



SHEPHERD+ WEDDERBURN

Commercial debt and COVID-19

Advice note for clients in England and Wales

Due to the impacts of COVID-19 (“Covid”) on businesses, the UK Government has introduced various provisions in order to help viable companies survive amidst the pandemic.

These provisions are contained within the Corporate Insolvency and Governance Act 2020 (“CIGA”), which this note sets out to summarise, in order for our clients to understand the various options available to their businesses if needed.



1. What is CIGA?

CIGA was brought into force on the 25 June 2020 and largely amends previous provisions set out within the Insolvency Act 1986 (“IA”). Of particular importance to directors, is the ability under CIGA for the allowance of time that can be granted for directors to consider various options to rescue the company concerned, rather than dealing with imminent creditor action.

2. What are the key provisions that are useful under CIGA?

Moratorium

A Part A1 Moratorium (“the Moratorium”) procedure is extremely useful for directors introduced under CIGA. It allows directors of a company to implement the Moratorium and prevent a creditor for taking any action against the company concerned.

However, the company of concern must be ‘eligible’ for the Moratorium under CIGA. This means that unless the company is excluded under Schedule ZA1 of the IA, the procedure can be used. Companies that are excluded are those such as: insurance companies, banks, electronic money institutions and specific overseas companies.

While the Moratorium is in place, the company is controlled by the directors but the directors’ actions are assessed by what is referred to as a ‘monitor’ (a qualified insolvency practitioner), selected by the company directors.

There are three ways in which a company may obtain a moratorium, which avenue is taken depends on the company’s specific circumstances. In summary they are:

- If a company is eligible, is not subject to a winding-up petition and is not an overseas company, the directors may obtain a moratorium by filing the ‘relevant documents’ at Court (s.A3 of IA);
- Alternatively, if a company is eligible but is subject to an outstanding winding up petition, the directors may apply to Court for a moratorium. The Court may order a moratorium only if it is satisfied that it would achieve a better result for the company’s creditors as a whole than would be the case if it was wound up without first being subject to a moratorium (s.A4 of IA); or
- If a company is eligible, is not subject to an outstanding winding-up petition and is an overseas company, the directors may apply to the Court for a moratorium (s.A5 of IA).

Regardless of which avenue the company must take, all require the directors to produce the ‘relevant documents’ for the Court. These are defined in sA6 of the IA and include: a notice that the directors want a moratorium and that in their view, the company is, or is likely to become, unable to pay its debts, and a statement from the proposed monitor to confirm (among other matters) that they are a qualified person, that they consent to act, and that the company is eligible.

If successfully obtained the Moratorium can last 20 business days, starting on the business day after which the relevant documents are either filed at Court or an order is made via Court, but can also be extended.

An extension of the Moratorium can be made via the following:

- The directors extending by a further 20 business days by submitting statements with the ‘monitor’ and the Court; or
- Creditor Consent can be granted. This is required to be via a majority of both the secured and unsecured pre-moratorium creditors and can be extended more than once via this route up to a period of 12 months from the first day of the initial Moratorium period;
- By the Court on the application of the directors. The Court will then consider this application.

Restructuring plan

The Restructuring Plan (“the Plan”) was also introduced by CIGA and was implemented for companies in financial difficulty and is modelled on the previous schemes of arrangement.

Under this provision, directors are able to propose the Plan to compromise the claims of creditors and/or members.

In order to implement the Plan, a two-stage Court approval is needed. The first application to Court relates to a meeting that is held between creditors and members to consider the Plan. The Plan will only be approved if 75% of those voting at this meeting approve its implementation. The second application concerns the Court approving the Plan.

Extension on prohibition of termination due to insolvency

Whilst the IA previously prevented utilities and IT suppliers terminating supply upon insolvency, CIGA introduced new restrictions that apply to all suppliers of goods and services (although there are some exceptions).

The excluded suppliers are mainly suppliers of financial services such as banks and insurers.

This extension applies to both the Moratorium and Plan mentioned above.

3. How are these provisions beneficial in light of COVID-19?

Moratorium

If your company is impacted by COVID-19, the main benefit of the use of the Moratorium is that it would give your company a ‘payment holiday’ in respect of specific pre-moratorium debts (defined with sA53 of the IA).

However, there are certain exceptions to this payment holiday, which include:

- The ‘monitor’s’ pay and expenses incurred;
- Rent during the Moratorium;
- Goods or services supplies during the Moratorium;
- Wages or salary payable to employees;
- Payments relating to redundancy; and
- Liabilities arising under a contract/other instrument related to financial services.

In addition, the Moratorium both restricts creditors starting insolvency proceedings against the company and prevents landlords from exercising a right of forfeiture of a lease.

However, if the ‘monitor’ concludes that the Moratorium is unlikely to rescue the company as a going concern and the company is unable to pay any of its moratorium debts or pre-moratorium debts not subject to a payment holiday, the ‘monitor’ could bring the Moratorium to an end.

It is also important to note that if the company enters into a recognised insolvency procedure the Moratorium will end.

Restructuring plan

The Plan is available to companies that are in, or are likely to encounter, financial difficulty; which is of particular relevance during the COVID-19 pandemic.

This Plan can allow directors to propose an arrangement between the company and creditors in order for the company to continue trading during the downturn of business.

Extension on prohibition of termination due to insolvency

If your business is entering into an insolvency process due to COVID-19, this provision within CIGA should increase the opportunities available to your business in terms of agreements already in place.

This provision is particularly important if your business is reliant on the continuation of goods/supply agreements to continue trading and increasing funds.

4. Conclusion

Overall, CIGA introduces options for companies affected during COVID-19 and provides directors with options in order to try and save the company. It is important to consider whether your company, if in financial difficulties, could benefit from these provisions introduced under CIGA.

If you have any queries on the content of the above, please contact a member of our Commercial Disputes and Regulation team.

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