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Extensions to Temporary Changes to UK Insolvency, Company Laws in Response to Continuing COVID-19 Crisis

Background

The Corporate Insolvency and Governance Act (CIGA) came into force on 26 June 2020, introducing a number of permanent and temporary changes to the UK's insolvency and company laws (for further details, [please refer to our GT Alert on CIGA](#)). Certain of the temporary changes introduced by CIGA were due to expire on 30 September 2020. Some (but not all) of these temporary changes have now been extended pursuant to regulations¹ (the Extension Regulations) made under CIGA in order to provide corporate debtors with additional relief during the ongoing Coronavirus Disease 2019 (COVID-19) pandemic and the related financial pressures on firms which have needed to adapt to the 'new normal'. However, pursuant to separate regulations² made under CIGA (the Termination Regulations) some of the temporary provisions of CIGA have also been discontinued.

¹ The extensions came into force on 29 September 2020 pursuant to the Corporate Insolvency and Governance Act 2020 (Coronavirus) (Extension of the Relevant Period) Regulations 2020.

² See the Corporate Insolvency and Governance Act 2020 (Coronavirus) (Early Termination of Certain Temporary Provisions) Regulations 2020 which came into force on 1 October 2020.

The Extension Regulations provide for the following:

- **Statutory demands / winding up petitions:** an extension of the period during which creditors are prevented from presenting a winding-up petition based on an unpaid statutory demand or an unpaid judgment debt (unless the creditor had reasonable grounds for believing that (i) COVID-19 has not had a financial effect on the company or (ii) the company's inability to satisfy the statutory demand or judgment debt was not caused by COVID-19). The relevant period previously ran from 1 March 2020 to 30 September 2020, but the Extension Regulations extend this to 31 December 2020.
- **Moratorium against creditor action:** One of the bars to entry of a moratorium is, as a general matter, that the company must not have been subject to a moratorium or certain formal insolvency procedures in the last 12 months. At the time of introduction of CIGA, however, that bar was stated not to apply until 30 September 2020. The rationale may have been to facilitate the invocation of the moratorium procedure during COVID-19. The Extension Regulations provide for an extension of the disapplication of that bar from 30 September 2020 to 30 March 2021.
- **Ban on 'ipso facto' clauses:** an extension of the period during which small suppliers could terminate or vary the contractual terms of supply to companies solely because they became subject to an insolvency event, which previously expired on 30 September 2020 and now expires on 30 March 2021.

The Extension Regulations also provide for, amongst other matters, additional flexibility for companies to hold their annual general meetings remotely (rather than in-person) until 30 December 2020.

The temporary relaxation of wrongful trading laws introduced by CIGA which expired on 30 September 2020 has not been extended by the Extension Regulations. This reflects an approach by the UK government to balance the need to protect those viable businesses which have been affected by COVID-19 against the need to protect creditor interests in relation to those businesses which are not viable irrespective of COVID-19's impact on them. Therefore, the risks of directors of some UK companies in this latter category may increase materially as of 1 October 2020.

Similarly, prior to the Termination Regulations coming into effect, a monitor (being a licenced insolvency practitioner) of a moratorium was permitted to qualify his/her statement that, in their view, it is likely that a moratorium for the relevant company would result in the rescue of the company as a going concern, to the effect that a rescue would be the result if it were not for the worsening of the financial position of the company for reasons relating to COVID-19. Pursuant to the Termination Regulations, from 1 October 2020 this qualification is no longer available in relation to new moratoriums or extensions of existing moratoriums, and the monitor would need to be confident that the moratorium would result in the rescue of the company as a going concern regardless of the impact of COVID-19.

The rationale behind the termination of the relaxation with regard to directors' liabilities for 'wrongful trading' and the termination of the softer requirement with regard to the entry into of the new moratorium process may be to ensure that, whilst the UK government separately provides material financial relief (for example, through the employee furlough scheme), the impact of COVID-19 cannot be discounted from forward planning. The discontinuation of those relaxations increases the pressure on businesses which may be pushed over the edge by COVID-19 to address that consequence now. If they do not, directors may face increased risk of 'wrongful trading' liability. Additionally, the longevity of those businesses will not be able to be preserved through the invocation of the new moratorium. Rather, for directors to obtain that protection and/or for companies to invoke the new moratorium there should be a

reasonable likelihood that the business will, notwithstanding any effect COVID-19 may have had or may have, survive.

Legal developments in response to the continuing COVID-19 crisis will of course impact the interests of a variety of stakeholders in different ways.³ The above extensions to the temporary changes to the UK's insolvency and company laws introduced by CIGA are not unexpected given the continued economic turmoil that the COVID-19 crisis is causing in the UK economy, involving multiple sectors including retail, commercial property and transport, amongst many others. As government guidance on lockdowns and related measures to combat the spread of the virus continues to evolve on a national level and also on a more regional and local level, businesses may well continue to face significant uncertainties in their operations. Therefore, these extensions to the temporary CIGA changes will be a welcome relief to many firms, but any further extensions will be monitored with caution by other stakeholders (such as creditors and commercial landlords) that are impacted by them.

** This GT Alert is limited to non-U.S. matters and law.*

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³ In particular, commercial landlords in the UK are prevented from exercising their rights of re-entry or forfeiture for non-payment of rent until 31 December 2020 (which was previously extended from 30 September 2020) under the Business Tenancies (Protection from Forfeiture: Relevant Period) (Coronavirus) (England) (No. 2) Regulations 2020.