



The coronavirus corporate insolvency cliff edge is extended to the new year

COMMENTARY BY [JAMIE HOLMES](#), 29TH SEPTEMBER 2020

1. At the 11th hour the Government has, effective today, 29 September, extended some (but not all) of the temporary provisions (which were due to expire on 30 September 2020) introduced by the *Corporate Insolvency and Governance Act 2020* ("CIGA" or "the 2020 Act" [see here](#)).¹
2. The structure and effect of these four sets of extensions, by way of two separate Statutory Instruments ("SIs" 2020 No. 1031 and 1033) are summarised below with extracts from their respective Explanatory Memorandums. These extensions apply to the temporary provisions within *CIGA* concerning:
 - a. winding up;
 - b. the 'small entity' exception to the (otherwise permanent) suspension of insolvency-triggered clauses within certain contracts;
 - c. the new (and otherwise permanent) moratorium process; and
 - d. the format and timing of certain meetings of certain 'qualifying' bodies.
3. This article also briefly considers the temporary provisions that have most notably not been extended: the provisions on wrongful trading.²

A. The two SIs themselves

4. The Government has, somewhat inelegantly, enacted two separate SI, each with its own Explanatory Memorandum:
 - a. The first, which comes into force today, 29 September, extends four of the sets of temporary provisions within *CIGA* to, variously, 30 December 2020, 31 December 2020 and 30 March 2021 (the "*Extension of Time Regulations*", being SI 2020 No. 2031). As set out below, this in effect extends a number of discrete deadlines within these four sets of provisions. The SI can be found [here](#), and its Explanatory Memorandum [here](#).

¹ *CIGA* itself came into force on 26 June 2020.

² It should be noted that this is not the only temporary provision within *CIGA* that has not, as yet, been extended.

The latter perhaps notably refers at ¶16.4 to the former as "*the first exercise*" (emphasis added) of the power to extend these temporary provisions.

- b. The second SI, which comes into force on 1 October, has the effect of curtailing some of the extensions of time provided for within the *Extension of Time Regulations*, by re-establishing the time limit originally set out in *CIGA* (the "*Early Termination Regulations*", being SI 2020 No. 2033).³ The SI can be found [here](#), and its Explanatory Memorandum [here](#).
5. To date no amendments have been proposed to the [Insolvency Practice Direction relating to CIGA](#) (the "*CIGA PD*") of 3 July 2020, nor any of the other Insolvency Practice Directions that have been issued or amended this year. Nor has the Government to date proposed to issue any further Guidance in relation to these SIs or *CIGA*, save as to best practice on holding AGMs flexibly and electronically pursuant to paragraphs 15–16 below.⁴
6. Guidance on *CIGA*, the *CIGA PD* and the substance of their reforms (as have been extended by these SIs and otherwise) can be found in previous #WilberforceWebChats and webinars given by members of Chambers, including [here](#) and [here](#). The substance of these reforms, which are considerably detailed, is beyond the scope of this article.

B. The four sets of extensions

(1) The regime for the winding up of companies

7. First, and perhaps most significantly, the restrictions imposed by *CIGA*, *Sch 10* on the winding up of companies⁵ have all been extended to 31 December 2020.⁶ The effect of this is, most notably, as follows:
 - a. No winding up petition can be presented on a statutory demand served between 1 March 2020 and **31 December 2020**.⁷

³ Explanatory Memorandum to the *Early Termination Regulations*, ¶13.2–3.3 and Explanatory Memorandum to the *Extension of Time Regulations*, ¶13.3.

⁴ Explanatory Memorandum to the *Extension of Time Regulations*, ¶11.1.

⁵ No corresponding restrictions were imposed on personal insolvency procedures i.e. bankruptcy.

⁶ *The Extension of Time Regulations*, Regulation 2.(3).

⁷ *CIGA*, s10 and Schedule 10, Part 1, paragraph 1.

- b. During the period 27 April 2020 to **31 December 2020**,⁸ no creditor⁹ may present a winding up petition on any of the bases that the company is unable to pay its debts¹⁰ unless the creditor has reasonable grounds for believing that the Coronavirus Test (as it is termed in the *CIGA PD*) has been met.¹¹ Nor may a Court make a winding up order on any of those bases, on a petition presented within the period 27 April 2020 to **31 December 2020**, unless it appears/is satisfied that the Coronavirus Test has been met.¹² There is some guidance as to the application of these provisions, including as to the burden of proof, and suggesting a multiple-stage test, in the decision of ICC Judge Barber (albeit prior to *CIGA* having been enacted) in *Re A Company* [2020] EWHC 1551 (Ch).
- c. Where a winding up order has been made on one of the bases referred to in paragraph 7.b above (following the Coronavirus Test having been satisfied, and on a petition presented within the period 27 April 2020 to **31 December 2020**), the winding up is deemed to commence on the making of the order, not the date the petition was presented.¹³ A number of the 'look-back' time periods within the *Insolvency Act 1986* ("the 1986 Act") have been modified accordingly, including most notably those at s240.¹⁴
8. As to these extensions the Explanatory Memorandum to the *Extension of Time Regulations* provides at ¶¶7.2-7.3, 12.1 and 12.2 as follows:

[7.2] The reason for extending the duration of the temporary insolvency measures is to continue to provide breathing space to companies whilst coronavirus related restrictions remain in place (including social distancing and regional lockdowns). This extension ensures that the measures remain available to companies that may be in financial difficulties during this difficult and unprecedented time and whilst the Government's plans are to wind down the package of financial support. The duration of the extension for each measure has been determined having regard to the nature of the measure in question.

[7.3] The restrictions placed on the use of statutory demands and winding-up petitions are extended to 31 December 2020. These restrictions help to protect companies from

⁸ *CIGA, s10 and Schedule 10, Part 2, paragraph 21(1).*

⁹ This includes a petition presented by multiple creditors but does not one presented by a creditor together with one or more other persons (presumably as listed in the *1986 Act, s124(1)*), or (presumably) such persons without a creditor: *CIGA, Sch 10, Part 2, paragraph 21.(2).*

¹⁰ These provisions within *CIGA* do not appear to apply to the other bases within the *1986 Act, s122* such as the 'just and equitable' ground at *s122(1)(g)*: see the wording of *CIGA, Schedule 10, Part 2, paragraphs 2-7.*

¹¹ See *CIGA, s10 and Schedule 10, Part 2, paragraphs 2-3.*

¹² See *CIGA, s10 and Schedule 10, Part 2, paragraphs 5-6.*

¹³ See *CIGA, s10 and Schedule 10, Part 2, paragraphs 8-9*, curtailing the effect of the *1986 Act, s127* to the period following the winding up order, rather than applying retrospectively to the date of the petition.

¹⁴ See *CIGA, s10 and Schedule 10, Part 2, paragraphs 10-18.*

aggressive creditor action during the period when companies are continuing to be financially impacted by coronavirus. The extension of these measures mean creditors cannot rely on statutory demands to bring winding-up petitions, and are prohibited from filing winding-up petitions where the company's inability to pay is due to coronavirus. It is nevertheless 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.

[12.1] The impact on business, charities or voluntary bodies of the restrictions on statutory demands and winding up petitions limits a creditors options for enforcing a debt, which therefore increases risks when doing business. However, the Government assesses the rebalancing of risks described above is an appropriate temporary intervention also with the Government's wider interventions. ...

[12.2] The impact on the public sector is in relation to the restrictions on statutory demands and winding up petitions, namely public sector creditors. However, the Government has assessed that any impact is an appropriate temporary intervention also with the Government's wider interventions.

(2) The small entity exception to the suspension of insolvency-triggered rights within certain contracts for the supply of goods or services to a company

9. As an, at present, permanent reform, CIGA s14 (introducing a new s233B to the 1986 Act) suspended the effect of certain clauses within contracts for the supply of goods or services to a company that are triggered by the company becoming subject to a 'relevant insolvency procedure'. This, like much of CIGA, is subject to detailed provisions within the 2020 Act (most notably it is broader than it may at first appear, or at least than as it is often described: see s14.(3)-(4)), including a number of exceptions.
10. One of those exceptions, which applies where the supplier is a 'small entity' (as defined in CIGA, s15), is time limited. The **second** set of extensions of time within these SIs concerns that exception, with the effect that this exception applies where the company in question (to which goods or service are supplied) becomes subject to a relevant insolvency procedure during the period 26 June to **30 March 2021** (and the supplier is at that time a small entity).¹⁵
11. As to this extension the Explanatory Memorandum to the *Extension of Time Regulations* provides at ¶¶7.4-7.5 and 12.1 (in light of 7.2) as follows:

[7.5] The termination clause provisions in the CIG Act prohibit contractual terms that allow contracts to be terminated if a customer enters an insolvency procedure. To help support small business suppliers who are more likely to experience a greater impact from the effects of coronavirus, the CIG Act included a temporary carve-out which excludes small suppliers from the scope of the termination clause measure. Extending this measure provides certainty to small suppliers that whilst they attempt to recover from any financial impact coronavirus has had on their business they can

¹⁵ *The Extension of Time Regulations, Regulation 2.(2).(a).*

continue to rely on contractual termination clauses where their customer has entered a formal insolvency procedure.

[12.1] ... The small supplier exemption to the termination clause provisions will assist small businesses, which represents 99% of the business community, although 63% of turnover is through businesses that do not fall within the definition of a small business.

...

(3) Certain temporary provisions concerning the new moratorium process

12. The moratorium process introduced by *CIGA s1-3 and Sch 1-4* was one of the two flagship (and, again, permanent) reforms introduced by *the 2020 Act*.¹⁶ The provisions within *CIGA* as to the new moratorium are particularly detailed and beyond the scope of this article, save in that they included a number of temporary/transitional provisions. The effect of the **third** set of extensions of time with these two SIs is that:

- a. some of these temporary/transitional provisions have been extended by the *Extension of Time Regulations, Regulation 2.(2).(b)*, and will now apply until **30 March 2021**, as to which the Explanatory Memorandum to that SI provides some context at ¶7.6-7.7; and
- b. some of these temporary/transitional provisions have not been extended, being the subject of the *Early Termination Regulations, Regulation 2*, and will cease to have effect on **1 October 2020**, as to which the Explanatory Memorandum to that SI provides some context at ¶6-7.

13. As to these changes the Explanatory Memorandums to the *Extension of Time Regulations* and *Early Termination Regulations* provide in turn as follows:

[*Extension of Time Regulations - ¶7.6*] The moratorium procedure, introduced in the *CIG Act* provides companies in financial difficulty with breathing space from creditors whilst they consider a rescue solution. The temporary modifications to moratoriums being extended by this instrument relax the normal eligibility criteria to enter into a moratorium which recognises the extraordinary and temporary difficulties being caused by coronavirus, in order to make the moratorium as widely available as possible. These are being extended until 30th March 2021. The extension of six months is the maximum possible at any one point.

[*Extension of Time Regulations - ¶7.7*] The temporary modifications to moratoriums also provide temporary procedural rules to enable the operation of the moratorium. It was necessary to provide temporary moratorium rules in the *CIG Act* to ensure the procedure was operational as soon as the legislation came into force. These temporary rules need to remain in place to allow time for permanent rules to be drafted (requiring further secondary legislation) and consulted on with the *Insolvency Rules Committee* (for those rules covering England and Wales). It would also be

¹⁶ The other being the new restructuring plan pursuant to the new *Companies Act 2006, Part 26A*; as to which see *CIGA, s7 and Schedule 9*.

undesirable to require business to adjust to new procedural rules at a time of great economic uncertainty such as having to adapt to Government fiscal support being withdrawn and other regulatory changes as a result of coronavirus.

[Extension of Time Regulations ¶12.1] ... The temporary moratorium measures will make the procedure more accessible to companies during this difficult period, which therefore provides breathing space for companies to consider rescue and restructuring options, which ultimately could lead to the rescue of more companies impacted by coronavirus. ...

[Early Termination Regulations - ¶7.3] The instrument carves-out certain of the temporary moratorium provisions that would otherwise fall within scope of the Extension of Time Regulations. Specifically, this instrument terminates modifications to the conditions for having a moratorium which allows the supervising insolvency practitioner to disregard aspects of the company's financial position that relate to coronavirus when considering whether the company is "rescuable" for the purposes of having a moratorium. It also terminates the relaxation of the conditions for extending, monitoring and terminating of the moratorium on the grounds that any worsening of the company's financial position, because of coronavirus, should be disregarded.

[Early Termination Regulations - ¶7.4] As a result of this instrument the lowered threshold will no longer apply, and, when considering whether the company is rescuable, the monitor will not be able disregard the economic impact of coronavirus. Whilst the Government's plans are to wind down the package of financial support, this will ensure that the requirements for obtaining a moratorium will begin to revert to the original legislative intention. That being only a company deemed to be rescuable by the proposed monitor is able to access a moratorium and therefore minimise the risk of increasing the number of so-called zombie companies (those that have no real prospect of servicing and repaying their debts). Allowing the rescue criteria to take into account any worsening of the financial position caused by coronavirus could impede restructuring in the wider economy, leading to further damage to creditors or suppliers.

(4) Format and timing of certain meetings of certain qualifying bodies

14. CIGA also included a number of provisions relaxing various company law rules outside of the context of any insolvency. These included, for example, the deadline for the filing of public accounts: CIGA, s38.
15. This also included provisions relaxing certain formal requirements for the holding of certain meetings of 'qualifying' bodies. These provisions are detailed in CIGA, s37 and Schedule 14. The **fourth** set of extensions of time within these SIs applies to these relaxations, which are extended to now apply until **30 December 2020**.¹⁷ However, it should be noted that this extension applies to only some but not all of the qualifying bodies listed in CIGA, Sch 14,

¹⁷ *The Extension of Time Regulations, Regulation 2.(4).*

paragraph 1: *Extension of Time Regulations, Regulation 2.(5)*. As noted above, the Government plans to produce best practice Guidance on holding AGMs flexibly and electronically.¹⁸

16. As to this extension the Explanatory Memorandum to the *Extension of Time Regulations* provides at ¶¶7.8-7.9 and 12.1 (in light of 7.2) as follows:

[7.8] The company meetings measures are extended to 30 December 2020. The reason for extending this measure is due to the continued prevalence of coronavirus, Government-enforced social distancing measures continue, (albeit to a reduced level), making it difficult to hold a physical AGM.

[7.9] During July and August 2020, the Government received representations from across the business community urging for the extension of the measures until the end of the calendar year. Research showed that some 120 companies would be negatively impacted should the extension not be granted. While there is potential for an extension to be seen as damaging in the interests of shareholders, the Government in fact received a great deal of active support for the extension from a range of shareholder representatives groups.

[12.1] ... Shareholders' and members' rights to vote are unaffected by measures which allow corporate bodies to hold general meetings flexibly.

C. What has most notably not been extended: provisions on wrongful trading

17. Most notably, the suspension pursuant to *CIGA, s12* of the remedy for wrongful trading liability pursuant to the *1986 Act, s214* or *s246ZB* has not been extended. No particular reason has been given for this.¹⁹

18. Although it would appear that this short-lived experiment has now been curtailed, its effects will remain with us for some time. The suspension pursuant to *CIGA, s12* for the period 1 March to 30 September 2020 will, presumably, continue to apply to claims brought following 30 September 2020. Indeed on its face it applies to claims that had been brought prior to 1 March 2020 (although that is subject, presumably, to the usual canons of statutory construction). As with much of *CIGA*, this reform is subject to detailed provisions within the *2020 Act*, including a number of exceptions.

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¹⁸ Explanatory Memorandum to the *Extension of Time Regulations*, ¶11.1.

¹⁹ Explanatory Memorandum to the *Extension of Time Regulations*, ¶6.4.