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ARTICLE

Wasted Breath? Insolvency Reforms in Response to COVID-19

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Synopsis

On 28 March 2020, the Business Secretary announced insolvency reforms in response to the business impacts of COVID-19, designed 'to give companies breathing space and keep trading while they explore options for rescue'. A Bill passed in Parliament and the Corporate Insolvency and Governance Act 2020 ('CIGA') came into force on 26 June, containing the most significant reforms to insolvency legislation this generation of practitioners has seen. Its highlights include a debtor-in-possession moratorium, a new restructuring plan and a rewriting of the law relating to contractual insolvency termination rights.

The CIGA's effect on market practice and attitudes will no doubt take months, if not years, fully to form. In this article we consider key elements of the reforms, focusing on the measures designed to save companies in immediate crisis rather than the new restructuring plan, and ask whether they will have the desired effect.

The legislative process

When the legislature modernises insolvency laws, it historically does so following much consultation (for example, the Cork Report which preceded the Insolvency Act 1986 ('IA 1986')).

But not this time – the CIGA is an emergency measure. Its drafting has been described by the Insolvency Service as 'challenging', condensing a 'process [that] takes many months, frequently more than a year' into a matter of weeks. Such a process limits meaningful consultation.

Inevitably, hasty drafting increases the risk that issues are missed. The Government sought to address this via executive powers to amend the CIGA ('Henry VIII powers'), which Parliament's Delegated Powers and Regulatory Reform Committee considered 'deeply troubling', exacerbated 'because of the speed at which Parliament is being asked to consider the Bill'. The Committee also identified a proposed 'super-Henry VIII power' by which the executive could in certain circumstances amend not only CIGA but also any other Act. The Government responded by limiting some of the powers delegated to the executive and adding parliamentary oversight.

Peers raised concerns about the Bill's structure, combining three permanent reforms (moratorium, *ipso facto* and restructuring plans) with two temporary measures (regarding wrongful trading and winding up petitions):

> 'We are mixing coronavirus amendments—which we all understand have to happen quickly—with permanent changes to our insolvency law, and this is a rushed job that may well rebound to cause more trouble for the Government than they like.' (Lord Hodgson)

The Government pointed to insolvency reform consultation dating back to 2015 in support of the permanent reforms but much of the detail had not been trailed.

The House of Lords also raised important policy questions about the treatment of financial creditors in the payment holiday under the new moratorium, HMRC's status and the effect on pension creditors. Out of necessity, these were debated predominantly in Committee by way of proposed drafting amendments rather than wide-ranging discussion of the Bill's objectives and design. Peers demonstrated substantial expertise and business acumen but many acknowledged their relative inexperience in the insolvency context. Certain peers engaged with industry bodies, such as the Law Society and the ICAEW, in order to assist with identifying unintended consequences of the Bill. Peers with a pensions background were particularly vocal in relation to the 'super priority' issue, considered below. However, the Bill was enacted mostly as originally drafted.

Where the CIGA appears to divert from established legal policy, it is sometimes questionable whether that is really what the legislature meant to do and, if so, how it was supposed to work. This is an issue with which the courts will grapple, particularly when the reforms are deployed in the early stages. As with historic insolvency legislation reforms, it is hoped that the courts will find pragmatic solutions and that market practices will develop to counter any difficulties.

'Suspension' of wrongful trading

The first temporary measure is what the Business Secretary termed a 'temporary suspension of wrongful trading liability' intended to 'reassure directors that the difficult decisions they have to make about the future viability of their business will not have to be unduly influenced by the exceptional circumstances which are entirely beyond their control.'

Wrongful trading triggers where directors do not take every step to minimise loss to creditors once they knew or ought to have known that the company did not have a reasonable prospect of avoiding administration or liquidation. Claims can only be commenced by insolvency officeholders. If liability is established, the court may declare that the director makes a contribution to the company's assets. The court's discretion is extremely broad, though exercised on well-trammelled lines (*Re Produce Marketing Consortium Ltd* (1989) 5 BCC 569). Liability is compensatory. The officeholder must show that, had the director acted differently, the loss in question would not have occurred (*Lexi Holdings plc v Luqman* [2008] BCLC 725).

One way to minimise loss to creditors is to seek insolvency protection. By 'suspending' wrongful trading, it was hoped that viable companies would not be rushed into insolvency processes by directors fearful of personal liability when facing a potentially short-lived liquidity crisis.

However, the CIGA does not suspend liability. Section 12 CIGA requires the court, when determining the contribution (if any) to be made by the director, to 'assume' that such director 'is not responsible for any worsening of the financial position of the company or its creditors' between 1 March and 30 September 2020. It does not remove liability for a director failing to take steps to minimise losses to creditors; it reduces, potentially to zero, the quantum of that liability without need for a causative link between coronavirus and the company's financial deterioration.

During the House of Lords debate on the Bill, it was questioned whether the assumption is rebuttable. The CIGA does not expressly provide either way but the assumption is likely conclusive not presumptive; were that not the case, this could hardly be described as a 'suspension' of liability. If that is correct, interesting questions arise. For example, could a director be disqualified as a result of wrongfully trading even if the court is compelled not to order him to make a contribution?

Other questions may need to be considered by the court. What of the director who fails to take a relevant step on 29 February 2020 which, had he done so, would have prevented financial deterioration on 2 March? Similarly, what of financial deterioration that commenced before 30 September but continues long after as a result of a relevant step taken before 30 September? The court is required to ignore the deterioration after 1 March but before 30 September so, it would appear, the court could not make any order. But the facts are rarely that simple. The deterioration of a company is often gradual until a precipice is reached. If the precipice is reached after 1 March, the director's contribution will be limited to compensation for the gradual deterioration predating 1 March but before 30 September.

Such uncertainties may be a sideshow. The threat of wrongful trading liability might cause a director to seek an insolvency filing earlier than otherwise but it is just one of the potential liabilities to which directors of a distressed company are exposed. The common law imposes a duty on directors to have regard to the interests of creditors when a company is in financial distress (see *Directors' Duties in a COVID-19 World*, vol. 17(3)). The common law duty is not suspended. The 'suspension' of wrongful trading should not, therefore, give directors comfort to continue trading where they otherwise might be more doubtful – whatever comfort they take from the ability to trade without fear of wrongful trading liability or winding up petitions (see below) will be misplaced if they are ultimately found liable under the common law duty.

Statutory demands and winding up petitions

The second temporary measure is effectively a ban on statutory demands and winding up petitions. In short summary, schedule 10 CIGA provides that:

- Creditors cannot present winding up petitions between 27 April and 30 September 2020 (for this purpose, the 'relevant period') on the basis of a failure to satisfy a statutory demand served between 1 March and 30 September 2020.
- Creditors must not present winding up petitions during the relevant period on the basis that the company is unable to pay its debts unless the creditor has reasonable grounds for believing that (broadly) coronavirus has not had a financial effect on the company.
- The court must not make a winding up order if (broadly) coronavirus has had a financial effect unless satisfied that an order would have been made absent such effect.
- Winding up orders made after 27 April 2020 but before the CIGA came into force are void if, post-CIGA, the court would not have made that order.

There is no *de minimis* qualification to the financial effect test – any adverse effect will be sufficient. Many companies will clear that threshold in the current environment.

The gating issue is therefore whether the order would have been made absent the financial effect of coronavirus. Creditors face an evidential difficulty. How can creditors prove that a company would have been unable to pay its debts when the majority if not all of the relevant financial information is in the possession of the company not the creditor? Will creditors be able to show that non-payment was part of a decline into insolvency even absent coronavirus, not a temporary blip?

Even if a creditor has the relevant evidence, the costs of a creditor petition are likely to increase given the additional evidence that will be required and the fact that it is more likely to be contested. Creditor petitions are likely to be reduced until September 2020, though there may be a deluge in October reflecting pent-up demands.

If a creditor will struggle to obtain a winding up order, a company might delay payment of its debts. The creditor's alternative, civil proceedings followed by judgment and enforcement, likely involves greater cost and delay. Creditors seeking payment in order to meet their own liabilities may have little choice but to accept a substantial haircut in exchange for swift payment. The effect on liquidity throughout the supply chain could be pronounced.

Three other details deserve mention:

– Even before CIGA's enactment, the court had regard to its likely provisions when considering whether to restrain the presentation of winding up petitions on the basis (broadly) that, even if those petitions were presented, by the time they were heard the court would be bound by CIGA to dismiss the petition given the temporary coronavirus financial effect test: *Re Travelodge Limited* [2020] EWHC 1217 (Ch), *Re a Company* [2020] EWHC 406 (Ch) and *Re a Company* [2020] EWHC 1551 (Ch)). While unusual for a court to have regard to potential future legislation, this was a pragmatic approach in the circumstances – but could have unexpected consequences. The presentation of a winding up petition would likely constitute a finance event of default permitting acceleration and enforcement. By restraining the presentation of the petition by one creditor, unrelated bank creditors' acceleration rights may not trigger.

– Where a court *does* make a winding up order on a petition which is presented during the relevant period, the winding up commences from the date of the order not (as usual) the date of the petition. Section 127 IA 1986 makes void any disposition of the company's property after the commencement of winding up. Ordinarily, this makes it very difficult for a company to continue operating after a petition is presented – third parties are not generally prepared to continue dealing with a company whose transactions may be void. The temporary amendment will allow debtors facing a petition to focus on defeating the petition and restoring the company's financial health without the need to incur costs and distract management with an application for an order validating post-petition transactions. For creditors, there will be a concern that the *pari passu* distribution of the company's assets could be hampered by dispositions of company property post-petition while the directors retain management control pre-order. Where post-petition transactions are automatically void absent order to the contrary, they are more unlikely to occur and easier to remedy. If post-petition transactions are not automatically void, reversing them is more likely to require detailed investigation and proceedings. Obtaining a remedy against a third party beneficiary of the transaction is likely to depend in particular on that party's state of knowledge. This gives rise to the possibility of an increased frequency of applications for provisional liquidation, given one of its main purposes is to prevent dissipation of assets by directors.

– The lookback periods for transactions at an undervalue and preferences are extended temporarily so that for transactions at an undervalue or preferences with connected persons, officeholders may now be able to look back up to 2½ years from the order date.

The new moratorium

A new Part A1 to IA 1986 creates a debtor-in-possession company moratorium, the centrepiece of the CIGA and an English law first. Arguably, the breathing space provided by this new moratorium was not required, at least in response to coronavirus, due to the effective ban on winding up petitions but may provide a useful bridge to a wider consensual restructuring or a formal insolvency procedure.

Almost all companies will be eligible for the new moratorium. Exceptions include companies that have recently been the subject of other insolvency processes and most financial institutions, as well as parties to capital market arrangements. Provided that no winding up petition is outstanding, obtaining a moratorium is straightforward. Directors file certain documents at court, including a statement by the directors that the company is or is likely to become unable to pay its debts (akin to administration) and by the proposed monitor that the moratorium is likely to result in the rescue of the company as a going concern.

Two aspects of the monitor's statement were the subject of detailed debate in Parliament. The first was whether it was necessary to require a moratorium to be likely, not merely possible, to result in rescue. Parliament chose the higher bar, which will likely require proposed monitors to have reached an informed view as to the likely route out of a moratorium before it is commenced. The second was whether it is necessary for the company itself to be likely to be rescued, as opposed to all or part of its business. Again, Parliament chose the higher bar. A moratorium is likely to be engaged at an earlier stage than other insolvency processes when saving the company should remain the goal. Administration remains the preferred process for rescuing all or part of a company's business.

The monitor must be an insolvency practitioner. He or she is not responsible for the management of the company (contrast administration). The directors of the company remain in management control but require the monitor's consent for certain transactions.

The moratorium will last for an initial period of 20 business days, extendable for a further 20 business days by the directors without creditor consent. Subsequent extensions require creditor consent or court approval. Upon any extension, the directors must confirm that the company has paid or will pay all debts arising during the moratorium ('moratorium debts') and pre-moratorium debts for which the company does *not* have a payment holiday (see below). If the monitor concludes at any time that these debts cannot be paid or that it is no longer likely that the company can be rescued, the moratorium must be terminated.

The core effect of the moratorium is a 'payment holiday'. This term is not defined. Section A18(2) IA 1986 provides that the relevant Part A1, Chapter 4 (containing ss.A18 to A33) 'includes restrictions on the enforcement or payment of the debts which are defined by subsection (3) as pre-moratorium debts for which a company has a payment holiday during a moratorium.' On a natural reading, it might be thought that the Chapter is *not* intended to impose restrictions on enforcement or payment of debts for which the company does *not* have a payment holiday.

A company has a payment holiday for all pre-moratorium debts which fell due before or fall due during the moratorium unless they are specifically excluded under section A18(3). These exclusions include rent, payments for goods and services and monitor's remuneration during the moratorium. They also include all wages, redundancy payments and 'debts or other liabilities arising under a contract or other instrument involving financial services'. Debts which are excluded from the payment holiday must be paid as they fall due. If not, the moratorium must be terminated (see above).

It is the financial services contracts exclusion which has attracted the most attention. These are defined not by the character of the creditor (e.g. a financial institution) but by the services provided under the contract. A wide range of financial services contracts are covered, including derivatives and capital markets arrangements. So is lending. This means that related party or shareholder debt is excluded from the payment holiday alongside bank debt.

Further, in order to be excluded from the holiday, a relevant debt need only arise under a contract for the provision of financial services. In a lending contract, this might include the payment of fees and indemnities, not just principal and interest.

A reasonable reader of sections A18(2) (quoted above) and (3) in isolation could be forgiven for thinking that the relevant Chapter has no application to debts which are excluded from the payment holiday. However, other provisions in the Chapter point in the opposite direction and suggest that non-holidayed debts *are* subject to restrictions, albeit may receive some special treatment. For example, section A21 prohibits the commencement of legal proceedings during a moratorium. As in administration, legal proceedings can be brought with the permission of the court. However, only creditors in respect of non-holidayed debts may seek such permission. Where a debt *is* subject to a payment holiday, an application for permission is expressly prohibited.

Section A20 prohibits creditors from petitioning for a company's winding up, seemingly whether or not the debt which forms the basis of the petition is holidayed. No distinction is made in section A22 either, which relates to the crystallisation of floating charges (most likely to be held by creditors under financial services contracts, whose debts are not holidayed).

What is the consequence of this distinction between debts which are and are not subject to a holiday? Pre-moratorium debts which are not subject to the holiday must continue to be paid. If they are not paid, the monitor must terminate the moratorium. This could lead to very short-lived moratoriums. There is nothing to prevent a creditor under a financial services contract from exercising a power to demand payment or accelerate repayment during the moratorium. Even if the company can continue to service its financial services contracts as they fall due in the ordinary course, it is likely to be sufficiently in distress that it will not be able to pay demanded or accelerated debts before they would otherwise have fallen due.

This could limit the utility of moratoriums. Could a monitor sensibly conclude that a moratorium is likely to result in the rescue of the company as a going concern if, upon entry into the moratorium, creditors under financial services contracts will demand or accelerate debt which the company could not pay? If not, the monitor will not be able to make the requisite statement for the company to enter a moratorium. Practically, there is uncertainty as to how the monitor is meant to obtain visibility of the facts which would inform his opinion of whether rescue is likely. Will a proposed monitor need to discuss with creditors under financial services contracts in advance of any moratorium to ascertain their likely position? If so, there is an opportunity for the financial services contract creditors to take pre-emptive action.

Creditors under financial services contracts do not have it all their own way. They will not be permitted to participate in a creditor vote relating to the extension of the moratorium – section A12 provides that only creditors for holidayed debts have a vote. This jars with the effect that the moratorium appears to have even on non-holidayed debts. As explained above, non-holidayed creditors cannot sue during the moratorium without permission under A21, yet cannot vote on the moratorium's length. But this permission may never be required: any suit would most likely relate to non-payment and such non-payment should result in the termination of the moratorium, lifting restrictions on suit.

The pendulum swings to the other extreme where a restructuring plan follows within 12 weeks of a moratorium terminating – then, the non-holidayed creditor cannot be bound to any arrangement in respect of the debt owed to that creditor absent its agreement under new section 901H(5) of the Companies Act 2006.

Perhaps the most crucial distinction between holidayed and non-holidayed debts is their treatment upon a subsequent insolvency process which commences within 12 weeks of the moratorium terminating. Schedule 3 of the Bill as originally drafted provided that all moratorium debts and all non-holidayed pre-moratorium debts would be paid out of the company's assets in priority to all other claims. They would take 'super priority' ahead of an officeholder's expenses and remuneration and secured claims (save in the case of fixed security, which falls outside the estate). The House of Lords, particularly peers with a pensions background, explained that the result for holidayed creditors could be catastrophic. Pension schemes and the Pension Protection Fund would likely recover even less from the company than they do currently. Ultimately, that would result in a cost to pension schemes contributing to the Fund's levy.

This is not the only issue. Why should an insolvency officeholder agree to act if, after payment of moratorium and non-holidayed debts, there are no assets with which to pay the officeholder's expenses and remuneration?

'Super priority' also produces the odd result that a loan debt could rank ahead of the security in respect of that loan. The distributions for creditors under financial services contracts secured by floating charges may be reduced, since they will now rank alongside other non-holidayed creditors (some of which would have been unsecured) rather than having priority over them via security. Longstanding priorities rules are upended and the *pari passu* principle is undermined. No real explanation has been provided by Government for the giving of 'super priority' to financial services creditors, notwithstanding that it drives a coach and horses through centuries of law requiring equitable distribution upon insolvency. It is bad enough for unsecured creditors in insolvency that they will inevitably lose money, but the Government's creation of these rights – which do not appear to have been requested by financial services creditors –could be devastating.

'Super priority' could produce significant unfairness even for financial services creditors. Secured and unsecured lending is generally priced differently, reflecting the risk of non-payment in the event of insolvency. Yet in this particular circumstance, the lending will be treated equally. Historic pricing decisions and creditors' legitimate expectations of the position on insolvency are potentially undermined. Heavily negotiated inter-creditor arrangements may also be affected.

The Government recognised certain of these concerns and amended the Bill to include a new category of 'priority pre-moratorium debts'. Only these obtain 'super priority' in a subsequent insolvency process. The priority pre-moratorium debts include all those that are not holidayed in a moratorium but not (a) certain redundancy payments; and (b) financial services contracts debts 'that fell due during the relevant period by reason of the operation of, or the exercise of rights under, an acceleration or early termination clause'. So, taking a term loan by way of example, periodic payments of principal and interest have 'super priority' if they fell due before or during the moratorium but any accelerated principal would not.

Arguably, these amendments solve the wrong problem – they prevent financial services contracts creditors from gaming the system to obtain 'super priority' in relation to accelerated debts, but they still permit these creditors (including unsecured related party lenders) to obtain 'super priority' in respect of at least some of the debts due to them. Additionally, these amendments do not impact demands (as opposed to acceleration). It remains likely that financial services creditors will attempt to game the system, including because they will likely be aware of when a moratorium is likely to commence and thus may have an opportunity to call a default and place all amounts outstanding on demand prior to the commencement of the moratorium, enhancing their 'super priority' status at the termination of the moratorium.

Creditors under contracts which would not ordinarily involve the provision of financial services could change the terms of those contracts in order to benefit from the new rules. Suppliers of goods and services could, for example, seek to include a provision that unpaid invoices are converted into lending. Arguably, suppliers could also include a single financial services obligation, since the entire contract might then be said to be a 'contract or other instrument involving financial services.'

It is doubtful that the amendments to the Bill, as reflected in the CIGA when enacted, fully solve the problems with 'super priority'. Many debts due under financial services contracts, particularly between related parties, will be due on demand. They do not need to be accelerated in order for the entire principal to become due. Demanded debt will still have 'super priority'. That is particularly concerning because a related party debt is often unsecured and on demand. If demanded, the entire amount due to related parties will take priority over accelerated term loans due to financial institutions even if those term loans are secured. This may lead to the odd situation that lenders under term loans which would usually accelerate upon an insolvency event will instead structure their loans so that they are on demand.

Ipso facto

In what is a radical, permanent change to contract law, where a company enters an insolvency process (including established insolvency processes, the new restructuring plan and the new moratorium, but not the existing scheme of arrangement), its suppliers of goods and services will not be permitted to enforce a termination right which would have arisen due to insolvency. Automatic termination clauses will be similarly ineffective. Further, the supplier will not be permitted to rely on any pre-existing termination right (whether related to insolvency or not), cannot make ongoing supply to the company conditional on payment of past invoices and will not be permitted to exercise any right to do 'any other thing' (for example, increase prices, charge default interest or accelerate payment terms) as a result of insolvency.

All of these changes are contained in a new section 233B IA 1986, which is designed to bring English law into line with the approach under US Chapter 11 and follows Government consultation and recommendations in 2016. They apply only to suppliers (except, at least until 30 September 2020, certain smaller suppliers) of goods and services, expressions which are not defined in the section. There will be questions around the edges, including those raised in the consultation as to the treatment of IP licences.

The termination right may be exercised with the consent of the company or officeholder (depending on which insolvency process has been commenced) or permission of the court, though the court will only give permission where the supplier is suffering hardship by the contract's continuance. The concept of hardship is not defined in the section so the courts will be expected to develop principles along which its discretion to permit termination is exercised.

While the moratorium (which gives a payment holiday for supplier debts) and the temporary suspension of winding up petitions practically and disproportionately affect suppliers' ability to ensure prompt payment, section 233B actively targets them. It promotes the trading of the company (even in liquidation) at the expense of the suppliers – something that wrongful trading rules would ordinarily prevent prior to an insolvency filing.

A supplier might expect to obtain payment for post-insolvency supply, either as moratorium debts or insolvency expenses. But even that is not certain, given that the moratorium debts might exceed the company's assets particularly if there is a demand or acceleration by a non-holidayed creditor. The supplier must also continue supplying on existing terms, potentially problematic if the market for the supplier's own supplies has changed or order volumes are affected.

One way suppliers may combat these changes is to revise their contractual terms so as to adopt shorter term contracts that terminate automatically on a particular date or as a result of an earlier warning sign of financial distress than the start of insolvency proceedings. That way, the termination is not linked to insolvency proceedings and potential exposure to the risk of being forced to supply an insolvent company is minimised.

By preventing suppliers' exercise after insolvency of termination rights which had arisen before insolvency, suppliers are incentivised to 'use it or lose it' and replace a long term contract with revised terms reflecting the new approach. So, while the legislation may assist in ensuring supply to insolvent companies, it may have the opposite effect for companies merely in distress who find suppliers anxious to exercise termination rights before they are lost.

Conclusion

As with the insolvency reforms in 1986 and 2002, the effectiveness of the CIGA's reforms may turn more on the creative ways in which the new toolkit is deployed by insolvency practitioners, distressed companies and their advisers than on the legislature's intention.

What is particularly unusual about the CIGA is that by bringing English law closer into line with US Chapter 11 (via a debtor-in-possession process and *ipso facto*), it makes the UK regime more debtor friendly and promotes the rescue of businesses with all of the benefits that brings, including for employment and tax receipts. The UK has arguably enjoyed its status as a restructuring centre as a result of its historically creditor-friendly approach – and there is something to be said for allowing businesses to fail, since it promotes the more efficient deployment of capital across the economy into better businesses. It remains to be seen whether the UK's status will be undermined by debtor friendly reforms.

International Corporate Rescue

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