphs 8 and 9 of Schedule 10. By way of a reminder, this exemption does not depend on the company showing that it is only insolvent on account of Covid; on the contrary, it will apply to a company which the petitioning creditor establishes was insolvent regardless of Covid. See again our previous notes for further details.

(5) The temporary provisions about company meetings are now in place until 30.12.20

11. Schedule 14 of CIGA 2020 temporarily relaxed our usual laws about EGMs/ meetings and voting arrangements for companies (and other qualifying types of body) and contained related provisions. By way of example, by para. 3 of Sched. 14, company meetings held within the relevant period of time were

not required to be held at any particular place; votes could be cast electronically or by any other means; and meetings could be held without any particular number of participants being present together to form a physical quorum. The “relevant period” for these provisions has now been extended from 30.9.20 to 30.12.20 (not 31.12.20 like the other extensions discussed above): see reg. 2(4) of the Extension Regs.

(6) The temporary dispensation for small suppliers from the new ipso facto rules will now remain in place until 30.3.21

12. Section 14 of CIGA 2020 brought into force new restrictions on so called ‘ipso facto clauses’ in order to prevent suppliers of goods and services from terminating their contracts with companies that have become subject to insolvency procedures (and/or to prevent them from taking other steps in consequence of such insolvency): see the new section 233B of the Insolvency Act 1986 which was introduced by section 14 of CIGA.
13. The Government was concerned that this could be bad news for certain smaller suppliers of goods and services and was concerned about the potential knock-on impact on them during the Covid-19 crisis. Section 15 of CIGA 2020 therefore provided a temporary dispensation to ‘smaller suppliers’, so that they could still rely on ipso-facto clauses in their contracts in order to terminate a contract (or otherwise react) in light of their customer’s entry into an insolvency procedure during the “relevant period”, which was initially defined as running to 30.9.20. This has now been extended by a full 6 months (the longest possible period for a single extension) to 30.3.20: see reg. 2(a) of the Extension Regs.

(7) The temporary modifications to the rules on the new Moratorium regime will be partly extended to 30.3.21

14. As explained in our previous webinar notes, section 1 of CIGA 2020 introduced the entirely new insolvency procedure called the Moratorium, which is inserted at the start of the Insolvency Act 1986 in its new Part A1 and Schedule ZA1. The Moratorium regime set out which companies would be eligible to invoke it and which would be ineligible for various reasons: see now the Insolvency Act 1986 Schedule ZA1 para. 2.
15. For a temporary period during the Covid-19 crisis, the Government wished to make it somewhat easier for companies to invoke the new Moratorium procedure. It therefore enacted a series of temporary modifications and relaxations of the criteria and procedure as set out in CIGA 2020 Schedule 4. There were broadly 3 categories of temporary relaxation. To recap:
 - 15.1. First, the directors of a company wishing to invoke the Moratorium would normally have to apply to court (rather than being able to use the out of court filing route) where the company was subject to an outstanding creditor’s winding up petition – but during the temporary period, that was modified so that the directors should adopt the out of court route only (unless the company was an overseas one): *ibid* para. 6(1)(a).
 - 15.2. Second, whereas a company would ordinarily have been disqualified from invoking the Moratorium if it had been subject to a CVA, admin. or Moratorium within the past year, – during the temporary period, any such disqualification was removed: *ibid* para. 6(1)(c).
 - 15.3. Third, the Monitor would ordinarily be required to certify that a Moratorium was “likely...[to] result in the rescue of the company as a going concern”, both in support of the initial filing for a Moratorium (section A6(1)(e) IA 1986) and in support of any extension of the period of the Moratorium (section A10(1)(d) and A11(1)(d)), and would also assume a duty to review matters during

the course of any Moratorium to see whether the procedure remained likely to result in the company's rescue as a going concern (section A35), and a duty to terminate it if that were no longer considered to be the case (section A38). However, for any company which invoked a Moratorium within the temporary period, the phrase "it is likely that a moratorium for the company would result in the rescue of the company as a going concern" was to be modified by adding 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".

16. The Extension Regs have now extended the relevant temporary period in this respect to 31.3.21. However, the Government is about to lay a further statutory instrument to be known as The Corporate Insolvency and Governance (Coronavirus) (Early Termination of Certain Temporary Provisions) Regulations 2020 ("**The Early Termination Regulations**") which will row back from certain of these extensions to the temporary modifications to the Moratorium regime. The text of the Early Termination Regs has yet to be published but it seems likely that they will row back on the point noted at 16.3 above, consistent with the Government's approach to now focusing on helping companies which are viable, rather than all companies that have been affected by Covid but which may be in terminal decline.

Kavan Gunaratna **Enterprise Chambers**

E: kavangunaratna@enterprisechambers.com
T: 020 74050 9471
M: 07966 723 654

Disclaimer: These notes are produced for educational purposes only. The views expressed in them are those of the author. The contents do not constitute legal advice and should not be relied on as such advice. The author and Enterprise Chambers do not accept legal responsibility for the accuracy of their contents. The contents of these notes must not be reproduced without the consent of the author.

About the author

Kavan is a barrister practising from Enterprise Chambers. He is ranked by the Legal500 and Chambers & Partners as a leading junior simultaneously in the fields of Insolvency/Restructuring and Real Estate/Property litigation and Chancery-Commercial litigation, where quotes about him have included the following:

*"unfailingly brilliant"; "one of the best barristers in the area";
"exceptionally user-friendly"; "a delight to work with"; "clients love him"
"highly intelligent, quick to get to the bottom of an issue, articulate and charming"
"has a masterful grasp of the law" and is "as strong with strategic advice"
"a wonderful opponent - very able and slightly deadly"
"knows exactly how to present a case to a judge" and "gets amazing results".*

He is an author of 'Butterworth's Property Insolvency' and 'The Landlord and Tenant Factbook' amongst other texts, and has published articles across his fields of practice, including recently in 'Butterworth's Journal of International Banking and Financial Law'. He has provided training for bodies including the PLA, ILA, R3 and the ICAEW, as well as in-house for leading law firms. His list of reported cases and full CV is available on the Chambers website.