

Memorandum

New U.K. Insolvency Regulations on Tenancy-Related Winding-Up

13 September 2021

On 10 September, the U.K. government published amending regulations to the current coronavirus winding-up petition rules laid out under the Corporate Governance and Insolvency Act 2020 (CIGA 2020). The new regulations will replace the current moratorium on winding-up petitions for companies unable to pay debts, set to expire on 30 September. The new protections for businesses and commercial tenants commencing from 1 October until 31 March 2022, will:

1. restrict rent or tenancy-related winding-up petitions for debts accrued as a result of a “financial effect from coronavirus” (but not winding-up petitions in respect of other types of debt);
2. increase the minimum debt value required to present a winding-up petition from £750 to £10,000; and
3. introduce a coronavirus-focused “Statutory Demand Plus” mechanism, and provide debtor companies 21 days to propose a repayment scheme before a creditor may petition.

The new changes will come as a welcome relief to suppliers presently out of pocket and largely without remedy. However, landlords still waiting for coronavirus period rent will remain restricted as regards to their ability to pursue payment.

The regulations attempt to bridge the treatment of coronavirus-related rent arrears disputes until the U.K. government’s rent arbitration scheme for unpaid coronavirus rents is implemented. The arbitration is expected to be put on statutory footing before the end of March 2022. Its detail is keenly awaited by landlords and tenants wanting to understand their route out of the effects on their business from coronavirus.

Unpaid Rent Due to “Financial Effect”

As was the case throughout the pandemic, if rent is unpaid but not by reason of a “financial effect of coronavirus,” a landlord could petition for winding-up—though this is now subject to the £10,000 and “Statutory Demand Plus” requirements, as described further below.

Meaning of “Financial Effect”

The phrase “financial effect” previously appeared elsewhere in the CIGA 2020 as the only relevant test for when a winding-up petition on the grounds of an inability to pay debts owed to any creditor (under section 122(f) of the Insolvency Act 1986) would be permitted throughout the pandemic. The meaning of “financial effect from coronavirus” on a company meant “if (and only if) the company’s financial position *worsened* in consequence of,

or for reasons relating to, coronavirus.” The new regulation builds upon the “financial effect” test with the “Statutory Demand Plus” and increased debt minimum requirements.

It’s for the debtor company to prove that coronavirus had the causative financial effect. Previous judgments have held this as likely to be a relatively low threshold for a tenant to cross. Where debts have nothing to do with coronavirus, *e.g.*, the rent became due and payable before the pandemic, those debts will not be restricted by the regulation and can form the basis of a winding-up petition.

The wording of the new regulation suggests that the scope of protected debts under it is broader than the expected coverage of the forthcoming arbitration scheme. The U.K. government previously reported that the arbitration will only cover rent accrued during U.K. government mandated closures. The detail of the arbitration scheme will be important for all concerned to understand their rights into the longer term.

Perhaps crucially, landlords are not restricted from pursuing unpaid rent via county court judgments. Many tenants complain this is an unintended loophole that can adversely affect their credit rating and increase risks to their business during these challenging times.

Temporary Increase of Debt Minimums

The sum of any debt (or debts in the case of multiple petitioners) on which a petition may be based must now collectively be £10,000 or more. This temporary measure is considerably higher than the £750 that has been ordinarily applicable under the Insolvency Act 1986. As context, £750 in 1986 would be the equivalent of £2,200 today adjusted for inflation. The higher bar is designed to provide further relief to debtors following almost two years of unique business disruption by avoiding precipitative actions for immaterial sums.

“Statutory Demand Plus”—21 Days to Agree Terms

Unpaid creditors seeking to petition a winding-up of a debtor company on the basis of an inability to pay debts must now have a liquidated debt and must first make demand in a prescribed form, in a manner similar to the statutory demand process, and wait 21 days in order to be eligible to present a winding-up petition. As part of the prescribed form, the creditor must request the debtor make a repayment proposal. During the 21 days, the debtor is able to make proposals for payment, but it is entirely within the creditor’s gift as to whether a proposal is acceptable.

It remains to be seen whether the very low insolvency statistics over the last two years will increase as debtors use that period to seek protection through administration, liquidation or the new U.K. moratorium.

The court will have discretion to waive or reduce the 21 day period as it sees fit, providing creditors with some flexibility in unique or time-sensitive situations.

Looking Ahead

This has been a tough time for most businesses, including tenants, landlords and suppliers. The regulation's aim appears to be to provide some greater balance in favour of ordinary suppliers (provided not relating to rent) as part of a gradual return to normality in terms of creditor recourse for unpaid supplier debts.

However, there remains significant uncertainty regarding how accrued rent arrears (and other coronavirus-related borrowings) will ultimately be unwound.

It is hoped that the U.K. government will provide guidance regarding how the rent arbitration system will operate sooner rather than later.

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