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ARTICLE

The CIGA Moratorium: A Lifeline for UK Companies?

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Synopsis

The new moratorium provisions introduced into UK law by the Corporate Insolvency and Governance Act 2020 ('CIGA') are designed to provide breathing space for viable companies that have been laid-low by the effects of the COVID-19 pandemic to allow them to either trade out of trouble or come up with a rescue plan before creditors take enforcement action.

Commercial lawyers need to be aware of the basics of the new procedure because of the challenges it presents to creditors seeking to enforce debts and because it includes a change of priorities in any subsequent insolvency. This article outlines the key aspects of the new moratorium process.

Introduction

CIGA, which runs to a mammoth 254-pages, was rushed through the United Kingdom's Parliament during the country's lockdown. It came into force on 25 June 2020, and it makes significant amendments to the Insolvency Act 1986 ('IA'). Despite the compressed timetable for Parliamentary approval, the new moratorium provisions meet a problem that has troubled insolvency practitioners in the UK for years: UK law did not provide for a 'debtor in possession' process. Directors of struggling companies often did not have sufficient time to consider rescue options before their plans were disrupted by creditor action.

There were previously two contexts in which a company could obtain protection from creditors: *(i)* the moratorium available to small, eligible companies pursuing a Company Voluntary Arrangement, further to IA section 1A and Schedule A1, which was not widely used and which has been repealed by CIGA; and *(ii)* the moratorium further to Schedule B1 of the IA for a company in administration.

The new regime represents a step-change. It is a free-standing process which does not lead to any or any particular insolvency procedure. It prevents creditors from taking enforcement action while a company's directors, overseen by a licensed insolvency practitioner referred to as 'the monitor', seek to save the company as a going concern. It also introduces a change in priorities if the company subsequently enters administration or liquidation to incentivise counterparties to continue to trade with the company through its moratorium.

Eligibility

A company must be 'eligible' in order to obtain a moratorium under the new regime.

A company is eligible unless it falls within one of 14 excluded categories set out in detail in new Schedule ZA1 of the IA. The excluded categories include: companies subject to or recently subject to a moratorium or insolvency procedure; insurance companies; banks; electronic money institutions; parties to capital market arrangements; and certain overseas companies, which essentially covers any company whose registered or head office is outside the UK and whose functions correspond to any of the other exclusions.

The exclusion of financial services companies is not surprising given that they are subject to their own rules and procedures in respect of insolvency.

The exclusion for companies subject to or recently subject to a moratorium or insolvency procedure applies if on the date of filing the relevant papers at court, a moratorium or other insolvency procedure is already in place, or at any time during the 12 month period ending with the filing date, a moratorium or other insolvency procedure was in force, unless the court orders that a previous moratorium is not to be taken into account (IA Sched ZA1 para 2). However, the exclusion in respect of the 12-mont period is suspended temporarily, until 30 September 2020, further to Schedule 4, paras 6-7 of CIGA to account for the impact of the COVID-19 pandemic.

How to obtain a moratorium

A company may obtain a moratorium by either simply filing the relevant documents at court or by making a successful application to the court. There are three routes to a moratorium depending on the company's specific circumstances.

Firstly, 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 simply by filing the 'relevant documents' at court: IA s.A3.

Secondly, if a company is eligible but is subject to an outstanding winding-up petition, the directors may apply to court for a moratorium, and 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 likely if it was wound up without first being subject to a moratorium: IA s.A4.

Thirdly, if a company is eligible, is not subject to an outstanding winding-up petition and is an overseas company, the directors may apply to court for a moratorium: IA s.A5.

All three routes require the directors to produce the 'relevant documents' for the court. The 'relevant documents' are defined in s.A6 of the IA. They 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; a statement from the proposed monitor that he or she is a qualified person, that he or she consents to act as monitor, that the company is eligible; and that in his or her view, it is likely that a moratorium would result in the rescue of the company as a going concern, or until 30 September 2020 that it would do so were it not for any worsening of the company's financial position for reasons relating to the current pandemic: IA sA6(1)(e), and Sched 4 para 7(a) CIGA.

The selection of the proposed monitor is a matter for the company's directors rather than its creditors or one particular creditor. Further, the monitor does not run the business once appointed; he or she must be kept appraised of progress and consider whether the purpose of the moratorium is being met.

The emphasis in CIGA is on saving *the company* as a going concern rather than saving *the business* as a going concern, which is the aim in administration. The distinction may signal that the primary aim of CIGA is to rescue entities rather than simply ensuring creditors get paid. On the other hand, it may simply reflect a drafting anomaly and/or the speed at which the legislation was rushed through Parliament.

Duration of the moratorium

If obtaining a moratorium is simply a paper exercise, the moratorium, including the appointment of the monitor, comes into effect when the relevant documents are filed at court. Otherwise, it comes into effect when the relevant order is made: IA s.A7.

The directors must notify the monitor as soon as reasonably practicable that the moratorium has come into effect, and the monitor must notify Companies House, every company creditor of whose claim the monitor is aware, and if the company is an employer in respect of a pension scheme further to s.126 of the Pensions Act 2004, the Board of the Pension Protection Fund: IA s.A8.

A moratorium lasts for an initial period of 20 business days beginning on the business day after the moratorium came into effect: IA s.A9. There are three ways in which the period may be extended.

The directors can extend the moratorium for 20 business days after the initial period ends without creditor consent. The directors must file further statements from themselves and the monitor with the court to obtain this type of extension, and the company must have paid its moratorium debts and pre-moratorium debts that are not subject to a payment holiday (see below): IA s.10.

The moratorium can be extended with creditor consent. Creditor consent means a majority by value of secured and unsecured pre-moratorium creditors (CIGA Sched 4, para 28). The moratorium may be extended in this way more than once, but the overall extension cannot be for more than 12 months from the first day of the initial period: IA ss.A11-12.

It can be extended by the court on the application of the directors. The court will consider the interests of pre-moratorium creditors and the likelihood that an extension will result in the rescue of the company as a going concern: IA s.A13.

Effects of the moratorium

One of the defining features of the new moratorium is that it gives the company a payment holiday in respect of certain 'pre-moratorium debts'.

A 'pre-moratorium debt' is defined at IA s.53(1) as follows:

> '(a) any debt or other liability to which the company becomes subject before the moratorium comes into force; or (b) any debt or other liability to which the company has become or may become subject during the moratorium by reason of any obligation incurred before the moratorium comes into force.'

It stands in contrast to a 'moratorium debt', which is defined at IA s.A53(2) as:

> '(a) any debt or other liability that the company becomes subject to during the moratorium other than by reason of an obligation incurred before the moratorium came into force; or (b) any debt or other liability to which the company has become or may become subject after the end of the moratorium by reason of an obligation incurred during the moratorium.'

There are six exceptions to the payment holiday for pre-moratorium debts. The pre-moratorium debts that a company must continue to pay during the moratorium are as follows:

- The monitor's remuneration or expenses
- Goods or services supplied during the moratorium
- Rent in respect of a period during the moratorium

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- Wages or salary arising under a contract of employment
- Redundancy payments
- Liabilities arising under a 'contract or other instrument involving financial services', a phrase defined in IA Schedule ZA2.

In addition, the company must continue to pay its moratorium debts.

CIGA provides an incentive for those who continue to extend credit to a company in a moratorium: debtors and pre-moratorium debtors who are not subject to the payment holiday are given priority if the company enters into liquidation or administration within 12 weeks after the end of the moratorium: IA s.174A. Those creditors rank below fixed charge holders, but above the expenses of the subsequent insolvency procedure, floating charge holders and preferential creditors.

As one would expect, a moratorium also restricts the ability of creditors to start insolvency proceedings. Further, floating charge holders are precluded from giving any notice that would cause the floating charge to crystallise, although there are certain financial market exceptions: IA s.A22.

Additionally, a landlord cannot exercise a right of forfeiture; no steps may be taken to enforce security over company property (subject to a number of exceptions); goods subject to hire-purchase may not be repossessed without the court's permission; and no legal process may be instituted or continued, unless it involves an employment claim, or the court gives permission: s.A21 IA.

Role of the monitor

The monitor is an officer of the court: IA s.34. He or she must monitor the company's affairs throughout the moratorium to form a view as to whether it remains likely that the moratorium will result in the rescue of the company as a going concern: IA s.A35.

The monitor must bring the moratorium to an end if, among other matters, he or she thinks that the company is unable to pay any of its moratorium debts that have fallen due, or any of the pre-moratorium debts for which it does not have a payment holiday: IA s.A38.

If a creditor under a moratorium debt or pre-moratorium debt that is not subject to the payment holiday is not paid, its primary recourse therefore appears to be a complaint to the monitor, which in most cases is presumably likely to result in the end of the moratorium.

Creditors, directors or company members may challenge the actions of the monitor and/or the directors (IA ss.42-43), and CIGA creates a number of offences in respect of the behaviour of company officers before a moratorium is obtained and concerning the way in which a moratorium is obtained: IA ss.A46-47.

The end of the moratorium

The moratorium can be brought to an end if the company enters into a consensual debt restructuring or a relevant insolvency procedure, which includes a voluntary arrangement, administration or liquidation. It can also be brought to an end by the monitor or the court, or simply by reason of the time limit for the moratorium expiring.

Conclusion

It will take time to assess whether the UK's new moratorium provisions genuinely help viable companies survive or whether the effect is more akin to a sticking plaster on a gaping wound. But given that the provisions allow the directors to remain in control in the short term at least, it appears likely that they will become a common feature of UK corporate rescue.

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International Corporate Rescue

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