

# UPDATE ON TEMPORARY PROVISIONS

The Corporate Insolvency and Governance Act 2020 (Coronavirus) (Extension of the Relevant Period) Regulations 2020 (**First Extension Regulations**) came into effect on 29 September 2020, followed by the Corporate Insolvency and Governance Act 2020 (Coronavirus) (Early Termination of Certain Temporary Provisions) Regulations 2020 (**Termination Regulations**) which came into effect on 1 October 2020.

On 31 December 2020, the Corporate Insolvency and Governance Act 2020 (Coronavirus) (Extension of the Relevant Period) (No.2) Regulations 2020 (**Second Extension Regulations**) came into force, which were followed by the Corporate Insolvency and Governance Act 2020 (Coronavirus) (Extension of the Relevant Period) Regulations 2021 (**Third Extension Regulations**), which came into effect on 26 March 2021. These were further followed by the Corporate Insolvency and Governance Act 2020 (Coronavirus) (Extension of the Relevant Period) (No. 2) Regulations 2021 (**Fourth Extension Regulations**). Most recently, the Corporate Insolvency and Governance Act 2020 (Coronavirus) (Amendment of Schedule 10) Regulations 2021 were published and will come into effect on 1 October 2021 (**Amendment Regulations**). These Regulations modify a number of the time limits on temporary measures set out in The Corporate Insolvency and Governance Act 2020 (**Act**).

## 1. MORATORIUM PROVISIONS

### WHAT HAS CHANGED?

The Act introduced a new moratorium procedure which allows a company to obtain a free standing moratorium to allow breathing space for them to consider rescue and restructuring options. This new (permanent) moratorium is subject to certain temporary measures, some of which have been extended by the Third Extension Regulations but otherwise have been disapplied by the Termination Regulations.

Under s3(2) of the Third Extension Regulations, until **30 September 2021** a company may enter a moratorium if they have been subject to an insolvency procedure in the previous 12 months. However, the Temporary Regulations disapplied other temporary relaxations in the entry criteria, including the relaxation of the requirement that the monitor must be of the opinion that the company is likely to be rescued as a going concern were it not for any worsening of its financial position due to coronavirus.

As the temporary rules end, The Insolvency (England and Wales) (No.2) (Amendment) Rules 2021 (**No.2 Rules**) which will come into force on 1 October 2021, will provide permanent procedural rules for the company moratorium procedure in England and Wales. The Insolvency (Scotland) (Company Voluntary Arrangements and Administration (Amendment) Rules 2021 (**Scottish Rules**), which also come into force on 1 October 2021, will provide similar, permanent procedural changes in Scotland. While these permanent rules will closely mirror the temporary measures that were introduced by the Act, some additional rules have been made to improve the operation of the moratorium. These additions include the reframing notice periods in terms of "business days" rather than "days". They also give the monitor greater flexibility when assessing whether to terminate the moratorium due to the company's inability to pay its moratorium debts. The new rules will further allow the monitor to disregard any debts they reasonably believe are likely to be paid within 5 days or will be compromised with the creditor's agreement.

### WHY?

While certain of the temporary provisions have been extended to 30 September 2021 to ensure businesses have access to adequate support through the next phase of restrictions, Parliament's rationale behind dis-applying the remaining temporary provisions was to minimise the risk of increasing numbers of companies who continue to operate with no real prospect of servicing and repaying their debts. The explanatory guidance on the Termination Regulations sets out the view that to allow the implications of COVID-19 to continue to be disregarded by insolvency practitioners, could hinder restructuring of the wider economy and lead to further damage to creditors and suppliers. The most recent No2. Rules and the Scottish Rules will provide additional flexibility for companies to explore rescue and restructure of their businesses as the UK emerges out of the pandemic.

## 2. WINDING-UP/ STATUTORY DEMAND RESTRICTIONS

### WHAT HAS CHANGED?

Schedule 10 of the Act contains various provisions aimed at preventing a significant number of winding up petitions from being issued.

The winding-up and statutory demand restrictions have now been extended to **30 September 2021** by s2 of the Second Extension Regulations, s.3(4) of the Third Extension Regulations and s.2 of the Fourth Extension Regulations.

The change of date has implications including:

- no petition can be issued on or after 27 April 2020 based on a statutory demand served during the relevant period (1 March 2020 until **30 September 2021**);
- no petition is to be issued during the relevant period (27 April 2020 and **30 September 2021**) unless the creditor has reasonable grounds for believing either (i) COVID-19 has not had a financial impact on the company; or (b) the debt would have arisen even if COVID-19 had not had an impact on the company;
- for petitions presented between 27 April 2020 and **30 September 2021**, the deemed commencement date of any liquidation is the date of any order, and not the date of presentation of the petition;
- for petitions presented after the Act comes into force, and before **30 September 2021**, the rules on advertisement are amended such that no petition shall be advertised until the Court determines whether it is likely to make a winding up order.

As these restrictions will expire on 30 September 2021, the Amendment Regulations will lift the current restrictions on statutory demands but will continue with more limited restrictions on creditors' ability to file a winding-up petition from 1 October 2021 until **31 March 2022**

These new restrictions on winding-up petitions mean that:

- no petition can be issued during the relevant period (1 October 2021 until **31 March 2022**) where the debt relates to a commercial rent debt unless the creditor can prove that the non-payment of the debt is not related to the pandemic;
- no petition can be issued during the relevant period (1 October 2021 until **31 March 2022**) unless it meets the newly introduced debt threshold of £10,000 or more;
- for petitions presented between (1 October 2021 until **31 March 2022**), creditors must give the debtor at least 21 days to put forward proposals for repayment before they can proceed with the winding-up action. Creditors will be required to confirm to the court that they have sent the notice, whether they have received any proposals from the debtor and if so why they are not satisfactory.

## WHY?

The extensions provide further breathing space to companies and prevent aggressive creditor action during the period when companies are continuing to be financially impacted by COVID-19. However, as the country is gradually recovering, the UK government is scaling down its overall support to businesses which is reflected in the Amendment Regulations. Since the current restrictions on statutory demands are being lifted and as winding-up petitions are back in a modified form, it is clear that the supportive plaster is slowly being ripped off. If the country continues its current recovery, it seems likely that the present restrictions will fully come to an end in 2022.