

# 4 STONE BUILDINGS

## Litigation in the Time of Covid-19

Legal issues in commerce, finance and insolvency



9<sup>th</sup> Edition (15 February 2021):

*Latest developments on contract law, the Corporate Insolvency and Governance Act 2020, company law, banking and financial services, civil procedure, remote litigation and offshore litigation in Bermuda, the BVI and the DIFC*

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## Members of Chambers

### ***George Bompas QC***

George Bompas QC is listed by Chambers and Partners as one of the leading Silks in Chancery/Commercial, Commercial Dispute Resolution, Company, Financial Services and Reconstruction/Insolvency; and by the Legal 500 as one of the Leading Silks in Commercial Litigation, Company and Insolvency. He has acted over the years in many of the major corporate matters of public interest in the UK. He has also acted in major arbitrations and sits as an arbitrator.

### ***John Brisby QC***

John Brisby QC is a seasoned litigator, with substantial experience of heavy trials in both the Chancery Division and the Commercial Court, and is known as a formidable cross-examiner in court. He enjoys working with other people, and is a good team player. Over the years, John Brisby has been extensively involved in heavy litigation arising out of large scale corporate collapses such as Barlow Clowes, British and Commonwealth, Maxwell, BCCI, Barings, Railtrack, Enron, and Madoff. More recently, he has been involved in major international litigation and arbitrations relating to disputes originating from the former Soviet Union and China.

### ***Jonathan Crow QC***

Described as “one of the leading barristers of his generation” and “probably the most persuasive advocate at the Bar”, Jonathan has appeared in over 200 reported cases, including more than 40 in the Supreme Court, House of Lords, and Privy Council. His practice straddles a broad range of litigation including banking & finance (*Singularis Holdings Ltd v Daiwa Capital Markets Ltd*), civil fraud (*Madoff Securities International Ltd v Raven*), and corporate insolvency (*Re Lehman Brothers International*). One of Chambers and Partners’ ‘Stars at the Bar’, he has been awarded both Commercial Litigation and Chancery Silk of the Year. In addition to his work in London, Jonathan enjoys a thriving offshore practice and is a full member of the BVI Bar.

### ***Richard Hill QC***

Richard Hill QC specialises in commercial litigation, banking, corporate insolvency and restructuring, civil fraud and company law. His practice involves both litigation and advisory work and he appears in the High Court and appellate courts in England and Wales as well as in international arbitrations and courts in the DIFC and other offshore jurisdictions. He has appeared in a number of the leading recent cases including *Travelport v WEX*, *Autonomy v Lynch*, the Lloyds/HBOS litigation, *Constantin Medien v Ecclestone*, *Lehman* client money appeal (Supreme Court) and *Benedetti v Sawiris* (Supreme Court). He is highly ranked in the main practitioner directories.

### ***Andrew Clutterbuck QC***

Andrew Clutterbuck QC practices in insolvency, company and commercial law generally. He has acted in two of the largest recent bankruptcies (*Maud* and *Stanford*) and is one of the joint principal editors of *Loose & Griffiths on Liquidators* (9th ed.). He routinely acts for and advises office holders and trustees

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### ***Orlando Fraser QC***

Orlando was called to the Bar in 1994, and was made Silk in 2014. In addition to his work in the Chancery and Commercial Divisions in London, Orlando is also called to the Bars of the BVI and St Christopher & Nevis, and is on the Part II DIFC register. Orlando has served as a Legal Member of the Board of the Charity Commission, and on the Civil Justice Council. Orlando recently led Hermann Boeddinghaus and Eleanor Holland in a 12 day remote derivative action trial before Mr Justice Wallbank in the Commercial Court of the BVI.

### ***Andrew de Mestre QC***

Andrew's practice covers the full range of work done in Chambers, spanning commercial and commercial/chancery litigation, insolvency, company law, financial services and general contractual matters. He regularly appears in the Chancery Division and the Commercial Court as well as before arbitral tribunals. In March 2020 Andrew conducted one of the first High Court trials to take place remotely after the introduction of the first lockdown measures related to the Covid-19 pandemic. He has since conducted a successful remote 6-day appeal in the Court of Appeal (*GEHC v Gray*) and acted for the claimants in *Travelport & Ors v WEX* in an expedited 7-day hybrid trial of preliminary issues in September 2020.

### ***Sharif A Shivji QC***

Sharif is a former derivatives trader, who worked in London and Hong Kong. He joined Chambers as a pupil in 2001 and took silk in 2020. He was Legal 500 Insolvency Junior of the Year 2020 and Chambers and Partners' Commercial Litigation Junior of the Year 2018. He is called to the Bar in the BVI and the DIFC. His recent cases include *Mozambique v Credit Suisse* and *Autonomy v Lynch*, a 10 month trial in the Chancery Division where he appeared with 6 other members of Chambers. He is also the author of *Transaction Avoidance in Insolvencies*, OUP 2018.

### ***Sarah Harman***

Sarah completed pupillage at 4 Stone Buildings and has practiced from Chambers ever since. Her work has largely centred in the Company and Insolvency areas of chambers' work, acting for shareholders, directors, creditors and office-holders. She has also acted in a substantial range of Directors' Disqualification cases although as a member of the AG's 'A' Panel for a decade her practice has extended to embrace broader areas too, ranging from the civil recovery of the proceeds of crime to excise duty/VAT in the alcohol export/import trade

### ***Christopher Harrison***

Christopher's practice is founded on more than 20 years of experience in commercial and chancery litigation, company law, insolvency and civil fraud. He is a highly regarded advocate and adviser, noted for his commercial and tactical approach, attention to detail and unflagging support for his clients.

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***Paul Greenwood***

Paul Greenwood specialises in all aspects of dispute resolution in the fields of company, insolvency, chancery commercial and financial services law; many of his cases span more than one field, and many have an international or cross-border element. In addition, he has acted in various important cases concerning art and the art world. Paul has appeared in the Courts of various offshore jurisdictions, and regularly appears unled at hearings against senior silks. In December 2020, he was appointed as a Deputy Insolvency and Companies Court Judge.

***Nicholas Cox***

Nicholas Cox is an exceptionally versatile senior junior with a silk-level commercial chancery practice. With over 20 years' experience on the AG's Panel instructed by every major department of state, he is a recognised expert in large and complex public sector commercial and contractual disputes often involving national importance or media sensitivity. He appears in all divisions of the higher courts in disputes involving commercial and contractual disputes, insolvency and company law, constructive trusts and civil fraud and Proceeds of Crime Act civil recovery actions. He has also acted as a sole arbitrator and is a fully qualified mediator.

***Charles Marquand***

Charles was called in 1987. He worked as a lawyer at HM Treasury where he advised on financial services matters and drafted financial services legislation. He has practised at the independent Bar since 1996. He is financial services specialist, advising on a wide range of complex financial services related/regulatory issues for UK and overseas clients, including foreign governments. He is mentioned in the Chambers and Partners Directory and the Legal 500 as a top financial services specialist.

***Anna Markham***

Anna was called to the Bar in 1996 and joined Chambers following the completion of her pupillage the following year. Her recent cases include acting for the claimants in the Court of Appeal in *Bott & Co v Ryanair DAC*, a leading case on the law of equitable lien. She is a contributor to Annotated Companies Legislation, and an author of the forthcoming 4th edition of Walters & Davis-White on Directors' Disqualification & Insolvency Restrictions. She is a regular contributor to Practical Law Corporate and the Honorary Secretary of the Chancery Bar Association.

***Hermann Boeddinghaus***

Hermann has over 20 years' experience as a specialist in corporate and commercial disputes and insolvency law, with an emphasis on complex and high value shareholder litigation, asset recovery and cross-border enforcement. He appears regularly in the Chancery Division, the Commercial Court and the BVI Commercial Court, as well as before international arbitration tribunals.

Hermann was educated at the Universities of Cape Town (BSc in Medicine) and Oxford (MA Jurisprudence, BCL). He then trained as a solicitor with Slaughter and May, before joining the Bar in 1996. He will become a QC on 15 March 2021.

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***Gregory Denton-Cox***

Greg was called to the Bar in 2000 and specialises in commercial and chancery litigation, with particular experience in company law, insolvency, banking, trusts, civil fraud and asset recovery. He was named Chancery Junior of the Year at the Chambers and Partners Bar Awards in 2017, having previously been shortlisted in 2013 and 2016, and has been consistently recommended by the legal directories for his chancery, commercial and company work.

***Tiran Nersessian***

Tiran Nersessian specialises in corporate/personal insolvency and has been recommended for many years as a leading practitioner by Chambers and Partners and the Legal 500 in that field, as well as being nominated as Insolvency Junior of the Year. He is also recommended in Who's Who Legal in the fields of Restructuring/Insolvency and Company/Partnership. He has acted in several high profile matters for the government and private clients over the years including Phones 4u, BHS, Boris Becker, the Grenfell Tower Inquiry, the proposed acquisition of Sky by 21st Century Fox, James Stunt and Comet to name but a few.

***Alastair Tomson***

Alastair has a commercial disputes focussed practice encompassing High Court litigation (predominantly the Business and Property Court and Commercial Court) and international arbitration (ICSID, ICC, UNCITRAL, LCIA), with particular expertise in banking and finance, financial services, energy and natural resources, company disputes and insolvency. Much of Alastair's practice has an international flavour, and he is therefore experienced in dealing with issues of foreign law and working with foreign clients, lawyers and experts. He is also called to the Bar of the Dubai International Financial Centre and the Bar of Rwanda.

***Adam Holliman***

Adam Holliman joined 4 Stone Buildings in 2005. He has a broad commercial chancery practice, often working with leading counsel in heavy, high value or international matters. Adam has particular experience of shareholder disputes, and those involving allegations of breach of duty by directors. Adam has also been instructed by the UK Government on matters involving allegations of rendition and improper treatment of detainees. He is currently assisting with the remediation process of a major retail Bank. Adam has law degrees from London and Oxford, enjoys walking with his dog and daughter, and being a governor at her school.

***Tom Gentleman***

Tom Gentleman is a specialist in commercial litigation, company law, financial services and insolvency. He joined Chambers in 2005, after studying at Oxford and at City University in London. Recent cases include the *Hewlett Packard / Autonomy* litigation, and the *Tchenguiz v Grant Thornton* litigation, arising out of the collapse of the Icelandic bank Kaupthing.

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***Donald Lilly***

Donald was called in 2006 and has considerable experience in offshore jurisdictions, including Bermuda, Gibraltar, the British Virgin Islands, The Bahamas, St Kitts & Nevis and the Cayman Islands. He was called to the British Virgin Islands in 2013, and is called for matters concerning the Berezovsky estate in Gibraltar. He has been instructed in relation some of Bermuda's most high profile litigation in recent years, including the s.105 and s.111 proceedings concerning Viking River Cruises and in relation to the Ritz-Carlton development on Caroline Bay.

***Alexander Cook***

Alexander was called to the Bar in 2008. His practice encompasses all aspects of commercial litigation, fraud, company law, insolvency, and actions under the Proceeds of Crime Act 2002, with a significant proportion comprising offshore or international work. He appears regularly before the British Virgin Islands Commercial Court, having been called to the BVI Bar, and has experience of acting in cases involving other common law jurisdictions, including Bermuda, Cyprus, Malaysia, Hong Kong, Jersey and Guernsey. Alexander also acts regularly for the UK government, having been appointed to the Attorney General's Panel of Counsel (B Panel).

***Nicola Timmins***

Nicola joined Chambers in 2008 having previously practiced as a solicitor in the Dispute Resolution department of Baker McKenzie (where she did her training contract), and following working as a judicial assistant at the Court of Appeal and an internship at The Hague Conference on Private International Law. Her practice focuses on general commercial litigation, with particular experience in disputes concerning banks and financial instruments, and the oil, gas and mining industries. Nicola also practices company law and insolvency law, with significant experience in large offshore insolvencies. Outside of work Nicola enjoys sports, particularly running and dancing.

***James Knott***

James's practice spans Chambers' core work areas, with a particular emphasis on shareholder disputes and commercial litigation involving elements of fraud. Equally at home acting on his own or as part of a team, James frequently appears in the Business and Property Courts and is ranked as a leading company law junior by both Chambers and Partners and the Legal 500. Recent cases include *Stanford International Bank Ltd (In Liquidation) v HSBC Bank Plc* [2020] EWHC 2232 (Ch); *Gertner v CFL Finance Limited* [2020] EWHC 1241 (Ch); and *Global Energy Horizons Corp v Gray* [2020] EWCA Civ 1668.



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### ***Eleanor Holland***

Eleanor is a barrister and CEDR-accredited mediator with a broad commercial Chancery practice. Eleanor provides practical advice tailored to meeting the client's objectives, and is particularly sought after for work involving complex legal questions. She regularly receives repeat instructions from solicitors' firms, and works both alone and led by barristers in and out of Chambers. As a mediator, Eleanor offers a practical and constructive approach to parties wishing to explore settlement of their dispute. Eleanor is recommended by Chambers and Partners, and was identified by Legal 500 as one of its top ten commercial litigation juniors under eight years' call. Eleanor was recently led by Orlando Fraser QC in a 12 day remote trial in the BVI.

### ***Joseph Wigley***

Joseph was called to the Bar in 2010 and joined Chambers as a tenant in 2011, having successfully completed pupillage in Chambers. He is ranked as a leading junior in the 2021 edition of Chambers and Partners and is a registered practitioner with full rights of audience in the DIFC courts in Dubai. His recent cases include *Edgeworth v Maud*, in which Joseph acted for the debtor, Glenn Maud, in opposing a bankruptcy petition on an alleged £51 million debt presented by an investment company financed by the Abu Dhabi sovereign wealth fund and a company associated with Robert Tchenguiz.

### ***Nienke van den Berg***

Nienke was called to the Bar in 2012. She specialises in high-value insolvency and commercial Chancery litigation and arbitration. Matters on which Nienke is instructed often include a cross-border or off-shore element. Past cases and experience include: *Robert Tchenguiz & anor. v Grant Thornton UK LLP* and *Blue Tropic & anor. Ltd v Ivane Chkhartishvili*. Nienke is also regularly instructed in relation to contentious and non-contentious company law and banking matters, including unfair prejudice petitions, breaches of directors' duties, and she has acted on behalf of the FCA, HSBC and RBS. Nienke was educated at Harvard, Oxford and Leiden universities.

### ***Edward Crossley***

Edward specialises in commercial and company litigation and arbitration. Examples of recent cases Edward has been involved in include: a \$1bn off-shore claim; arbitration claims in Singapore, DIFC, Mauritius, New York and London; contentious company law matters involving unfair prejudice petitions, derivative claims, breaches of directors' duties and other such matters; the second largest bankruptcy in English legal history; cross-border mergers, schemes of arrangement and reductions of capital. Before joining Chambers, Edward read law at St John's College, Cambridge and at Christ Church, Oxford (BCL). While completing his professional qualifications, Edward taught contract law at St John's College, Cambridge.

### ***Andrew Rose***

Andrew was called to the Bar in 2013 and joined Chambers after pupillage. His recent cases include the *Marme* swaps litigation in the Commercial Court, the *Maud* bankruptcy proceedings in the Chancery Division, and the *Al Khorafi* mis-selling litigation in the Dubai International Financial Centre (where he is a registered practitioner).

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### ***Albert Sampson***

Albert was called to the Bar in 2014 and has a commercial and commercial Chancery practice. He advises and represents domestic and international clients in relation to commercial litigation, company law, insolvency, banking and financial services, civil fraud and international commercial arbitration. He also has substantial experience in acting for the National Crime Agency in claims under proceeds of crime legislation and for the Financial Conduct Authority in relation to regulatory matters. Albert is also a contributor to *Loose & Griffiths on Liquidators* (9th ed.).

### ***Lara Hassell-Hart***

Lara was called to the Bar in 2014. Since completing pupillage in Chambers she has been involved in a number of high-profile cases with other members; in particular, *Sharp and Ors v Blank and Ors* (a 12-week trial concerning Lloyds' acquisition of HBOS); *Autonomy and Ors v Lynch and Anor* (a 10-month civil fraud trial arising from HP's acquisition of Autonomy); and *Travelport and Ors v WEX* (a Commercial Court trial concerning the interpretation of a MAC clause). She is a contributor to *Loose & Griffiths on Liquidators* (9th ed.) and writes the "Investigations" section of *Tolley's Company Law Service*.

### ***Emma Horner***

Emma was called to the Bar in 2015 and joined Chambers as a pupil the same year. She frequently appears in the Business and Property Courts and has full rights of audience before the AIFC Court in Kazakhstan. She was a Pegasus scholar in 2017, seconded to an international firm in Bermuda. Her recent cases include acting for minority shareholders of a Jersey company in an unfair prejudice petition in *FTV & ors v ETFS & Tuckwell*. She is a contributor to *Loose & Griffiths on Liquidators* (9th ed.) and an author of "On Your Feet: A Practical Guide to Civil Advocacy".

### ***Guy Olliff-Cooper***

Guy was called to the Bar in 2015. He has a broad commercial Chancery practice, with a particular emphasis on Insolvency Law and Civil Fraud. His recent reported cases include *Al Jaber v Bosheb*, *Coral Reef v Silverbond Enterprises Ltd* and *Kea Investments Ltd v Ivory Castle Ltd*. Guy is a contributor to *Transaction Avoidance in Insolvencies* (3rd ed.) and *Loose & Griffiths on Liquidators* (9th ed.).

### ***Zara McGlone***

Zara practises across the full range of work undertaken by Chambers, including banking and finance, commercial litigation and arbitration, company and insolvency. She regularly appears both led and unled in the High Court and County Court, and also has experience of international arbitration and arbitration-related court applications. Before coming to the Bar, Zara read Classics and Modern Languages at the University of Oxford, with a year studying abroad in France. She has rights of audience in the AIFC Court in Kazakhstan, and was awarded the 2018 Inner Temple Pegasus Scholarship to Hong Kong.

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***Karl Anderson***

Karl joined Chambers in 2018 and has since built a busy commercial chancery practice. He is frequently instructed both as sole counsel and as part of a wider counsel team in heavy commercial litigation. Recent instructions include *Autonomy Corporation Ltd v Lynch*, *Mayr v CMS Cameron McKenna Nabarro Olswang LLP* (both of which featured in in The Lawyer's "Top 20 Cases of 2019") and *General Electric Company v Al Alpine US Bidco Inc* [2021] EWHC 45 (Ch). Karl is also an editor of *Zuckerman on Civil Procedure* (Sweet & Maxwell 2021) and a contributor to *Loose & Griffiths on Liquidators* (LexisNexis 2019).

***Daniel Kessler***

Daniel Kessler joined Chambers in 2019 and specialises in commercial litigation; company law; insolvency; and civil fraud; banking and finance. His recent reported cases include *Toma v Murray* [2020] EWHC 2295 (Ch); proprietary injunction restraining the dealing of bitcoin; and *Davies v Ford* [2020] EWHC 3063 (Ch); [2019] EWHC 3161 (Ch); [2019] EWHC 2914 (Ch); ongoing case concerning breach of directors' duties and the nature of the remedies available. He is the author of a textbook on insolvency law aimed at litigants in person due to be published later in 2021.

***Nicholas Wright***

Nicholas was called to the Bar in 2019 and joined Chambers following completion of his pupillage the same year. Before joining 4 Stone Buildings he worked at a leading boutique litigation firm and as a legal researcher in the House of Lords. He is building a broad commercial and chancery practice with a particular emphasis to date on company law, shareholder and joint venture disputes.

***Hossein Sharafi***

Hossein joined Chambers in October 2020 and is building a practice across all areas of commercial and commercial chancery law. He is often instructed as sole counsel or part of a team, and has experience in complex high-value international disputes.

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## Clerks

### ***David Goddard***

David Goddard has been our Senior Clerk since 1983 after 11 years in a commercial set in the Temple. He is a past Chairman of the Institute of Barristers Clerks and is now its President. He has served on numerous Bar Council Committees and working parties in the past, and is currently a member of the Bar Council Direct Access Panel. David takes an active interest in all aspects of Chambers' life, and also sits on the Pupillage Committee. David is Chambers' Pro Bono Champion. He was shortlisted for the Senior Clerk/Chief Executive of the Year at the Legal 500 UK Awards 2014 and received the Lifetime Achievement Award at the Chambers UK Bar Awards in 2019.

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### ***Ben Lashmar***

Ben Lashmar is our First Junior Clerk and joined Chambers in 1993. Deputising for David in his absence, and as part of the senior clerking team, he is responsible for the management and strategic development of barristers' practices across all levels of seniority. His experience and understanding of individual practices, coupled with his pragmatic and proactive approach, allow him to make considered & trusted recommendations to clients. Ben is recognised in both Chambers and Partners and Legal 500 for his user friendly and committed approach to clerking. He is a qualified member of the Institute of Barristers' Clerks, and is a past management committee member of PILARS, a pro-bono organization that provides free representation to debtors in bankruptcy cases.

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### ***Ryan Tunkel***

Ryan began his clerking career in 2012 at 4 Stone Buildings. As part of our senior clerking team, he is responsible for the management and strategic development of barristers' practices across all levels of seniority. Ryan is recognised in both Chambers and Partners and Legal 500 where he is commended for his work ethic and experience. Ryan's time in Chambers has provided him with an in-depth knowledge across all of Chambers' practice areas, allowing him to make considered recommendations suited to clients' expectations and needs. He has a comprehensive understanding of the court's listing system within all divisions. Ryan is also a member of the Institute of Barristers' Clerks.

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***Ellie Hecht***

Ellie joined Chambers in 2017, starting her clerking career at 4 Stone Buildings. On a daily basis she assists the clerking team by: liaising with solicitors, dealing with new instructions, managing the diary, dealing with listing, and general chambers administration. Ellie is also involved in the updating and maintaining of Chambers' social media sites. She is a member of the Institute of Barristers' Clerks and has completed the Central Law Training, Advanced Award in Chambers Administration. In her spare time, Ellie co-runs London's leading cross-industry networking group, 'London Young Professionals'.

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***Connor Ward***

Connor Ward became a clerk at 4 Stone Buildings in March 2019. He is currently a member of the Institute of Barristers' Clerks. Connor assists the senior clerking team on a daily basis, dealing with emails, diary management, general administration and liaising with the court to ensure documents are safely received. Connor is also responsible for compliance, making sure that solicitors receive the terms and conditions of the Counsel they have instructed.

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***Max Shepherd***

Max Shepherd is newest member of the clerking team and began his career at 4 Stone Buildings in October 2019 as a Junior Clerk. His roles include the transferring of papers to and from court, checking court listings each day, while also assisting the clerking team with diary management, entering up new cases and general administrative duties.

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## Chambers' Staff

### *Dawn Russell*

Dawn has been associated with Chambers since 1991. She has worked in a variety of different roles during her career and has gained extensive knowledge of Chambers' organisation. Dawn is Chambers' Administrator and is responsible for all aspects of Chambers' administration including property and facilities management. Dawn is also Chambers' Pupillage Secretary and is the point of contact for all queries relating to pupillage and mini-pupillage.

### *Tracie Lansdowne*

Tracie has been with Chambers for 9 years managing the IT; before this she worked at One Essex Court. She is responsible for developing and implementing Chambers' IT strategy, covering computers, applications and telephones. Tracie then gives support and training to barristers, Clerks and staff.

Tracie has 30 years experience in the IT industry, working with large IT companies such as 3Com and Uniplex. She has worked as a Project Manager and Support engineer in many large corporates such as FM Global and Wang Global.

### *Sarah Forde*

Sarah Forde has acted as our Accounts Administrator since 2004. She provides support to a variety of businesses as a Professional Company Secretary, covering accounts and payroll as well as HR and consultancy work. She is a member of the CIPP and in 2016 worked with their Associate Policy Director on pensions auto-enrolment and its effect on SMEs, culminating in her reporting to the then Pensions Minister. Sarah also works extensively within the field of Learning Disabilities, acting as Company Secretary to the Intensive Interaction Institute from its inception in 2010 until 2018.

### *Nicola White*

Nicola is our part-time Fees Clerk and first started working as a fees clerk in 2002 although she did have a break for several years to work as a Senior Administration Officer in a school to fit in with her family. For a majority of her working life she has worked in the legal profession. She qualified as a Fellow of the Institute of Legal Executives prior to becoming a fees clerk.

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## Preface from the Head of Chambers

We are very pleased to bring to you this present edition of *'Litigation in the time of Covid-19: Legal Issues in commerce, finance and insolvency'*.

In its original form this work was first published, in June 2020, as an e-book available free of charge on our Chambers website. The e-book is now in its 9th edition, released in February of this year.

Our e-book was developed by us in the light of the rapid and dramatic changes to commercial life flowing from the Covid-19 pandemic. When we first launched the work our aim was, as it has continued to be in subsequent editions, to provide a convenient tool, focussed on our Chambers' main areas of law, for lawyers when advising clients on developments and issues unfolding with dizzying and ever-increasing speed.

The end of the transition period following the UK's departure from the EU has increased the challenge of keeping up to date, in particular in the field of insolvency and corporate restructuring. The significant changes in the law since the end of 2020, with their impact on many of the topics discussed in this book, are reflected in the 9th edition.

This present book is our first paper-based text book version. Our reason for publishing a book in physical form is that many users find a printed book easier to use than a virtual one, or at least are assisted by having a hard copy to complement the digital.

*'Litigation in the time of Covid-19'* is a Chambers project which, we are proud to say, every member of 4 Stone Buildings has been involved in. It is testament to our collaborative approach, as well as to the strength of our working arrangements in these remarkable times, that we have been able to produce our e-book and to keep it updated in what has been, in any event, a very busy period.

If you would like to be notified by email when updates are released, please email us at [ebook@4stonebuildings.com](mailto:ebook@4stonebuildings.com). Meanwhile, the latest edition of the e-book can always be found on our website at <https://4stonebuildings.com/publication/litigation-covid-19/>.

George Bompas QC, Head of Chambers, February 2021

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## Preface from the Senior Clerk

The Lord Chief Justice in his message to judges on 19 March 2020 emphasised the need to continue with the work of the courts, as a vital public service. The restrictions put in place by the government have pushed both the legal profession and the judicial system into a more technologically friendly era. Virtual applications and hybrid trials have now become standard practice. The emergence of stable and secure platforms has moved litigation out of the Court room and into our home offices.

At 4 Stone Buildings, we have always invested heavily in technology. Before the pandemic, we had already moved to an entirely cloud based IT and telephone system. This meant that our transition to remote working was seamless and we have adapted well to a virtual workplace. Our physical presence in Lincoln's Inn has also been maintained. We have been open throughout the pandemic and have not missed a single day.

Even during this difficult period, Chambers has been fortunate to sustain and advance its busy practice with, amongst other things, numerous substantial matters in court. In particular, we have recently had a silk and two juniors involved in a three-week virtual hearing in the BVI; a substantial COVID-related expedited contract case in the Commercial Court which was heard on a hybrid basis with two silks and a junior; a 10-week trial in the Chancery Division for one of our silks. Members have also been active in writing and presenting topical webinars in the UK, BVI, DIFC and AIFC.

A feature of 4 Stone Buildings continues to be its members' strong loyalty to Chambers and each other. During this unprecedented year, Chambers has produced this e-book – available free to clients and other practitioners – dealing with pandemic-related issues in our areas of practice. The work, now in its 9th edition, was contributed to by almost every member of Chambers. This pulling together of my members in producing this e-book has been magnificent. I am proud to be associated with it.

David Goddard, Senior Clerk of 4 Stone Buildings, February 2021



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# Section One

## CONTRACTS

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## Introduction

- 1.0.1** At the heart of most commercial relationships is a contract. In many areas, the pandemic has had and continues to have a significant effect on parties' ability, or willingness, to meet contractual obligations to which they agreed at a time when the present challenges were unforeseen. In this section we therefore examine some of the key issues facing contracting parties as the pandemic and its effects continue.
- 1.0.2** In many cases, circumstances will have materially changed since the parties contracted. The pandemic may have resulted in a party's performance being delayed or even rendered impossible (for instance, because of legislation relating to movement). The whole rationale of the contract may have been undermined (for example, because of a cancellation of a particular event). The subject matter of the contract may have fundamentally changed – for instance, the profits of a business contracted for sale may have materially worsened as a result of the pandemic. In such circumstances, parties are understandably keen to ascertain what their options and rights may be.
- 1.0.3** This section discusses some of the particular issues that we have seen arise in the context of the pandemic over the past year. We begin by setting out high level answers to each of the scenarios where a party's performance is delayed due to the pandemic, and where it has been rendered impossible. We then delve into the particular options open in each of these scenarios, specifically: variation of the contract terms, suspension of performance, and waiver of breaches; reliance on *force majeure* clauses; arguing that there has been frustration of the contract; and terminating the agreement either in accordance with its terms (including by the exercise of rights under termination clauses and reliance on material adverse change clauses) or for repudiatory breach of contract.
- 1.0.4** This section deals generally with contract law principles that may be particularly relevant to the pandemic. Questions regarding specific types of contracts, including business interruption insurance policies (dealt with in the recent test case of *FCA v Arch Insurance (UK) Limited* [2021] UKSC 1), are covered at [Section Five: Banking and Financial Services](#) below. Many businesses which have been affected by the pandemic have made claims under business interruption policies or are considering doing so. But there has been uncertainty for insureds and insurers about whether the wording of widely used policies covers the novel peril of the pandemic and about whether insured parties can establish the causal link between the peril and their losses which their policies require. This uncertainty has been addressed in part by the FCA's test case, which has recently been heard by the Supreme Court on a leapfrog appeal. Interested readers are encouraged to look at the [Business Interruption Insurance section](#) of Section Five: Banking and Financial Services from [para. 5.15](#) below. Suffice to say at this juncture that so far as contract law principles went in that case, the judgment of the Supreme Court upheld the lower court's application of the well-established principles as to contractual construction derived from the long line of Supreme Court decisions, including *Rainy Sky SA v Kookmin Bank* [2011] UKSC 50; [2011] 1 WLR 2900; *Arnold v Britton* [2015] UKSC 36; [2015] AC 1619; *Wood v Capita Insurance Services Ltd* [2017] UKSC 24; [2017] AC 1173 (see *FCA v Arch* at [47] and the lower court's decision in that case at [2020] EWHC 2448 (Comm) from [61]).



## Summary Issues

### **What happens if a party's performance is delayed because of the pandemic? 1.1**

The pandemic has affected a wide range of businesses and supply networks. This has, inevitably, resulted in delays to performance of contracts – in many cases contrary to the terms of the contract. 1.1.1

Notwithstanding the widespread nature of such delays, the starting point is that if a party is delayed in performing their end of the bargain, and this is contrary to the terms of the contract, they are likely to be in breach of contract unless either (a) arrangements are made to adjust the terms of the contract so as to avoid breach (see [para. 1.3](#) below), (b) the breach is waived by the non-defaulting party (see [para. 1.9](#) below), or (c) the defaulting party can rely on a *force majeure* clause (see [para. 1.9](#) below) or argue that the contract has been frustrated (see [para. 1.11](#) below). 1.1.2

### **What if one of the parties wants to be released from the contract because of the pandemic? 1.2**

The effect of the pandemic may be to make fulfilment of one party's or both parties' obligations under the contract difficult or impossible. If this is merely a temporary state of affairs, the parties may wish to renegotiate the terms of performance (discussed in [paras. 1.3](#) and [1.4](#) below). However, in some circumstances, renegotiation will not be possible or desirable, and in those circumstances one of the parties may want to be released from the contract. In such circumstances, there are four main options: the exercise of any rights to terminate the contract, including by reliance on a termination clause (see [para. 1.7](#) below); reliance on a breach by the other party as a repudiatory breach (see [para. 1.8](#) below); reliance on a *force majeure* clause (see [para. 1.9](#) below); reliance on a material adverse change or material adverse effect clause (see [para. 1.10](#) below); or reliance on the doctrine of frustration (see [para. 1.11](#) below). 1.2.1

## Variation, Suspension and Waiver

### **What are the options and risks if parties wish to adjust their contractual arrangements due to the pandemic? 1.3**

In some cases, the pandemic will have resulted in a change of attitude by the parties towards contracts concluded prior to the pandemic: either because performance has become more costly or difficult, or because a party's financial or other circumstances have changed as a result of the pandemic. Sometimes the preferred option will be to bring the contract to an end by exercising whatever termination rights may be available (as discussed at [para. 1.7](#) below). But often, there is the will to keep the contract alive in some way, but adjusted to meet the new circumstances. The contract will sometimes demand co-operation on the way forward, either expressly or impliedly. As Lord Blackburn said in *Mackay v Dick* (1881) 6 App Cas 251, 263 (referred to recently in the Privy Council case of *Ali v Petroleum Company of Trinidad and Tobago* [2017] UKPC 2; [2017] ICR 531): 1.3.1

*“I think I may safely say, as a general rule, that where in a written contract it appears that both parties have agreed that something shall be done, which cannot effectually be done unless both concur in doing it, the construction of the contract is that each agrees to do all that is necessary to be done on his part for the carrying out of that thing, though there may be no express words to that effect. What is the part of each must depend on circumstances.”*

**1.3.2** The existence and extent of a duty to co-operate will depend on circumstances which include whether the contract is of a kind which ordinarily involves a duty of co-operation – or, more broadly, good faith. Thus a duty of good faith is an ordinary incident of a partnership agreement, and it would be unsurprising to find courts expecting high levels of co-operation between partners whose joint venture is affected by the pandemic. More broadly, a clear trend in recent cases since *Yam Seng Pte Ltd v International Trade Corp Ltd* [2013] EWHC 111 (QB); [2013] 1 All ER (Comm) 1321 has been to find duties of co-operation in contracts, apart from contracts such as partnership where duties of good faith are well established, which can be characterised as “relational”: see e.g. *Sheikh Tahnoon Bin Saeed Bin Shakhboot Al Nehayan v Kent* [2018] EWHC 333 (Comm); [2018] 1 CLC 216 and *Bates v Post Office (No.3: Common Issues)* [2019] EWHC 606 (QB). In the latter case, which was group litigation concerned with the contracts between the Post Office and sub-postmasters, Fraser J set out at [725] a helpful checklist of factors which on the current state of the authorities point towards a contract being “relational”, namely:

- (1) no express terms preventing a duty of good faith being implied;
- (2) a long-term contract, with a mutual intention of a long-term relationship;
- (3) an intention for the parties’ roles to be performed with integrity and fidelity to their bargain;
- (4) a commitment for the parties to collaborate in performing the contract;
- (5) the spirits and objectives of the venture being incapable of exhaustive expression in a written contract;
- (6) the parties reposing trust and confidence in one another, but of a different kind from that involved in fiduciary relationships;
- (7) a high degree of communication, co-operation and predictable performance based on mutual trust and confidence, and expectations of loyalty;
- (8) a degree of significant investment by one or both parties; and
- (9) exclusivity of the relationship.

***Can a party adjust the terms unilaterally?***

**1.3.3** It is not uncommon for contracts to provide one party or another with the ability to impose changes to the terms of a contract unilaterally, as in the case of the bank which changes the interest rate of a mortgage. Imposing changes on the other side will generally be less burdensome than having to negotiate them. But parties which seek to exercise such rights must appreciate the limits on their powers, which may be constrained, as with other contractual discretions, by considerations of rationality, good faith, etc. (see *Chitty on Contracts*, 33<sup>rd</sup> ed., at 22-039; and see also the judgment of Fraser J in *Bates v Post Office (No.3: Common Issues)* [2019] EWHC 606 (QB) at [756] to [759]).

***What are the options for a party if the contract does not provide for unilateral amendments?***

If a party cannot achieve what it wishes unilaterally, co-operation will be needed. Indeed, in some contractual situations, co-operation on the “way forward” will be expressly or impliedly required by the terms of the contract. The extent to which parties are obliged to co-operate is dealt with above. What immediately follows is based on the assumption that there is no issue of co-operation, but that the parties propose to agree an adjustment. **1.3.4**

The most conceptually straightforward way in which the terms of the contract can be adjusted to the changed circumstances is a formal variation of the original contract. Whether the parties have agreed to a variation of their contract, i.e. a permanent adjustment to their contractual terms (subject to any future agreement) will depend principally on: (i) whether, considered objectively, they intended permanently to change their terms (as opposed, for example, to temporarily suspending those terms); (ii) whether they have complied with any formal requirements which apply to variations of the particular contract; and (iii) whether the adjustment to their terms is supported by what the law regards as consideration. If the parties in substance agree to dispense with the original contract and enter into a new contract then what has happened may be analysed as precisely that – not a variation but a new contract. **1.3.5**

Sometimes the legal characterisation of the new arrangement will not much matter, although it may matter if there are any formalities (either under the terms of the original contract or as a matter of general law) which apply either to the valid variation of the original contract, to the termination of the original contract, or to the formation of a new contract. For example, the contract may provide that the contract cannot be varied otherwise than in writing. It is clear that such contractual formalities will be effective (see *MWB Business Exchange Centres Ltd v Rock Advertising Ltd* [2018] UKSC 24; [2019] AC 119), and parties seeking to achieve a formal variation of a contract should therefore ensure that these are complied with. **1.3.6**

Whether or not a contract requires formalities such as being in writing for variation to be effective, parties will be well advised to ensure that any variations are properly documented in order to minimise the risk of disputes; otherwise they are at risk of leaving the relatively firm legal ground of a variation of contract for the murky waters of forbearance, waiver by estoppel and promissory estoppel (as to waiver, see further [para. 1.6](#) below). **1.3.7**

**When can a party rely on economic duress to challenge adjustments to contractual arrangements?** **1.4**

In response to the many challenges created by the pandemic, businesses may well be seeking to renegotiate the terms of their contracts. Some of these renegotiations will be taking place in circumstances where one of the parties may be struggling to survive and thus vulnerable to demands made by their counterparty to agree to certain changes in the contractual relationship. Parties may wonder if in such circumstances it is open to them to rely on economic duress to challenge these changes. **1.4.1**

In order to successfully mount a challenge based on economic duress, a party will need to show (1) that an illegitimate threat has been made, and (2) that it had no practical alternative to agreeing to the terms set out by the party making the threat (i.e. causation). **1.4.2**

There is some uncertainty about precisely how this doctrine operates in English law, but there is nonetheless a number of principles which can be drawn from the jurisprudence. **1.4.3**

***What constitutes an illegitimate threat?***

- 1.4.4** The first element of showing that there has been economic duress is to show that there has been an illegitimate threat. Whether this requirement is satisfied will of course depend on the facts of each case, and there is no rigid definition of the facts which may render a threat illegitimate. However, it seems that there must be a threat, as opposed to a mere warning of the potential consequences of refusing to agree to a demand.
- 1.4.5** In some cases, a threat to breach a contract unless a demand is complied with may be legitimate. A party may be experiencing genuine difficulties in performing its contractual obligations, due to increased costs as a result of complying with government guidance, for example. In those circumstances, further payment or some form of amendment to the contract may genuinely be necessary to keep the contract alive, and the party's threat to breach the contract if there is no such extra payment or amendment may be legitimate.
- 1.4.6** By extension, it seems that if a party is making a demand which can be regarded in some sense as 'fair', that is unlikely to be considered illegitimate. Some caution should be exercised in this regard, though, given the uncertain role of good and bad faith in relation to economic duress.
- 1.4.7** More broadly, a threat to commit an act which is otherwise lawful is not in itself illegitimate, but it may be if it is accompanied by a demand which goes far beyond what would be normal or legitimate in commercial relationships (see in this regard *Sheikh Tabnoor Bin Saeed Bin Shakhboot Al Nehayan v Kent* [2018] EWHC 333 (Comm); [2018] 1 CLC 216, where it was held that a demand coupled with a threat to commit a lawful act would be illegitimate if there were no reasonable grounds for the demand and reasonable people would not consider the threat to be a proper means of reinforcing the demand).

***How can causation be proved?***

- 1.4.8** The second factor which needs to be addressed for a finding of economic duress is that of causation. This has been articulated in various contexts as meaning that the innocent party needs to show that it had no practical alternative but to agree to the demand in question, or that but for the illegitimate threat, it would not have agreed to the demand (*Huyton SA v Peter Cremer GmbH & Co* [1999] 1 Lloyd's Rep 620; *Sheikh Tabnoor Bin Saeed Bin Shakhboot Al Nehayan v Kent* [2018] EWHC 333 (Comm); [2018] 1 CLC 216). The precise interaction between these two articulations is not always clear, but it seems that the absence of a practical alternative may be evidentially important for demonstrating causation. In any event, it appears to be the case that if the innocent party had a reasonable alternative to agreeing to the demand in question, it will not – or will rarely – obtain relief.

***What is the effect of a finding of economic duress?***

- 1.4.9** If there is a finding of economic duress, this will render the contract voidable – not void. In other words, a party which has entered into a contract under economic duress can either affirm or avoid the contract after the duress has ceased.
- 1.4.10** This means that if the innocent party has voluntarily acted in accordance with the contract, with a full knowledge of all the circumstances, it may be found that it has affirmed the contract. This was what happened in *North Ocean Shipping Co Ltd v Hyundai Construction Co Ltd (The Atlantic Baron)* [1979] QB 705; while the court found that there had been economic duress, it also found that because the claimant had paid the extra monies and taken delivery of the ship (and had not raised its objections at any later stage), it had affirmed the contract.

If the contract is to be avoided, it must be avoided as a whole. 1.4.11

***Do the circumstances of the pandemic lend support to an argument of economic duress?***

As will be evident from the foregoing, whether an argument of economic duress can be successfully advanced will depend on the circumstances of the parties. It is not out of the realms of possibility for scenarios of potential economic duress to have arisen and to continue to arise as commercial parties struggle to stay afloat as a result of the pandemic. However, the bar for successfully making a case of economic duress is high. There is a difference between economic pressure and economic duress, and it should not be presumed that there has been a case of the latter where commercial parties have simply been engaged in hard bargaining (see in this regard *DSND Subsea Ltd v Petroleum Geo-services ASA* [2000] BLR 530, and *Morley (t/a Morley Estates) v Royal Bank of Scotland Plc* [2020] EWHC 88 (Ch)). 1.4.12

**Can performance of the contract simply be suspended? 1.5**

Where a party is experiencing difficulties with performance but does not wish to enter into a formal variation of the contract – perhaps because failure of performance looks to be only temporary – it may wonder if performance of the contract can simply be suspended. 1.5.1

There is no general right to suspend unilaterally performance of a contract under English common law. Individual contracts may contain express terms permitting suspension in specific circumstances (for example, in a *force majeure* clause – see [para. 1.9](#) below), and those terms should be examined with care. It may in other cases be possible to argue that there is an implied term to suspend performance in certain circumstances, provided that such term meets the usual test for an implied term (i.e. it can be implied through custom, through previous course of dealings, by fact (e.g. it is necessary to give business efficacy to the contract, or what a reasonable person would have understood the parties’ intentions to be), or by statute). 1.5.2

**How can a breach of contract be waived? 1.6**

***What is waiver?***

Waiver is the process by which a party gives up the right to enforce its legal rights or give up immunities (e.g. immunity from suit). To put it another way, in a contractual context a non-defaulting party may give up the right to insist on a contract being performed exactly in accordance with its terms. This doctrine has obvious attraction to a party in default of its obligations under a contract because of the pandemic, because it may be able to protect itself from legal action by the non-defaulting party for breach of contract by arguing that the non-defaulting party has waived its right to sue. 1.6.1

***How can a breach be waived by the non-defaulting party?***

A waiver may be oral or written or implied by conduct. There are three ways in which a breach of contract may be waived: 1.6.2

- (1) Waiver, release or variation by contract or deed;
- (2) Waiver by election;
- (3) Waiver by estoppel.

- 1.6.3** Whether there has been a waiver by contract or deed will depend on the construction of that written instrument and the usual considerations as to whether a binding contract has been concluded (i.e. consideration, etc.) will apply. If seeking to record a waiver the instrument should be carefully drafted to ensure that all breaches by the defaulting party have been covered as intended.
- 1.6.4** Waiver by election can only occur in specific circumstances, and only where there is a choice between two rights (so that a party can be said to have “elected” for his preferred right). The right to elect usually arises where a non-defaulting party has a contractual right or option to terminate or rescind the contract (so that the choice is between termination/rescission and continuing the contract). Another situation where it commonly arises (particularly in the context of sale of goods) is where a party has a right to reject a tender of performance as having been contractually compliant, or, conversely, to accept non-compliant performance as having been compliant: see, for example, *Motor Oil Hellas (Corinth) Refineries SA v Shipping Corporation of India (The Kanchenjunga)* [1990] 1 Lloyd’s Rep 391 (HL).
- 1.6.5** Note that for a waiver by election to have occurred, the electing party must be aware of the right of election (as well as having appeared objectively to have exercised it). The election must be outward, clear and unequivocal: *Insurance Corporation of the Channel Islands v The Royal Hotel Ltd* [1998] Lloyd’s Rep IR 151 at [162]-[163]. Whether waiver by election has occurred will depend on the circumstances, but note that it has been held that the mere giving of time to perform did not amount to an election: *State Securities plc v Initial Industry Ltd* [2004] EWHC 3482 (Ch); [2004] All ER (D) 317 (Jan). There is no requirement of reliance by the defaulting party for waiver by election to have occurred.
- 1.6.6** Waiver by estoppel differs from an election in that the waiving party may waive their rights without being aware of it. It also differs from waiver by contract since there is no requirement for consideration. The key elements are that the waiver must have been clear and unequivocal, and that the defaulting party must have acted in reliance on it. Readers are directed to the useful discussion in *Chitty on Contracts*, 33<sup>rd</sup> ed., from 22-040.
- 1.6.7** For a discussion of the distinction between waiver by election and waiver by estoppel, see *Kosmar Villa Holidays plc v Trustees of Syndicate 1243* [2008] EWCA Civ 147; [2008] Lloyd’s Rep IR 489, and also *Chitty on Contracts*, 33<sup>rd</sup> ed., from 24-088.

***Can parties contract out of waivers?***

- 1.6.8** There is often a clause in commercial contracts to the effect that any delay, neglect or forbearance in enforcing any term of the contract shall not be deemed a waiver of that term and/or that any alteration to the contract can only be achieved through fulfilling stipulated formalities (such as that any amendment must be in writing, signed by both parties). Any party seeking to rely on a waiver, particularly one made orally, should take steps to ensure that it is not prohibited in some way by the original contract.

**Termination, Repudiation, Force Majeure and MAC and MAE Clauses**

**1.7 When can a party rely on a contractual termination clause?**

- 1.7.1** Parties are free to agree by contract a termination regime which provides for a wide set of circumstances (e.g. reasonable notice, insolvency, one party making a certain assessment of the position) in which termination may take place, for the formalities of termination, and for its consequences; and a well-drafted commercial contract will typically include

such provisions. Parties should be aware of the impact that new legislation may have on insolvency-related termination rights: see [The Prohibition of Termination Clauses section](#) of Section Two: Corporate Insolvency below.

The general principles of interpretation apply to termination provisions as much as to any other contractual provisions. There are also specific points relevant to termination provisions which need to be considered. For example:

**1.7.2**

- (1) The court is likely to be reluctant to conclude that one party is entitled to terminate a relatively long-term contract, unless the contract is clear as to the circumstances in which the party seeking to terminate is entitled to do so: see e.g. *Sutton Housing Partnership Ltd v Rydon Maintenance Ltd* [2016] EWHC 1122 (TCC).
- (2) While provisions entitling a party to terminate in specified circumstances may be characterised as contractual discretions, the fetters which typically apply to the exercise of contractual discretions are less likely to apply, provided the specified circumstances apply: *Monde Petroleum SA v Westernzagros Ltd* [2016] EWHC 1472 (Comm); 167 Con LR 15; *Monk v Largo Foods Ltd* [2016] EWHC 1837 (Comm). That is not to say that fetters cannot ever apply (see e.g. *Bates v Post Office Ltd (No. 3: Common Issues)* [2019] EWHC 606 (QB) at [894]-[902]).

However, although the decision to terminate itself may not be subject to those usual fetters on contractual discretions, similar considerations of rationality, reasonableness, or good faith may nonetheless be in play, for example if (i) the availability of the termination provisions depends on the terminating party making a judgement on some issue before terminating (e.g. “If A concludes that X is the case he may terminate”) or (ii) the contract gives the terminating party some choice about the manner in which it terminates. Thus in the *Bates* decision cited above the Post Office had a contractual right to terminate on notice of “not less than three months” (see [893]); this gave it a discretion to determine how long the notice period should be, which was fettered – it could not choose the notice period arbitrarily.

**1.7.3**

A party which is considering terminating needs to work out which rights may in the circumstances be available to it at common law and under the contract, how the rights need to be exercised, and what consequences would flow from exercising those rights. If the parties are using a standard form contract it may be reasonably clear what the termination options are under the contract and at common law. Thus the case law establishes at least certain features of termination under the ISDA Master Agreement, for example in relation to whether termination for anticipatory breach is possible and what notice must be given (see e.g. *Marme Inversiones 2007 SL v NatWest Markets plc* [2019] EWHC 366 (Comm) discussed in *Firth: Derivatives Law and Practice* at 11.122).

**1.7.4**

But the task of working out what termination options are available may be less straightforward if a contract has bespoke termination provisions, which will require parties and their advisers to undertake a careful iterative process, comparing the position at common law with the terms of the contract, and assessing the sometimes complex interplay between them. For example:

**1.7.5**

- (1) On the one hand, the terms of the contract may affect the rights which would otherwise be available at common law (while it will be rare for the contract to exclude common law rights entirely: see e.g. *Stocznia Gdynia SA v Gearbulk Holdings Ltd* [2009] EWCA Civ 75; [2010] QB 27 at [28]-[29]). For example, the existence of a grace period to remedy a breach may prevent a common law right to terminate arising unless the grace period has elapsed: see e.g. *Vinergy International (PVT) Ltd v Richmond Mercantile Ltd FZC* [2016] EWHC 525 (Comm) at [28]-[29].

- (2) On the other hand, the common law, which is the inescapable background to whatever the parties may have agreed, may affect the interpretation of the terms of the contract. For example, express terms of the contract permitting termination for breach may be interpreted to apply only to breaches which would justify termination at common law: see e.g. *Dominion Corporate Trustees Ltd v Debenhams Properties Ltd* [2010] EWHC 1193 (Ch), distinguished in *Looney v Trafigura Bebeer BV* [2011] EWHC 125 (Ch).

**1.7.6** Having determined what termination options are likely to be available, a party then needs to decide which of its rights can be deployed to greatest advantage. If a contractual termination regime regulates the situation in a sensible way which will allow matters to be resolved amicably that may prove an attractive course. But if there is a potentially valuable damages claim if the party terminates at common law this course, although it may risk an expensive dispute arising, may overall be better.

**1.7.7** At this point, it is critical to have well in mind the extent to which termination rights can or cannot be exercised in tandem. A recent case discussed below (*Phones 4u Ltd (in administration) v EE Ltd* [2018] EWHC 49 (Comm); [2018] 2 All ER (Comm) 315) starkly illustrates how painful the consequences of getting this wrong can be. There is helpful guidance (from Leggatt J) on when contractual and common law termination rights can or cannot be exercised in tandem in *Newland Shipping and Forwarding Ltd v Toba Trading FZC* [2014] EWHC 661 (Comm). Although the case concerned the interplay of, on the one hand, the common law right to terminate and, on the other, a contractual right, the guidance probably applies just as well to the exercise of different contractual rights:

- (1) Where the consequences of the exercise of either right are inconsistent, an election is required, which means that the terminating party must “*clearly communicate its choice to exercise one of the rights rather than the other*”: [53].
- (2) Where the consequences of termination at common law and under a contractual provision are identical, “*it is not necessary to specify which right is being exercised to effect a valid termination*”: [54].
- (3) “*...in cases where the consequences of exercising two rights are different, but not inconsistent, it is necessary to make clear which right is being exercised or that both rights are being exercised; otherwise there will not be the certainty required for an effective termination*”: [54].

**1.7.8** *Phones 4u Ltd (in administration) v EE Ltd* [2018] EWHC 49 (Comm); [2018] 2 All ER (Comm) 315 illustrates what can go wrong when different termination options may be available but a party chooses to rely on one when terminating. EE’s notice to Phones 4u that it was terminating under a contractual provision in a distributorship agreement which entitled it to do so if Phones 4u went into administration had the unwelcome consequence (for EE) of precluding EE from a very substantial damages claim which it might otherwise have had. In order to claim damages EE needed to allege a breach of contract on the part of Phones 4u before it terminated on grounds of the latter’s entry into administration (which was not itself a breach). But Andrew Baker J decided that even if EE succeeded in establishing breach the substantial damages would not be available to it because the loss of the bargain for which EE claimed compensation was caused not by a breach by Phones 4u (as it would have been if EE had terminated at common law for repudiatory breach) but instead by EE’s decision to terminate due to the administration under the contractual provision. The fact that on EE’s case it could have terminated for repudiatory breach made no difference because as



a matter of fact it had not done so. Instead, it had relied on a right to terminate which arose independently of any breach.

The analysis in *Phones 4u* (particularly at [73]-[76]) repays attention when termination options may be available. In that case the right to terminate if Phones 4u went into administration was clearly a right which arose independently of any breach. Other rights to terminate will only arise if there is a breach, most obviously the right to terminate for breach at common law. But yet other rights to terminate provided for in a contract may arise in circumstances which may or may not involve a breach. For example, the contract may provide a party with a right to terminate if it concludes that the counterparty is in breach. If a party has so concluded, and its conclusion cannot be challenged on grounds of e.g. irrationality or bad faith, then it will validly have terminated under that provision whether or not the counterparty was in fact in breach. But can it also claim damages for its loss of bargain? If the terminating party is entitled to terminate at common law and validly does so, in addition to relying on its contractual right, there is no reason in principle why it should not also be able to claim those damages. But whether it is entitled to will depend on something different from the condition for the valid exercise of the contractual right (which was its own conclusion that there was a breach): it will depend on whether there was in fact a breach.

1.7.9

Having decided that one or more termination rights are available, and having decided which to rely on, the terminating party needs to get the formalities of termination right. This will involve complying with any contractual formalities which apply to the right being exercised. Although not all failures to follow formalities will make the termination invalid, they are all ammunition for the other side should a dispute arise. Notice of termination will always need to be clear, and this is particularly important where different and inconsistent rights may be in play.

1.7.10

At worst, a botched attempt by a party to terminate may itself amount to a repudiatory breach of contract entitling the counterparty to terminate at common law and claim loss of bargain damages: see e.g. *Regulus Ship Services Pte Ltd v Lundin Services BV* [2016] EWHC 2674; [2017] 1 All ER (Comm) 686 at [113] to [115].

1.7.11

### **What is the impact of a repudiatory breach?**

1.8

A repudiatory breach of a contract arises where one party has committed a breach of the contract which is so serious that the innocent party will have a right to choose either to accept the breach, bringing the contract to an end, or alternatively to affirm the contract. The unprecedented nature of the pandemic and its consequences over the past year mean that this is an issue likely to arise in contracts between parties across a range of industries.

1.8.1

In circumstances where such a breach may bring the contract to an end, only breaches of certain terms in the contract will be repudiatory. A breach of condition will usually suffice, as will breach of an intermediate term which deprives the innocent party of substantially the whole benefit of the contract. Renunciation of the contract – that is, a refusal by a party to perform its contractual obligations – may also amount to a repudiatory breach.

1.8.2

Where a party has committed a repudiatory breach, the innocent party has two options.

1.8.3

The first is to accept the breach, such that the contract will be discharged. If the innocent party wishes to follow this route, it must accept the repudiation (*Heyman v Darwins Ltd* [1942] AC 356) and make its acceptance clear and unequivocal to the other party. The acceptance of the repudiation does not need to be in a particular form (*Vitol SA v Norelf Ltd* [1996] AC 800), but the innocent party does need to make its acceptance “real”, by demonstrating

1.8.4

that it consciously intends to bring the contract to an end, or by doing something which is inconsistent with the contract continuing (*Geys v Société Générale, London Branch* [2012] UKSC 63; [2013] 1 AC 523). Unless and until the innocent party accepts the repudiation, the contract will continue to exist. Once the contract has been discharged, both parties are generally excluded from further performance of their primary obligations, although dispute resolution provisions will continue to have their full force and effect.

**1.8.5** The second option for the innocent party faced with a repudiatory breach is to affirm the contract. This is only an option if the innocent party is both aware of the facts which give rise to the breach, and of its legal right to choose either to accept the breach and terminate the contract, or to affirm the contract. Affirmation of the contract must be complete, not partial (*Suisse Atlantique Societe d'Armement Maritime SA v NV Rotterdamsche Kolen Centrale* [1967] 1 AC 361). Once an innocent party has chosen to affirm the contract, and the affirmation has been communicated to the other party, that choice also becomes irrevocable. However, in the case of continuing repudiatory breach, the fact that the innocent party has continued to press for performance will not normally preclude it at a later stage from choosing to accept the repudiation and treating the contract as discharged.

**1.8.6** A party choosing this second option can affirm the contract either expressly or impliedly. Mere inactivity will not imply affirmation, however – it will only be implied if the innocent party does something unequivocal from which it may be inferred that it intends to proceed with the contract in spite of the breach, or that it is not going to exercise its right to treat the contract as repudiated (*China National Foreign Trade Transportation Corp v Evlogia Shipping Co SA of Panama (The Mihalios Xilas)* [1979] 1 WLR 1018). Some caution should be exercised in this regard, since an innocent party which accepts performance by the other party after becoming aware of a repudiatory breach will be held to have affirmed the contract.

**1.8.7** The innocent party has time to decide whether to accept the repudiation or affirm the contract. The length of time afforded to it for these purposes will, unsurprisingly, depend on the facts of the case, but it is important to note that the contract will remain in force until it has been terminated for breach. Therefore, while the uncertainty of the current circumstances may tempt some parties to delay making a decision whether to terminate or affirm the contract, they should be aware that this carries the risk that they will be found to have affirmed the contract in spite of the other party's repudiatory breach.

**1.8.8** In either case, the innocent party can claim damages. Where it has chosen to accept the breach, it can potentially claim damages both for losses resulting from the breach, and for loss of a bargain (as long as the contract is consistent with the position at common law). Where the innocent party has affirmed the contract, damages can nonetheless be claimed in the normal way for loss suffered as a result of the breach.

## **1.9 When will a *force majeure* clause be engaged?**

### *What is a force majeure clause?*

**1.9.1** Most modern commercial contracts contain a clause which aims to protect the parties from a claim for breach of contract if they are unable to perform their obligations as a result of an event or class of events, generally beyond their control. Such clauses are generally referred to as *force majeure* clauses, even if they are not expressly labelled as such, and typically provide that if a trigger event occurs the party seeking to rely on the clause can suspend performance for the duration of that event; and in some cases provide for the termination of the contract.

An example of a *force majeure* clause can be seen in the judgment in the recent case of *2 Entertain Video Limited v Sony DADC Europe Limited* [2020] EWHC 972 (TCC). In that case, the defendant sought (unsuccessfully) to rely on the following clause as a defence to a claim for breach of contract in circumstances where a warehouse owned and occupied by the defendant was burned to the ground during rioting and looting in August 2011:

1.9.2

“14.1 Neither party shall be liable for its failure or delay in performing any of its obligations hereunder if such failure or delay is caused by circumstances beyond the reasonable control of the party affected including but not limited to industrial action (at either party), fire, flood, wars, armed conflict, terrorist act, riot, civil commotion, malicious damage, explosion, unavailability of fuel, pandemic or governmental or other regulatory action.

14.2 The obligations of the party affected (but not the Term) will be suspended to the extent and during the time its ability to fulfil such obligations is affected by such *force majeure*.

14.3 The affected party shall use all reasonable efforts to remedy the effects on its operations and resume normal operations as soon as is practicable.” (see [25]).

### ***How will force majeure clauses be interpreted?***

*Force majeure* clauses are simply a matter of contractual agreement. Consequently, their operation and effect is to be determined by applying the normal principles of contractual construction to determine the parties’ intention as to the true meaning and effect of the clause in question.

1.9.3

In the *2 Entertain Video* example set out above, the defendant claimed that the riots were the cause of the failure to perform, and were outside its reasonable control. That defence failed, the court holding that the cause of the inability to perform was not the rioting but the fire, and preventing the fire was within the reasonable control of the defendant. This case demonstrates that the court’s chief concern is to construe the parties’ agreement and hold them to it strictly.

1.9.4

Note that *force majeure* clauses will usually be construed strictly since their effect is far-reaching, in that they allow a party to be excused from performance of its contractual obligations without any damages being payable. The event which is relied upon by the defaulting party must have been in the contemplation of the parties at the time of contracting. If it was not, even if the event falls within the literal meaning of the clause, it might be said that the clause has not been triggered, and that the contract has been frustrated (see e.g. *Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour* [1943] AC 32).

1.9.5

However, note that recent Court of Appeal authority suggests that they are not to be construed *contra proferentem* (*National Bank of Kazakhstan v Bank of New York Mellon SA/NV, London Branch* [2018] EWCA Civ 1390; [2018] 2 CLC 103 at [50]). The wording used by the parties is therefore key. The court’s priority will be to determine the meaning of the clause using ordinary principles of construction. It has been held that the proper approach to a *force majeure* clause is to interpret it by reference to the actual words used by the parties, not their general intention (*Coastal (Bermuda) Petroleum Ltd v VTT Vulcan Petroleum SA (No 2) (The Marine Star)* [1996] 2 Lloyd’s Rep 383).

1.9.6

Many phrases in *force majeure* clauses are boilerplate, and will have been subject to previous litigation, and so where there is a query about the scope of a specific phrase, it is worth

1.9.7

checking whether that phrase has been the subject of a previous decision. This may provide useful guidance, although the factual matrix, the contemplation of the parties, and the circumstances of the inability to perform will always be important.

***Who bears the burden of proof in demonstrating that a force majeure clause has been engaged?***

- 1.9.8** The burden of proof in these situations will fall on the party which is seeking to rely on the *force majeure* clause, which is usually the party seeking to extract itself from its contractual obligations.

***What does a party seeking to rely on a typical force majeure clause have to demonstrate?***

- 1.9.9** A party seeking to rely on a typical *force majeure* clause will generally have to prove: that an event has occurred which is within the *force majeure* clause the parties have agreed; that the party's non-performance was due to unforeseeable circumstances beyond his control; that the trigger event prevented / hindered / delayed performance; that it was the sole cause of the non-performance; and that there were no reasonable steps that the non-performing party could have taken to avoid or mitigate the event or its consequences.

- (1) **Scope:** The precise scope of a *force majeure* clause will depend on the contents of the agreement in question, and it should only be used in agreements when it is properly defined. Where it has been used by itself in an agreement, with no definition as to specific circumstances or reference to customary or trade usage, it may be void for uncertainty, and thus ineffective: *British Electrical and Associated Industries (Cardiff) Ltd v Patley Pressings Ltd* [1953] 1 WLR 280. For this reason, in practice modern commercial contracts will generally define the events or types of events which the parties have agreed will amount to *force majeure*. As noted above, the clause will generally be interpreted relatively strictly.
- (2) **Unforeseeable events:** *Force majeure* clauses will often exclude foreseeable and/or foreseen events. The greater the foreseeability of an event, the greater the possibility that it was preventable or avoidable and thus within the control of the non-performing party (see *Fyffes Group Ltd v Reefer Express Lines Pty Ltd* [1996] 2 Lloyd's Rep 171). Even where there is no express requirement to this effect, authority suggests that this principle of interpretation will be applied (see e.g. *Lewison: The Interpretation of Contracts*, 7<sup>th</sup> ed., at 13.03). *Force majeure* clauses will be construed to exclude an event arising out of the defaulting party's negligence, save where there are clear words evidencing the contrary intent: *The Super Servant Two* [1990] 1 Lloyd's Rep 1.
- (3) **Impact on ability to perform:** A typical *force majeure* clause will state what the effect of the supervening event on the defaulting party's ability to perform needs to have been in order for the clause to be applicable, i.e. whether it must actually prevent performance, or merely hinder or delay performance.

In the case of the former category, the non-performing party must show that performance is physically or legally impossible – not just that it is more difficult or onerous (*Tennants (Lancashire) Ltd v CS Wilson & Co Ltd* [1917] AC 495). Mere “commercial impossibility” will not suffice. In particular, the courts have been wary of parties seeking to terminate a contract by way of *force majeure* when a change in economic conditions, the risk of which the parties are taken to have bargained for, simply means that it is less commercially attractive (see *Tandrin Aviation Holdings Ltd*

*v Aero Toy Store LLC* [2010] EWHC 40 (Comm); [2010] 2 Lloyd's Rep 668, *Seadrill Ghana Operations Ltd v Tullow Ghana Ltd* [2018] EWHC 1640 (Comm); [2019] 1 All ER (Comm) 34).

Where the event must simply hinder or delay performance, the threshold is lower and may be satisfied if performance is substantially more onerous, but not impossible. So, a merchant who is “unable to deliver unless he dislocates his business and breaks his other contracts in order to fulfil one surely hinders delivery”: *Tennants (Lancashire) Ltd v CS Wilson & Co Ltd* [1917] AC 495, 510. A mere increase in the cost of performance is unlikely to be sufficient, although an “astronomical” increase might be (*Holcim (Singapore) Pte Ltd v Precise Development Pte Ltd* [2011] SGCA 1). That said, it should be emphasised that it is all a question of construction of the clause itself, and there is no reason in principle why parties could not agree that increased costs would be a relevant hindrance.

- (4) **Causation:** On the current state of the authorities it seems it will be necessary to show that the supervening event was the sole cause of the non-performing party's inability to perform or its delay in performance (see *Seadrill Ghana Operations Ltd v Tullow Ghana Ltd* [2018] EWHC 1640; [2019] 1 All ER (Comm) 34). However, the Court of Appeal in *Classic Maritime Inc v Limbungan Makmur SDN BHD* [2019] EWCA Civ 1102; [2019] 4 All ER 1145 suggested that a distinction might be drawn between the causation test applicable depending on the use to which the *force majeure* clause is being put. If it is being used as a defensive shield in relation to a claim for actual breach, then a “but for” test applies; however, where it is being used as a “contractual frustration clause” – i.e. in order to bring the contract to an end and prevent future obligations arising – then no such “but for” test applies.
- (5) **Mitigation by non-performing party:** There must also have been no reasonable steps which the non-performing party could have taken to avoid or mitigate the supervening event or its consequences. The contract will often include an express obligation to mitigate (such as clause 14.3 in the example from the *2 Entertain Video* proceedings quoted above), but this obligation may be implied in any case (see for example *Channel Island Ferries Ltd v Sealink UK Ltd* [1988] 1 Lloyd's Rep 323). Therefore, a party will not be allowed to sit on its hands while relying on a *force majeure* clause – it will be expected to show that it took all reasonable steps to work around the supervening event, even if that renders performance significantly more costly and less profitable.

Note that a party that wishes to rely on a *force majeure* clause may also need to comply with any formality/procedural requirements for doing so stated in the contract. It is important that such formalities are complied with (*Bremer Handels GmbH v Vanden-Avenne Izegem PVBA* [1978] 2 Lloyd's Rep 109), especially if they are articulated as a condition precedent rather than merely an intermediate term.

1.9.10

***Might the pandemic entitle a party to rely on a force majeure clause?***

It follows from what has been set out above that the answer to this question is “possibly, depending on the terms of the *force majeure* clause, and the overall circumstances”.

1.9.11

First, does the *force majeure* clause in question, on its true construction, encompass the pandemic? Some clauses refer expressly to pandemics, such as the clause in the *2 Entertain*

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*Video* proceedings referred to above. Where a clause does not refer expressly to pandemics, then there might be a “wrap up” provision which can be construed to cover a pandemic.

- 1.9.13** Secondly, when was the contract entered into? If it was entered into once it became apparent that the contracting parties could be affected by the pandemic, it might be argued that the pandemic was a foreseeable event, and that the parties accepted the risk that there would be disruption as a result. This argument may be all the stronger if no express provision was made, particularly if the word “pandemic” was not used at all in the *force majeure* clause.
- 1.9.14** Thirdly, what has the effect of the pandemic been? Depending on the clause in question, has it made performance of the party’s obligations legally or physically impossible such that (if the clause so requires) performance has been prevented? The most obvious cause of impossibility is likely to be legal impediments which were introduced by the Government in response to the pandemic which in many cases will have rendered performance impossible because it would have been illegal. If the necessary test is a hindrance to performance, can that threshold be met? Could the debtor of the obligation have performed even if it was significantly more onerous or difficult to do so?
- 1.9.15** Fourthly, what mitigation steps has the non-performing party taken, and were they sufficient?
- 1.9.16** Fifthly, was the pandemic the sole cause of non-performance? For example, a business that was already in difficulties for other reasons and would not have been able to perform will not be able to rely on the pandemic as the cause of its breach.
- 1.9.17** Each case will, of course, be highly fact sensitive. However, some cases are likely to be relatively clear-cut: the social event, concert or party that has been cancelled because of social distancing rules being an obvious example. In those case, unfair as it may seem, unless performance can be made at a later date the consequence may well be that the paying party suffers a loss under the contract, not being able to sue for damages for breach of contract as a result of the *force majeure* clause. Hence, in such circumstances, a payor may wish to consider whether an action based on frustration might be available so that restitution may be obtained under the provisions of the Law Reform (Frustrated Contracts) Act 1943 (see [para. 1.11](#) below), or to look to their business insurance policy to see whether the loss might be insured.
- 1.9.18** Depending on the wording of the contract, thought should also be given to whether the *force majeure* event is the pandemic generally, or one or more “waves” of the pandemic in the UK, or one or more of the national lockdowns. This is particularly relevant to the fourth point above regarding mitigation, since it may be open to a non-defaulting party to argue that there has been the prospect of another “wave” of infections for some time and that the defaulting party should have taken steps to mitigate the impact of another wave.

***What are the consequences of successfully invoking a force majeure clause?***

- 1.9.19** The consequences of a *force majeure* clause, if successfully invoked, are most usually to suspend performance while the event continues or excuse liability for non-performance (usually while the event continues), rather than providing for automatic discharge of the contract. Clause 14.2 in the example from the *2 Entertain Video* proceedings quoted above is an example of such suspensory effect, albeit that the term of the contract itself was expressly not suspended, such that in practice, on that example, the continuation of the event for a sufficient period of time would in practice lead to the discharge of the obligation entirely. There may be an express right to terminate where a *force majeure* clause is invoked, and in theory there is nothing to prevent the parties from agreeing any consequences they so wish if the trigger event occurs.

***What are the practical steps a party should take if considering reliance on a force majeure clause?***

In terms of practical steps which should be taken when advising a client in relation to the application of a *force majeure* clause, the following are particularly pertinent: **1.9.20**

- (1) Consider the precise wording of the clause, plus the contract as a whole and the circumstances which have arisen.
- (2) Consider whether there are any alternative means of the defaulting party carrying out its obligations under the contract. Remember that increased costs of performance will not usually suffice to excuse non-performance or delay.
- (3) Serve any notices as required in accordance with the provisions of the contract, and as soon as possible or (if advising a potential claimant) be alert to the consequences of the debtor of the obligation failing to do so and take steps to ensure no waiver or estoppel arguments could later be made.
- (4) Keep a detailed contemporaneous documentary record: this may prove invaluable in relation to causation and mitigation, in particular if the dispute ends in litigation.

***What if the contract does not contain a force majeure clause?***

English law, as distinct from some other legal systems including French law, from which the term is derived, does not have a freestanding doctrine of *force majeure*: there is no statutory or common law basis for the operation of *force majeure* to protect a non-performing party. *Force majeure* clauses are simply a matter of contractual agreement. Consequently, their operation and effect is to be determined by applying the normal principles of contractual construction to determine the parties' intention as to the true meaning and effect of the clause in question, as set out above. If a contract does not contain a *force majeure* clause, it will fall to the person seeking to be relieved from their contractual obligations to show that some other principle should apply. **1.9.21**

**When will a material adverse change or a material adverse effect clause be engaged? **1.10****

***What is a material adverse change clause?***

Material adverse change (“**MAC**”) clauses (sometimes also called material adverse effect (“**MAE**”) clauses) are aimed at addressing unforeseen or unpredictable events which affect one party or both parties to a contract. They usually permit the contract to be terminated by a party if a material adverse change has occurred in respect of another party to the contract. **1.10.1**

Such clauses are found in most types of lending transactions. They operate to relieve lenders of continuing obligations in circumstances where the borrower's financial circumstances have deteriorated to such an extent that its ability to repay is threatened. They are also often found in acquisition agreements, and mean that the purchaser can avoid proceeding with the acquisition if there is a material adverse change before the deal closes. **1.10.2**

The form of MAC and MAE clauses in England can differ substantially depending on the nature and context of the transaction in question, and the MAC or MAE may have been negotiated in specific terms. The clause in question may be straightforwardly defined, or it may be long and detailed with multiple exceptions, and exceptions to those exceptions (see, for example, the clause in *Travelport Limited and Ors v WEX* [2020] EWHC 2670 (Comm), set out at [46] of the judgment). **1.10.3**

***How are material adverse change and material adverse effect clauses interpreted?***

- 1.10.4** Whether or not a material adverse change or effect has taken place will be a question of fact. However, there may well be a live dispute as to the proper interpretation of the relevant clause.
- 1.10.5** The treatment of MAC and MAE clauses by the English courts is limited. The leading case can reasonably be regarded as the recent judgment of *Travelport*, which concerned a MAE clause in the context of a share purchase agreement. *Ipsos SA v Dentsu Aegis Network Limited* [2015] EWHC 1726 (Comm), a judgment of Blair J, is another such case, but, being a summary judgment/strike out application, perhaps has rather less utility. There are two other notable cases which concerned MAC clauses in the context of banking transactions, namely *BNP Paribas v Yukos Oil Company* [2005] EWHC 1321 (Ch) (Evans-Lombe J) and *Grupo Hotelero Urvasco v Carey Value Added* [2013] EWHC 1039 (Comm) [2013] EWHC 1039 (Comm) (another judgment from Blair J).
- 1.10.6** However, it is clear even from that limited body of case law that the interpretation of a MAC clause will be undertaken in accordance with general principles of contract law, as is clear from all of the cases cited above. Further, the case law of other common law jurisdictions where MAC or MAE clauses have come before the courts – notably the Delaware Court of Chancery – may give some insight into how such clauses should be interpreted in this jurisdiction and will be regarded as persuasive (as was recognised by Cockerill J in *Travelport* from [176], and see also the approach taken by Blair J in *Urvasco*, in particular at [335], [360] and [364]).

***Who has the burden of proof in demonstrating that a material adverse change has occurred?***

- 1.10.7** The general burden of proof of demonstrating that a material adverse change has occurred will fall upon the party which is seeking to rely on the MAC or MAE clause in question.<sup>1</sup> The position may be nuanced where a party is relying on an exception to the general applicability of the clause and authority from insurance cases may be relevant: see *Travelport* at [276]-[279].

***Might the pandemic entitle a party to rely on a material adverse change clause?***

- 1.10.8** The answer to this question necessarily depends on the terms of the MAC or MAE clause and the specific circumstances of the parties. A MAC clause which refers to a deterioration in a company's business prospects may be more easily triggered by the pandemic and associated government measures than one which requires a proven deterioration in the company's financial position.
- 1.10.9** For MAC or MAE clauses in the latter category, it may well be the case that such a material adverse change is the result of the pandemic, especially for businesses in the retail and hospitality sectors, but simply citing the pandemic as a change will not suffice. In this regard, it is worth noting that the events which gave rise to the *Urvasco* case mentioned above took place against the backdrop of the 2007-2009 financial crisis. That crisis was only relevant, however, insofar as it played a part in the deterioration in the borrower's financial condition.

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<sup>1</sup> In *Travelport*, the defendant buyer conceded that the general burden of proof as to establishing a MAE lay on it rather than the claimant sellers, notwithstanding that the action had been brought by the sellers for, *inter alia*, a declaration that there was no MAE.



The MAC or MAE clause may also contain specific exemptions relating to pandemics. The MAE clause in *Travelport*, for instance, contained various carve-outs of events of which one was permitted to take account when calculating whether there had been a MAE. The effect of the clause was that any effects arising solely from pandemics were not to be taken into account unless the pandemic had disproportionately affected the business of the companies for sale, as compared with other participants in the industries in which the companies participated. That in turn required an analysis of the industries in which the companies participated, the participants within them, and how the comparison to determine “disproportionality” was to be undertaken. This case underlines the extent to which entitlement to rely on a MAC or MAE clause in the context of the pandemic will depend heavily on both the wording of the contract and the specific facts of the case. **1.10.10**

## **Impossibility and Frustration**

**When will a contract be frustrated?** **1.11**

### ***What is frustration?***

The classic statement of the doctrine of frustration in English law is found in *Davis Contractors Ltd v Fareham Urban District Council* [1956] AC 696, 729: “*frustration occurs whenever the law recognises that without default of either party a contractual obligation has become incapable of being performed because the circumstances in which performance is called for would render it a thing radically different from that which was undertaken by the contract. Non haec in foedera veni. It was not this that I promised to do.*” **1.11.1**

Frustration of a contract is the automatic discharge of a contract by reason of a supervening event for which neither party to the contract is responsible. What matters is that the supervening event makes fulfilment of the contract impossible, or radically transforms the performance obligation from that undertaken at the outset. **1.11.2**

This is a high threshold, and it is important to note at the outset that it is one which is often difficult to meet. In the words of Rix LJ at [111] in *The Sea Angel* [2007] EWCA Civ 547; [2007] 2 All ER (Comm) 634, the doctrine of frustration is “*not to be lightly invoked...there has to be as it were a break in identity between the contract as provided for and contemplated and its performance in the new circumstances*”. This approach was reiterated in the recent decision in *Canary Wharf (BP4) T1 Limited v European Medicines Agency* [2019] EWHC 335 (Ch); 183 Con LR 167, which also contains a helpful review of the authorities in this area. **1.11.3**

### ***How does frustration interact with force majeure?***

It will be observed from the foregoing that there may appear to be some overlap between the ability to rely on the doctrine of frustration and the ability to rely on a *force majeure* clause: both generally require an external event outside the control of the parties. However, the consequences of frustration differ from the engagement of a *force majeure* clause: if a contract is frustrated, then the contract is discharged and the parties are automatically and completely released from their contractual obligations; the effect of a *force majeure* clause will depend on the wording of the clause (often the position is only that the contract is suspended). **1.11.4**

Note that a *force majeure* clause which has been carefully drafted may displace the doctrine of frustration altogether. However, it is important to note in this regard that such clauses are interpreted narrowly by the court. **1.11.5**

- 1.11.6** Provision for the event in question must be “*full and complete*” (*Bank Line Ltd v Arthur Capel & Co* [1919] AC 435), and it seems that it will be extremely difficult, if not impossible, to have a *force majeure* clause which completely excludes the operation of the doctrine of frustration.
- 1.11.7** In particular, if a *force majeure* clause provides that performance obligations set out in the contract will be suspended upon a particular event, the suspension may be expressed to apply only to temporary interruptions in performance, and so may not apply where performance is impossible or futile for the whole term of the contract.

***How does the Court determine whether a contract has been frustrated?***

- 1.11.8** The Court will take into account a range of factors in determining whether a contract has been frustrated. The need to adopt a multi-factorial approach to this question meant that the court in the recent case of *Natixis v Famfa Oil Ltd* [2020] 2 WLUK 330 was unwilling to summarily strike out a defence based on frustration.
- 1.11.9** Quite what these factors are will vary from case to case. However, they have been held to include: (1) “*the terms of the contract itself, its matrix or context*”; (2) “*the parties’ knowledge, expectations, assumptions and contemplations, in particular as to risk as at the time of the contract, at any rate so far as these can be ascribed mutually and objectively*”; and (3) “*the nature of the supervening event and the parties’ reasonable and objectively ascertainable calculation as to the possibilities of future performance in the new circumstances*” (per Rix LJ at [111] in *The Sea Angel* [2007] EWCA Civ 547; [2007] 2 All ER (Comm) 634).
- 1.11.10** There is no limit to the different types of supervening event which may operate to frustrate a contract, although the case law has developed various categories of such events:
- (1) **The whole purpose of the contract has been rendered obsolete:** This was considered in the authorities known collectively as the ‘coronation cases’, which arose out of the postponement of King Edward VII’s coronation at the beginning of the twentieth century, and which include *Krell v Henry* [1903] 2 KB 740, *Herne Bay Steam Boat Company v Hutton* [1903] 2 KB 683, and *Chandler v Webster* [1904] 1 KB 493. Those authorities necessarily considered what the purposes of the contracts in question were, even though they had all been entered into against the backdrop of the coronation. Whether they were frustrated varied depending on whether the foundation of the contract was in fact the coronation or not. Therefore, where the sole purpose of a room hire was the letting and hiring of a view of the coronation procession, that contract had been frustrated by the postponement (*Krell v Henry*). By contrast, where a steamship had been hired both for the purpose of viewing a Royal Naval review and for “*a day’s cruise around the fleet*”, and the naval review was cancelled, the contract for hire was not frustrated (*Herne Bay Steam Boat Company v Hutton*): the postponement did not affect the substance of the hiring, but only the profit which the hirer hoped to make.
  - (2) **Supervening illegality, i.e. where there has been a change in law:** This arises where a supervening change in law has made it unlawful for one of the parties to perform their obligations under the contract. This was the case in *Metropolitan Water Board v Dick Kerr & Co* [1918] AC 119. Shortly before the beginning of the First World War, the parties had entered into a contract for the construction of a reservoir within six years. In 1916, the contractors were required to cease work pursuant to a notice from the Ministry of Munitions, and did so. The water board argued that the contract was

still binding, but the House of Lords held that the interruption created by the 1916 notice meant that the contract had become a different contract from that originally agreed, and that the contract had ceased to be operative.

- (3) **Delay:** A contract may be frustrated by delay, although it can often be difficult to determine when this is the case. Lord Roskill observed in *Pioneer Shipping Ltd v BTP Tioxide Ltd (The Nema)* [1982] AC 724 at 752: “Whether or not the delay is such as to bring about frustration must be a question to be determined by an informed judgment based upon all the evidence of what has occurred and what is likely thereafter to occur. Often it will be a question of degree whether the effect of delay suffered, and likely to be suffered, will be such as to bring about frustration of the particular adventure in question.” Note that in order to bring about frustration, the delay must be abnormal, such that it falls outside what was reasonably expected by the parties (objectively ascertained) at the time of contracting; *Blankley v Central Manchester and Manchester Children’s University Hospitals NHS Trust* [2014] EWHC 168 (QB); [2014] 1 WLR 2683 at [40].

In addition to these, a contract may be frustrated where its performance has become impossible due to the destruction of the contract’s subject-matter, or where, in the case of a contract for personal services, the provider of those personal services has died. **1.11.11**

***Will the pandemic frustrate a contract?***

In short – it will depend on the contract in question. **1.11.12**

A sensible starting-point when considering whether a contract has been frustrated by the pandemic would be to consider the factors mentioned by Rix LJ in his judgment in *The Sea Angel* (quoted above), and whether the pandemic and its effects mean that performance of the contract is now something “radically different” from that envisaged at the time when the contract was entered into. **1.11.13**

It will also be sensible to consider whether the situation maps onto one of the established categories of frustration set out above. For example, it may be the case that a hotel room was booked for a particular event, but the event was cancelled and the hotel closed, such that the purpose of the contract was rendered obsolete as in the ‘coronation cases’. In this regard, however, it is important to note that the fact that one party no longer needs the services or product in the contract does not necessarily mean that the contract has been frustrated. **1.11.14**

Alternatively, there may be a case of supervening illegality if performance of the contract was rendered unlawful by the provisions of the Coronavirus Act 2020 or the Health Protection (Coronavirus, Restrictions) Regulations 2020. Here, too, however, some caution will need to be exercised in order to determine whether performance would really have been unlawful in the circumstances. **1.11.15**

Parties should remember that increased cost of performance or the hindering of performance does not mean that performance is impossible, and should also check the details of any *force majeure* clause in the contract, remembering that it will need to be “full and complete” in order to displace the doctrine of frustration. **1.11.16**

***What happens to a contract which has been frustrated?***

Where a contract has been frustrated, it will be automatically brought to an end. The parties are excused from any further performance and are excused from liability for damages for any **1.11.17**

such non-performance, without any consideration of the parties' intentions or wishes. The severity of these consequences should not be underestimated, and it is unsurprising that the doctrine has been described as the “*nuclear option*”.

***What are the financial consequences of frustration?***

- 1.11.18** This is addressed by the Law Reform (Frustrated Contracts) Act 1943 (the “**1943 Act**”), which effectively operates to prevent the unjust enrichment of either party to the contract at the other's expense.
- 1.11.19** Section 1(2) provides that sums which have been paid under the contract by one party before the frustrating event can be recovered, and that any sums which were payable before the frustrating event but unpaid do not need to be paid.
- 1.11.20** A party may also be able to recover expenses which it has incurred in performing its contractual obligations prior to the frustrating event, or to retain payment which it has received from the other party to the contract in order to reflect those expenses.
- 1.11.21** In addition, where a party has obtained a non-monetary ‘valuable benefit’ before the discharge of the contract, s. 1(3) provides that the other party may recover a sum to reflect that. Once the benefit has been identified, it will need to be valued by the court so that it can determine the appropriate sum to be recovered. In carrying out this exercise, the court will have regard to all the circumstances of the case.
- 1.11.22** Section 2(4) provides that where there is a part of the contract in question which can be severed from the rest of the contract and was wholly performed before the discharge, that part will be treated as though it were a separate contract which has not been frustrated.
- 1.11.23** Section 2(5) provides that the 1943 Act does not apply to four types of contract, namely charterparties, contracts for the carriage of goods by sea, contracts of insurance, and contracts for the sale of specific goods which perish.
- 1.11.24** It is in theory possible for parties to contract out of the 1943 Act by making provision for the consequences of a frustrating event, and it may also be possible to bring a common law claim in unjust enrichment where a payment has been made after the frustrating event.

***Should one argue frustration?***

- 1.11.25** The seriousness and permanence of the consequences of frustration, together with the need to show that the affected obligations are fundamental to the contract, mean that the courts will typically be reluctant to find that a contract has been frustrated. Parties should bear this in mind when considering whether to argue frustration, although it is inevitable that there will be circumstances where contracts have been frustrated by the pandemic and its effects.
- 1.11.26** More broadly, parties should bear in mind the serious consequences of frustration in circumstances where they may wish to maintain a commercial relationship with the other party to the contract. In this regard, it is worth noting the UK Cabinet Office note of 7 May 2020 (*Guidance on responsible contractual behaviour in the performance and enforcement of contracts impacted by the Covid-19 emergency*<sup>2</sup>), together with the [update published on 30 June](#)

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2 [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/883737/\\_Covid-19\\_and\\_Responsible\\_Contractual\\_Behaviour\\_\\_web\\_final\\_\\_7\\_May\\_.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/883737/_Covid-19_and_Responsible_Contractual_Behaviour__web_final__7_May_.pdf) (accessed 1 February 2021).

2020<sup>3</sup>. That guidance asks parties to act responsibly and fairly in performing and enforcing contracts. While it has no legal force, it would be surprising if courts did not try to give some effect to the spirit of the note in relevant cases.

## Other Rights in the Event of a Breakdown in Pre-Contractual Negotiations

### **What options may a party have if negotiations for a contract break down due to the pandemic? 1.12**

This section highlights recent caselaw which parties and their advisers will wish to have in mind where the pandemic has caused negotiations to hit a brick wall, and an anticipated deal had not been done, whether because of logistical challenges (e.g. an inability to perform due diligence on a property by conducting a site visit) or a change in the business rationale for the deal. 1.12.1

As a starting point, it is always important to interrogate the premise that no deal has been done – i.e. that no enforceable contract has been formed. Could there be an enforceable oral agreement, even if the deal has not been documented? Is there a concluded agreement in respect of some aspect of the overall anticipated transaction but not others? The answers to these questions will all of course depend on a detailed examination of the evidence but market practice may also be important – for example, it may be the case that, in the particular market, contracts are formed by oral agreement which is subsequently documented. The legal principles as to whether or not a binding contract has been concluded were restated by the Supreme Court in *RTS Flexible Systems Ltd v Molkerei Alois Müller GmbH & Co KG* [2010] UKSC 14 at [45]: 1.12.2

*“The general principles are not in doubt. Whether there is a binding contract between the parties and, if so, upon what terms depends upon what they have agreed. It depends not upon their subjective state of mind, but upon a consideration of what was communicated between them by words or conduct, and whether that leads objectively to a conclusion that they intended to create legal relations and had agreed upon all the terms which they regarded or the law requires as essential for the formation of legally binding relations. Even if certain terms of economic or other significance to the parties have not been finalised, an objective appraisal of their words and conduct may lead to the conclusion that they did not intend agreement of such terms to be a pre-condition to a concluded and legally binding agreement.”*

The force of the final sentence from that passage in *RTS Flexible Systems Ltd*, particularly in circumstances where parties proceed on the basis that there is a contract between them, is clear from the Supreme Court’s recent decision in *Devani v Wells* [2019] UKSC 4; [2020] AC 129, in which the Court, overturning the Court of Appeal, allowed an estate agent to recover an orally agreed commission. The Court of Appeal had held that the lack of any express mention of the trigger for the payment of commission in the short conversation between the seller and the estate agent made the agreement too uncertain to be an enforceable contract. But the Supreme Court considered that the lack of express mention of the trigger did not 1.12.3

3 [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/899175/\\_Update\\_-\\_Covid-19\\_and\\_Responsable\\_Contractual\\_Behaviour\\_-\\_30\\_June\\_\\_final\\_for\\_web\\_.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/899175/_Update_-_Covid-19_and_Responsable_Contractual_Behaviour_-_30_June__final_for_web_.pdf) (accessed 1 February 2021).

matter because, absent that, the reasonable person would understand that commission would be payable on the “usual terms”, i.e. out of the proceeds of any sale (Lord Kitchin JSC at [23]).

**1.12.4** The Supreme Court considered that this result was open to it as a matter of interpretation, although it would have reached the same result by the implication of the payment trigger as an implied term. This approach is open to question, in that a case in which market practice fills in a gap which the parties have not addressed would appear to be a textbook case for implication of a term. But for practical purposes the decision is a clear illustration of the court’s willingness to use a variety of legal tools to uphold a deal which has been acted on, even if at first blush there appear to be gaps to be filled if the contract is to be made workable.

**1.12.5** If a court decides that no contract has been concluded it is fundamental that a court will not force the parties to reach agreement, even if the parties have in some way committed themselves (perhaps in a preliminary agreement entered into before the main transaction) to seeking to agree. This was recently reaffirmed by the Court of Appeal in *Morris v Swanton Care & Community Ltd* [2018] EWCA Civ 2763. (The position is different where there is no issue as to whether a contract has been entered into at all, and the question is whether an “agreement to agree” as to future matters during performance is enforceable; this will depend in part on whether the parties have agreed objective criteria which the court can itself apply to decide the matter to be agreed, if agreement is not forthcoming.)

**1.12.6** If the law of contract says that no contract has been concluded the law of unjust enrichment may nonetheless enable a party which has made payments or provides services in anticipation of an agreement to a restitutionary remedy. This is now a well-established type of unjust enrichment claim: see *Goff & Jones: The Law of Unjust Enrichment*, 9<sup>th</sup> ed., chapter 16. There has been a series of recent cases which consider application of unjust enrichment principles in this context, including, for example: *MSM Consulting Ltd v United Republic of Tanzania* [2009] EWHC 121 (QB); *AMP Advisory & Management Partners AG v Force India Formula One Team Ltd (in liquidation)* [2019] EWHC 2426 (Comm); and *Dowman Imports Ltd v 2 Toobz Ltd* [2020] EWHC 291 (Comm). The first of these cases, *MSM Consulting Ltd*, includes at [171] a useful restatement of the principles specific to this type of unjust enrichment claim which has been relied on in subsequent cases. In summary:

- (1) The claimant’s cost of demonstrating its skills to the defendant as part of bidding for the contract cannot generally be recovered.
- (2) The court can impose an obligation where the defendant received an incontrovertible benefit in the knowledge that the services were not intended to be given freely.
- (3) The court can however conclude that in the circumstances the risk should fall on the claimant.
- (4) It may be just to impose an obligation if the defendant behaved unconscionably in declining to pay for a benefit received.

**1.12.7** Many more claims of this kind may be expected in the wake of the pandemic. Often a claim of this kind is brought in conjunction with a contract claim, and it can be a valuable weapon to deploy in a dispute for negotiation purposes. The outcome of these claims is highly fact-specific, depending critically on why the work has been done or the payment has been made, why the negotiations for the contract have broken down, and what if any expectations the parties had about which of them would bear the risk if no contract resulted from negotiations. In respect of the last of these, market practice may be just as important as it can be in cases about the formation of contracts, discussed above.

# Section Two

## CORPORATE INSOLVENCY

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*Law stated as at: 1 February 2021*

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## **Introduction**

### ***The Corporate Insolvency and Governance Act 2020***

- 2.0.1** The [Corporate Insolvency and Governance Act 2020](#) (the “Act” or “CIGA 2020”) was the most dramatic transformation of UK insolvency law since the Enterprise Act 2002. It effected important and fundamental changes in the corporate insolvency regime.
- 2.0.2** Some of the provisions did not come as any surprise to practitioners. They were on the cards since the Government consulted on its *‘Review of the Corporate Insolvency Framework’* in May 2016. However, the Government accelerated the implementation of the review as part of its response to the coronavirus pandemic. These are permanent legal changes.
- 2.0.3** Other provisions were novel. The Government created these as additional weapons to help businesses fight back against the pandemic’s financial effects. These are temporary changes. These provisions were initially applicable until 30 September 2020, but have been extended (to a variety of dates between 30 March 2021 and 30 April 2021) by the [Corporate Insolvency and Governance Act 2020 \(Coronavirus\) \(Extension of the Relevant Period\) Regulations 2020](#), the [Corporate Insolvency and Governance Act 2020 \(Coronavirus\) \(Suspension of Liability for Wrongful Trading and Extension of the Relevant Period\) Regulations 2020](#), and the [Corporate Insolvency and Governance Act 2020 \(Coronavirus\) \(Extension of the Relevant Period\) \(No. 2\) Regulations 2020](#).
- 2.0.4** The Act’s overall aim and purpose is to support the development of the ‘rescue’ culture. Therefore, its specific and urgent objective, at this time of the pandemic, is to “*provide businesses with the flexibility and breathing space they need to continue trading ... helping them avoid insolvency during this period of economic uncertainty*”.<sup>4</sup>
- 2.0.5** CIGA 2020 was brought to the statute books rapidly. The Bill was introduced to Parliament on 20 May 2020. It received Royal Assent just over a month later, on 25 June 2020, and the Act came into force on 26 June 2020.

### ***Permanent changes and temporary changes***

- 2.0.6** The permanent changes to the insolvency regime, implementing the 2016 review’s proposals, are for:
- (1) a new moratorium for financially distressed companies;
  - (2) a new restructuring plan; and
  - (3) provisions relating to termination clauses in supplier contracts.

The temporary changes are for:

- (1) new rules relating to statutory demands and winding-up petitions; and
- (2) the temporary suspension of the wrongful trading laws.

### ***The topics addressed in this Corporate Insolvency section***

- 2.0.7** Each of the topics referred to above is addressed in detail below.

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<sup>4</sup> See para. 1 of the Explanatory Notes to the Act, which can be found online at: [https://www.legislation.gov.uk/ukpga/2020/12/pdfs/ukpgaen\\_20200012\\_en.pdf](https://www.legislation.gov.uk/ukpga/2020/12/pdfs/ukpgaen_20200012_en.pdf) (accessed 1 February 2021).

The text below also addresses a number of additional topics that do not arise out of CIGA 2020, but which nonetheless will be important to companies facing financial difficulties.

By way of brief introduction to each topic:

- (1) **Moratorium:** The Moratorium is a free-standing breathing space to enable companies to keep their creditors at bay while exploring the possibility of rescuing and restructuring their businesses. It does not have to be tied into any formal insolvency process such as an administration. CIGA 2020 creates the relevant provisions by inserting a new Part A1, with new Schedules ZA1 and ZA2, into the Insolvency Act 1986 (“**IA 1986**”).
- (2) **Restructuring Plans:** A Restructuring Plan enables a company in financial difficulties to enter into a court-sanctioned compromise or arrangement with its creditors or members with a view to surviving the difficulties. CIGA 2020 creates the relevant provisions by inserting Part 26A into the Companies Act 2006 (“**CA 2006**”). The provisions have some similarities to Part 26, CA 2006, dealing with schemes of arrangement, but also include important new concepts – including, notably, the ability to ‘cram down’ dissentient creditors and members.
- (3) **Termination clauses:** CIGA 2020 prevents suppliers of goods or services from relying on the fact that a company has gone into an insolvency procedure for the purposes of terminating the contract under which the supply is made. The intention is to enable the company to carry on trading through the rescue and restructuring process, to increase the likelihood of a corporate rescue or a sale of the business as a going concern. The prohibition is not necessarily a blanket one. There is an attempt to strike a balance by allowing termination in some circumstances, particularly if hardship would be caused to the supplier. There is also a temporary exemption for ‘small’ suppliers during the circumstances of the pandemic.
- (4) **Statutory demands and winding-up petitions:** The provisions in relation to statutory demands and winding-up petitions are temporary provisions, applying during the circumstances of the pandemic. They impose prohibitions on the use of statutory demands and restrictions on the presentation of winding-up petitions, mostly in circumstances where the pandemic has had an adverse effect on the company’s financial circumstances. The courts have already made important case law in this regard, even before CIGA 2020 came into force, by anticipating the legislation’s retrospective effect. The cases are referred to below.
- (5) **Wrongful trading suspension:** CIGA 2020 temporarily suspended the wrongful trading laws (i.e. ss. 214 and 246ZB, IA 1986) during the immediate circumstances of the pandemic. That suspension expired on 30 September 2020; however, on 26 November 2020, the Government introduced The Corporate Insolvency and Governance Act 2020 (Coronavirus) (Suspension of Liability for Wrongful Trading and Extension of the Relevant Period) Regulations 2020, which once again suspend the wrongful trading laws until 30 April 2021. The aim is that directors should not feel under pressure to close down a business when there might be a good chance that it can trade through its difficulties and survive.
- (6) **Administration:** Some recent developments in the law relating to administrations have arisen out of the circumstances relating to the pandemic.

- (7) **Procedure:** The courts have developed a number of procedural responses to the conduct of insolvency-related litigation in light of the pandemic.

***Related materials***

- 2.0.9** For those who are interested in the background of CIGA 2020, a wealth of related material can be found on the [Parliamentary website](#),<sup>5</sup> including records of the Parliamentary debates and the Explanatory Notes.
- 2.0.10** The Government has also published a series of [Factsheets](#). These provide further detail and background to each of the matters that CIGA 2020 addresses, with a summary of what the Government intends the provisions to achieve.
- 2.0.11** A number of statutory instruments and practice statements have already been brought into operation to support some of the new provisions. These are referred to in the relevant parts of the text below. The main [Insolvency Proceedings Practice Direction](#) (“**Insolvency Practice Direction**”) has been updated. A new, supplemental, [Insolvency Practice Direction relating to the Corporate Insolvency and Governance Act 2020](#) (“**CIGA 2020 Practice Direction**”) deals with a few specific matters relating to winding-up petitions and moratoriums. Finally, as noted above, the ‘Relevant Period’ (a term which is used in various provisions of the CIGA 2020, but which does not always refer to the same date) has been extended by the [Corporate Insolvency and Governance Act 2020 \(Coronavirus\) \(Extension of the Relevant Period\) Regulations 2020](#) and the [Corporate Insolvency and Governance Act 2020 \(Coronavirus\) \(Extension of the Relevant Period\) \(No. 2\) Regulations 2020](#).

***Practical matters***

- 2.0.12** Debtor companies, their creditors, their members, and their employees, are facing financial issues of great concern and complexity. CIGA 2020 seeks to ameliorate the situation where possible, but the complexity of the situation is heightened by the Act’s attempt to strike a balance between the needs of debtors and creditors. As always, there is an inherent tension in a rescue culture. One company’s rescue might be another company’s downfall. Allowing debtor X a moratorium not to pay creditor Y might cause financial difficulties for Y who might in turn be debtor Y to creditor Z. If Y were driven to a moratorium too, that might cause difficulties for Z, and so forth. There is rarely an easy solution.
- 2.0.13** It is therefore essential that businesses understand how the law is changing and why, and how if possible they can use the new provisions to their advantage. The watchword is, of course, that forewarned is forearmed. Businesses should be planning ahead, with a knowledge of the provisions at their (or at least at their advisers’) fingertips.
- 2.0.14** Indeed, businesses should note that ‘insolvency’ in the context of CIGA 2020 is something of a misnomer. CIGA 2020 aims where possible to prevent insolvency, for example by allowing some of its provisions to be invoked at the anterior (and undefined) stage of ‘financial difficulties’ that may affect a company’s ability to carry on business as a going concern. Businesses should therefore be ready to deploy the Act’s armoury at the earliest possible stage.

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<sup>5</sup> These documents can be found online at: <https://services.parliament.uk/Bills/2019-21/corporateinsolvencyandgovernance.html> (accessed 1 February 2021).

In particular, debtors and creditors should be alive to five matters:

2.0.15

- (1) They should work alongside, and not against, each other from an early stage. The risk of a domino effect caused by the collapse of any one company in a chain is particularly high at present.
- (2) If nonetheless there are likely to be problems, debtors and creditors must be on top of their contractual documentation. The termination clause provisions discussed below are particularly important. Debtors and creditors need to understand their contractual frameworks. There are likely to be fast-moving situations in which they must know immediately which provisions they can invoke and when.
- (3) They must be on top of their financial position. They must have the relevant details close to hand in case they might need to produce evidence at short notice for any court hearing. For example, debtors applying for a restructuring plan will need to show the relevant ‘financial difficulties’. Creditors wishing to invoke a termination clause might wish to show ‘hardship’.
- (4) Situations that might lead to a corporate collapse are likely to develop quickly. They must understand not only the substantive legal provisions but also the procedural provisions and the relevant timetabling. The necessary steps must be taken on time and correctly.
- (5) Liquidity is crucial in periods of uncertain trading. Where at all possible, they should maintain an appropriate cash cushion.

### ***Constitutional matters***

Finally, it is to be noted that CIGA 2020 raises a number of important constitutional issues. Some of these were highlighted by the [Constitution Committee’s report on the Bill](#).<sup>6</sup> In particular the Committee was concerned about: (i) the speed of the Parliamentary process, which allowed for little input from stakeholders and the public; (ii) the retrospective provisions, as to which the Committee was concerned that such provisions are generally regarded as inconsistent with the rule of law and are inherently constitutionally suspect; and (iii) the so-called ‘Henry VIII’ powers to modify the legislation.

2.0.16

The Government [responded](#) in part by removing some, but not all, of the Henry VIII powers but otherwise the Bill had a relatively straightforward passage through Parliament and so the Committee’s concerns are largely likely to remain.

2.0.17

### **The Moratorium**

A moratorium is a period in which action by a debtor’s creditors is restricted. Prior to the coming into force of CIGA 2020, UK law already contained moratoriums in the context of administration, and for small companies who wished to make a proposal for a voluntary arrangement. It did not, however, contain any ‘free-standing’ moratorium, i.e. a moratorium that is not part of, or a gateway to, any particular insolvency procedure.

2.1.1

The purpose of the new moratorium is to fill this gap, allowing companies who are in financial difficulties but who stand a real chance of recovery the “*breathing space*” they require in which to “*explore [their] rescue and restructuring options*” (Explanatory Notes, para. 4).

2.1.2

<sup>6</sup> This report can be found online at <https://publications.parliament.uk/pa/ld5801/ldselect/ldconst/76/7603.htm> (accessed 1 February 2021).

**2.1.3** CIGA 2020 aims to ensure that the moratorium is “*streamlined . . . keeps administrative burdens to a minimum, makes the process as quick as possible, and does not add disproportionate costs onto struggling businesses*” (Explanatory Notes, para. 6). The details of how this is achieved are set out below, but in summary:

- (1) UK companies that are not subject to an outstanding winding-up petition (and during the immediate period of the pandemic, even those that are) will be able to obtain a moratorium simply by filing the relevant forms with the court.
- (2) The initial period of the moratorium is 20 business days, but the directors are able to extend this by a further 20 business days using the relevant forms provided the company has been able to discharge all of its ‘moratorium debts’ and ‘pre-moratorium debts’ for which it does not have a payment holiday. Further extensions are available by court order, or with creditor consent.
- (3) The moratorium is overseen by a ‘monitor’, but day-to-day responsibility for the running of the company remains with the directors (the so-called ‘debtor-in-possession’ model).
- (4) The monitor is responsible for ensuring that the moratorium is continuing to serve its purpose, namely, the rescue of the company as a going concern. If it is no longer likely that this purpose can be achieved, or if it has already been achieved, the monitor must bring the moratorium to an end.
- (5) Creditors and other affected parties can challenge the actions of the monitor or the directors on grounds of ‘unfair harm’.

**2.1.4** The majority of the relevant provisions have been inserted as a new Part A1 to IA 1986, which is supplemented by Schedules ZA1 and ZA2. Schedule 3 to CIGA 2020 contains further amendments to IA 1986. Schedule 4 contains temporary procedural rules relating to the new moratorium. These rules will expire on 30 March 2021 unless extended. Consultation on a permanent replacement was due to begin in November 2020. The most important of the temporary rules are highlighted in this chapter, but practitioners would be well advised before taking any steps in respect of a moratorium to check the up to date position and take advice on Schedule 4 to ensure that all of the procedural details have been complied with.

**2.1.5** Paragraph 3.3(6) of the Insolvency Practice Direction provides that applications for orders concerning moratoria may be listed before a High Court Judge or an ICC Judge, but not, ordinarily, before a District Judge Sitting in a District Registry or a District Judge.

## **2.2 Which companies are eligible for a moratorium?**

### *Eligible and excluded companies*

**2.2.1** This is addressed by s. A2 and Schedule ZA1, IA 1986.

**2.2.2** In summary, a company is eligible for the moratorium unless it is excluded under any of paras. 2-18 of Schedule ZA1. The key exclusions are:

- (1) Companies that are, or have been subject to a moratorium within the last 12 months (para. 2(1), Schedule ZA1);
- (2) Companies that are subject to an insolvency procedure, or have been subject to a voluntary arrangement or administration within the last 12 months (para. 2(2), Schedule ZA1);

- (3) ‘City companies’ e.g. banks, insurance companies, electronic money institutions etc. (paras. 3-14, Schedule ZA1). This includes companies that are party to a capital market arrangement under which they have incurred, or expected to incur, a debt of £10 million or more, and which involved the issue of a capital market investment. This may exclude some medium sized companies that might otherwise have hoped to benefit from a moratorium (paras. 13 and 14, Schedule ZA1).

Paragraph 20, Schedule ZA1 empowers the Secretary of State to alter the circumstances in which a company is eligible. On 29 June 2020, this power was used to exclude private registered providers of social housing – see the Insolvency Act 1986 Part A1 Moratorium (Eligibility of Private Registered Providers) Regulations 2020 (SI 2020/652).

2.2.3

### ***Temporary modifications***

As enacted, the CIGA 2020 contained a number of temporary modifications designed to assist companies during the pandemic. These modifications were originally supposed to come to an end on 30 September 2020 (the “**Relevant Period**”) (Schedule 4, para. 1(b)) but the Relevant Period was extended by the Corporate Insolvency and Governance Act 2020 (Coronavirus) (Extension of the Relevant Period) Regulations 2020 (SI 2020/1031) to 31 March 2021. Certain modifications, however, were explicitly excluded from this extension by virtue of The Corporate Insolvency and Governance Act 2020 (Coronavirus) (Early Termination of Certain Temporary Provisions) Regulations 2020 (SI 2020/1033). These modifications instead ceased to have effect on 1 October 2020 (save where the moratorium had already come into force before this date).

2.2.4

Thus, as enacted, the eligibility rules set out above were subject to the following modifications:

2.2.5

- (1) The list of excluded companies was extended to include companies that have permission under Part 4A of the Financial Services and Markets Act 2000 (“**FSMA 2000**”) to carry on a regulated activity, and are not subject to a requirement imposed under FSMA 2000 to refrain from holding money for clients (para. 5, Schedule 4).
- (2) A company is not ineligible for a moratorium by reason of its having been subject to a moratorium, a voluntary arrangement, or administration within the last 12 months (para. 6(1)(c), Schedule 4).

The first of these modifications, however, came to an end on 1 October 2020.

### ***Overseas companies***

Overseas companies are only eligible for a moratorium if they could be wound-up under Part 5, IA 1986 (winding-up of unregistered companies).

2.2.6

Under The Insolvency (Amendment) (EU Exit) Regulations (SI 2019/146), a company may be wound-up in the UK if the debtor’s centre of main interests (COMI) is in the UK, or its COMI is in the EU and it has an establishment in the UK. These gateways, however, are expressly additional to “*any grounds for jurisdiction ... which apply in the law of any part of the United Kingdom*”. At common law, the English courts are willing to wind-up an overseas company if it has a “*sufficient connection*” to the jurisdiction (*Stocznia Gdanska SA v Latreefers Inc* [2001] BCC 174 at 179). This is the test that has historically been applied to non-EU companies. It is possible that the same test will now be applied to EU companies.

2.2.7

### ***Other entities***

**2.2.8** In addition to ordinary limited companies, the new moratorium is available to:

- (1) Limited Liability Partnerships (paras. 36-38, Schedule 3, CIGA 2020, and the Limited Liability Partnerships (Amendments etc.) Regulations 2020 (SI 2020/643)).
- (2) Charitable Incorporated Organisations, other than private registered providers of social housing or registered social landlords under Part 1 of the Housing Act 1996 (para. 49, Schedule 3, CIGA 2020, and The Charitable Incorporated Organisations (Insolvency and Dissolution) (Amendment) (No. 2) Regulations 2020 (SI 2020/856)).
- (3) Co-operative and community benefit societies (paras. 50-53, Schedule 3, CIGA 2020, and The Co-operative and Community Benefit Societies and Credit Unions (Arrangements, Reconstructions and Administration) (Amendment) and Consequential Amendments Order 2020 (SI 2020/744)).

### **2.3 How does an eligible company obtain a moratorium?**

#### ***UK companies not subject to a winding-up petition***

**2.3.1** A UK company that is not already subject to a winding-up petition may obtain a moratorium simply by filing the relevant documents with the court (s. A3(2), IA 1986). Paragraph 13, Schedule 4, CIGA 2020 provides that, in this context, ‘the court’ means “*a court having jurisdiction to wind up the company*”. The relevant documents are:

- (1) A notice that the directors wish to obtain a moratorium;
- (2) A statement from the proposed ‘monitor’ that the monitor is: (i) qualified; and (ii) consents to act – the ‘monitor’ is a new concept, discussed further at [para. 2.5](#) below (who is the monitor?);
- (3) A statement from the proposed monitor that the company is an eligible company;
- (4) A statement from the directors that, in their view, the company is, or is likely to become, unable to pay its debts; and
- (5) A statement from the proposed monitor that, in the monitor’s view, it is likely that a moratorium for the company would result in its rescue as a going concern (s. A6, IA 1986).

**2.3.2** Details of the procedural requirements of these forms are set out in Schedule 4, CIGA 2020.

**2.3.3** There is, as yet, no standard form of notice. In the circumstances, companies have been advised by the courts to use [Form IAA](#). This, however, is somewhat unsatisfactory, as the IAA proceeds on the assumption that the applicant is asking the court for certain relief / orders / directions, whereas a moratorium may be obtained simply by the act of filing. Applicants may, therefore, prefer to use the forms produced by the Practical Law Restructuring and Insolvency team, which can be found in their Part A1 moratorium forms: toolkit.

**2.3.4** The test of “*is, or is likely to become, unable to pay its debts*” has been drawn from para. 11, Schedule B1, and so, presumably, the same case law will be applied. It is not enough, therefore, that there is real prospect of insolvency; it must be “*more probable than not*” (*Re COLT Telecom Group plc* [2002] EWHC 2815 (Ch); [2003] BPIR 324 at [25]; *Re AA Mutual International Insurance Co Ltd* [2004] EWHC 2430 (Ch); [2005] 2 BCLC 8 at [21]).



### ***Other companies***

If a company is subject to a winding-up petition (s. A4, IA 1986), and / or is an overseas company (s. A5), then it must instead apply to court. The application must be accompanied by the relevant forms (as set out above). On an application by a company that is already subject to a winding-up petition, the court may only make an order for a moratorium if it is satisfied that it would achieve a better result for the company's creditors as a whole than would be likely if the company were wound up (without first being subject to a moratorium). **2.3.5**

### ***Temporary modifications***

Originally, these requirements were modified in two respects: **2.3.6**

- (1) The requirement that it be likely that a moratorium for the company would result in its rescue as a going concern, was amended by the addition of the words "*or would do so if it were not for any worsening of the financial position of the company for reasons relating to coronavirus*" (paras. 6(1)(b) and 7(a), Schedule 4, CIGA 2020).
- (2) Only overseas companies needed to apply for a moratorium. UK companies, even if they were already subject to a winding-up petition, were required to use the filing procedure (paras. 6(1)(a) and 6(2), Schedule 4).

The first of these modifications, however, came to an end on 1 October 2020, save where the application for a moratorium had already been made to the court. The second continues to apply up to the end of the Relevant Period (as defined at [para. 2.2](#) above). **2.3.7**

## **What are the effects of obtaining a moratorium on creditors and the company? **2.4****

The moratorium places restrictions on both the company's creditors and the company itself. It also enables the company, with the court's permission, to do certain things it would not ordinarily be able to do. Some of these provisions will be familiar to practitioners with experience of administrations. **2.4.1**

### ***Restrictions on creditors***

As stated above, the primary purpose of the moratorium is to give the company some 'breathing space' from its creditors, whilst leaving control of the company in the hands of the directors. Accordingly: **2.4.2**

- (1) Only the directors may present a winding-up petition, and no winding-up order may be made except on such a petition (s. A20(1)(a) and (c); s. A20(2) and (3), IA 1986). There are, however, exceptions for petitions by the Secretary of State and the Financial Conduct Authority ("FCA"). Where a petition (other than an FCA petition) has been presented before the moratorium begins, s. 127, IA 1986 (avoidance of property dispositions) will cease to apply to dispositions made during the moratorium (para. 12, Schedule 3, CIGA 2020).
- (2) The company may only be voluntarily wound up by special resolution, and only then if the directors recommend such a resolution (s. A20(1)(b) and (c), IA 1986).
- (3) Only the directors may make an administration application. Neither the company nor a qualifying floating charge holder may appoint an administrator (or an administrative receiver) (s. A20(1)(e)-(h)).

- (4) Landlords may not exercise a right of forfeiture by peaceable re-entry in relation to premises let to the company, except with the permission of the court (s. A21(1)(a)).
- (5) No steps may be taken to enforce any security over the company's property without the permission of the court. This is subject to exceptions in respect of collateral security charges and securities created or arising under a financial collateral arrangement (s. A21(1)(c)).
- (6) No steps may be taken to repossess goods in the company's possession under any hire-purchase agreement, except with the permission of the court (s. A21(1)(d)).
- (7) No legal process may be instituted or continued against the company or its property without the permission of the court, except for certain employment proceedings (s. A21(1)(e)).
- (8) The holder of a floating charge (except a collateral security, market charge, security financial collateral arrangement, or system-charge) may not give any notice which would have the effect of crystallising the floating charge, or, by virtue of any provision in the charge instrument, any restriction on the disposal of the property of the company, and no other event during the moratorium is to have that effect. If the time for giving notice expires during the moratorium, the chargee may instead give notice as soon as practicable after the end of the moratorium, or when notice is received thereof. Similarly, when a crystallisation event occurs during the moratorium, provided the chargee gives notice of the event as soon as practicable after the end of the moratorium or notice thereof, the event will be treated as if it occurred when the notice was given (s. A22).

Note that any provision in a floating charge (except a collateral security, market charge, security financial collateral arrangement, or system-charge) which provides that the obtaining of a moratorium, or anything done with a view to obtaining a moratorium, constitutes a crystallisation event, or an event causing restrictions on the disposal of property that would not otherwise apply, or gives grounds for the appointment of a receiver, is automatically void under s. A52.

- (9) Security granted by a company during a moratorium may only be enforced with the consent of the monitor even if the court has given its permission (s. A23).

**2.4.3** As set out above, the restrictions on enforcement and legal proceedings are expressed to be subject to the permission of the court. Sections A21(2) & (3), however, provide that no application for permission may be made with a view to obtaining the crystallisation of a floating charge, or for the purposes of enforcing 'a pre-moratorium debt for which the company has a payment holiday during the moratorium'. This is one of the key phrases in the CIGA 2020, and therefore requires careful explanation.

**2.4.4** The Act draws a distinction between 'moratorium debts' and 'pre-moratorium debts'.

**2.4.5** A 'pre-moratorium debt' is a debt or other liability which the company becomes subject to before the moratorium comes in to force, or which it becomes, or may become subject to during the moratorium by reason of any obligation incurred before the moratorium comes into force.

**2.4.6** A 'moratorium debt' is a debt or other liability which the company becomes subject to during the moratorium (other than by reason of an obligation incurred before the moratorium came into force), or to which the company has become, or may become subject to after the end

of the moratorium by reason of an obligation incurred during the moratorium (s. A53, IA 1986).

The wording used in the definition of ‘pre-moratorium debt’ is intended to bring in the distinction made in *Re Nortel GmbH (in admin.)* [2013] UKSC 52; [2014] AC 209 between provable debts and expenses in administration (Explanatory Notes to CIGA 2020, para. 129). **2.4.7**

The phrase ‘a pre-moratorium debt for which the company has a payment holiday’ includes all pre-moratorium debts that have fallen due before the moratorium, or that fall due during the moratorium, except (s. A18(3), IA 1986): **2.4.8**

- (1) The monitor’s remuneration or expenses (which does not include remuneration in respect of anything done by a proposed monitor before the moratorium begins).
- (2) Goods or services supplied during the moratorium.
- (3) Rent in respect of a period during the moratorium.
- (4) Wages or salary arising under a contract of employment.
- (5) Redundancy payments.
- (6) Debts or other liabilities arising under a contract or other instrument involving financial services.

Of these exclusions, it is the last that has proved most controversial. The expression ‘contract or other instrument involving financing services’ is broadly defined by Schedule ZA2, IA 1986, and includes any form of lending. ‘Excluded debts’ therefore includes any debts arising under a loan agreement entered into before the moratorium came into force. **2.4.9**

As set out below (para. 2.5), s. A38 provides that a monitor must bring a moratorium to an end if the monitor thinks that the company is unable to pay any of its pre-moratorium debts for which the company does not have a payment holiday. Accordingly, all that a lender needs to do if it wants to bring a moratorium to an end is accelerate repayment of its loans, as few companies that meet the test for a moratorium will be able to pay such a liability immediately. The end result may be that companies enter a moratorium only to bounce back out again at the instance of their lenders. **2.4.10**

### ***Restrictions on the company***

The moratorium is designed to enable the company to continue to trade in its ordinary course of business as it considers its options, whilst ensuring that stakeholders are sufficiently protected. This is reflected in the restrictions placed upon the company: **2.4.11**

- (1) The company may not obtain credit of £500 or more (including the payment in advance for the supply of goods or services) unless the person providing that credit has been informed that the moratorium is in force (s. A25, IA 1986).
- (2) The company may grant security over its property only if the monitor consents (s. A26).
- (3) The company may not enter into market contracts, financial collateral arrangements, or other specified financial services contracts (s. A27).
- (4) The company may not make a payment in respect of a pre-moratorium debt for which the company has a payment holiday that exceeds £5,000, or 1% of its unsecured debts

at commencement of the moratorium (whichever is greater) without the consent of the monitor, a court order, or as required by s. A31(3) (disposal of charged property with the permission of the court) or s. A32(3) (disposal of hire-purchase property with the permission of the court).

- (5) The company may not dispose of its property outside of the ordinary course of business without monitor consent or a court order (s. A29).

**2.4.12** In each case, the monitor may only consent if the monitor thinks the action will support the rescue of the company as a going concern.

**2.4.13** If a company breaches these rules, it commits an offence, and any officer who authorised or permitted the breach without reasonable excuse commits an offence, but the transaction itself remains valid and enforceable (s. A33).

### ***Disposals with the permission of the court***

**2.4.14** CIGA 2020 enables a company in a moratorium to do the following with the permission of the court:

- (1) Dispose of property which is subject to a security interest as if it were not subject to the security interest (unless that property is subject to a financial collateral arrangement, a market charge, a system charge, or a collateral security) (s. A31, IA 1986).
- (2) Dispose of goods which are in the possession of the company under a hire-purchase agreement as if all the rights of the owner under the agreement were vested in the company (s. A32).

**2.4.15** Having done so, except in the case of property secured by a floating charge, the company must apply the net proceeds towards discharging the sums secured or payable, plus whatever is required to reach the net amount which would have been realised on a sale of the property in the open market by a willing vendor (as determined by the court). Where the property was subject to two or more security interests, the money must be applied in the order of priority of those interests.

**2.4.16** Where the property was subject to a floating charge, then the charge holder enjoys the same priority in the property of the company which directly or indirectly represents the property disposed of.

**2.4.17** Where the court makes such an order, the directors must, within 14 days, send a copy to the registrar (see form [MT07](#)). Failure to do so without reasonable excuse constitutes an offence.

## **2.5 Who is the monitor?**

**2.5.1** The monitor is an officer of the court (s. A34, IA 1986) and must be a qualified insolvency practitioner (although any defect in the monitor's appointment or qualifications will not invalidate any of the monitor's actions) (s. A41). The monitor has four responsibilities:

- (1) Assessing the eligibility conditions at the commencement of the moratorium.
- (2) Sanctioning asset disposals outside the normal course of business and the granting of any new security over the company's assets.
- (3) Monitoring the company's affairs for the purpose of forming a view as to whether it remains likely that the moratorium will result in the rescue of the company as a going concern (s. A35), or, for companies that entered a moratorium before 1 October

2020, that it would do if one were to disregard any worsening of the financial position of the company for reasons relating to coronavirus (para. 9, Schedule 4, CIGA 2020).

- (4) Where appropriate, bringing the moratorium to an end.

To ensure that the monitor can meet their responsibilities, s. A36, IA 1986 provides that the monitor may require the directors of the company to provide any information the monitor requires for the purpose of carrying out the monitor's functions, and the directors must comply with these requests as soon as practicable. The monitor is then entitled to rely upon this information when making decisions, unless the monitor has reason to doubt its accuracy.

**2.5.2**

The monitor must bring the moratorium to an end by filing a notice with the court if:

**2.5.3**

- (1) The monitor thinks that the moratorium is no longer likely to result in the rescue of the company as a going concern (or, for companies that entered a moratorium before 1 October 2020, would not do "*even if one were to disregard any worsening of the financial position of the company for reasons relating to coronavirus*" (para. 10, Schedule 4), CIGA 2020);
- (2) The monitor thinks that the objective of rescuing the company as a going concern has already been achieved;
- (3) The monitor thinks that, by reason of a failure by the directors to comply with a request for further information, the monitor is unable properly to carry out the monitor's functions; or
- (4) The monitor thinks that the company is unable to pay any of its moratorium debts, or pre-moratorium debts for which the company does not have a payment holiday that have fallen due (s. A38, IA 1986), but for these purposes, the monitor must disregard (a) any debts that the monitor has reasonable grounds for thinking are likely to be paid within 5 days of the decision, and (b) any debts in respect of which the creditor has agreed to defer payment until a time that is later than the decision (para. 37, Schedule 4, CIGA 2020).

This notice must be filed with the court as soon as practicable. For the contents of the notice, see para. 36(1), Schedule 4, CIGA 2020.

**2.5.4**

The monitor may apply to the court for directions e.g. in cases of legal uncertainty (s. A37, IA 1986).

**2.5.5**

For further details on the role and responsibilities of the monitor, see the Government's '[Guidance for monitors](#)'.

**2.5.6**

### **When does a moratorium come into force?**

**2.6**

The moratorium comes into force, in the case of a company who is using the filing procedure, when the relevant documents are filed, and in all other cases, when an order is made by the court (s. A7, IA 1986). Paragraph 10 of the CIGA 2020 Practice Direction provides that where directors file the relevant documents by means of electronic delivery for the purposes of obtaining a moratorium pursuant to s. A3, the documents are treated as being filed with the court at the date and time recorded in the automated notification acknowledging that the document has been submitted (see PD 51O, para. 5.3(1)).

**2.6.1**

Upon the coming into force of the moratorium, the proposed monitor(s) are formally appointed as the monitor(s).

**2.6.2**

**2.6.3** As soon as reasonably practicable after the moratorium comes into force, the directors must notify the monitor of that fact. The monitor must then notify the registrar, every creditor of whose claim the monitor is aware, and, where applicable, the Pensions Regulator and / or the Board of the Pension Protection Fund. The notice must specify when the moratorium came into force and when it will come to an end (see form [MT01](#)). Failure to comply with these notice requirements without reasonable excuse is an offence (s. A8, IA 1986).

## **2.7 What is the duration of a moratorium, including extensions?**

**2.7.1** Unless extended, a moratorium lasts 20 business days starting from the business day after the day it came into force. This is known as the ‘initial period’.

**2.7.2** There are five ways to obtain an extension, the first three of which may only be used once the first 15 business days of the initial period have passed:

- (1) The directors may obtain a further 20 business days from the end of the initial period by filing:
  - (a) A notice that the directors wish to extend the moratorium;
  - (b) A statement from the directors that all ‘moratorium debts’, and all pre-moratorium debts for which the company does not have a payment holiday, that have fallen due, have been paid or otherwise discharged;
  - (c) A statement from the directors that, in their view, the company is, or is likely to become, unable to pay its pre-moratorium debts; and
  - (d) A statement from the monitor that, in their view, it is still likely that the moratorium will result in the rescue of the company as a going concern (s. A10, IA 1986).
- (2) The directors may seek the consent of the company’s pre-moratorium creditors who are subject to a payment holiday, which have not already been paid or otherwise discharged (the ‘relevant creditors’) for a revised end date (which may be anything up to 1 year from the beginning of the moratorium). This is done using a qualifying decision procedure in accordance with Parts 15 and 16 of the Insolvency Rules 2016 (“**IR 2016**”), modified by paras. 23-28, Schedule 4, CIGA 2020. Note that the deemed consent provisions do not apply for the purposes of the new moratorium. If such consent is obtained, then the directors may extend the moratorium to the date agreed by filing the documents identified above with the court, together with a statement that creditor consent has been obtained and the date agreed (ss. A11 and A12, IA 1986). Creditor consent may be provided more than once.

Under The Pension Protection Fund (Moratorium and Arrangements and Reconstructions for Companies in Financial Difficulty) Regulations 2020 (SI 2020/693), where the company is an employer in respect of an eligible pension scheme, the right to participate in decisions as to whether to extend the moratorium is granted to the Board of the Pension Protection Fund to the exclusion of the scheme’s trustees or managers, although the Board must consult the trustees or managers before exercising its rights.

- (3) The directors may apply to the court for an extension. Any such application must be accompanied by the forms listed at (1)(b)-(d) above. Additionally, the directors must provide a statement as to whether the relevant creditors have been consulted about the

application, and if not, why not. It is likely that, in practice, if the directors apply to court without having consulted the relevant creditors, and there is no good reason for this, their application will not succeed. Further procedural requirements are set out in paras. 29-30, Schedule 4, CIGA 2020.

When assessing the application, the court must consider the interests of the relevant creditors, and the likelihood that the extension will actually result in the rescue of the company as a going concern. If the relevant creditors are opposed to an extension, this will weigh heavily in the court's mind. If the moratorium is not likely to result in the rescue of the company, then it is highly unlikely that the court would grant an extension, as the new moratorium is not designed to allow companies that are inevitably going to fall into liquidation to delay the inevitable.

It is notable that under s. A13(6)-(7), IA 1986, the mere making of an application will prevent the moratorium coming to an end. It may be, therefore, that directors will be tempted to make an application even where there is no real prospect of success to take advantage of this provision.

The moratorium may be extended by the court more than once.

- (4) If, at any time, the directors make a proposal for a Company Voluntary Arrangement (“CVA”), then until that proposal has been disposed of, the moratorium will not come to an end (s. A14).
- (5) If a moratorium is in force at the same time that an application under ss. 896 or 901C(1), CA 2006 (arrangements and reconstructions: court order for holding of meeting) is before the court, then the court may extend the moratorium (s. A15).

As with the eligibility criteria, the requirements for obtaining an extension during coronavirus were originally relaxed such that it only needed to be likely that the moratorium would result in the rescue of the company as a going concern, or would do, if it were not for any worsening of the financial position of the company for reasons relating to coronavirus (para. 8, Schedule 4, CIGA 2020), however, this modification came to an end on 1 October 2020.

**2.7.3**

If the moratorium is extended, the directors must notify the monitor in accordance with s. A17, IA 1986. Failure to do so without reasonable excuse is an offence (s. A17(7)). Once notified, the monitor must then notify the registrar of companies, every creditor of the company of whose claim the monitor is aware, and, in certain circumstances, the Pensions Regulator and / or the Board of the Pension Protection Fund (the ‘relevant persons’) (s. A17(8)). For the contents of these notices, see paras. 31-34, Schedule 4, CIGA 2020 and form [MT02](#).

**2.7.4**

### **When does a moratorium terminate, and what are a director’s and the company’s duties of notification?**

**2.8**

The moratorium will terminate in any of the following circumstances:

**2.8.1**

- (1) The moratorium expires (s. A9(1), IA 1986).
- (2) The company enters into a relevant insolvency procedure (voluntary arrangement, administration, interim moratorium, or liquidation) (s. A16).
- (3) The moratorium is terminated by the monitor (s. A38).
- (4) The moratorium is terminated by the court (s. A42 or s. A44).

**2.8.2** If the moratorium terminates early other than as a result of the intervention of the monitor, then the directors must notify the monitor in accordance with s. A17. The monitor must then notify ‘the relevant persons’ (as defined at [para. 2.7](#) above). The relevant forms for notifying Companies House are [MT03-MT06](#).

## **2.9 What must the company do to publicise the moratorium?**

**2.9.1** For as long as the moratorium lasts, any premises where the company carries on business or to which customers or suppliers of the company have access must display a notice stating that a moratorium is in force in relation to the company and the name of the monitor. This notice must be placed in a prominent position so that it may be easily read by customers and suppliers. The same information must be displayed on any website of the company, and every business document issued by or on behalf of the company (including invoices, orders, business letters, and order forms) (s. A19).

**2.9.2** If the company breaches these rules it commits an offence. Further, any officer of the company who authorised or permitted the breach without reasonable excuse commits an offence. Ignorance of the rules is unlikely to be considered a ‘reasonable excuse’, and so any practitioners who are advising a client in respect of a moratorium would do well to draw this requirement to their client’s attention.

## **2.10 Can I challenge a monitor’s actions?**

**2.10.1** Under s. A42, IA 1986, a creditor, director, or member of the company, or any other person affected by the moratorium may apply to the court on the ground that an act, omission, or decision of the monitor during the moratorium (including a failure to bring the moratorium to an end) has ‘unfairly harmed’ their interests. Such applications may be made during the moratorium or after the moratorium has been brought to an end (s. A42(3)).

**2.10.2** The concept of ‘unfair harm’ is also applied during challenges to the decisions of administrators under para. 74, Schedule B1, IA 1986, and so it is likely that the same case law will be invoked. This case law was recently considered by the Court of Appeal in *Lehman Brothers Australia Limited (in liquidation) v MacNamara* [2020] EWCA Civ 321; [2020] 3 WLR 147. The following points were emphasised:

- (1) Fairness is an objective test determined by reference to the standards which ‘right-thinking people’ would expect, not a subjective one determined by reference to the standards of the person whose actions are under scrutiny.
- (2) What constitutes unfairness depends on the circumstances of the case. The office-holder’s conduct may be in the interests of the creditors generally, but nonetheless it may still involve the infliction of unfair harm on a particular creditor.
- (3) If an office-holder is acting in accordance with its statutory obligations, there can be no question that they are acting unfairly, even if by doing so they cause harm. The question of unfairness arises in the context of the office-holder’s exercise of their discretion.
- (4) Discriminatory conduct may be unfair, but it is not a necessary requirement.
- (5) The court will adopt a cautious approach.

**2.10.3** If this test is met, the court may confirm, reverse, or modify any act or decision of the monitor, give the monitor directions, or make such other order as it thinks fit (except for



ordering the monitor to pay compensation). This may include bringing the moratorium to an end, or, where the argument is that the moratorium has been brought to an end prematurely, declaring that it shall not be taken into account when assessing the company's eligibility for a further moratorium. Whatever order the court thinks appropriate, it must have regard to the need to safeguard the interests of persons who have dealt with the company in good faith and for value.

CIGA 2020 contains no equivalent to para. 75, Schedule B1 (misfeasance by an administrator). This is presumably because the monitor, unlike an administrator, does not control the company's assets during a Part A1 moratorium, and so it should not be possible for a monitor to misapply, or become accountable for company property. **2.10.4**

Where a moratorium is, or has been in force in relation to a company that is, or has been at any time during the moratorium, an employer in respect of an 'eligible pension scheme' (as defined by s. 126, Pensions Act 2004), and where the trustees or managers of the scheme are a creditor of the company, then the Board of the Pension Protection Fund may make any application under s. A42 that the trustees or managers could have been made in their capacity as creditor (s. A45). This provision was introduced by amendment in the House of Lords. The purpose of the Pension Protection Fund is to protect people with an eligible defined benefit pension when their employer becomes insolvent. Section A45 will help the Board of the Fund fulfil that responsibility when an employer enters a moratorium. **2.10.5**

### **Can I challenge a director's actions?** **2.11**

Under s. A44, IA 1986, a creditor or member of a company may apply to the court on the grounds that: **2.11.1**

- (1) during the moratorium, the company's affairs, business, and property are being, or have been, managed by the directors in a manner which has unfairly harmed the interests of its creditors or members generally, or of some part of its creditors or members including at least the applicant; or
- (2) any actual or proposed act or omission of the directors during a moratorium causes or would cause such harm.

Upon such an application, the court may make such order as it thinks fit, including: **2.11.2**

- (1) Regulating the management of the company's affairs by the directors.
- (2) Requiring the directors to refrain from doing the acts complained of, or to do an act which the applicant has complained they have omitted to do.
- (3) Bring the moratorium to an end.

This raises the same concept of 'unfair harm' as discussed at [para. 2.10](#). **2.11.3**

Again, when considering what order to make, the court must have regard to the need to safeguard the interests of persons who have dealt with the company in good faith and for value. **2.11.4**

The Board of the Pension Protection Fund will also be able to challenge the decisions of the directors in circumstances where the company is an employer in respect of an eligible pension scheme (s. A45). **2.11.5**

## **2.12 Can the monitor be replaced?**

**2.12.1** The court may remove or replace an existing monitor, or may appoint a qualified person to act as an additional monitor, but only on the application of the directors, or the existing monitor himself (s. A39, IA 1986). This is presumably a reflection of the fact that the monitor does not have administrative control over the company, and so there is no need for creditors to have standing.

**2.12.2** It is possible that creditors will seek to get around this restriction by invoking the court's inherent jurisdiction to control its own officers. In our view, this is unlikely to be successful. As Lord Neuberger said in *Re Lehman Bros International (Europe) (in admin.) (No.4)* [2017] UKSC 38; [2018] AC 465 at [13], given the “*full and detailed nature of the current insolvency legislation and the need for certainty, a judge should think long and hard before extending and adapting an existing rule, and even more before formulating a new rule*”. Where, as here, the legislature has imposed explicit restrictions on who may apply to remove or replace a monitor, the court should be reluctant to exercise its inherent jurisdiction to undermine those restrictions.

**2.12.3** For a helpful review of this area see *Zinc Hotels (Investment) Limited v Beveridge* [2018] EWHC 1936 (Ch); [2018] BCC 968 where Carr J rejected an argument that the court's inherent jurisdiction could be used to appoint an additional interim administrator after commencement of the administration.

**2.12.4** Ultimately, these kinds of questions may be less important in the context of the new moratorium, as creditors will be able, under s. A44, to regulate the actions of the directors (who retain control of the company) directly.

**2.12.5** When a monitor is appointed or removed by court order, the monitor must notify the registrar, every creditor of the company of whose claim the monitor is aware, and, where applicable, the Pensions Regulator and / or the Board of the Pension Protection Fund. See forms [MT08](#) and [MT09](#). Failure to do so without reasonable excuse is an offence (s. A39(8) and (9)).

## **2.13 Are there any criminal sanctions related to the new moratorium?**

**2.13.1** Sections A46 and A47, IA 1986 include a broad range of offences which aim to penalise officers of companies who obtain a moratorium through fraudulent means, or who remove or damage company property (including its documents) before or during the moratorium. The punishments for these offences are set out at para. 33, Schedule 3, CIGA 2020.

**2.13.2** If it appears to the monitor that any past or present officer of the company has committed an offence in connection with the moratorium the monitor must report the matter to the appropriate authority, which for companies registered in England & Wales means the Secretary of State (s. A48, IA 1986). The monitor may be called upon to assist the Secretary of State in any subsequent investigation of the company under s. 431 or s. 432, Companies Act 1985.

## **2.14 Are there any additional rules applicable to regulated companies?**

**2.14.1** Additional rules apply to UK Companies that are regulated (s. A49, IA 1986):

- (1) When seeking a moratorium, in addition to the ordinary documents, the company must provide the written consent of the appropriate regulator to their proposed monitor.

- (2) The regulator must be informed when the moratorium comes into force, or comes to an end, or when there is a change in the monitor(s).
- (3) The directors must give the regulator notice of any qualifying decision procedure sought from the company's creditors in respect of a request of an extension, or pursuant to an order of the court following a challenge to the directors' conduct.
- (4) The regulator is entitled to be heard on any application to the court for permission to dispose of charged property, or property that is subject to a hire-purchase agreement.
- (5) The regulator has standing to challenge the actions of the monitor or directors, and to apply for a change in the monitor, and to be heard on any such application brought by anyone else.

A regulated company is a company that is, or has been, regulated by the FCA and / or the Prudential Regulation Authority ("**PRA**") under FSMA 2000 (s. A48(13)). **2.14.2**

### **Where do moratorium debts rank in priority if the company does enter an insolvency procedure?** **2.15**

Where a winding-up petition or a resolution for voluntary winding-up is passed within 12 weeks before the end of the moratorium, the moratorium debts, and 'priority pre-moratorium debts', rank in priority to all other claims save only the prescribed fees or expenses of the official receiver (s. 174A, IA 1986; inserted by para. 13, Schedule 3, CIGA 2020). This is a striking provision, as it grants affected debts (many of which would otherwise be ordinary unsecured liabilities) 'super-priority' over even the expenses of the winding-up (including the remuneration of the liquidator), preferential debts, and floating charge holders. **2.15.1**

Priority pre-moratorium debts include the pre-moratorium debts for which the company did not have a payment holiday during the moratorium (see [para. 2.4](#) above), save that: **2.15.2**

- (1) priority is only afforded to wages or salary arising under a contract of employment so far as relating to a period of employment before or during the moratorium;
- (2) similarly, priority is only afforded to redundancy payments that fell due before or during the moratorium;
- (3) debts that fell due between the monitor's statement that a moratorium would likely result in the rescue of the company and the last day of the moratorium by reason of an acceleration or early termination clause in a contract or other instrument involving financial services ('relevant accelerated debts') are excluded.

The exclusion of accelerated financial services debts was introduced upon the recommendation of the House of Lords so that lenders cannot obtain 'super priority' simply by accelerating their loans during the moratorium. **2.15.3**

Where a company enters administration within 12 weeks of the end of the moratorium, the administrator must make a distribution to the creditors of the company in respect of the moratorium debts and the priority pre-moratorium debts (as defined in s. 174A), and the administrator must realise any property required to do so. This distribution is to be paid in priority to any security to which para. 70, Schedule B1 applies (floating charge holders' priority in respect of acquired property), and sums payable under para. 99, Schedule B1 (liabilities relating to former administrators) (para. 64A, Schedule B1; inserted by para. 31(3), Schedule 3, CIGA 2020). **2.15.4**

**2.15.5** Where the assets of the company are insufficient to meet the moratorium and priority pre-moratorium debts in full, the order of priority is as follows (paras. 42-43, Schedule 4, CIGA 2020):

- (1) Amounts payable in respect of goods or services supplied during the moratorium under a contract where, but for s. 233B, IA 1986 (the new rules for protecting supplies of goods and services, considered elsewhere in this chapter), the supplier would not have had to make that supply.
- (2) Wages or salary arising under a contract of employment.
- (3) Other debts or other liabilities apart from the monitor's remuneration or expenses.
- (4) The monitor's remuneration of expenses.

## **2.16 What happens if the monitor's remuneration is excessive?**

**2.16.1** The remuneration of the monitor is a contractual matter between the company and the monitor, therefore, the parts of IR 2016 that relate to an office-holder's remuneration do not apply to the monitor's fees.

**2.16.2** An administrator or liquidator of a company may apply to the court on the ground that the monitor's remuneration was excessive up to 2 years from the end of the moratorium. If made out, the court may order the monitor to repay some or all of their remuneration, or make such other order as it thinks fit (para. 40, Schedule 4, CIGA 2020).

## **Arrangements and Reconstructions for Companies in Financial Difficulty**

**2.17.1** One of the long-term changes introduced by CIGA 2020 is the introduction (through s. 7 and Schedule 9, CIGA 2020) of Part 26A (ss. 901A to 901K), CA 2006, which establishes a process for entering into a compromise or arrangement (known as a "**Restructuring Plan**" in this context).

**2.17.2** Such a Restructuring Plan enables a company to enter into a court-sanctioned restructuring in order to deal with financial difficulties. The process follows the well-established and highly regarded template set by schemes of arrangement and reconstructions under Part 26, CA 2006. The new Restructuring Plan provisions have been introduced to provide companies with enhanced tools to effect a restructuring, particularly in the face of creditor or shareholder opposition.

**2.17.3** The introduction of the Restructuring Plan provisions dates back to the Government's 2016 consultation, '*A Review of the Corporate Insolvency Framework*'. The consultation referred to the desirability of introducing a restructuring tool that could overcome creditor dissent. The proposal was also driven in part by the fact that CVAs under IA 1986 were (and are) unable to bind secured creditors without their consent and, in 2014, had a failure rate of 60%.<sup>7</sup>

**2.17.4** Although the Restructuring Plan is modelled on schemes of arrangement under Part 26, CA 2006, the Government consultation noted that such schemes often target specific groups of stakeholders and are often only part of a wider restructuring solution. The ability to combine

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<sup>7</sup> See also the 2018 report 'Company Voluntary Arrangements: Evaluating Success and Failure' commissioned by R3 and sponsored by the Institute of Chartered Accountants in England and Wales, which found that, of CVAs commenced in 2013, 65% failed.

a Restructuring Plan with the new moratorium introduced by CIGA 2020, for example, should allow for a more flexible and effective restructuring tool.

Part 26, CA 2006 remains. As set out under [para. 2.20](#) below, the new provisions in Part 26A, CA 2006 are only available where a company is in financial difficulties and must be implemented with a view to addressing those financial difficulties. Currently, schemes of arrangement under Part 26, CA 2006 can be used as a restructuring tool for financially distressed companies, but often they are also used to conduct mergers and acquisitions or group restructurings for solvent companies. Equally, as discussed under [para. 2.19](#) below, CVAs are likely to be cheaper than Restructuring Plans, and are therefore likely to remain as an option for companies going through a restructuring. **2.17.5**

The Government has published a useful [factsheet on Restructuring Plans](#).<sup>8</sup> **2.17.6**

Practitioners should also refer to the [Practice Statement \(Companies: Schemes of Arrangement under Part 26 and Part 26A of the Companies Act 2006\)](#) promulgated by Vos C (the “**Practice Statement**”).<sup>9</sup> **2.17.7**

### **What do the new provisions on arrangements and reconstructions for companies in financial difficulty allow a company to do?** **2.18**

Part 26A, CA 2006 provides for a ‘compromise’ or ‘arrangement’ with creditors or members. Inherent in both concepts is the idea that there will be some sort of accommodation or “*give and take*” between the company and its creditors or members (see e.g. *Re NFU Development Trust Ltd* [1971] 1 WLR 1548 at 1555 and, in relation to Restructuring Plans, *Re Virgin Atlantic Airways Ltd* [2020] EWHC 2191 (Ch) at [38]), although the court will take a broad approach to these terms (see e.g. *Re Bluebrook Ltd* [2009] EWHC 2114 (Ch); [2010] BCC 209 at [72]-[74]). **2.18.1**

Under s. 901A, CA 2006, an ‘arrangement’ includes a reorganisation of the company’s share capital by the consolidation of shares of different classes or by the division of shares into shares of different classes, or by both of those methods. **2.18.2**

Schemes of arrangement under Part 26, CA 2006 have been used to carry out a wide range of legal transactions, including restructuring debt obligations, reorganising corporate structures, conducting mergers and acquisitions and returning capital to members. Given the high degree of overlap between Part 26A and Part 26, CA 2006, it is anticipated that Part 26A will enable companies to enter into a wide range of transactions, provided that the tests discussed under [para. 2.20](#) below are met. **2.18.3**

### **What are the main differences between Part 26A of the Companies Act 2006 and company voluntary arrangements under the Insolvency Act 1986?** **2.19**

As set out further under [para. 2.29](#) below, the Restructuring Plan provisions enable companies to effect a restructuring that will be binding on creditors and members, even if certain classes of creditors or members dissent. Currently, CVAs only bind secured creditors if they consent. **2.19.1**

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8 <https://www.gov.uk/government/publications/corporate-insolvency-and-governance-bill-2020-factsheets/restructuring-plan> (accessed 1 February 2021).

9 <https://www.judiciary.uk/wp-content/uploads/2020/06/Schemes-Practice-Statement-FINAL-25-6-20.pdf> (accessed 1 February 2021).

- 2.19.2** Further, the majority required to obtain consent from creditors or members (or classes thereof) is 75% in value. By contrast, a CVA requires approval from 75% in value of a company's creditors, which must include half of the company's unconnected creditors by value (see r. 15.34, IR 2016).
- 2.19.3** However, the process for obtaining approval of a Restructuring Plan is likely to be more complicated and expensive than the process for obtaining approval of a CVA, not least because the process involves two court hearings.
- 2.20 Which companies can use the new provisions in Part 26A of the Companies Act 2006, and when can they do so?**
- 2.20.1** The Restructuring Plan is available to companies that satisfy both the conditions set out in s. 901A, CA 2006, as follows:
- (1) The company has encountered, or is likely to encounter, financial difficulties that are affecting, or will or may affect, its ability to carry on business as a going concern.
  - (2) A compromise or arrangement is proposed between the company and: (i) its creditors (or any class of them); or (ii) its members (or any class of them), with the purpose of eliminating, reducing, preventing or mitigating the effect of the company's financial difficulties.
- 2.20.2** The concept of 'financial difficulties' is not defined in the new provisions. The High Court recently considered the meaning of this phrase in the first Restructuring Plan to receive judicial consideration, but the case was one where the company in question was "*on the brink of collapse*" and therefore clearly came within the statutory wording (see *Re Virgin Atlantic Airways Limited* [2020] EWHC 2191 (Ch); [2020] BCC 997 at [37]). However, it is unlikely that this will be a difficult test to satisfy, since the policy intention behind CIGA 2020 is to facilitate corporate rescues and to introduce greater flexibility in the insolvency regime. Further, the first condition embraces current, future and potential difficulties. Nonetheless, a significant factor is that the 'financial difficulties' must affect, or will or may affect, the company's ability 'to carry on business as a going concern'. The combination of the two concepts – 'financial difficulties' and impact on carrying on business as a 'going concern' – may create interesting and important evidential issues on proposals for Restructuring Plans, with consequential legal issues to be tested in the courts.
- 2.20.3** The proposed Restructuring Plan must satisfy the purposive test contained in the second condition. This is also widely drawn, ranging from 'eliminating' those financial difficulties to simply 'mitigating' them. In *Re Virgin Atlantic*, the court confirmed that this is "*broad language which was intended to be expansively construed*" (see [39]).
- 2.20.4** The court recently clarified that this test does not require the Restructuring Plan to ensure that the relevant company can continue to operate as a going concern. In *Re DeepOcean 1 UK Ltd* [2020] EWHC 3549 (Ch), sustained underperformance of a division group of companies (the "**plan companies**") caused them to rely on funding from other group entities, without which the operations of the plan companies were thought to be unsustainable. As a result, at least in part, of the pandemic, that funding arrangement was ended. This led to a winding down of the plan companies' operations, such that their ability to continue to carry on business as a going concern was imperilled. The proposed Restructuring Plans were not intended to rescue the plan companies, but to provide a better return to creditors benefiting from the terms of the proposed Restructuring Plans. Trower J held that the test in s. 901A, CA 2006 was satisfied where the purpose of the Restructuring Plans was to provide a better

return to creditors, where it could be said that the effect of a company's financial difficulties was that the company could no longer carry on a business as a going concern. This is because, as the Judge held, “*even if there is no mitigating effect on the company's ability to continue to carry on its business as a going concern, there is a mitigating effect on the severity of the losses which its creditors could otherwise sustain*”, such losses being an effect of the company's financial difficulties. The Judge also held that there was nothing in the legislation or the explanatory notes to CIGA 2020 supporting a restrictive interpretation of the necessary mitigating effect (see in particular [48]-[49]).

Under s. 901B, CA 2006, the Secretary of State has the power to make regulations excluding companies from the ambit of new Part 26A where the company is: an authorised person under the Financial Services and Markets Act 2000; an authorised person of a specified description in the regulations; or where the proposed compromise or arrangement is between the company, or a company of a specified description, and the company's creditors fall into any category prescribed by the regulations. **2.20.5**

Pursuant to s. 901A(4), Part 26A, CA 2006 applies to ‘companies’, which includes companies liable to be wound up under IA 1986. This includes overseas companies by dint of ss. 220 and 221, IA 1986, which give the English court power to wind up any association and any company other than those registered under CA 2006. **2.20.6**

It is well established at common law that a Part 26 scheme of arrangement may be sanctioned in relation to an overseas company, provided that the company has a sufficiently close connection to this jurisdiction and the scheme will have a substantial effect (see e.g. *Re Magyar Telecom BV* [2013] EWHC 3800 (Ch); [2014] BCC 448 at [21]). **2.20.7**

Prior to the end of the transition period following the UK's withdrawal from the European Union, schemes of arrangement with creditors domiciled in foreign EU Member States would engage questions as to the application of the Recast Brussels Regulation (EU Regulation No 1215/2012) (the “**Recast Brussels Regulation**”). It is conventional to assume (but not to decide) that Chapter II of that Regulation applies to schemes of arrangement, and then to address the question of jurisdiction on the basis of that assumption. Generally, jurisdiction may be founded either on the basis of a jurisdiction clause engaging Art. 25 or on the basis that there are anchor defendants in England and the claims relating to creditors in foreign Member States are sufficiently closely connected to the claims relating to the anchor defendants for the purposes of Art. 8. This approach was recently discussed in *Re Selecta Finance UK Limited* [2020] EWHC 2689 (Ch); [2020] ILPr 40 at [46]-[55]. **2.20.8**

Cases commenced prior to the end of the Brexit transition period will continue to engage the operation of the Recast Brussels Regulation or the Lugano Convention, where relevant, because reg. 92 of the Civil Jurisdiction and Judgments (Amendment) (EU Exit) Regulations 2019 (SI 479/2019) provides that those instruments shall continue to apply in such cases. **2.20.9**

Cases commenced after the end of the Brexit transition period will no longer be subject to the Recast Brussels Regulation or the Lugano Convention, because their effect has been ended by regs. 82 and 89, Civil Jurisdiction and Judgments (Amendment) (EU Exit) Regulations 2019 (SI 479/2019).<sup>10</sup> In such cases, the common law test referred to above would apply to parties domiciled in EU Member States. Alternatively, it may be possible to rely on a choice of court **2.20.10**

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<sup>10</sup> The UK applied to join the Lugano Convention on 8 April 2020 but, at the time of writing, the EU and Denmark have not indicated their support for the UK's accession, whereas Switzerland, Norway and Iceland have done so.

agreement within the scope of the 2005 Hague Convention on Choice of Court Agreements (the “**Hague Convention**”).

- 2.20.11** Further, the Recast Brussels Regulation will not provide a basis for the recognition and enforcement of English judgments in the European Union for cases commenced after the end of the Brexit transition period. The Hague Convention, to which the UK and the EU are parties, may provide partial solution to this problem, as it provides for the recognition and enforcement of judgments given by a court designated in a relevant choice of court agreement.<sup>11</sup>
- 2.20.12** The Government has published [guidance](#) in relation to the effects of Brexit on cross-border civil and commercial cases.<sup>12</sup>
- 2.20.13** As set out under [para. 2.22](#) below, the courts have started to apply the case law developed in relation to Part 26 schemes of arrangement to Restructuring Plans under Part 26A and, accordingly, overseas companies will be able to enter into Restructuring Plans. This was recently confirmed in relation to the issue of jurisdiction (see the comments in *Re Virgin Atlantic* at [36] and [58]-[59]).
- 2.20.14** It should, however, be noted that the court’s powers under s. 901J, CA 2006 (discussed under [para. 2.31](#) below), are restricted to ‘companies’ within the meaning of s. 1, CA 2006, which means companies formed and registered under CA 2006.

## **2.21 What is the process for entering into a compromise or arrangement under Part 26A of the Companies Act 2006?**

- 2.21.1** In outline, there are seven stages in putting forward a Restructuring Plan and obtaining the court’s approval:
- (1) A compromise or arrangement must be proposed between the company and its creditors or members (s. 901A, CA 2006).
  - (2) The promoter of the Restructuring Plan should take all reasonable steps to notify any person affected by the Restructuring Plan of the matters set out in para. 7 of the Practice Statement. These matters include: the purpose and effect of the proposed Restructuring Plan; any meetings that will be required and their composition; the matters that will be addressed at the first court hearing, as well as its date and location; and how persons affected by the proposals can make further enquiries. This document is generally referred to as a ‘Practice Statement’ letter.
  - (3) On the application of the company, a creditor or member (or, where relevant, a liquidator or administrator), a first hearing before the court takes place, where the court may order a meeting (or meetings) of creditors or members (or relevant classes thereof) for the purposes of voting on the proposed Restructuring Plan (s. 901C, CA 2006).
  - (4) A notice, including a statement setting out the effect of the compromise or arrangement, must be circulated to creditors or members, or instructions on how creditors or members entitled to attend meetings may obtain copies of such a statement (s. 901D).

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<sup>11</sup> See Art. 8, Hague Convention.

<sup>12</sup> <https://www.gov.uk/government/publications/cross-border-civil-and-commercial-legal-cases-guidance-for-legal-professionals/cross-border-civil-and-commercial-legal-cases-guidance-for-legal-professionals> (accessed 1 February 2021).



- (5) Meetings of creditors and members (or classes thereof) take place for the purpose of voting on the proposed Restructuring Plan.
- (6) If the Restructuring Plan is approved by the relevant meetings, or at least one of them, a further hearing before the court takes place, where the court decides whether to sanction the proposed Restructuring Plan (s. 901F).
- (7) The court's order sanctioning the Restructuring Plan must be sent to the registrar of companies (or, in the case of an overseas company that is not required to register particulars under s. 1046, CA 2006, published in the Gazette) (s. 901F(6)).

Each of these steps is covered in more detail in [para. 2.23](#) to [para. 2.28](#) and [para. 2.34](#) below. **2.21.2**

## **Will the existing case law in relation to Part 26 of the Companies Act 2006 apply to Part 26A?** **2.22**

Since Part 26A, CA 2006, is modelled on the existing Part 26, CA 2006, it was anticipated that the case law developed in relation to Part 26 schemes of arrangement would apply generally to Restructuring Plans, with any necessary modifications: see para. 16 of the Explanatory Notes to the Act. **2.22.1**

In the first Restructuring Plan to come before the court, Trower J applied many of the principles that have been developed in relation to Part 26 schemes of arrangement when considering whether to make a convening order (see *Re Virgin Atlantic Airways Ltd* [2020] EWHC 2191 (Ch); [2020] BCC 997). In *Re Virgin Atlantic Airways Ltd* [2020] EWHC 2376 (Ch); [2020] BCC 997, at the sanction hearing, Snowden J followed the “*tried and tested*” approach to the exercise of discretion in relation to Part 26 schemes of arrangement in the context of a Part 26A Restructuring Plan (see [46] and [51]-[52] of Snowden J’s judgment, and see further [para. 2.28](#) below). Further decisions considering the Restructuring Plan have emphasised the similarities between Part 26 and Part 26A, CA 2006, while noting that there are some differences (see for example *Re PizzaExpress Financing 2 Plc* [2020] EWHC 2873 (Ch) and *Re DeepOcean 1 UK Ltd* [2020] EWHC 3549 (Ch)). In particular, such differences will arise where sanctioning a Restructuring Plan involves use of the ‘cross-class cram down’ discussed at [para. 2.29](#) below (see *Re DeepOcean 1 UK Ltd* [2021] EWHC 138 (Ch) at [8], [21] and [44]-[46]). **2.22.2**

There are, nevertheless, differences between the new provisions contained in CIGA 2020 and Part 26, CA 2006, notably the threshold requirement that a company should be facing ‘financial difficulties’ and the availability of the ‘cross-class cram down’ (as to which, see [para. 2.29](#) below). The court will therefore have to develop additional principles that apply to the specific features of Part 26A, CA 2006. **2.22.3**

## **The first court hearing: what are the responsibilities of the applicant and what matters should be dealt with?** **2.23**

### ***Starting the Restructuring Plan process***

Once a compromise or arrangement has been proposed, and subject to notifying persons affected by the Restructuring Plan, the next step is to make an application for a convening hearing under s. 901C, CA 2006 (see [para. 2.21](#) above). **2.23.1**

Pursuant to the requirements of PD 49A, the application under s. 901C, CA 2006, must be made using a Part 8 claim form (see para. 5, PD 49A). **2.23.2**

- 2.23.3** It is likely that para. 15, PD 49A will be updated so as to apply to Part 26A, CA 2006. Assuming that this will be the case, the claim form will have to seek directions for: convening a meeting of creditors or members or both, as the case requires; the sanction of the court to the Restructuring Plan, if it is approved at the meeting or meetings, and a direction for a further hearing for that purpose; and a direction that the claimant files a copy of a report to the court by the chairman of the meeting or of each meeting.
- 2.23.4** Pursuant to para. 7, PD 49A, if the company is not the claimant, the company should be made a defendant to the Part 8 claim.
- 2.23.5** Pursuant to para. 4 of the Practice Statement, an application under s. 901C, CA 2006 will be listed before a High Court Judge. Usually, the same Judge will then hear the application to sanction the scheme.

***Purpose of the first court hearing***

- 2.23.6** The primary purpose of the first court hearing is to consider whether to order meetings of creditors and members for the purpose of considering and voting on the Restructuring Plan, and the composition of those meetings. At this stage, the court is not concerned with the merits of the proposed scheme (see e.g. *Re Indah Kiat International Finance Co BV* [2016] EWHC 246 (Ch); [2016] BCC 418 at [39]).
- 2.23.7** However, there are several other important issues that will, if necessary, be dealt with at this stage (as to which, see the guidance in [para. 6](#) of the Practice Statement):
- (1) The court's jurisdiction to sanction the Restructuring Plan.
  - (2) Issues relating to the threshold conditions for using the Part 26A, CA 2006 process (see [para. 2.20](#) above).
  - (3) Any other issues not going to the merits or fairness of the scheme, but which might lead the court to refuse to sanction the scheme.

***Evidence required at the first hearing***

- 2.23.8** On the assumption that PD 49A will be updated so as to apply to Part 26A, CA 2006 (and in any event as a matter of good practice), the claim form will have to be supported by written evidence setting out statutory information about the company and the terms of the Restructuring Plan.
- 2.23.9** The court will consider the adequacy of the explanatory statement required under s. 901D, CA 2006 at the first hearing. The court will not approve the statement, but deficiencies at this stage may lead the court to decline to convene any meetings (see *Re Indah Kiat International Finance Co BV* at [42], and para. 15 of the Practice Statement); the explanatory statement must therefore be put before the court at this juncture. The evidence should also describe how members and/or creditors will be given notice of any meetings convened by the court (see para. 13 of the Practice Statement).
- 2.23.10** In the evidence in support of the application for an order convening meetings of members and/or creditors, the applicant should also draw to the court's attention any issues in relation to: the constitution of any relevant meetings or anything that would affect the conduct of those meetings; the existence of the court's jurisdiction to sanction the scheme; the satisfaction of the threshold conditions under Part 26A, CA 2006; or the exclusion of members or creditors from meetings under s. 901C(4), CA 2006 (see para. 6 of the Practice Statement).

At the hearing, the court will decide whether to determine the issue, or to give directions for the resolution of that issue (see para. 9 of the Practice Statement). **2.23.11**

***Other obligations on the applicant***

Before the first hearing takes place, where such issues arise and where there is no good reason for not doing so, the applicant must take all reasonable steps to give notice to any person affected by the Restructuring Plan of the following matters (as to which, see para. 7 of the Practice Statement): **2.23.12**

- (1) that the Restructuring Plan is being promoted;
- (2) the purpose of the Restructuring Plan and its effect;
- (3) the meetings of members and/or creditors that will be required and their composition;
- (4) any other issues that need to be addressed at the first hearing;
- (5) the date and place fixed for the first hearing;
- (6) that such persons are entitled to attend the first hearing and any subsequent sanctioning hearing; and
- (7) how such persons can make further enquiries about the Restructuring Plan.

The purpose of giving such notice is to enable those who are affected by the proposals to consider them, to take appropriate advice and, if so advised, to attend the first hearing (see para. 8 of the Practice Statement). **2.23.13**

What will constitute adequate notice will depend on all the circumstances. Where the proposals under a Restructuring Plan are novel or complex, a greater notice period will be required, although in the case of urgency it may be legitimate to depart from the requirements of the Practice Statement (see e.g. *Re ColourOz Investment 2 LLC* [2020] EWHC 1864 (Ch); [2020] BCC 926 at [37], specifically in relation to the new Practice Statement). **2.23.14**

This obligation is particularly important because, as set out above, the court will consider class, jurisdiction and threshold issues at the first meeting. Members or creditors who object to the scheme may raise such issues at the sanction hearing, but para. 10 of the Practice Statement indicates that they should give a good reason for not raising the objection earlier. The *quid pro quo* is that members and creditors should be given adequate notice of the first hearing in order to consider whether there are any points they should raise. If they have been given adequate notice and fail to raise an issue at the earliest opportunity, a costs sanction may follow. Making sure that relevant stakeholders are notified is part of the court's general oversight of the fairness of the process, and rigorous compliance with the process may be an important factor in obtaining international recognition of a Restructuring Plan (see *Re ColourOz Investment 2 LLC* at [44] and [46]). **2.23.15**

At the first hearing, the applicant is under a duty of full and frank disclosure, whether or not there is any opposition to the Restructuring Plan (see *Re Indah Kiat International Finance Co BV* at [40]). **2.23.16**

***Determining classes of creditors or members***

Although the principles in relation to convening class meetings were developed in the context of Part 26 schemes of arrangement, the court recently applied a number of those principles **2.23.17**

when considering a Restructuring Plan (see *Re Virgin Atlantic Airways Limited* [2020] EWHC 2191 (Ch); [2020] BCC 997 at [41]-[48]).

- 2.23.18** A class must be “*confined to those persons whose rights are not so dissimilar as to make it impossible for them to consult together with a view to their common interest*” (*Sovereign Life Assurance Co v Dodd* [1892] 2 QB 573 at 583).
- 2.23.19** When defining classes, the court’s focus is on legal rights, rather than commercial interests which may differ as between persons who have the same or similar legal rights.
- 2.23.20** In considering whether or not to make an order convening meetings of members and/or creditors, the court will consider whether more than one meeting of members or creditors is required and, if so, how those meetings should be composed (see para. 11 of the Practice Statement). The court’s order may provide limited time for anyone affected by it to apply to vary or discharge the order (see para. 12 of the Practice Statement).
- 2.23.21** The trend in relation to schemes of arrangement under Part 26, CA 2006 is to avoid the proliferation of classes. The fact that different persons’ legal rights are not identical will not necessarily prevent the court from putting them in the same class; if their rights are sufficiently similar so as to enable them to consult together, that is likely to point towards their inclusion in a single class (see e.g. *Re Hawk Insurance Co Ltd* [2001] EWCA Civ 241; [2002] BCC 300).
- 2.23.22** However, more recent authorities have also emphasised that it is necessary to consider the effect of the scheme on proposed members of the same class; if their rights after implementation of the scheme will differ to such an extent that they cannot consult with a view to their common interest, then this will point towards their inclusion in different classes (see e.g. *Re Apcoa Parking (UK) Ltd* [2014] EWHC 997 (Ch); [2014] Bus LR 1358 at [28]). Moreover, conflicting interests may be taken into consideration at the second hearing when deciding whether to sanction the Restructuring Plan (see *Re ColourOz Investment 2 LLC*).
- 2.23.23** The reason for this in the context of Part 26 schemes of arrangement is to avoid giving a veto to minority interests among the general body of stakeholders. Conversely, in the context of the new Restructuring Plan provisions contained in CIGA 2020, the incentive may be to create a greater number of classes, so that approval from at least one class may be obtained in order to enable use of the ‘cross-class cram down’ provisions (discussed under [para. 2.29](#) below). However, it would be reasonable to expect the court to be reluctant to allow the creation of additional classes simply to maximise the chances of pushing a restructuring through using the ‘cross-class cram down’.
- 2.23.24** This is therefore likely to be an area that will give rise to disputes. Companies seeking to implement a Restructuring Plan will look for ways to engineer the proposed class structures to enable a cram down. Creditors who wish to dissent from the proposed Restructuring Plan will look for ways to stymie a cram down. In particular, promoters of Restructuring Plans may now seek to include classes of creditors where 100% of the class supports the proposed Restructuring Plan, in order to make the ‘cross-class cram down’ available (although it remains unclear whether doing so would in fact activate this power). Under Part 26 schemes of arrangement, it would be very unusual to include such classes of creditors (see *Re Virgin Atlantic Airways Limited* [2020] EWHC 2376 (Ch); [2020] BCC 997 at [48]-[50]). Further, where sanctioning a Restructuring Plan engages the ‘cross-class cram down’, the court may revisit the conclusion on class composition that it reached at the convening hearing if there is artificiality in the composition of classes (*Re Deep Ocean 1 UK Ltd* [2021] EWHC 138 (Ch) at [41]).”

**What are the requirements for the statement required to be circulated under Part 26A of the Companies Act 2006?** 2.24

The statement to be circulated under s. 901D, CA 2006 must explain the effect of the compromise or arrangement. The statement must also set out any material interests of the directors of the company, whether in their capacity as directors, members or creditors of the company, or otherwise, and the effect on those interests of the compromise or arrangement in so far as it is different from the effect on the like interests of other persons. 2.24.1

If the compromise or arrangement affects the rights of debenture holders of the company, the statement must give the same explanation as respects the trustees of any deed for securing the issue of the debentures as it is required to give as respects the company's directors. 2.24.2

Assuming that the case law in relation to Part 26 schemes of arrangement will apply to Restructuring Plans with equal force (as to which, see [para. 2.22](#) above), the statement must set out the proposed Restructuring Plan and its purpose adequately and accurately, in order to enable those who are voting on it to be properly informed. This includes an explanation not just of the legal effect of the compromise or arrangement, but also its commercial effect (*Re Allied Domecq plc* [2000] BCC 582). There is also an ongoing obligation to explain any material changes in circumstances that would change the mind of a reasonable creditor or member (see e.g. *Re Minster Assets plc* (1985) 1 BCC 99299). 2.24.3

Complying with these common-law requirements is likely to be essential in order to obtain the court's approval of a Restructuring Plan: in the context of a Part 26 scheme of arrangement, any deficiency in the explanatory statement may affect the court's discretion in deciding whether to sanction the proposed compromise or arrangement. 2.24.4

As a matter of practice, the explanatory statement should be in a form and style that is appropriate to the circumstances of the case, including the nature of the members or creditors involved, and it should be as concise as possible (see para. 14 of the Practice Statement). The court will consider the adequacy of the statement at the first hearing and, if it finds it deficient, it may refuse to make an order convening meetings of members and/or creditors (as to which see [para. 2.23](#) above). 2.24.5

The obligations imposed on directors and trustees for debenture holders by s. 901D, CA 2006 are serious ones. Any person who breaches them commits an offence (as does the company) and will be liable on conviction to a fine. Directors and trustees for debenture holders are also under a statutory requirement to give notice to the company of any matters concerning them that are necessary for the purposes of the explanatory statement (see s. 901E). Any person who fails to do so commits an offence and will be liable on summary conviction to a fine. 2.24.6

**Does anyone other than the company's creditors or members need to be notified of a proposed Restructuring Plan?** 2.25

In short, yes; certain companies may need to give notice to an appropriate regulator or the Bank of England, as set out below. 2.25.1

***Pensions Regulator and Pension Protection Fund***

Section 901I, CA 2006 requires certain companies in relation to which a Restructuring Plan is proposed to notify the appropriate bodies with oversight over pensions: 2.25.2

- (1) A company that is or has been an employer (within the meaning of s. 318(1), Pensions Act 2004) in respect of an occupational pension scheme that is not a money purchase

scheme (within the meaning of the Pension Schemes Act 1993) must send any notices or documents that it is required to provide to creditors to the Pensions Regulator.

- (2) A company that is an employer (within the meaning of Part 2 of the Pensions Act 2004) in respect of an eligible scheme (within the meaning of s. 126, Pensions Act 2004) must send any notices or documents that it is required to provide to creditors to the Board of the Pension Protection Fund.

**2.25.3** Section 901I, CA 2006 also gives the Secretary of State the power to make regulations providing for the Board of the Pension Protection Fund to exercise the powers of the trustees or managers of an eligible scheme in respect of which the company is an employer (within the meaning of Part 2 of the Pensions Act 2004), where the trustees or managers of the scheme are a creditor of the company.

### ***FCA and PRA***

**2.25.4** Certain companies carrying on regulated activities are required to give notice to the appropriate regulator (the FCA or, in the case of PRA-regulated companies, both the FCA and the PRA) where they intend to make an application to the court under Part 26A, CA 2006, or where they believe that a creditor or member of the company has made or intends to make such an application in relation to the company (see generally s. 355A, FSMA 2000, as inserted by para. 20, Schedule 9, CIGA 2020).

**2.25.5** Further, where the company is regulated by the PRA, it may not make an application under Part 26A, CA 2006 without the PRA's consent (s. 355A(3), FSMA 2000).

**2.25.6** The companies falling within the scope of this requirement are (s. 355A(1), FSMA 2000):

- (1) Companies that are, or have been, authorised persons or recognised investment exchanges.
- (2) Companies that are, or have been, electronic money institutions, authorised payment institutions, small payment institutions or registered account information service providers.
- (3) Companies that are, or have been, appointed representatives.
- (4) Companies that are carrying on, or have carried on, regulated activities in contravention of the general prohibition.

**2.25.7** The appropriate regulator is entitled to be heard at any hearing of an application made under Part 26A (whether under s. 901C or s. 901F), CA 2006 in relation to the company (s. 355A(5), FSMA 2000).

**2.25.8** In addition, the explanatory statement required under s. 901D, CA 2006 and any notice or other document that has to be sent to the company's creditors, must be sent to the appropriate regulator (s. 355A(6), FSMA 2000), and the regulator may appoint a person to attend any meeting of the company's creditors summoned by the court, and to make representations at such a meeting (s. 355A(7), FSMA 2000).

**2.25.9** These requirements are serious and may be enforced under s. 355B, FSMA 2000 through public censure statements or financial penalties.

**Bank of England**

CIGA 2020, through para. 49 of Schedule 9, also inserts s. 124A into the Financial Services (Banking Reform) Act 2013 (the “**FSBRA 2013**”). This provision confers similar requirements and rights in relation to the Bank of England (the “**BoE**”), where a proposed Restructuring Plan concerns an “*infrastructure company*”, as defined in s. 112, FSBRA 2013. **2.25.10**

In such a case, a ‘relevant applicant’ (i.e. a company, or a liquidator or administrator) must give notice to the BoE of any application under s. 901C(1), CA 2006 that the relevant applicant intends to make, or of any application which the relevant applicant believes a creditor or member of the company has made or intends to make under that section (s. 124A(2), FSBRA 2013). **2.25.11**

A relevant applicant may not make an application under s. 901C(1), CA 2006 without the consent of the BoE (s. 124A(3), FSBRA 2013). The BoE is entitled to be heard at any hearing of an application made under s. 901C or s. 901F, CA 2006 in relation to the company (s. 124A(5), FSBRA 2013). **2.25.12**

Notices or other documents that are required to be sent to creditors must also be sent to the BoE (s. 124A(6), FSBRA 2013). The BoE may appoint a person to attend any meeting of the company’s creditors summoned by the court, and to make representations at such a meeting (s. 124A(7), FSBRA 2013). **2.25.13**

These requirements are serious and s. 124A(8), FSBRA 2013 allows the BoE to sanction any infrastructure company that fails to comply by publishing details of the non-compliance, imposing a penalty or by obtaining an injunction under ss. 197, 198 and 202A of the Banking Act 2009. **2.25.14**

**Who is entitled to participate in a meeting summoned under Part 26A of the Companies Act 2006? **2.26****

Every creditor or member of the company whose rights are affected by the compromise or arrangement must be permitted to participate in a meeting ordered to be summoned by the court (s. 901C(3), CA 2006). **2.26.1**

However, this right does not arise in respect of any class of creditors or members where the court is satisfied that none of the members of that class has a genuine economic interest in the company (s. 901C(4), CA 2006). **2.26.2**

Further, the court recently confirmed that the provisions in para. 3, Schedule 14, CIGA 2020, apply to Part 26 schemes of arrangement (and will therefore apply to Restructuring Plans): see *Re Columbus Energy Resources plc* [2020] EWHC 2452 (Ch). Paragraph 3, Schedule 14 makes provision for holding and conducting meetings of ‘qualifying bodies’ (e.g. companies) during a defined ‘relevant period’ (see para. 2, Schedule 14). This ‘relevant period’ began on 26 March 2020 and was originally to expire on 30 September 2020; however, that ‘relevant period’ has been extended to 30 March 2021 by the Corporate Insolvency and Governance Act 2020 (Coronavirus) (Suspension of Liability for Wrongful Trading and Extension of the Relevant Period) Regulations 2020. Pursuant to para. 6, Schedule 14, CIGA 2020, a member of a company does not have a right to attend such a meeting in person, to participate in such a meeting other than by voting, or to vote at such a meeting by particular means. As a result, for the time being, members do not have a right to consult with one another at a class meeting held for the purposes of Part 26A, CA 2006. **2.26.3**

**2.26.4** In *Re Columbus Energy*, the court observed that this was at odds with the principles set out in *Re Castle Trust Direct plc* [2020] EWHC 969 (Ch) to the effect that the essence of a meeting is that participants should be able to come together to consult (see further para. 2.27 below). However, the court also explained that CA 2006 does not require consultation to take place; it simply requires that the statutory majority be fulfilled (see s. 901F, CA 2006). Nevertheless, the court stressed that the requirements for a meeting of members had been changed. Further, where the rights of members of a qualifying body to participate in a meeting other than by voting had been removed by para. 3(6), Schedule 14, CIGA 2020, it was particularly important for the qualifying body to take sufficient steps to ensure that the terms of the Restructuring Plan, and in particular those on which shareholders would wish to consult, had been fully and adequately explained. The court also commented that the provision does not apply to meetings of creditors, to which the principles set out in *Re Castle Trust Direct* continue to apply. However, it has subsequently been indicated that, in circumstances where a company convenes meetings where shareholders are able to raise questions or otherwise comment on a proposed scheme, “*although the CIGA may have created a technical difference between the requirements for participation at a meeting of creditors and a meeting of members for the purposes of the scheme jurisdiction, it would nonetheless be desirable for the Company (via the Chairman of the meetings) to provide evidence for the sanction hearing as to the holding of the meetings of the type outlined by Trower J in Re Castle Trust Direct plc [2020] EWHC 969 (Ch)*”: see *Re PA Consulting Group Ltd* [2021] EWHC 29 (Ch) at [46].

**2.26.5** Where an application for an order convening meetings of creditors is made before the expiry of 12 weeks beginning with the day after the end of a moratorium under Part A1 of IA 1986, creditors in respect of moratorium debts or priority pre-moratorium debts may not participate in the meeting summoned by the court (s. 901H(3), CA 2006).

**2.26.6** A moratorium debt is defined in s. A53, IA 1986 (via s. 174A(11), IA 1986), as:

- (1) any debt or other liability to which the company becomes subject during the moratorium, other than by reason of an obligation incurred before the moratorium came into force; or
- (2) any debt or other liability to which the company has become or may become subject after the end of the moratorium by reason of an obligation incurred during the moratorium; or
- (3) any liability in tort or delict, provided that it accrues during the moratorium, or all necessary elements to establish the claim exist before the moratorium comes to an end save for actionable damage.

**2.26.7** A priority pre-moratorium debt is defined in s. 174A(3), IA 1986. Such debts include:

- (1) pre-moratorium debts payable in respect of the monitor’s remuneration or expenses, goods or services supplied during the moratorium, rent in respect of a period during the moratorium, or wages or salary arising under a contract of employment, so far as relating to a period of employment before or during the moratorium;
- (2) pre-moratorium debts that consist of a liability to make a redundancy payment and fell due before or during the moratorium; and
- (3) any pre-moratorium debts that arise under a contract or other instrument involving financial services, fell due before or during the moratorium and are not a ‘relevant accelerated debt’.



A pre-moratorium debt is defined in s. A53, IA 1986 (via s. 174A(11), IA 1986), as: **2.26.8**

- (1) any debt or other liability to which the company becomes subject before the moratorium comes into force;
- (2) any debt or other liability to which the company has become or may become subject during the moratorium by reason of any obligation incurred before the moratorium comes into force; and
- (3) any liability in tort or delict where the cause of action has accrued before the moratorium comes into force, or all the elements necessary to establish the cause of action exist before the moratorium comes into force except for actionable damage.

For the purposes of s. 174A, IA 1986, a relevant accelerated debt (as defined in s. 174A(4), IA 1986) is any pre-moratorium debt 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 in a contract or other instrument involving financial services. The relevant period begins with the day on which the proposed monitor makes a statement in support of the filing or application for a moratorium, and ends on the last day of the moratorium. **2.26.9**

Paragraph 35 of Schedule 9, CIGA 2020, makes amendments to the same effect in respect of Part 26 schemes of arrangement (see amended ss. 896, 899 and 899A, CA 2006). **2.26.10**

See also [para. 2.25](#) above in relation to the rights of regulators and the Bank of England to attend meetings. **2.26.11**

## **What are the requirements for meetings of creditors or members to approve a proposed compromise or arrangement under Part 26A of the Companies Act 2006?** **2.27**

### ***What constitutes a meeting?***

As a matter of corporate law generally, a meeting is understood to be a coming together of more than one person, unless otherwise indicated by the relevant legal provision. In the context of Part 26 schemes of arrangement (and it is therefore likely to be the same for Part 26A, CA 2006), a meeting requires more than one member of a particular class to attend, unless the class has only one member or there are other exceptional circumstances (see *Re Altitude Scaffolding Ltd* [2006] EWHC 1401 (Ch); [2006] BCC 904 at [18]-[19]). **2.27.1**

The purpose of a meeting, in the context of schemes of arrangement (which is therefore likely to be the case in the context of Restructuring Plans), is to enable creditors or members to come together and to consult with each other in order to make a collective decision on the re-arrangement or compromise of their rights against the company (*Re Castle Trust Direct plc* [2020] EWHC 969 (Ch) at [38]). This may involve debating the merits of the scheme and questioning the scheme's proponents (see *Re Altitude Scaffolding Ltd* at [7]). **2.27.2**

Provided that something takes place which has those characteristics, it will be considered to be a meeting. It has been held that this is capable of being achieved by telephonic communication where those who are participating are able to hear and ask questions and express opinions in circumstances in which everybody else who is present at the meeting is also able to hear, ask questions and express opinions (*Re Castle Trust Direct plc* at [42]). There is no reason why such reasoning should not apply to a meeting sought to be convened over a video-conferencing platform. **2.27.3**

**2.27.4** However, the court will require evidence that the meeting did enable the necessary “*coming together*” to take place. In practice, this means that the court is likely to require evidence at the sanction hearing as to how the technology worked and whether or not there were any difficulties in relation to participation at the meeting. The court will require to be satisfied that there were no difficulties for participating creditors in their ability to hear, ask questions or express opinions at the meeting or otherwise have their ability to contribute to the business of the meeting impaired. It may be appropriate for this to be dealt with in the chairman’s report (as to which, see below). Such difficulties, if sufficiently serious, may prevent the court from concluding that a meeting had properly taken place (see *Re Castle Trust Direct plc* at [43]-[44]).

***What is the nature of a court-ordered meeting?***

**2.27.5** Meetings in the context of schemes of arrangement (and which is therefore likely to be the case in the context of Restructuring Plans) have been described as “*sui generis*”, and consequently the law in relation to the exercise of votes as set out in the context of companies’ general meetings does not apply (*Re Dee Valley Group plc* [2017] EWHC 184 (Ch); [2018] Ch 55 at [27]).

**2.27.6** Therefore, at a court-ordered meeting, when casting their votes, the participants should bear in mind that they are supposed to be fairly representing their class, acting *bona fide*, and not coercing a minority in order to promote interests adverse to the class they purport to represent. In other words, participants must take care that they vote in the interests of the class as whole and not in their own specific interests if they are different from the interests of the class (see *Re Dee Valley Group plc* at [42]-[47]).

***What is the necessary majority for obtaining creditor or member approval?***

**2.27.7** In order to be approved, and subject to the effects of the ‘cross-class cram down’ discussed under [para. 2.29](#) below, a proposed Restructuring Plan must be approved by 75% in value or more of the creditors or members (or relevant class thereof) present and voting in person or by proxy at the relevant court-ordered meeting (although not a specific statutory requirement, this is assumed by s. 901F(1), CA 2006). There is no requirement for a simple majority by number, in contrast to the requirements for a Part 26 scheme of arrangement.

**2.27.8** The company is then entitled to apply to the court for an order sanctioning the proposed Restructuring Plan.

***The conduct of a meeting***

**2.27.9** A chairman will preside over the meeting. Generally, the chairman will address the meeting on the background to the proposed Restructuring Plan and its principal provisions, and will explain the voting procedure and any other administrative matters. The chairman will take questions in relation to the proposals, and those attending should be able to raise concerns or objections.

**2.27.10** Once the meeting has had the opportunity to raise any questions and consult on the terms of the Restructuring Plan, the chairman invites the meeting to vote on the proposals. The chairman may admit or reject (if it appears that there is a legitimate reason for doing so) creditors’ claims for the purposes of taking a vote, or the chairman may determine the value which their claims represent within the class.

The conduct and outcome of the meeting will be recorded in a report written by the chairman of the meeting. The chairman's report should identify any areas of concern in relation to the conduct of the meeting (particularly if it was convened through the use of technology, as to which, see above) or the way in which the relevant class was represented. **2.27.11**

**The second hearing: what are the requirements for obtaining the court's approval of a proposed compromise or arrangement under Part 26A of the Companies Act 2006?** **2.28**

Once the relevant meetings of creditors or members have approved the proposed Restructuring Plan, an application to the court may be made under s. 901F(1), CA 2006. This leads to a further hearing where the court will decide whether to approve the Restructuring Plan. **2.28.1**

Given the similarities between Part 26, CA 2006 and Part 26A, CA 2006, it is expected that the principles developed in the context of approving schemes of arrangement will apply in relation to the approval of Restructuring Plans (see further the answer to [para. 2.22](#) above). **2.28.2**

Case law has confirmed that this will be the general approach to Part 26A Restructuring Plans (see *Re Virgin Atlantic Airways Ltd* [2020] EWHC 2376 (Ch); [2020] BCC 997 at [46] and [51]-[52]), save that there will be some differences in approach where a case involves the 'cross-class cram down' (*Re DeepOcean 1 UK Ltd* [2021] EWHC 138 (Ch) at [8], [21] and [44]-[46]), as to which see [para. 2.29.14](#) below. Accordingly, the key relevant principles in a case not involving the 'cross-class cram down' may be summarised as follows: **2.28.3**

- (1) The court has discretion whether to sanction a Restructuring Plan, although it cannot sanction a Restructuring Plan where class meetings were not properly constituted in accordance with the court's directions or the requisite majorities were not obtained (*Re Dorman, Long and Company Ltd* [1934] Ch 635 at 655).
- (2) The members in each class must have been fairly represented by those who attended the meeting, and the majority must be acting bona fide and not coercing the minority in order to promote interests adverse to those of the class they purport to represent (*Re Dee Valley Group plc* [2017] EWHC 184 (Ch); [2018] Ch 55).
- (3) The court will not merely rubber-stamp the Restructuring Plan. It must consider whether the proposal is such that an intelligent and honest person, a member of the class concerned and acting in respect of their own interest, might reasonably approve the scheme (*Re Dee Valley Group plc*).
- (4) The court will also look at the Restructuring Plan in the round and make sure that it is fair as between all the interests involved (*Re Lehman Brothers International (Europe)* [2018] EWHC 1980 (Ch); [2019] Bus LR 1012 at [66]).
- (5) Finally, the court will ensure that there is no "blot" on the proposed Restructuring Plan, such as any technical or legal defects or any reason why the scheme would not take effect as envisaged (*Re The Co-Operative Bank plc* [2017] EWHC 2269 at [22]).

**What is the 'cross-class cram down' and when can it be used?** **2.29**

The cross-class cram down is one of the most important provisions of new Part 26A in CA 2006. It is a mechanism (provided for by s. 901G, CA 2006) for binding creditors or members (or classes thereof) who do not approve the proposed restructuring plan, provided that certain conditions are met: **2.29.1**

- (1) The court must be satisfied that, if the compromise or arrangement were to be sanctioned, none of the members of the dissenting class would be any worse off than they would be in the event of the 'relevant alternative' (as to which, see below).
- (2) The compromise or arrangement must have been approved by 75% in value of a class of creditors or members, present and voting either in person or by proxy at the court-ordered meeting, who would receive a payment or have a genuine economic interest in the company in the event of the relevant alternative.

**2.29.2** The 'relevant alternative' means whatever the court considers would be most likely to occur in relation to the company if the compromise or arrangement were not sanctioned.

**2.29.3** Identifying the 'relevant alternative' in relation to a Restructuring Plan draws on the exercise in relation to a Part 26 scheme of arrangement, and on the exercise of considering whether a company voluntary arrangement is unfairly prejudicial (*Re DeepOcean 1 UK Ltd* [2021] EWHC 138 (Ch) at [29]-[30]). The most likely alternative eventuality will probably depend on the financial position of the company at the time that the court is considering the proposed Restructuring Plan. Sometimes, but certainly not always, the most likely alternative will be an insolvent liquidation (see e.g. *Re ColourOz Investment 2 LLC* [2020] EWHC 1864 (Ch); [2020] BCC 926 at [79]). However, in other cases, for example if the company is solvent or is seeking to mitigate potential financial difficulties that are some way off in the future, an insolvent liquidation may well not be the relevant comparator (see e.g. *Re The British Aviation Insurance Co Ltd* [2005] EWHC 1621 (Ch); [2006] BCC 14 at [82]). The primary question for the court is the likely financial return in each of the alternative eventualities, although the phrase 'any worse off' is a broad concept and appears to embrace all aspects of the liability in question, including matters such as timing and security (*Re DeepOcean 1 UK Ltd* at [34]-[35]).

**2.29.4** This is to be distinguished from the way in which a 'cram down' operates in proceedings under Chapter 11 of the United States Bankruptcy Code, where the dissenting class of creditors must be paid in full before any junior claims are met. The way in which this provision has been implemented allows for a much greater degree of flexibility in considering how a proposed restructuring plan will impact dissenting creditors or members. However, it is expected that this aspect of the new provisions will lead to disputes over the extent to which dissenting creditors are left worse off when a proposed Restructuring Plan is considered by the court. The court's decision-making role will therefore be very important in relation to this aspect of the Restructuring Plan process where proposals are contested.

**2.29.5** As mentioned above, promoters of Restructuring Plans may now seek to include classes of creditors where 100% of the class supports the proposed Restructuring Plan, in order to make the 'cross-class cram down' available (although it remains unclear whether doing so would in fact activate this power). Under Part 26 schemes of arrangement, it would be very unusual to include such classes of creditors (see *Re Virgin Atlantic Airways Limited* [2020] EWHC 2376 (Ch); [2020] BCC 997 at [48]-[50]). Further, where sanctioning a Restructuring Plan engages the 'cross-class cram down', the court may revisit the conclusion on class composition that it reached at the convening hearing if there is artificiality in the composition of classes (*Re DeepOcean 1 UK Ltd* at [41]).

**2.29.6** The new Restructuring Plan provisions could also permit 'cramming up' of senior dissenting creditors. However, in such a situation, it may be more difficult to show that those creditors are not worse off under the Restructuring Plan than in the case of the 'relevant alternative'.

**2.29.7** For example, a company has realisable assets of £85 million but owes £100 million to its creditors, as follows:

<b>Class</b>	<b>Details</b>	<b>Debt (£)</b>
A	Maturity in 3 years Fully secured debt Payment in full upon liquidation	50 million
B	Maturity in 2 years Partially secured debt Payment of £30 million upon liquidation	40 million
C	Repayable immediately Unsecured debt Payment of £5 million upon liquidation	10 million

The ‘relevant alternative’ in respect of this company is an insolvent liquidation. **2.29.8**

Under the Restructuring Plan, the maturity of the debt instruments held by Classes A and B will be extended but the amount repayable will be written down in order to create £5 million more in realisable value for Class C. This is achieved by releasing £5 million of Class A’s secured debt and writing down Class B’s debt to £30 million (i.e. the amount it would currently receive upon an insolvent liquidation), in order to ensure that the released value is available to Class C: **2.29.9**

<b>Class</b>	<b>Details</b>	<b>Restructured debt (£)</b>
A	Maturity in 5 years Fully secured debt	45 million
B	Maturity in 3 years Fully secured debt	30 million
C	Unsecured debt (but £10 million available in realisable value)	10 million

Class A considers that its interests are best served by the company continuing to trade as a going concern and therefore supports the Restructuring Plan, as does Class C. Class B opposes the Restructuring Plan. **2.29.10**

In such a scenario, Class B is not worse off under the Restructuring Plan than it would be in the event of the ‘relevant alternative’. The ‘cross-class cram down’ should therefore be available in order to bind Class B and to implement the Restructuring Plan. **2.29.11**

However, if Class A were the dissenting class, would Class A be left worse off under the Restructuring Plan than it would be upon an immediate liquidation? Would it be possible for Class A to be ‘crammed up’ in circumstances where Classes B and C support the restructuring? **2.29.12**

The answer is likely to depend on the value that Class A would receive from the extension to the maturity of the relevant debt instruments, and the anticipated performance of the assets over which the class has security over the additional 2 years by which those instruments are extended. These are likely to be difficult questions involving expert financial and valuation evidence and a determination by the court at a contested hearing. **2.29.13**

The court’s power to sanction a Restructuring Plan using the cross-class cram down was considered in *Re DeepOcean 1 UK Ltd* [2021] EWHC 138 (Ch). In this case, seven out of eight creditor classes approved the three inter-related Restructuring Plans. In the remaining class, only 65% of the creditors approved the proposals, although no creditors appeared at the sanction hearing to oppose the confirmation of the proposals. As a result, the statutory **2.29.14**

majority required to sanction the Restructuring Plan was not fulfilled, and the court's power under s. 901G, CA 2006 was engaged. Trower J explained that, in such a case, the approach to sanctioning a Part 26 scheme of arrangement was the appropriate starting point, but that there were some differences arising out of the necessity to use the cross-class cram down. This is because the legislative intent behind the power in s. 901G, CA 2006 is that the court should, where appropriate, deviate from the decision of a dissenting class meeting, which is a substantial difference from Part 26, CA 2006 (see [44]-[46]). However, where the threshold criteria under s. 901G are satisfied, the court's focus will generally be on the negative question of whether sanction should be refused, rather than on the positive question of whether sanction is appropriate on the grounds that the Restructuring Plan is just and equitable. This is partly because the threshold criteria under s. 901G, CA 2006 safeguard the interests of the dissenting class, since that class must not be left worse off than under the relevant alternative (see [48]-[49]). Trower J also highlighted other relevant factors that apply when sanctioning a Restructuring Plan using the power under s. 901G, CA 2006, namely: whether the dissenting class would be out of the money in the relevant alternative; the source of any benefits to be received under the Restructuring Plan; the representation at the class meetings, including turnout, compared as between the various classes and viewed globally; the relative treatment of creditors under the proposals and the justification for any differential treatment, and in particular whether benefits have been fairly distributed between consenting and dissenting classes; and the practicability of the Restructuring Plan (see [51]-[66]).

**2.30 Are there any exceptions to who can be bound by a compromise or arrangement under Part 26A of the Companies Act 2006?**

**2.30.1** Moratorium debts are treated as a special case in Part 26A, CA 2006 (see s. 901H, CA 2006).

**2.30.2** Where, in relation to a proposed Restructuring Plan, the application for meetings of creditors or members is made before the expiry of 12 weeks beginning with the day after the end of a moratorium under Part A1, IA 1986, and the proposals make provision for creditors in respect of a moratorium debt or a priority pre-moratorium debt, the court may not sanction that Restructuring Plan unless those creditors consent.

**2.30.3** See [para. 2.26](#) above for the definition of a 'priority pre-moratorium debt'. Paragraph 35 of Schedule 9, CIGA 2020, makes amendments to the same effect in respect of Part 26 schemes of arrangement (see amended ss. 896, 899 and 899A, CA 2006).

**2.31 Are there special provisions in the event that a compromise or arrangement under Part 26A of the Companies Act 2006 involves the transfer of an undertaking or a company's property to another company?**

**2.31.1** Reflecting the flexibility of its corporate reconstruction powers, the court has wide statutory powers in respect of Restructuring Plans that involve the reconstruction of one or more companies, or the amalgamation of two or more companies, in which the whole or part of a company's undertaking or property will be transferred to another company (see s. 901J, CA 2006).

**2.31.2** In such a scenario, the court may make a wide variety of orders to facilitate a reconstruction of that nature. Specifically, the court may make an order in respect of any of the following matters:

- (1) the transfer to the transferee company of the whole or any part of the undertaking and of the property or liabilities of any transferor company;

- (2) the allotting or appropriation by the transferee company of any shares, debentures, policies or other like interests in that company which under the compromise or arrangement are to be allotted or appropriated by that company to or for any person;
- (3) the continuation by or against the transferee company of any legal proceedings pending by or against any transferor company;
- (4) the dissolution, without winding up, of any transferor company;
- (5) the provision to be made for any persons who, within such time and in such manner as the court directs, dissent from the compromise or arrangement; and
- (6) such incidental, consequential and supplemental matters as are necessary to secure that the reconstruction or amalgamation is fully and effectively carried out.

Where an order provides for the transfer of property or liabilities, the effect of the order is to vest property in the transferee company and the transferred liabilities become the liabilities of the transferee company. **2.31.3**

In addition, the court has power to order that any transferred property vests free of any charges released by the compromise or arrangement. **2.31.4**

As set out under [para. 2.20](#) above, it should be noted that the court's powers under s. 901J, CA 2006, are restricted to 'companies' within the meaning of s. 1, CA 2006, which means companies formed and registered under CA 2006. **2.31.5**

Practitioners should also note that para. 36, Schedule 9, CIGA 2020 makes various consequential amendments to Part 27, CA 2006 (mergers and divisions of public companies), in order to take account of the introduction of Part 26A. **2.31.6**

### **Are there special provisions applicable to the issue of new shares by a company entering into an arrangement or reconstruction under Part 26A of the Companies Act 2006?** **2.32**

CIGA 2020 amends s. 549, CA 2006, to avoid the restrictions on corporate authority for the allotment of shares. It also inserts s. 566A, CA 2006 in order to disapply existing shareholders' rights of pre-emption in relation to an allotment of equity securities that is carried out as part of a compromise or arrangement sanctioned under Part 26A, CA 2006. **2.32.1**

### **What are a company's duties in respect of its Articles of Association?** **2.33**

Where an order sanctioning a Restructuring Plan amends the company's articles or any resolution or agreement affecting a company's constitution (as to which, see s. 29, CA 2006), and a copy of the order must be delivered to the registrar of companies, the order must be accompanied by a copy of the articles, or the resolution or agreement in question, as amended (see s. 901K(2), CA 2006). **2.33.1**

Where new articles are issued by the company following the court's order sanctioning the compromise or arrangement, a copy of the articles must be accompanied by a copy of the court's order unless the effect of the order (including the effect of the compromise or arrangement itself) has been incorporated into the articles by amendment (s. 901K(3), CA 2006). **2.33.2**

Failure to comply with this requirement is an offence on the part of the company and every officer of the company who is in default. A person guilty of such an offence is liable to a fine on summary conviction. **2.33.3**

**2.34 What is the effect of a court order sanctioning an arrangement or reconstruction under Part 26A of the Companies Act 2006 and when will it be binding?**

**2.34.1** A compromise or arrangement sanctioned by the court becomes binding on the company's creditors or members (or relevant classes thereof) and on the company (or, if the company is being wound up, on its liquidator and contributories) (see s. 901F(5), CA 2006).

**2.34.2** However, the court's order itself is of no effect (and therefore the compromise or arrangement is not binding) until the order is delivered to the registrar of companies (or Gazetted for an overseas company not required to file particulars under s. 1046, CA 2006) (see s. 901F(6), CA 2006).

### The Prohibition of Termination Clauses

**2.35.1** CIGA 2020 includes provisions that prevent suppliers of goods or services from relying on the fact that a company has gone into an insolvency procedure for the purposes of terminating the contract under which that supply is made. The intention behind these provisions is to enable the company to carry on trading through the rescue and restructuring process, with the aim of increasing the likelihood of a corporate rescue or a sale of the business as a going concern.

**2.35.2** Evidently, such provisions could have a detrimental effect on the supplier, and CIGA 2020 therefore includes provisions which are intended to strike a fair balance by permitting the termination of a supply contract under certain circumstances, and by providing for certain exceptions to the operation of the new provisions particularly if they would cause 'hardship' to the supplier.

**2.35.3** CIGA 2020 also contains temporary exceptions, to operate in the immediate circumstances of the pandemic, which exempt 'small' suppliers from the operation of the provisions. These are discussed under [para. 2.38](#) below.

**2.35.4** Moreover, the new provisions do not deprive suppliers of any other contractual entitlement that arises while the company is going through an insolvency process.

**2.35.5** The provisions are brought in by ss. 14 and 15, CIGA 2020 and Schedule 12 to CIGA 2020, which, in particular, insert ss. 233B, 233C and Schedule 4ZZA into IA 1986.

**2.35.6** The concept behind the provisions is not entirely new. Some restrictions on the cancellation of some so-called 'essential' supplies, such as gas and electricity, have existed for some years (ss. 233 and 233A, IA 1986). While the new provisions in CIGA 2020 extend the position much further, they have themselves been on the cards since the May 2016 '[Review of the Corporate Insolvency Framework](#)'.<sup>13</sup>

**2.35.7** The Government has published a useful [factsheet on termination clauses](#).<sup>14</sup> See [para. 1.7](#) of Section One: Contracts above in relation to termination clauses generally.

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<sup>13</sup> [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/525523/A\\_Review\\_of\\_the\\_Corporate\\_Insolvency\\_Framework.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/525523/A_Review_of_the_Corporate_Insolvency_Framework.pdf) (accessed 1 February 2021)

<sup>14</sup> <https://www.gov.uk/government/publications/corporate-insolvency-and-governance-bill-2020-factsheets/prohibition-of-termination-clauses> (accessed 1 February 2021).



**Can a supplier rely on a clause providing for the termination of a contract for the supply of goods or services where a company goes into an insolvency process? 2.36**

In short, no, subject to some exceptions. The exceptions are discussed under [para. 2.37](#) and [para. 2.38](#) below. 2.36.1

Section 233B, IA 1986, as provided for by CIGA 2020, will apply where a company becomes subject to a relevant insolvency procedure. For the purposes of s. 233B, IA 1986, the relevant insolvency procedures are: 2.36.2

- (1) The coming into force of a moratorium under Part A1, IA 1986.
- (2) Administration.
- (3) Administrative receivership.
- (4) The entry into a CVA.
- (5) Liquidation.
- (6) Provisional liquidation.
- (7) The commencement of the Restructuring Plan process (i.e. an order summoning a meeting for the purpose of considering and voting on a Restructuring Plan). The Restructuring Plan process is the new process created by CIGA 2020, by the insertion of new Part 26A into CA 2006, which is discussed above in [paras. 2.18](#) to [2.34](#).

The new termination clauses provisions apply to contracts for the supply of goods or services, subject to the exceptions discussed under [para. 2.38](#) below. Accordingly, the scope of the prohibition on termination clauses is very wide and is likely to apply to a broad range of business relationships (other than those specifically excepted). 2.36.3

The term ‘goods’ is not defined by s. 233B, IA 1986, nor is it defined elsewhere in the IA 1986. Definitions of goods may be found in the Sale of Goods Act 1979, the Supply of Goods and Services Act 1982 and the Consumer Rights Act 2015. Broadly speaking, these statutes define ‘goods’ as personal chattels (i.e. tangible items) and not things in action (i.e. intangible items). However, it should be noted that the expression, as used in s. 233B, IA 1986, is not defined by reference to those statutes. 2.36.4

Similarly, the term ‘services’ is not defined by s. 233B, IA 1986, nor is it defined elsewhere in the IA 1986. As above, definitions of ‘services’ may be found in the Supply of Goods and Services Act 1982 or the Consumer Rights Act 2015. In these statutes, the expression means the provision of services other than employment or apprenticeship, with no further elaboration (although, as a matter of plain English, the supply of a service denotes the performance or carrying out work on behalf of another person). Again, it should be noted that the expression, as used in s. 233B, IA 1986, is not defined by reference to those statutes. 2.36.5

The new provisions contained in CIGA 2020 (see s. 233B(3) and (4), IA 1986) invalidate contractual terms that: 2.36.6

- (1) Provide for the termination of the contract or the supply, or provide for any other thing to take place, because the company becomes subject to a relevant insolvency procedure.
- (2) Enable the supplier to terminate the contract or supply, or to do any other thing, because the company has become subject to a relevant insolvency procedure.

- (3) Enable the supplier to terminate the contract or supply in relation to an event that arose before the start of the insolvency period, but that entitlement was not exercised prior to the commencement of the insolvency period. For these purposes, the ‘insolvency period’ begins when the company becomes subject to the relevant insolvency procedure (see s. 233B(8), IA 1986).

**2.37 Are there any circumstances under which a termination clause can be exercised notwithstanding the general prohibition?**

**2.37.1** Yes. Section 233B(5) and (6), IA 1986, provide for the exercise of a termination clause in three situations, where consent, or permission, for the exercise of the clause is obtained.

**2.37.2** First, where the company has entered administration, administrative receivership, liquidation or provisional liquidation, and the office-holder gives consent, the termination clause may be exercised.

**2.37.3** Second, in any other case, the termination clause may be exercised where the company consents.

**2.37.4** Third, the court may give permission for the exercise of the termination clause where it is satisfied that the continuation of the contract would cause the supplier ‘hardship’. The meaning of ‘hardship’ is not clarified by s. 233B. However, it is likely that this provision is intended to assist small businesses where an interruption to their cashflow, combined with an ongoing obligation to provide goods or services to an insolvent company, would cause them financial difficulties.

**2.38 Are there any exceptions to the application of the new “termination clauses” provisions, so that the provisions do not apply at all?**

**2.38.1** Yes. There are some permanent exceptions and some temporary exceptions.

**2.38.2** The permanent exceptions are brought in by Schedule 12 to CIGA 2020, which inserts Schedule 4ZZA into IA 1986 (provided for by s. 233B(10), IA 1986). This excludes certain contracts and suppliers from the ambit of s. 233B, IA 1986.

**2.38.3** Where a termination clause is already caught by s. 233A(1), IA 1986 (protection of essential supplies in the case of administration or a company voluntary arrangement), it is excluded from the ambit of s. 233B, IA 1986.

**2.38.4** The main exclusion relates to financial services. Accordingly, s. 233B, IA 1986 does not apply to suppliers involved in financial services, being: insurers; banks; electronic money institutions; investment banks and firms; payment institutions; operators of payment systems or infrastructure providers; recognised investment exchanges; and securitisation companies (see Part 2 of Schedule 4ZZA, IA 1986).

**2.38.5** Similarly, s. 233B, IA 1986 does not apply to financial contracts (e.g. loans, financial leasing, guarantees or commitments, securities contracts, commodities contracts, futures and forwards, swaps, inter-bank borrowing agreements of 3 months or less, or master agreements), securities financing transactions, derivatives, spot contracts, capital market investment contracts, or public-private partnership contracts (see Part 3 of Schedule 4ZZA, IA 1986).

**2.38.6** In addition, s. 233B does not affect various other specific legislative provisions, namely provisions relating to: financial markets and insolvency (specifically, Part 7 of the Companies Act 1989, the Financial Markets and Insolvency Regulations 1996, the Financial Markets and

Insolvency (Settlement Finality) Regulations 1999 and the Financial Collateral Arrangements (No. 2) Regulations 2003); set-off and netting arrangements within the meaning of s. 48(1)(c) and (d) of the Banking Act 2009; and interests in aircraft equipment under the International Interests in Aircraft Equipment (Cape Town Convention) Regulations 2015.

The temporary exceptions are brought in by s. 15, CIGA 2020. This provides that s. 233B, IA 1986 shall not apply where the company becomes subject to a relevant insolvency procedure during the 'relevant period' and the supplier is a 'small entity' at that time. This is intended to strike a balance, for the benefit of small supplier businesses, in the immediate circumstances of the coronavirus pandemic. **2.38.7**

For the purposes of these temporary provisions, the 'relevant period' began on 26 June 2020 and was originally to expire on 30 September 2020. However, that 'relevant period' has now been extended to 30 March 2021 by the Corporate Insolvency and Governance Act 2020 (Coronavirus) (Extension of the Relevant Period) Regulations 2020. **2.38.8**

An 'entity' in this context is a company, limited liability partnership, any other incorporated or unincorporated association or body of persons, or a sole trader. **2.38.9**

An entity will satisfy the test for being a 'small entity' by reference to the following requirements. **2.38.10**

If the supplier is not in its first financial year at the time, it must satisfy two of the following three conditions: **2.38.11**

- (1) The supplier's turnover in its most recent financial year was not more than £10.2 million. If the supplier's most recent financial year was not 12 months, the maximum figure for turnover is to be adjusted proportionately.
- (2) The aggregate of the amounts shown as assets in the supplier's balance sheet for the most recent financial year was not more than £5.1 million.
- (3) The average number of the supplier's employees over the most recent financial year was not more than 50. The average is to be determined taking the number of persons employed each month, adding together the monthly totals, and dividing by the number of months in the financial year.

If the supplier is in its first financial year at the relevant time, it must satisfy two of the following three conditions: **2.38.12**

- (1) The supplier's average turnover for each complete month in its first financial year is not more than £850,000.
- (2) The aggregate of amounts which would be shown in the supplier's balance sheet at the relevant time is not more than £5.1 million.
- (3) The average number of persons employed by the supplier in its first financial year is not more than 50. The average is to be determined in the way described above.

**Is a supplier entitled to insist on payment of any outstanding sums upon the occurrence of an insolvency event? **2.39****

No, but again with permanent and temporary exceptions. **2.39.1**

Section 233B(7), IA 1986, as inserted by CIGA 2020, prevents a supplier from making it a condition of any supply of goods or services after the company becomes subject to the **2.39.2**

relevant insolvency procedure that any outstanding charges in respect of supplies prior to the commencement of the insolvency procedure are paid, or to do anything which has the effect of imposing such a condition.

**2.39.3** The permanent exceptions are as follows:

**2.39.4** First, s. 233B(7), IA 1986 does not apply in respect of the permanent exclusions discussed under [para. 2.38](#) above.

**2.39.5** Second, s. 233B(7), IA 1986 does not apply in respect of essential supplies (gas, electricity, water, communications services, and in certain cases, specified IT equipment and services (see para. 1(2), Schedule 4ZZA, IA 1986 as inserted by Schedule 12 to CIGA 2020)) where a company enters administration, an administrative receiver is appointed, a voluntary arrangement is approved and takes effect, the company goes into liquidation or a provisional liquidator is appointed.

**2.39.6** The temporary exception is that the exclusion under s. 15(1), CIGA 2020 for ‘small entities’ discussed under [para. 2.38](#) above also covers s. 233B(7), IA 1986.

### Statutory Demands and Winding-up Petitions

**2.40.1** As mentioned above in the Introduction to this Corporate Insolvency section, CIGA 2020 creates breathing space for companies in financial difficulty. The exceptional circumstances of the pandemic are such that the Government takes the view that companies should be protected, for a limited time, from the risk of being driven into insolvency by unpaid creditors. This manifests itself in various ways. One way is the temporary suspension of the wrongful trading laws, addressed in [para. 2.52](#) below. Another way, addressed here, is through temporary suspensions in relation to statutory demands and winding-up petitions.

**2.40.2** Two points are to be emphasised at the outset:

**2.40.3** First, the measures are temporary measures. CIGA 2020 does not amend the provisions of IA 1986 in relation to statutory demands or winding-up petitions, but is applicable alongside those provisions. It aims to avoid demands and petitions being issued against companies during the period of the coronavirus emergency. The Government’s hope is that businesses can instead work through this period by reaching a realistic and fair agreement with their creditors. The measures therefore apply only for a designated period, as discussed below. Although, originally under the CIGA 2020 the relevant period in respect of statutory demands and winding-up petitions would end on 30 September 2020, the relevant period has subsequently been extended until 31 March 2021; first by the Corporate Insolvency and Governance Act 2020 (Coronavirus) (Extension of the Relevant Period) Regulations 2020, and subsequently by the Corporate Insolvency and Governance Act 2020 (Coronavirus) (Extension of Relevant Period) (No. 2) Regulations 2020. As s. 41, CIGA 2020 only allows the temporary measures to be extended by up to six months, no further extension is anticipated beyond 31 March 2021.

**2.40.4** Second, the measures do not give a ‘get out of jail free’ card to every company that finds itself in financial difficulties during the relevant period.

**2.40.5** In short, CIGA 2020 covers the following circumstances:

- (1) It prohibits winding-up petitions from being presented (on or after 27 April 2020) where they are based on a statutory demand served between 1 March 2020 and 31 March 2021 (para. 1, Schedule 10, CIGA 2020).

- (2) It prohibits winding-up petitions from being presented against a company (on or after 27 April 2020 and until 31 March 2021) on the ground that it is unable to pay its debts, unless the petitioning creditor has reasonable grounds to believe that the inability to pay is not the result of the coronavirus (paras. 2 and 3, Schedule 10).
- (3) It prohibits a winding-up order from being made against a company (on or after 27 April 2020 and until 31 March 2021) on the ground that it is unable to pay its debts, unless the court is satisfied that the company would be unable to pay its debts even if coronavirus had not had a financial effect on the company (paras. 5 and 6, Schedule 10).

If a creditor's winding-up petition falls outside of these parameters the normal rules of the IA 1986 and IR 2016 apply. **2.40.6**

The provisions in relation to statutory demands and winding-up petitions are largely contained in Schedule 10, CIGA 2020, which is incorporated via s. 10, CIGA 2020. An important feature of Schedule 10 is that many of its provisions will be applied retrospectively. This retrospectivity has been criticised by the Constitution Committee, but has nevertheless made it into CIGA 2020. **2.40.7**

Finally, directors of companies threatened with a statutory demand or winding-up petition should consider the risk of personal liability, even where a company cannot for the time being be wound-up. This is discussed in detail in [Section Four: Company](#), below. **2.40.8**

### **Can a creditor still rely on a Statutory Demand to prove a company's inability to pay its debts?** **2.41**

Under s. 122(1), IA 1986 there are seven circumstances in which a company may be wound up by the court. In ordinary circumstances, an unpaid creditor may invoke the sixth of these, i.e. that the company is unable to pay its debts (s. 122(1)(f)). **2.41.1**

Section 123, IA 1986, sets out the circumstances in which a company is deemed unable to pay its debts. **2.41.2**

One way to prove a company's inability to pay its debts is by the statutory demand procedure under s. 123(1)(a). The creditor serves a statutory demand for the debt (which must exceed £750) on the company. If the company does not satisfy the debt within three weeks of having received the statutory demand, the company will be deemed unable to pay its debts. The creditor then has a strong, practically unassailable, basis for presenting and proceeding with a winding-up petition under s. 124. **2.41.3**

In ordinary circumstances, the service of a statutory demand is therefore a powerful weapon for a creditor, to put pressure on the debtor company to pay up. The weapon is often deployed, often successfully. **2.41.4**

The current extraordinary circumstances require a different approach. **2.41.5**

Therefore, in light of the coronavirus crisis, s. 10, CIGA 2020 brings into operation Schedule 10, CIGA 2020, which imposes the temporary restrictions referred to in the introductory comments above. **2.41.6**

Specifically in relation to statutory demands, para. 1(1), Schedule 10 stipulates that no petitions for the winding-up of a registered company may be presented on or after 27 April 2020, insofar as such a petition relies on a statutory demand served on the debtor company under s. 123(1)(a), IA 1986 between 1 March 2020 and 31 March 2021. **2.41.7**

- 2.41.8** Paragraph 1(2), Schedule 10 achieves the same result for unregistered companies (s. 222, IA 1986).
- 2.41.9** The provisions of CIGA 2020 relating to statutory demands and winding-up petitions have retrospective effect. CIGA 2020 will therefore be applicable to any petition presented on or after 27 April 2020 but before it came into force on 26 June 2020 (para. 1(4), Schedule 10).
- 2.41.10** The answer to the question posed above is therefore, temporarily, ‘no’. A creditor may not rely on a statutory demand as the basis for a winding-up petition if and so far as the demand is served between 1 March 2020 and 31 March 2021.

**2.42 What are the practical consequences of the temporary inability to use a statutory demand?**

- 2.42.1** The practical consequences of Part 1 of Schedule 10 are that creditors are not only prevented from succeeding on a winding-up petition, which is based on a statutory demand served between 1 March 2020 and 31 March 2021, but they will also now be prevented from presenting such a petition.
- 2.42.2** Therefore, a company whose creditors are threatening to present a winding-up petition based on a statutory demand which was served on or after 1 March 2020, should consider making an application to restrain the winding-up petition from being presented. Time-permitting, it is always advisable to request the creditor concerned for an undertaking not to present the petition, before issuing an application. However, where a creditor refuses to give such an undertaking or where presentation appears imminent, the court is likely to grant an application to restrain the presentation of a winding-up petition on the basis of the provisions of CIGA 2020. Indeed, the court has already shown a willingness to do so, even before CIGA 2020 came into force: *Re a company (Injunction to restrain presentation of petition)* [2020] EWHC 1406 (Ch).
- 2.42.3** It is important to note, however, that Schedule 10 does not necessarily prevent the presentation of a creditor’s winding-up petition on the basis of an inability to pay debts where such inability is not based on a statutory demand served between 1 March 2020 and 31 March 2021, but on some other ground listed in s. 123, IA 1986 (registered companies) or ss. 223 and 224, IA 1986 (unregistered companies). However, such a petition can only be utilised in limited circumstances as there are other conditions that must be fulfilled before such a petition can be presented and can succeed. These are discussed in [para. 2.44](#).
- 2.42.4** The restrictions of Schedule 10 are designed to prevent pressure by creditors for non-payment of debts. Therefore, they do not appear to apply where the winding-up petition relies on some other non-debt related ground for winding-up (as listed in s. 122(1), IA 1986 (registered companies) or s. 221(5), IA 1986 (unregistered companies)).

**2.43 Will a pending winding-up petition be adjourned?**

- 2.43.1** A Temporary Insolvency Practice Direction Supporting the Insolvency Practice Direction first came into force on 6 April 2020 (“**Temporary Insolvency PD**”). That practice direction made provisions for the adjournment of pending winding-up applications and petitions, although it made an exception for winding-up petitions before an ICC Judge sitting in the Rolls Building in London (para. 4). This practice direction expired on 1 October 2020.
- 2.43.2** On 2 October 2020 a second Temporary Insolvency Practice Direction Supporting the Insolvency Practice Direction came into force (the “**Temporary Insolvency PD (October**

2020)”), replacing the earlier one. As per para. 4 of the Temporary Insolvency PD (October 2020), there is a temporarily amended listing procedure in place for winding-up petitions. This is addressed below, in the sub-section dealing with ‘Procedure’ in paras. 2.57 to 2.60.

If you have any questions or concerns about the listing of a winding-up petition, it is prudent to enquire with the Rolls Building ICC listing office: **2.43.3**

Email: [Rolls.ICL.Hearings1@justice.gov.uk](mailto:Rolls.ICL.Hearings1@justice.gov.uk)

Tel: 020 7947 6731

For general queries relating to issues with cases in the ICC list, the contact details are:

Email: [Rcjcompanies.orders@justice.gov.uk](mailto:Rcjcompanies.orders@justice.gov.uk)

Tel: 020 7947 6294

### **What other restrictions are in place in relation to the presentation of winding-up petitions by creditors?** **2.44**

The temporary prohibition on presentation of a petition based on a statutory demand has been addressed above in para. 2.41. In short, as explained more fully there, paras. 1(1) and 1(2) of Schedule 10 provide that a winding-up petition cannot be presented on or after 27 April 2020 on the basis of a statutory demand served on the debtor company between 1 March 2020 and 31 March 2021. If a winding-up petition is nevertheless presented, in such circumstances, the petition should be dismissed. **2.44.1**

The position is different for a creditor’s winding-up petition presented that relies on: **2.44.2**

- (1) a statutory demand which was served on the debtor company outside the relevant period (1 March 2020 and 31 March 2021); or
- (2) some other ground listed in s. 123, IA 1986 (registered companies) or ss. 223 and 224, IA 1986 (unregistered companies), relating to a company’s inability to pay its debts.

In such circumstances, a winding-up petition may not be presented between 27 April 2020 and 31 March 2021, unless the creditor presenting the petition has reasonable grounds for believing that: **2.44.3**

- (1) coronavirus has not had a financial effect on the company; or
- (2) for petitions:
  - (a) under s. 123(1)(a)-(d), IA 1986: the facts by reference to which the relevant ground applies, upon which the petition is based, would have arisen in any event even if coronavirus had not had a financial effect on the company;
  - (b) under s. 123(1)(e) or s. 123(2), IA 1986: the relevant ground would apply even if coronavirus had not had a financial effect on the company;

(paras. 2 and 3, Schedule 10, CIGA 2020).

In order to comply with this condition, CIGA 2020 stipulates that a winding-up petition must contain a statement from the petitioning creditor that it considers that the condition described in paras. 2 or 3, Schedule 10 is met (para. 19(3), Schedule 10). **2.44.4**

***What is a “financial effect”?***

- 2.44.5** CIGA 2020 defines that coronavirus has a “*financial effect*” on a company if (and only if) the company’s financial position worsens in consequence of, or for reasons relating to, coronavirus (para. 21, Schedule 10) (“**Financial Effect**”). There is currently no further guidance (either in CIGA 2020, the [Explanatory Notes](#) or case law) as to how ‘Financial Effect’ and a company’s “*financial position*” will be interpreted, although a [House of Commons Briefing Paper](#) expresses the expectation that the term will be interpreted ‘broadly’.<sup>15</sup>
- 2.44.6** If a creditor is threatening to present a winding-up petition in circumstances where the creditor’s petition would not fulfil the criteria listed above (paras. 2 and 3, Schedule 10) or relies on a statutory demand served on or after 1 March 2020, the debtor company should consider making an application to restrain the creditor from presenting the petition. This is discussed below at [para. 2.49](#).
- 2.44.7** The restrictions, discussed above, are not apparently applicable to any winding-up petitions presented on other, non debt-related, grounds under s. 122, IA 1986 (registered companies) or s. 221(5), IA 1986 (unregistered companies) (i.e. other than a company’s inability to pay its debts).
- 2.44.8** The provisions of CIGA 2020 in relation to statutory demands and winding-up have retrospective effect, being applicable to any petition presented on or after 27 April 2020 (paras. 1(4), 2(5) and 3(5) of Schedule 10). In order to avoid a redundancy of the Act’s provisions, CIGA 2020 includes provisions to deal with any petitions presented on or after 27 April 2020, but before CIGA 2020 came into force on 26 June 2020. These are addressed below at [paras. 2.45](#) and [2.46](#).
- 2.45** **What are the court’s powers in relation to a winding-up petition presented by a creditor after 27 April 2020, but before the Corporate Insolvency and Governance Act 2020 came into force?**
- 2.45.1** The court may make such order as it thinks appropriate to restore the position of the debtor company to what it would have been if the petition had not been presented, where:
- (1) a creditor presents a winding-up petition on or after 27 April 2020, but before Schedule 10 of CIGA 2020 came into force on 26 June 2020;
  - (2) in circumstances where the court considers that the creditor did not have the reasonable belief necessary under paras. 2 or 3 of Schedule 10; i.e. the belief that coronavirus had not had a Financial Effect on the company or that the relevant debt issues would have arisen in any event, as discussed in [para. 2.44](#);
- (para. 4(1)-(2), Schedule 10, CIGA 2020).
- 2.45.2** The court’s remedial powers appear to be discretionary and unlimited. It is likely that any remedial order may include an award for damages. This is important, because the presentation of a winding-up petition can have immediate financial consequences for a debtor company.
- 2.45.3** A public record is kept of all the winding-up petitions presented at the Companies Court. As a result, the public is in a position to find out against which companies winding-up petitions have been presented, even before the petition has been advertised in the London Gazette (but see further [para. 2.48](#) below). This can have serious consequences. For example, upon finding

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<sup>15</sup> House of Commons Library, Briefing Paper, Number 8971, 9 December 2020, “*New business support measures: Corporate Insolvency and Governance Act 2020*” by Lorraine Conway.



out about a winding-up petition, a bank may freeze the company's accounts. This could have consequences for the company's ability to continue trading or pay its employees. It can also cause serious reputational harm. The presentation of a petition can also trigger defaults in a company's borrowing covenants and in other company contracts.

Consequently, for any winding-up petitions presented between 27 April 2020 and 31 March 2021, where such a petition is based on a company's inability to pay its debts (other than relying on a statutory demand served between 1 March 2020 and 31 March 2021), the petitioning creditor must carefully consider the strength of its belief necessary under paras. 2 or 3 of Schedule 10, and whether such belief is reasonably held. **2.45.4**

If the court finds that the creditor did not have the reasonable belief necessary under paras. 2 or 3 of Schedule 10, the petitioning creditor risks being held liable for any financial harm suffered by the debtor company. **2.45.5**

These sections of CIGA 2020 appear to be limited in scope. They do not appear to apply to creditors' winding-up petitions which are based on a ground other than the company's inability to pay its debts. **2.45.6**

**Are there any circumstances in which a winding-up order made on or after 27 April 2020, but before the Corporate Insolvency and Governance Act 2020 came into force, may be reviewed or avoided?** **2.46**

Upon the making of a winding-up order in England & Wales, an official receiver is appointed (often on an interim basis) to collect documents and investigate the affairs of the company being wound-up. **2.46.1**

If, despite the restrictions included in Schedule 10, CIGA 2020, a company is wound-up on the basis of a petition presented on or after 27 April 2020 and before 26 June 2020 (the day on which CIGA 2020 came into force), the official receiver must refer the matter back to court if it appears to the official receiver that the petitioning creditor did not have the reasonable belief necessary under paras. 2 or 3 of Schedule 10 (para. 4(3), Schedule 10). The 'reasonable belief' is discussed at [para. 2.44](#). **2.46.2**

Upon referral to the court, the court will consider whether it would be appropriate to make a remedial order under para. 4(2), Schedule 10. This provision is discussed at [para. 2.45](#). As discussed above, it enables the court to make such orders as it thinks appropriate to restore the position of the debtor company to what it would have been if the petition had not been presented. **2.46.3**

The referral will be treated as if it were an application under s. 147, IA 1986; i.e. an application to stay the winding-up. **2.46.4**

Similarly, the court is to be regarded as having had no power to make a winding-up order, where: **2.46.5**

- (1) the court made the winding-up order on or after 27 April 2020, but before Schedule 10 of CIGA 2020 came into force; and
- (2) in circumstances where the court would not have made that order, had Schedule 10 of CIGA 2020 been in force. These circumstances are discussed at [para. 2.47](#) below. Essentially, they concern the question whether the court considers that coronavirus had a Financial Effect on the company.

- 2.46.6** The order will be regarded as void. The court may give such directions to the official receiver, liquidator or provisional liquidator as it thinks fit, for the purpose of restoring the company to the position it was in immediately before the petition was presented.
- 2.46.7** Similarly to para. 4(3), Schedule 10, the official receiver must refer the matter to the court to determine whether remedial directions should be given, where it appears to the official receiver that:
- (1) a winding-up order made by the court on the basis of a company's inability to pay its debts is void; and
  - (2) it might be appropriate for the court to give such directions;
- (para. 7, Schedule 10, CIGA 2020).
- 2.46.8** This reference, too, would be treated as if it were an application under s. 147, IA 1986.
- 2.46.9** It is, therefore, to be expected that any winding-up orders made on or after 27 April 2020, but before CIGA 2020 came into force, will be scrutinised. Any winding-up orders based on a company's inability to pay its debts are at risk of being considered void, with remedial directions or orders to follow.
- 2.47** **Will additional restrictions be in place where the court considers a creditor's petition presented on or after 27 April 2020?**
- 2.47.1** Any presented winding-up petitions will have to comply with the restrictions discussed at [para. 2.44](#).
- 2.47.2** In addition, the court's ability to grant a winding-up petition will be restricted where:
- (1) a creditor presents a winding-up petition between 27 April 2020 and 31 March 2021;
  - (2) the company is deemed unable to pay its debts on a ground specified in s. 123(1) or (2), IA 1986 (registered companies) or ss. 222, 223 or 224, IA 1986 (unregistered companies); and
  - (3) it appears to the court that coronavirus had a Financial Effect on the company, before the presentation of the winding-up petition.
- 2.47.3** In such circumstances, the court may only wind-up a company if it is satisfied that: (i) for petitions under s. 123(1)(a)-(d), IA 1986, the facts by reference to which the ground relied on for winding-up applies would have arisen even if coronavirus had not had a Financial Effect on the company; and (ii) for petitions under s. 123(1)(e) or s. 123(2), IA 1986, the ground relied on for winding-up would apply even if coronavirus had not had a Financial Effect on the company (paras. 5 and 6, Schedule 10, CIGA 2020).
- 2.47.4** In other words, if the court finds that coronavirus worsened the financial position of the company, but the ground upon which winding-up has been requested would have existed in any event, then the court will still make the winding-up order. Whether the coronavirus had a Financial Effect on the company is a question of fact, and each case will be assessed on its own merits and facts. Nevertheless, the [House of Commons Briefing Paper](#) in relation to the CIGA 2020 suggests that the expectation is that the courts will take a broad interpretation of the term "*Financial Effect*".<sup>16</sup>

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16 House of Commons Library, Briefing Paper, Number 8971, 9 December 2020, "*New business support measures: Corporate Insolvency and Governance Act 2020*" by Lorraine Conway.

An early example of the application of para. 5 of Schedule 10 can be found in the case *Re a company (application to restrain advertisement)* [2020] EWHC 1551 (Ch) at paras. [37]-[47]. This judgment was handed down when CIGA 2020 was still a Bill. It appears that ICC Judge Barber's assessment of the case was highly dependent on the evidence. **2.47.5**

Petitioning creditors must therefore carefully consider the contents of any evidence served in support of the winding-up petition. It will be important to convince the court that the petitioning creditor has the necessary belief that the grounds for petitioning would have arisen regardless of the Financial Effects of coronavirus, in compliance with paras. 2 or 3, Schedule 10. **2.47.6**

In *Re a company (application to restrain advertisement)* the petitioner was explicitly granted liberty to apply to lift the restraint on advertisement on production of further evidence demonstrating that s. 123(1)(e), IA 1986 would apply even if coronavirus had not had a financial effect on the debtor company. **2.47.7**

These sections only limit the court's power in respect of winding-up petitions based on the debtor company's inability to pay its debts. As such, they are limited in scope, and do not appear to apply to creditor's winding-up petitions which are based on a ground other than a company's inability to pay its debts. **2.47.8**

**What is the procedure for obtaining a winding up order, including the requirements for giving notice of, publicising, advertising or inspecting a winding-up petition, during the relevant period?** **2.48**

Paragraph 19(2), Schedule 10, CIGA 2020 provides that the normal rules regarding notice, publication and advertisement do not apply to winding-up petitions which are based on the ground that the debtor company is unable to pay its debts until the court has made a determination in relation to the question of whether it is likely that the court will be able to make a winding-up order. **2.48.1**

It therefore appears that any provisions in the IR 2016 in relation to notice, publication and advertisement of the petition should not be complied with until the court has made such a determination, as discussed in [paras. 2.44](#) and [2.47](#). **2.48.2**

No guidance as to how this is procedurally meant to operate was provided either in CIGA 2020 or in its [Explanatory Notes](#). However, the new [Practice Direction relating to the Corporate Insolvency and Governance Act 2020](#) (the "**CIGA 2020 Practice Direction**") has filled in this gap. The new Practice Direction, in force from 26 June 2020, sets out the following procedural requirements: **2.48.3**

- (1) A petition will not be accepted for filing unless it contains the statement required by r. 7.5(1), IR 2016, as amended by para. 19(3), Schedule 10, CIGA 2020 (i.e. the statement that the petitioner has satisfied the conditions discussed at [para. 2.44](#) above). The petition must also contain a summary of the grounds relied upon by the petitioner for the purpose of satisfying the test referred to at [para. 2.47](#) above (the "**Coronavirus Test**") (see para. 3, CIGA 2020 Practice Direction).
- (2) Upon presentation of the petition, the petition will be listed for a non-attendance pre-trial review ("**PTR**") with a time estimate of 15 minutes for the first available date after 28 days from the date of presentation. At the PTR, the court will give directions for a preliminary hearing in order to determine whether it is likely that it will be able

- to make an order under s. 122(1)(f) or s. 221(5)(b), IA 1986, having regard to the Coronavirus Test (see para. 4, CIGA 2020 Practice Direction).
- (3) If the petitioner wishes to rely on evidence at the preliminary hearing, other than the evidence contained in the petition, it must file and serve on the company a witness statement containing such evidence at the same time as the petition. If the company wishes to rely on any evidence at the preliminary hearing, it must file and serve on the petitioner a witness statement within 14 days of service of the petition (see paras. 6.1 and 6.2, CIGA 2020 Practice Direction).
  - (4) At least two days before the PTR, the parties must file and serve a listing certificate stating the identity of their legal representatives (if any), their availability for the preliminary hearing and a time estimate for the preliminary hearing (see para. 6.3, CIGA 2020 Practice Direction).
  - (5) At the PTR, the court may: (i) list the petition for a hearing in the winding-up list, if the company does not oppose the petition and the court is satisfied that it is likely to make a winding up order under s. 122(1)(f) or s. 221(5)(b), IA 1986, having regard to the Coronavirus Test; or (ii) list the preliminary hearing and give appropriate directions (see para. 7, CIGA 2020 Practice Direction).
  - (6) At the preliminary hearing, if the court is not satisfied that it is likely that it will be able to make an order under s. 122(1)(f) or s. 221(5)(b), IA 1986, having regard to the Coronavirus Test, it shall dismiss the petition. Alternatively, where the court is satisfied that it is likely that it will be able to make an order under s. 122(1)(f) or s. 221(5)(b), IA 1986, having regard to the Coronavirus Test, it shall list the petition for a hearing in the winding-up list (see para. 8.1, CIGA 2020 Practice Direction).
  - (7) Where the court gives a direction for the petition to be heard in the winding-up list, the relevant provisions in the IR 2016 as to giving notice of the petition and its further conduct take effect (see para. 8.2, CIGA 2020 Practice Direction).
  - (8) Where the court has determined that it is likely that a winding-up order will be made, and it appears that the same determination has been made in respect of another petition concerning the same company (whether by the same or by a different court), the court shall direct that both petitions shall be listed for a further hearing at the same time, with the petition presented first in time to be heard first and the second petition to be transferred to the court dealing with the first petition (if necessary) (see para. 8.3, CIGA 2020 Practice Direction).

**2.48.4** Importantly, until the court has made a determination as to whether it is likely that it can make a winding-up order, having regard to the Coronavirus Test, any rights to inspect the court files (under r. 12.39, IR 2016) are not exercisable (para. 19(4), Schedule 10, CIGA 2020). As such, the petition shall remain private (save for being served on the company and delivered to such other persons as specified in r. 7.9, IR 2016). Accordingly, unless the court orders otherwise, the petition will not be available for inspection, and neither the petition itself, nor the fact of its presentation shall be revealed in response to a search by a member of the public of the court file (para. 5, CIGA 2020 Practice Direction).

**2.48.5** Practitioners should also note that, pursuant to para. 9, CIGA 2020 Practice Direction, a winding-up petition within the scope of that practice direction is deemed to be other than 'Local Business' for the purposes of paras. 3.6 and 3.7 of the [Insolvency Practice Direction](#). Accordingly, if the petition is issued in a County Court hearing centre having insolvency

jurisdiction, it shall be transferred to one or other of the hearing centres referred to in para. 3.6, Insolvency Practice Direction.

**Can a debtor company restrain the presentation of a (new) petition? 2.49**

Yes, a debtor company can restrain the presentation of a winding-up petition where it does not meet the criteria of either IA 1986 or Schedule 10 of CIGA 2020. 2.49.1

Before the Government published the Corporate Insolvency and Governance Bill, Snowden J rejected an application for an injunction to restrain the presentation of a winding-up petition on the basis of the Government’s announcement (dated 23 April 2020) that it was intending to enact emergency legislation relating to statutory demands and winding-up petitions. Snowden J considered that the court had to make a decision on the law as it stands, and that he could not be sure of the scope of the legislation. It did not help the applicant that its evidence in respect of the effects of coronavirus on its financial position was contradictory (see: *Re Saint Benedict’s Land Trust Ltd* [2020] EWHC 1001 (Ch)). 2.49.2

However, Birss J came to a different conclusion two weeks later in *Travelodge Hotels Ltd v Prime Aesthetics Ltd* [2020] EWHC 1217. The applicant had received a confirmation from the Department of Business, Energy and Industrial Strategy that the intention was for the Corporate Insolvency and Governance Bill to cover high street shops and also other companies. Birss J considered that the court could take into account imminent changes in the law, considered it highly likely that the legislation would cover the situation at hand, and granted the application to restrain presentation of the winding-up petition. The court did not require a cross-undertaking in damages. 2.49.3

Subsequent to the Corporate Insolvency and Governance Bill having been published (but prior to its enactment), an injunction was also granted by Morgan J in *Re a company (injunction to restrain presentation of a petition)* [2020] EWHC 1406 (Ch). The application had been supported by a substantial body of evidence to the effect that the coronavirus had a Financial Effect on the company and that the facts on which the petition was based would not have arisen if coronavirus had not had a Financial Effect on the company. The court came to the conclusion that the petition would ultimately fail. Morgan J expressed a high degree of confidence that the Bill (as it then was) would be enacted in more or less its draft form. The Judge considered that the court could take into account the likelihood of a change in the law and granted the application. However, unlike *Travelodge*, the injunction was granted on terms that the company should provide a cross-undertaking in damages. 2.49.4

Consequently, despite the fact that CIGA 2020 had, at the time of these judgments, not yet entered into force, the courts have shown a willingness to restrain the presentation of winding-up petitions on the basis of prospective legislation. 2.49.5

**If a winding-up order is made, when is the winding-up deemed to commence? What is the consequence of this? 2.50**

Where: 2.50.1

- (1) a creditor presents a winding-up petition under s. 124, IA 1986 between 27 April 2020 and 31 March 2021; and
- (2) the court makes a winding-up order on the basis of a company’s inability to pay its debts;

the winding-up of the company is deemed to commence on the making of the winding-up order (para. 9, Schedule 10, CIGA 2020).

**2.50.2** This is an important change from the usual position where, by s. 129(2), IA 1986, the winding-up is deemed to commence earlier, at the time of the presentation of the petition.

**2.50.3** A crucial consequence of this provision is that transactions entered into between the presentation of the petition and the making of the winding-up order will (contrary to the usual principle in s. 127(1), IA 1986) not be void. “*As a result of the change, the company will not need to seek permission from the court to engage in its normal trading once a petition has been presented*” (Explanatory Notes, para. 211).<sup>17</sup>

**2.50.4** It is clear from this provision of CIGA 2020 that it does not apply to companies wound-up on the basis of a ground other than the company’s inability to pay its debts. In those circumstances s. 129(2), IA 1986 will remain applicable, and the winding-up will be deemed to have commenced at the time of the presentation of the petition for winding-up.

**2.51 What are the time periods for bringing a transaction-avoidance application in relation to a winding-up order made on a petition presented during the relevant period?**

**2.51.1** Paragraphs 8 to 18 of Schedule 10, CIGA 2020, make provision for the adjustment of time limits in other provisions in IA 1986, which relate to a company’s insolvency and the winding-up process. These adjusted time limits are applicable in relation to winding-up petitions presented between 27 April 2020 and 31 March 2021, insofar as such a petition is based on the debtor company’s inability to pay its debts.

**2.51.2** Paragraph 9, Schedule 10 has been dealt with at [para. 2.50](#) above.

***Liability as contributories of present and past members***

**2.51.3** Where a company is being wound-up, every present and past member is liable to contribute to a company’s assets to an amount sufficient for payment of its debts and liability as well as the expense of the winding-up (s. 74, IA 1986). This provision is subject to subsection 74(2). Paragraph 10, Schedule 10 provides that “*one year or more before commencement of the winding up*” in s. 74(2)(a), IA 1986 has to be interpreted to mean:

- (1) one year or more before the day on which the petition was presented; or
- (2) if the winding-up order was made more than 6 months after the day on which the petition was presented, 18 months or more before the day on which the winding-up order was made.

***Fraud in anticipation of winding-up***

**2.51.4** Section 206, IA 1986 lists the circumstances in which an officer of a company is deemed to have committed an offence following the winding-up of a company. The circumstances are only deemed to be an offence where they occurred within the 12 months immediately preceding the commencement of the winding-up.

**2.51.5** Paragraph 11, Schedule 10 provides that the 12-month timeframe is amended to begin with whichever is the later of:

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<sup>17</sup> The Explanatory Notes to the Corporate Insolvency and Governance Act can be found online at: [https://www.legislation.gov.uk/ukpga/2020/12/pdfs/ukpgaen\\_20200012\\_en.pdf](https://www.legislation.gov.uk/ukpga/2020/12/pdfs/ukpgaen_20200012_en.pdf) (accessed 1 February 2021).

- (1) the day 12 months before the day on which the petition was presented; and
  - (2) the day 18 months before the day on which the winding-up order was made; and
- ends with the day on which the winding-up order is made.

***Transactions in fraud of creditors***

In accordance with s. 207(1), IA 1986 an officer of a company is deemed to have committed an offence where (summarily put) the officer made a gift or concealed or removed property of the company before it was wound-up. However, the offence is not committed where the conduct occurred more than 5 years before the commencement of the winding-up (s. 207(2)(a), IA 1986). **2.51.6**

Section 207(2)(a), IA 1986 is amended by para. 12, Schedule 10 with the effect that s. 207(1), IA 1986 is applicable to conduct occurring: **2.51.7**

- (1) more than 5 years before the day on which the petition was presented; or
- (2) if the winding-up order was made more than 6 months after the day on which the petition was presented, more than 5 years and 6 months before the day on which the winding-up order was made.

***Misconduct in the course of winding-up***

Section 208(1), IA 1986 lists circumstances in which an officer of a company which is being wound-up commits an offence. Furthermore, by s. 208(2), IA 1986, an officer commits an offence if, after the commencement of the winding-up, he attempts to account for any part of the company's property by fictitious losses or expenses. The officer is deemed to have committed the offence if he has so attempted in connection with any qualifying decision procedure or deemed consent procedure of the company's creditors within 12 months immediately preceding the commencement of the winding-up. **2.51.8**

Paragraph 13, Schedule 10 seeks to amend this 12-month timeframe of s. 208(2) to begin with whichever is the later of: **2.51.9**

- (1) the day 12 months before the day on which the petition was presented; and
  - (2) the day 18 months before the day on which the winding-up order was made; and
- ends with the day on which the winding-up order was made.

***Adjustment of withdrawals (LLPs)***

Section 214A, IA 1986 (as inserted by the Limited Liability Partnership Regulation 2001 (SI 2001/1090)) is concerned with a person who is or has been a member of an LLP, where such a person withdrew property of the LLP (whether in the form of profits, salary, interest or otherwise) within the period of two years ending with the commencement of the winding-up (s. 214A(2), IA 1986). In such circumstances the court may declare that member liable to make such a contribution as it thinks proper (s. 214A(3), IA 1986). **2.51.10**

Paragraph 14, Schedule 10 amends the period in s. 214A(2) to begin with whichever is the later of: **2.51.11**

- (1) the day 2 years before the day on which the petition was presented; and

- (2) the day 2 years and 6 months before the day on which the winding-up order was made; and

ends with the day on which the winding-up order was made.

***Transactions at an undervalue (s. 238, IA 1986) and preferences (s. 239, IA 1986)***

**2.51.12** In relation to challenges of transactions made at an undervalue (s. 238, IA 1986) or preferences (s. 239, IA 1986), CIGA 2020 amends the “*relevant time*” (as set out in s. 240(1)(a), IA 1986), so as to begin with the later of:

- (1) the day 2 years before the day on which the winding-up petition was presented; and
- (2) the day 2 years plus 6 months before the day on which the winding-up order was made; and

ends with the day on which the winding-up order was made.

**2.51.13** But where the alleged preference is given to a person who is not connected with the company, CIGA 2020 amends the “*relevant time*” (as set out in s. 240(1)(b), IA 1986), so as to begin with the later of:

- (1) the day 6 months before the day on which the winding-up petition was presented; and
- (2) the day 12 months before the day on which the winding-up order was made; and

ends with the day on which the winding-up order was made (para. 15, Schedule 10, CIGA 2020).

***Avoidance of certain floating charges***

**2.51.14** In accordance with s. 245, IA 1986 floating charges on a company’s undertaking or property are invalid (to a certain extent (see s. 245(2)) insofar as they were created at a “*relevant time*”. Section 245(3), IA 1986 defines the ‘relevant time’ for the purpose of this provision. The time at which a floating charge was created by a company is dependent on the circumstances in which it was created.

**2.51.15** Where a charge was created in favour of a person who is connected with the company (s. 245(3)(a)), the relevant time begins with whichever is the later of:

- (1) the day 2 years before the day on which the petition was presented; and
- (2) the day 2 years and 6 months before the day on which the winding-up order was made; and

ends with the day on which the winding-up order was made.

**2.51.16** Where a charge was created in favour of any other person (s. 245(3)(b)), the relevant time begins with whichever is the later of:

- (1) the day 12 months before the day on which the petition was presented; and
- (2) the day 18 months before the day on which the winding-up order was made; and

ends with the day on which the winding-up order was made (para. 18, Schedule 10, CIGA 2020).



### **Reminder**

It is important to remember that the above adjusted time limits are only applicable to winding-up petitions presented between 27 April 2020 and 31 March 2021, insofar as such a petition was based on the debtor company's inability to pay its debts (para. 8, Schedule 10). **2.51.17**

In respect of any other winding-up petitions, the usual time limits will apply. **2.51.18**

## **Suspension of Liability for Wrongful Trading**

**What is wrongful trading?** **2.52**

Under ss. 214 and 246ZB, IA 1986, where a director of a company knows, or ought to conclude, that there is no reasonable prospect that the company will avoid going into insolvent liquidation or insolvent administration, the director must take every step with a view to minimising the potential loss to the company's creditors as the director ought to take. The steps that the director ought to take are those that would be taken by a reasonably diligent person having both the knowledge, skill and experience that may reasonably be expected of a person carrying out the director's functions and the director's own knowledge, skill and experience. **2.52.1**

If the director does not take those steps, and if the company does subsequently go into insolvent liquidation or insolvent administration, then the court, on the application of the company's liquidator or administrator, may order the director to make such contribution to the company's assets as it thinks proper. **2.52.2**

In practice, the court will assess the amount that a defaulting director should contribute by reference to the extent to which the director's decision to continue trading contributed towards an increase in the company's 'net deficiency' i.e. the amount by which its liabilities exceeded its assets *Nicholson v Fielding* [2017] All ER (D) 156 (Oct); *Re Ralls Builders Ltd, Grant v Ralls* [2016] EWHC 243 (Ch); [2016] BCC 293). **2.52.3**

The law of wrongful trading therefore understandably makes directors nervous. If they continue trading for too long, they are at risk of hefty personal financial exposure. A cautious director might therefore close a business down sooner than is really necessary. **2.52.4**

**What did the Corporate Insolvency and Governance Act 2020 do?** **2.53**

CIGA 2020 recognised the problem mentioned above, i.e. that the wrongful trading laws create a powerful incentive for directors, who believe that the company is at risk of entering insolvent liquidation or administration, to cease trading. In the circumstances of the pandemic, however, that was exactly what the Government did not want them to do. It would have preferred the directors to make greater efforts to continue in business, assisted if necessary by support schemes such as furloughing and the Business Interruption Loans. **2.53.1**

CIGA 2020 therefore temporarily suspended the wrongful trading laws. Section 12(1) provides that: **2.53.2**

*"In determining for the purposes of section 214 or 246ZB of the Insolvency Act 1986 (liability of director for wrongful trading) the contribution (if any) to a company's assets that it is proper for a person to make, the court is to assume that the person is not responsible for any worsening of the financial position of the company or its creditors that occurs during the relevant period."*

- 2.53.3** The ‘relevant period’ was defined as 1 March 2020 to 30 September 2020. This was not extended. However, on 26 November 2020, The Corporate Insolvency and Governance Act 2020 (Coronavirus) (Suspension of Liability for Wrongful Trading and Extension of the Relevant Period) Regulations 2020 (SI 2020/1349) (the “**Wrongful Trading Regulation**”) came into force. The Wrongful Trading Regulation essentially reproduces s. 12, CIGA 2020 but with a relevant period of 26 November 2020 to 30 April 2021.
- 2.53.4** The result, therefore, is that if a company has been wrongfully trading since 1 March 2020, its directors will be at no risk of personal liability under s. 214 or s. 246ZB, IA 1986 in respect of any increase in the company’s net deficiency that took place between 1 March 2020 and 30 September 2020, or between 26 November 2020 and 30 April 2021, but may find themselves liable for any increase in the net deficiency that occurred between 1 October 2020 and 25 November 2020. This is a somewhat odd result.
- 2.53.5** The Wrongful Trading Regulation is also notable from a constitutional perspective, as it is the first Regulation to be passed under the ‘made affirmative’ procedure in s. 20(1)(c), CIGA 2020.

### *Uncertainties*

- 2.53.6** Three particular questions arise.
- (1) First, is the court able to go behind the assumption in cases where it is clear that the director was responsible for a worsening of the financial position of the company during the relevant period? Judging by the Government’s response to the [Lords Constitution Select Committee](#),<sup>18</sup> the answer appears to be ‘no’. The court is to assume that the person is not responsible. The reason for this is that if there were any risk of directors being held liable under the wrongful trading laws during this period, some cautious directors might still have chosen to close the business down so as not to take that risk. This is exactly what the Government was trying to avoid.
  - (2) Second, how is the court to determine which element of a company’s loss is to be excised from any claim as having arisen during the relevant period(s)? There may be formidable evidential difficulties, particularly where, as often happens, a claim does not come to trial until several years later. Directors will seek to reduce their liability by arguing that the loss substantially occurred during the relevant period(s). Liquidators will seek to hike up the liability by arguing that the loss occurred mainly outside the relevant period(s), and in particular during the interval between the expiry of s. 12 and the coming into force of the Wrongful Trading Regulation. It will be a fruitful area for argument and for detailed accounting evidence. Directors who might need to show later that the loss did indeed occur mainly during the relevant period(s) would be advised to keep detailed financial records and management accounts (as they should do anyway).
  - (3) Third, are liquidators still able to hold directors who are guilty of what would otherwise be wrongful trading during the relevant period accountable by bringing claims for breaches of duties and using the summary procedural remedy against delinquent directors in s. 212, IA 1986? For example, where directors know, or ought to know that their company is, or is likely to become insolvent, they are obliged to take into account creditor interests as opposed to managing the company principally

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<sup>18</sup> [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/894355/200617\\_Letter\\_to\\_Constitution\\_Committee.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/894355/200617_Letter_to_Constitution_Committee.pdf) (accessed 1 February 2021).

for the benefit of its shareholders (*BTI 2014 LLC v Sequana SA* [2019] EWCA Civ 112; [2019] 2 All ER 784). Failure to do so is a misfeasance, which, if the company is subsequently wound-up, is actionable under s. 212, IA 1986, to which no amendment has been made. In our view (and, it seems, the Government's view - see for example para. 7.6 of the Explanatory Memorandum to the Wrongful Trading Regulation), there is nothing to prevent the liquidator from bringing such a claim (as discussed in detail in [para. 4.1](#) of Section Four: Company below). There would be a tension between such a claim and the policy behind the suspension of the wrongful trading laws, which it would not be easy for the court to resolve.

### **To which companies does the 'suspension' apply?**

**2.54**

The suspension does not apply to most of the 'City' companies that are excluded from the new moratorium, as stated in s. 12(3), CIGA 2020 and reg. 2(3), Wrongful Trading Regulation. This includes companies that are parties to capital market arrangements (as defined by paras. 13 and 14, Schedule ZA1, IA 1986). Further specific exclusions are set out at s. 12(8), CIGA 2020 and reg. 2(8), Wrongful Trading Regulation.

**2.54.1**

## **Administration**

### **How has the procedure for the filing of a notice of intention to appoint an administrator & a notice of appointment of an administrator been adjusted?**

**2.55**

There has for some time been uncertainty in the rather niche area of notices of intention to appoint administrators and notices of appointment of administrators which are CE-filed outside the courts' opening hours. It has not been clear whether it is possible for such notices to be filed through the CE-filing system outside the courts' normal opening hours and, if so, whether such notices were immediately effective. This uncertainty has been considered judicially in a number of decisions, and in relation to notices of appointment (but not notices of intention to appoint) is the subject of [guidance](#) issued by the Chancellor on 29 January 2020.<sup>19</sup>

**2.55.1**

That case law and guidance have now been overtaken to a large extent by the Temporary Insolvency PD for so long as it remains in force, i.e. the 'Temporary Practice Direction supporting the Insolvency Practice Direction' which originally came into force on 6 April 2020, but which has now been updated and replaced by a new [Temporary Insolvency PD \(October 2020\)](#) published on 2 October 2020.

**2.55.2**

Paragraph 3 of the Temporary Insolvency PD (October 2020) provides that:

**2.55.3**

- (1) A notice of intention to appoint an administrator which is CE-filed by a company or its directors outside the courts' usual opening hours (i.e. outside 10am to 4pm when the courts are open for business) will take effect as at 10am on the day that the courts are next open for business, and the ten business day period in which to make the appointment provided by para. 28(2), Schedule B1, IA 1986 will start running from that date: para. 3.3, Temporary Insolvency PD (October 2020).
- (2) Similarly, a notice of appointment which is CE-filed by a company or its directors outside the courts' usual opening hours will take effect as at 10am on the day that

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<sup>19</sup> <https://www.judiciary.uk/announcements/chancellor-of-the-high-court-guidance-note-on-appointing-an-administrator/> (accessed 1 February 2021).

the courts are next open for business: para. 3.4, Temporary Insolvency PD (October 2020).

- (3) By contrast, the CE-filing system may not be used to file a notice of appointment of an administrator by the holder of a qualifying floating charge outside the courts' usual opening hours (para. 3.6, Temporary Insolvency PD (October 2020)); such a notice may only be filed outside the usual opening hours by the procedure set out in r. 3.20-3.22, IR 2016.

**2.55.4** Paragraph 3.5 of the Temporary Insolvency PD (October 2020) provides that any such notices shall continue to be reviewed by the court, as and when practicable, in accordance with para. 5.3 of PD 51O (i.e. the Electronic Working Pilot Scheme) but that the validity and time at which the appointment of an administrator is effective shall not be affected by reason only of any delay in acceptance of the notice under para. 5.3(1) of PD 51O.

**2.55.5** For reasons which are not clear, the Temporary Insolvency PD (October 2020) does not apply to notices of intention to appoint an administrator by the holder of a qualifying floating charge: para. 3.1, Temporary Insolvency PD (October 2020). It may be that this omission means that notices of intention to appoint an administrator by the holder of a qualifying floating charge can continue to be e-filed and to be effective outside court hours (reflecting the pre-Temporary Insolvency PD view expressed by HHJ David Cooke in *Causer v All Star Leisure Group Ltd* [2019] EWHC 3231 (Ch); [2020] BCC 100). Alternatively, it may be that the changes introduced by the Temporary Insolvency PD (October 2020) ought also to apply by analogy here too, such that such notices may only be filed by the procedure set out in r. 3.20-3.22, IR 2016 (as is the case for a notice of appointment of an administrator filed by the holder of a qualifying floating charge). Alternatively, it may be that such notices should be capable of being CE-filed, but only take effect as at 10am on the day that the courts are next open for business (as is now the case for notices of intention to appoint an administrator and notices of appointment filed by a company or its directors). Clarification would be welcome, either by the courts through case law or through permanent changes to the IR 2016.

## **2.56 Does furloughing employees have the effect of adopting employment contracts?**

**2.56.1** Administrators may consider that the purpose of the relevant administration, to rescue the company as a going concern, may be best furthered if the company's employees are furloughed, or remain on furlough, under the Government's job retention scheme.

**2.56.2** A question which has arisen in that context is whether the administrators are taken to have "adopted" the relevant contracts of employment for the purposes of para. 99(5), Schedule B1, IA 1986 by paying the amounts claimed from the Government to furloughed employees. This is an important issue since the effect of the adoption of a contract of employment (for which, see para. 99, Schedule B1, IA 1986) is that the wages or salaries, together with some other amounts such as sick pay and holiday, for the period after adoption until termination of the employment or, if earlier, the end of the administration, are payable as expenses of the administration ahead of not only pre-administration unsecured liabilities but also many of the costs and expenses of the administration.

**2.56.3** The issue has been considered by the High Court in *In re Carluccio's Ltd* [2020] EWHC 886; [2020] BCC 100, and by the Court of Appeal in *In re Debenhams Retail Ltd* [2020] EWCA Civ 600; [2020] BCC 548.

In short, the answer is ‘yes’: retaining furloughed employees or placing employees on furlough does involve the adoption of their employment contracts for the purposes of para. 99(5), Schedule B1, IA 1986 – see *In re Debenhams Retail Ltd* at [70]-[71]. **2.56.4**

In reaching such a conclusion, the Court of Appeal noted that this may cause difficulties to administrators in deciding whether to retain furloughed employees or to place employees on furlough, and that there may be good reasons of policy for excluding action restricted to implementation of the furlough scheme from the scope of “adoption” under para. 99. However, the Court of Appeal concluded that such an exclusion could not be accommodated under the law as it stands (see [71]). If the law needs to be changed, it is a matter for Parliament. **2.56.5**

## Procedure

**What changes have been made to insolvency procedures as a result of the pandemic? **2.57****

### ***Temporary Insolvency PD***

The key changes to insolvency procedures are brought about by the “*the Temporary Insolvency PD*”. **2.57.1**

At first, the Temporary Insolvency PD was effective from 6 April 2020 until 1 October 2020. Unsurprisingly, given the continuing effects of the pandemic, the Temporary Insolvency PD has now been extended and replaced by a new [Temporary Insolvency PD \(October 2020\)](#), which was published on 2 October 2020. **2.57.2**

The new Temporary Insolvency PD (October 2020) **2.57.3**

- (1) Retains the changes made by the old Temporary Insolvency PD for filing notices of intention to appoint an administrator and notices to appoint an administrator (para. 3) – see [para. 2.55](#) above.
- (2) Retains the changes made by the old Temporary Insolvency PD to the statutory declarations regime (para. 6) – see [para. 2.60](#) below.
- (3) Deletes the former provisions in the old Temporary Insolvency PD relating to the automating adjournment and re-listing of insolvency applications, and temporary listing procedure for winding-up and bankruptcy petitions.
- (4) Provides for a new listing procedure for winding-up and bankruptcy petitions (para. 4) – see [para. 2.58](#) below.
- (5) Provides for a new listing procedure for all other insolvency hearings (para. 5) – see [para. 2.59](#) below.

At the time of writing, the new Temporary Insolvency PD is due to expire on 31 March 2021. **2.57.4**

### ***Other Procedural Guidance***

The Temporary Insolvency PD (October 2020) is supplemented by: **2.57.5**

- (1) A [Guidance Note](#) for the conduct of insolvency and company law proceedings in the Rolls Building, London, issued by Chief ICC Judge Briggs on 1 October 2020.<sup>20</sup>

<sup>20</sup> <https://www.judiciary.uk/wp-content/uploads/2020/10/Guidance-for-ICC-London-on-TIPD-2-October-2020-1.pdf> (accessed 1 February 2021).

- (2) A [Guidance Note](#) for the conduct of insolvency proceedings on the North and North Eastern Circuits.<sup>21</sup>
- (3) A [Guidance Note](#) on the form of electronic bundles for Insolvency Hearings in the Business and Property Courts in Leeds, Liverpool, Manchester and Newcastle.<sup>22</sup>

**2.57.6** There is also a [protocol](#) for insolvency and company work at Central London County Court, which applies to the bulk lists heard by the Business & Property District Judges.<sup>23</sup>

### ***Update to the Insolvency Practice Direction***

**2.57.7** A minor procedural change has been brought into effect through an update to the main [Insolvency Practice Direction](#). The update is to provide that applications for orders concerning moratoria, and applications for orders concerning the protection of supplies of goods and services may be listed before a High Court Judge or ICC Judge but not ordinarily before a District Judge: see the newly inserted paras. 3.3(6) and (7).

### ***CIGA 2020 Practice Direction***

**2.57.8** The [CIGA 2020 Practice Direction](#), which came into force from 26 June 2020, makes provision for certain procedural points arising from CIGA 2020. The effects of these are explained above in:

- (1) [Para. 2.48](#) (as regards winding up petitions); and
- (2) [Paras. 2.1.5 & 2.6.1](#) (as regards moratoria).

### ***Virtual meetings***

**2.57.9** The IR 2016 permits creditors to make decisions without meeting physically: see r. 15.2ff, IR 2016. This is of obvious importance in the context of the pandemic.

**2.57.10** The IR 2016 does not apply to schemes of arrangement, but in that context the courts are being flexible to allow virtual meetings to take place where meetings are required: see *Re Castle Trust Direct Plc* [2020] EWHC 969 (Ch) and *In Re African Minerals Ltd* [2020] EWHC 1702 (Ch).

**2.57.11** These decisions which permit meetings otherwise than in person have arisen as a result of the pandemic, but it will be interesting to see the extent to which such virtual meetings continue to be permitted once the pandemic has abated.

## **2.58 How are winding-up and bankruptcy petitions currently being listed?**

**2.58.1** Paragraph 4 of the Temporary Insolvency PD (October 2020) provides that:

- (1) The court will list a hearing of any winding-up and bankruptcy petition as a “*Remote Hearing*” (defined as “*a hearing at which the parties, witnesses and legal representatives appear remotely by audio or video technology*”) to be conducted using such video

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21 <https://www.judiciary.uk/wp-content/uploads/2020/10/Northern-TIPD-5-Oct-2020-1.pdf> (accessed 1 February 2021).

22 <https://www.judiciary.uk/wp-content/uploads/2020/10/North-BPC-Bundle-Guidance-1.pdf> (accessed 1 February 2021).

23 <https://www.judiciary.uk/wp-content/uploads/2020/09/covid-protocol-1sep20.pdf> (accessed 1 February 2021).

conferencing technology or telephone conferencing facility as the relevant court decides.

- (2) To that end, the parties must provide the court with an email address or telephone number for the purposes of being invited to join the Remote Hearing as soon as possible and in any event no later than 2 clear Business Days before the hearing date. Failure to do so may result in the court making an order (including a winding-up order, a bankruptcy order or dismissal of the petition as the case may be) in the absence of the party who did not provide such details.
- (3) Any other person who intends to appear at the Remote Hearing of a winding-up or bankruptcy petition must deliver a notice of intention to appear on the petition in accordance with r. 7.14 or r. 10.19, IR 2016, as the case may be, providing with it an email address or telephone number for the purposes of being invited to join the Remote Hearing.

### **How are other insolvency hearings currently being listed?**

**2.59**

Paragraph 5, Temporary Insolvency PD (October 2020) explains how other insolvency hearings are currently being listed and provides that:

**2.59.1**

- (1) Hearings may be conducted by one of three methods: an “*In-person Hearing*”, a “*Remote Hearing*” or a “*Hybrid Hearing*”. These terms are defined in the Temporary Insolvency PD (October 2020) as one might expect: an “*In-person Hearing*” is “*a hearing at which the parties, witnesses and legal representatives appear in person before the Court*”; a “*Remote Hearing*” is “*hearing at which the parties, witnesses and legal representatives appear remotely by audio or video technology*”; and a “*Hybrid Hearing*” is “*a hearing at which some of the parties, witnesses and legal representatives appear in person before the Court and others participate remotely by audio or video technology*”.
- (2) The parties shall liaise with each other with a view to providing the court with an agreed proposal for the method of hearing, as far in advance of the hearing date as reasonably practicable.
- (3) Where the parties are unable to reach agreement, they shall each provide the court with their proposals for the method of hearing as far in advance of the hearing date as reasonably practicable.
- (4) It shall be for the court (with the benefit, as applicable, of the agreement or proposals of the parties) to determine the method of the hearing.
- (5) In the case of any Remote Hearing or Hybrid Hearing, the parties must provide to the court as far in advance of the hearing as reasonably practicable, an email address or telephone number of each person intending to join the hearing remotely, for the purposes of being invited to join the Remote Hearing or Hybrid Hearing as the case may be. Failure to do so may result in the court making an order in the absence of the party who did not provide such details.
- (6) It will also be open to the court to fix a short remote case management conference in advance of the fixed hearing to allow for directions to be made in relation to the conduct of the hearing, the technology to be used, and/or any other relevant matters.

**2.60 What changes have been made to the statutory declarations regime?**

**2.60.1** Paragraph 6.1 of the Temporary Insolvency PD (October 2020) notes that where Schedule B1, IA 1986 requires a person to provide a statutory declaration, a statutory declaration that is made otherwise than in-person before a person authorised to administer the oath may constitute a formal defect of irregularity. Paragraph 6.1 continues to note that the court may, pursuant to r. 12.64, IR 2016, declare that such a formal defect or irregularity shall not invalidate the relevant insolvency proceedings to which the statutory declaration relates, unless the court considers that substantial injustice has been caused by the defect or irregularity which cannot be remedied by any order of the court.

**2.60.2** Given the circumstances as described by para. 6.1, and the risk of a formal defect or irregularity where statutory declarations are provided otherwise than in-person, para. 6.2 provides that where a statutory declaration is made in certain prescribed circumstances, then the defect or irregularity (if any) arising solely from the failure to make the statutory declaration in-person before a person authorised to administer the oath shall not by itself be regarded as causing substantial injustice. Those prescribed circumstances are where:

- (1) The person making the statutory declaration does so by way of video conference with the person authorised to administer the oath;
- (2) The person authorised to administer the oath attests that the statutory declaration was made in the manner referred to in (1) above; and
- (3) The statutory declaration states that it was made in the manner referred to in (1) above.

**2.60.3** The Temporary Insolvency PD (October 2020) thus enables statutory declarations to be provided by way of video conference without there being a risk that those statutory declarations may be defective or invalid. It therefore limits the need for in-person contact and facilitates the kinds of social distancing and remote working which are required by the pandemic.



# Section Three

## PERSONAL INSOLVENCY

*Andrew Clutterbuck QC, Tiran Nersessian, Joseph Wigley, Emma Horner ©*

*Law stated as at: 1 February 2021*

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## Introduction

- 3.0** Legal developments involving personal insolvency during the pandemic in 2020 were largely procedural. It is, however, anticipated that there will be an increase in personal insolvency proceedings in 2021. This is in circumstances where the furlough scheme is currently due to end in April 2021, employees may be made redundant and many of the self-employed who had their income significantly reduced as a result of the pandemic did not necessarily qualify for the Self-Employed Income Support Scheme. Individuals have been able to benefit from mortgage holiday payments and to freeze loan or credit card repayments, but only up to a maximum payment holiday of six months, and any applications for payment holidays must be made by 31 March 2021. We therefore expect to see a rapid development of the case law in this area throughout 2021, as the courts react to the effect of the pandemic on individuals.

## Specific Issues

- 3.1 Can individuals benefit from the moratorium in the Corporate Insolvency and Governance Act 2020?**
- 3.1.1** No, CIGA 2020 only applies to companies and not to individuals (see the discussion in [para. 2.3](#) of Section Two: Corporate Insolvency above). Individuals are therefore not able to benefit from the moratorium in respect of their personal insolvency position.
- 3.1.2** Individuals affected by the pandemic have, however, been able to obtain payment holidays from institutional creditors by applying on an individual basis to the relevant creditor. Many mortgage providers have been willing to provide mortgage payment holidays; in early June 2020 the FCA announced that mortgagors could apply for a mortgage payment holiday. Originally mortgagors could make such applications until 31 October 2020, and this was subsequently extended to allow applications to be made up until 31 March 2021: see <https://www.fca.org.uk/consumers/mortgages-coronavirus-consumers>.<sup>24</sup> Mortgagors can seek a payment holiday of up to six months in total, though lenders can only agree a payment holiday of up to three months at a time, and all payment holidays are to end by 31 July 2021. Further, the FCA has required most banks to offer a freeze on repayments of loans and credit cards for three months at a time, up to a maximum payment holiday of six months in total. Originally such payment holidays needed to be applied for by 31 October 2020, and this was also subsequently extended to 31 March 2021: <https://www.fca.org.uk/consumers/coronavirus-information-personal-loans-credit-cards-overdrafts>.<sup>25</sup> As with payment holidays for mortgages, all payment holidays for personal loans and credit cards must end by 31 July 2021.
- 3.2 Does the temporary ban on statutory demands in the Corporate Insolvency and Governance Act 2020 apply to personal insolvency proceedings?**
- 3.2.1** No, CIGA 2020 only applies to companies and not to individuals (see the discussion in [para. 2.3](#) in Section Two: Corporate Insolvency above). Under CIGA 2020 creditors are not prohibited from serving statutory demands, and statutory demands can continue to be used as a basis for presenting a bankruptcy petition (for information on the ban on the use of statutory demands as the basis of a winding-up petition against a company see the discussion in [para. 2.41](#) in Section Two: Corporate Insolvency above).

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<sup>24</sup> Accessed 1 February 2021.

<sup>25</sup> Accessed 1 February 2021.

If an individual debtor is served a statutory demand they can, in the usual way, make an application to set aside the statutory demand within 18 days of service in accordance with r. 10.4, IR 2016. The grounds for making an application to set aside a statutory demand are set out in r. 10.5(5), IR 2016. If an application to set aside a statutory demand is made, the creditor cannot present a bankruptcy petition while the application is outstanding: r. 10.9(2)(b)(ii), IR 2016. However, if the court later dismisses the application the court is required to make an order authorising the creditor to present a bankruptcy petition as soon as possible or at a date specified by the court. **3.2.2**

The court has a discretion under r. 10.5(5)(d), IR 2016 to set aside a statutory demand if satisfied that the demand ought to be set aside. There is some support in the authorities for the proposition that courts should not place too restrictive a construction on this discretion (see Court of Appeal in *Budge v AF Budge (Contractors) Ltd (In Receivership and Liquidation)* [1997] BPIR 366) and that the court must ultimately decide whether in all the circumstances it would be unjust for the matter to proceed to the presentation of a bankruptcy petition. However, it is questionable whether debtors will be able successfully to deploy that argument on grounds that relate to consequences of the pandemic, save perhaps in cases which are very fact-specific. In circumstances where the legislature has taken a deliberate decision to extend protections concerning statutory demands only to corporate debtors, it would be very difficult for a bankruptcy court to accede to a more general argument that the same protections should be read across to personal insolvency law through the mechanism of r. 10.5(5)(d), IR 2016. **3.2.3**

### **Can bankruptcy petitions be presented against debtors during the pandemic?** **3.3**

At the time of writing there is no change to a creditor's ability to present a bankruptcy petition against a debtor during the pandemic. **3.3.1**

### **What is HMRC's approach to enforcement activity during this period?** **3.4**

On 27 March 2020 HMRC issued a guidance document entitled '*Coronavirus — Insolvency Guidance*' in which HMRC set out its approach to enforcement activity. In the document, HMRC explained, among other things, that: **3.4.1**

- (1) it had paused the majority of all insolvency activity for the time being with the effect that HMRC would not petition for bankruptcy (or winding up) orders unless it was deemed to be essential, i.e. in cases of fraud, criminal activity;
- (2) it would continue to consider and deal with new Individual Voluntary Arrangements ("IVA") (and CVA and administration) proposals;
- (3) where a trustee representing an individual already subject to an IVA (or a supervisor representing a business already subject to a CVA) considers that his/her client is unable to maintain the IVA (or CVA) payments:
  - (a) where the terms of an arrangement allow the trustee (or supervisor) discretion, HMRC would expect that discretion to be exercised to its maximum, with reference to creditors only if essential;
  - (b) HMRC would support a variation to allow a three-month break from contributions and there is no need to contact HMRC to request this deferment; and

- (c) it considered that, after such deferral period, from 1 July 2020, the trustee representing the individual (or supervisor representing a business) should be able to resume payments per the terms of any IVA (or CVA) or, in the event that he/she is not able to, should contact HMRC's Enforcement and Insolvency Service to discuss a recovery 'Time to Pay' arrangement depending on the circumstances.

**3.4.2** HMRC also set up a telephone helpline to support businesses and self-employed individuals concerned about not being able to pay their tax due to Covid-19, allowing them to obtain practical help and advice. For individuals who are actually unable to pay due to Covid-19, HMRC have indicated that they will discuss the individual's specific circumstances to explore agreeing an instalment arrangement, suspending debt collection proceedings, cancelling penalties and interest where you have administrative difficulties contacting or paying HMRC immediately. The relevant telephone number is 0800 024 1222.

**3.4.3** Pursuant to the [Protocol for Insolvency and Company Work at Central London dated 24 March 2020](#), from that date until 6 September 2020 there was a standing arrangement with HMRC, whereby no bankruptcy order would be made on HMRC petitions listed for hearing in the Central London County Court. Rather, on the hearing date, and without attendance of HMRC or the debtor, the Judge would order the petition to be relisted after 12 weeks, unless HMRC was seeking a dismissal or withdrawal of the petition where the debt had been paid, which would be dealt with on the papers. There was no equivalent arrangement for HMRC petitions listed in the High Court, or at least no dissemination of any such arrangement to the extent it may have existed.

**3.4.4** However, pursuant to the [Protocol for Insolvency and Company Work at Central London dated 1 September 2020](#), the original Protocol dated 24 March 2020 was replaced with effect from 7 September 2020. In accordance with the Protocol for Insolvency and Company Work at Central London dated 1 September 2020, from 7 September 2020 HMRC petitions are to be listed for remote hearing, with two HMRC petitions listed for each 15-minute time slot. HMRC is to supply the link for Skype hearings of HMRC petitions to the other parties.

### **3.5 Is personal service of a bankruptcy petition still required during the pandemic?**

**3.5.1** Yes, a bankruptcy petition must be served personally on the debtor unless the court has directed that the petition can be served by alternative methods.

**3.5.2** Under r. 10.14(1) and Schedule 4, IR 2016, the service requirements of Part 6 of the CPR are modified such that a bankruptcy petition must be personally served on the debtor by the petitioner, unless the court approves or directs otherwise. Further, the bankruptcy petition must be served on the debtor at least 14 days before the hearing of the petition in accordance with r. 10.21(1), IR 2016.

**3.5.3** While some process servers stopped attempting personal service at the outset of initial lockdown in March 2020, many continued to work throughout the national lockdowns and restrictions, and it is expected any difficulties process servers may have faced at the start of the pandemic will have reduced. In any event, it is well established that 'personal service' is not restricted to physically handing over documents, but that it is also satisfied where the person being served is told what the document contains and it is left 'with or near' him (see *Tseitline v Mikhelson* [2015] EWHC 3065 (Comm) citing *Kenneth Allison Ltd (In Liquidation) v AE Limehouse & Co* [1992] 2 AC 105). It follows that there is no reason in principle why personal service of a bankruptcy petition could not be effected whilst observing

the Government's guidelines on social distancing, provided the serving party is able to make contact with the debtor.

If, however, the debtor cannot be served personally, the creditor can apply to the court for permission to effect service in an alternative manner (formerly known as substituted service, which for convenience is the shorthand used below). The court can grant an order for substituted service pursuant to para. 1(5), Schedule 4, IR 2016 which provides: “*If for any reason it is impracticable to effect service ... then service may be effected in such other manner as the court may approve or direct.*” **3.5.4**

Paragraph 12.7.1 of the [Insolvency Practice Directions](#) (“**PDIP**”) provides that in most cases evidence of the relevant steps in para. 12.7 having been taken will suffice to justify an order for service of the bankruptcy petition other than by personal service. Furthermore, the evidence in support of an application for an order permitting substituted service should include an explanation of the reasons why such an order is necessary. **3.5.5**

If the creditor is seeking to rely on the pandemic as the basis for an order for substituted service, the evidence should explain the specific difficulties that have been encountered in attempting service as a result of the pandemic. Provided there is clear evidence in support of the application, we expect the court will be amenable to granting an order for substituted service during the pandemic given the social distancing guidelines and lockdown restrictions, particularly if the individual debtor is self-isolating or shielding. **3.5.6**

Ideally, an application for substituted service should be made in advance of service of the petition on the debtor in an alternative manner. In light of the requirement under r. 10.21(1), IR 2016 that a bankruptcy petition must be served on the debtor at least 14 days before the hearing, an application for substituted service may need to be coupled with an application for postponement of the hearing of the petition pursuant to r. 10.22(1), IR 2016. **3.5.7**

If permission for substituted service cannot be sought prospectively, a petitioner could make a retrospective application for substituted service. Under the old Insolvency Rules 1986, an order for permission for substituted service could not be made retrospectively: see *Ardawa v Uppal and Jordan* [2019] EWHC 456 (Ch); [2019] BPIR 475. However, there appears to be scope under IR 2016 to make a retrospective application. This has not yet been the subject of a reported decision, but the wording of r. 10.14(1) and Schedule 4, IR 2016 appears to be sufficiently broad to make a retrospective application for substituted service. In *Yu v Cawley* [2020] EWHC 2429 (Ch), Fancourt J noted at [24] that the position under IR 2016 differed from the old Insolvency Rules 1986, pursuant to which Roth J had reached his conclusions in *Ardawa*. In *Yu*, Fancourt J accepted that service of a recognition application under the Cross-Border Insolvency Regulations 2006 could be retrospectively validated. He considered that case to be distinguishable from *Ardawa*, as it was not a case involving personal service of a bankruptcy petition on a debtor. **3.5.8**

Further, if a petition has been served on a debtor by a means other than personal service, a creditor could seek to rely on r. 12.64, IR 2016 which gives the court a discretion to waive a defect or irregularity provided that no substantial injustice has been caused. However, the general reluctance of the court to waive defects relating to service of bankruptcy petitions is likely to be heightened during the pandemic, particularly when proper service of the petition is such a fundamental feature going to the fairness of the proceedings. **3.5.9**

If a creditor does need to apply for an order permitting substituted service of a petition, they will need to serve the debtor with a copy of the application, the evidence in support, and a **3.5.10**

copy of the court order granting substituted service. Usually this can be served on the debtor at the same time as the bankruptcy petition itself.

### **3.6 Are bankruptcy petitions being heard or adjourned during the pandemic?**

**3.6.1** Initially bankruptcy petitions were adjourned as a matter of course – for example, on 25 March 2020, all bankruptcy petitions scheduled for hearing in the Insolvency and Companies List at the Rolls Building that day were adjourned generally with liberty to restore only on an urgent basis or, in the absence of urgency, after 18 June 2020. However, as explained below, bankruptcy petitions are now being listed for hearing and heard remotely, pursuant to the procedures set out below.

#### ***The Rolls Building and other relevant hearing centres of the Business and Property Courts***

**3.6.2** On 6 April 2020 the original [Temporary Insolvency PD](#) came into force and was applicable to all insolvency proceedings throughout the Business and Property Courts until 1 October 2020, subject to any variations outside London as directed by the relevant supervising Judge.

**3.6.3** A further [Temporary Insolvency PD \(October 2020\)](#) came into force on 1 October 2020, replacing the original. It will remain in force until 31 March 2021 unless revoked or amended. It applies equally to all insolvency proceedings in the Business and Property Courts subject to any variations as directed (in London) by the Chief ICC Judge or (outside London) by the relevant supervising Judge.

**3.6.4** Accordingly, the Temporary Insolvency PDs should be read together with the relevant guidance notes for the various circuits/regions.

**3.6.5** For the original Temporary Insolvency PD the guidance notes included:

- (1) a [Variations and Guidance Note for the North and North Eastern Circuits](#) issued by Snowden J dated 6 April 2020;
- (2) a [Variations and Guidance Note for the Midland, Western and Wales Circuits \(No 1\)](#) issued by Marcus Smith J dated 8 April 2020; and
- (3) a [Guidance Note issued by Chief ICC Judge Briggs](#) dated 7 April 2020 which is applicable to work listed before an ICC Judge in the Rolls Building.

**3.6.6** For the new Temporary Insolvency PD (October 2020) the following guidance notes have been published:

- (1) a [Guidance Note issued by Chief ICC Judge Briggs dated 1 October 2020](#), which replaces his earlier Guidance Note dated 7 April 2020 (which expired on 1 October 2020) with effect from that date;
- (2) a [Variations and Guidance Note for the North and North Eastern Circuits \(Second Issue\)](#) issued by Snowden J on and effective from 5 October 2020 which replaces the earlier Variations and Guidance Note dated 6 April 2020; and
- (3) a [Guidance on Form of Electronic Bundles for Insolvency Hearings for the North and North Eastern Circuits](#) issued and effective from 6 October 2020.

**3.6.7** There do not appear to be any specific variations or guidance from the Midland, Western and Wales Circuits for the new Temporary Insolvency PD (October 2020) as there had been for the original Temporary Insolvency PD. Accordingly, the Temporary Insolvency PD (October 2020) alone shall apply in those Circuits.

Pursuant to para. 4 of the new Temporary Insolvency PD (October 2020) all bankruptcy petitions (from 1 October 2020) are to be listed as remote hearings and will be conducted by such video conferencing technology or telephone conferencing facility as the court decides.

**3.6.8**

This differs from the position under the original Temporary Insolvency PD, whereby all bankruptcy petitions (save for bankruptcy petitions to be heard before an ICC Judge sitting in the Rolls Building) listed for hearing prior to 21 April 2020 were to be adjourned, to be re-listed either:

**3.6.9**

- (1) where one or other of the parties considered that the matter was urgent, on their application to have it re-listed pursuant to the listing procedure set out at para. 5 of the Temporary Insolvency PD; or
- (2) according to the temporary listing procedure for bankruptcy petitions set out at para. 7 of the original Temporary Insolvency PD (which applied, immediately in the case of petitions to be heard before an ICC Judge sitting in the Rolls Building, and as from the date that it is brought into effect for each other relevant hearing centre of the Business and Property Courts by a further guidance note to be issued by the supervising Judge for that hearing centre (to be published on the Insolvency List web page for the relevant hearing centre(s) (see [www.judiciary.uk/you-and-the-judiciary/going-to-court/high-court/courts-of-the-chancery-division/insolvency-and-companies-courts](http://www.judiciary.uk/you-and-the-judiciary/going-to-court/high-court/courts-of-the-chancery-division/insolvency-and-companies-courts))<sup>26</sup>).

Further, under the original Temporary Insolvency PD, all bankruptcy petitions listed between 21 April 2020 to 1 October 2020 were to be listed in accordance with the temporary listing procedure for bankruptcy petitions pursuant to para. 7 of the original Temporary Insolvency PD which provided for:

**3.6.10**

- (1) the allocation of time slots for groups of 2 or more petitions with each time slot being given a designated meeting link using Skype for Business, or such other video conferencing technology as the relevant court decides, or BT MeetMe, or such other telephone conferencing technology as the relevant court decides, the relevant links to be published on the daily cause list;
- (2) in the event that one or more of the parties was unable to use the link designated by the court, subject to the Judge's availability, the arrangement of an alternative link via the court clerks; and
- (3) any person who intended to appear on the hearing of the petition delivering a notice of intention to appear on the petition in accordance with r. 7.14, IR 2016, providing an email address or telephone number for the purposes of being invited to join the hearing remotely.

Paragraph 4 of the new Temporary Insolvency PD (October 2020) provides for a slightly modified temporary listing procedure from 1 October 2020, which requires:

**3.6.11**

- (1) the parties to provide the court with an email address or telephone number for the purposes of being invited to join the remote hearing as soon as possible and in any event no later than 2 clear business days before the hearing date. Failure to provide the court with such details may result in the court making an order (including a bankruptcy order) in the absence of the party who did not provide their details; and

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<sup>26</sup> Accessed 1 February 2021.

- (2) any person who intends to appear on the hearing of the petition must deliver a notice of intention to appear on the petition in accordance with r. 7.14, IR 2016, providing an email address or telephone number for the purposes of being invited to join the hearing remotely.

**3.6.12** Paragraph 5 of the Guidance Note issued by Chief ICC Judge Briggs on 1 October 2020 retains the allocation of time slots for groups of two or more petitions with each slot being designated a meeting link, which is no longer expressly referred to in the new Temporary Insolvency PD (October 2020) itself.

**3.6.13** As to other insolvency hearings, since 1 June 2020, while the general practice in the Rolls Building remains for cases to be heard remotely, physical hearings (with parties in court, subject to social distancing) and hybrid hearings (with some parties in court and some attending remotely) can also be held (the decision as to which sort of hearing is appropriate in a given case will be a judicial decision). The new Temporary Insolvency PD (October 2020) makes clear at para. 5 that other insolvency hearings may be conducted by any of those three methods, whereas para. 4 mandates a remote hearing for bankruptcy petitions.

### ***The County Court at Central London***

**3.6.14** For the period 24 March 2020 to 6 September 2020, pursuant to the [Protocol for Insolvency and Company Work at Central London dated 24 March 2020](#):

- (1) as noted at [para. 3.4](#) above, under a standing arrangement with HMRC, no bankruptcy order would be made on HMRC petitions currently listed for hearing, which would be adjourned and relisted after 12 weeks without the need for attendance;
- (2) unless a request for a remote hearing was made by email to [RCJBankCLCCDJHearings@justice.gov.uk](mailto:RCJBankCLCCDJHearings@justice.gov.uk), all other bankruptcy petitions would similarly be adjourned and relisted after 12 weeks without the need for attendance.

**3.6.15** Pursuant to the [Protocol for Insolvency and Company Work at Central London dated 1 September 2020](#), the Protocol dated 24 March 2020 is replaced with effect from 7 September 2020. From 7 September 2020, the Central London County Court is listing bankruptcy petitions for remote hearing, currently via Skype for Business or BT MeetMe:

- (1) HMRC petitions will be listed in 15-minute slots with two petitions listed in each slot and HMRC shall supply the link for Skype hearings of HMRC petitions to the other parties;
- (2) All other petitions will be listed in 30-minute slots with only one petition heard in each slot;
- (3) For all non-HMRC petitions, the parties will be requested in advance of the hearing to supply the court with their email or telephone number for the purpose of being linked to the remote hearing;
- (4) The petitioner should send the certificate of continuing debt and of compliance with r. 10.23, IR 2016 to [RCJBankCLCCDJHearings@justice.gov.uk](mailto:RCJBankCLCCDJHearings@justice.gov.uk); and
- (5) Any other creditors intending to appear on the hearing of the petition must give notice in accordance with r. 7.14, IR 2016 and should make a request by email to [RCJBankCLCCDJHearings@justice.gov.uk](mailto:RCJBankCLCCDJHearings@justice.gov.uk) to be joined to the remote hearing.



***The County Court elsewhere***

There has not been general dissemination of any guidance that might exist as to how other County Court hearing centres are dealing with bankruptcy petitions. HM Courts & Tribunals Service is, however, maintaining a tracker which provides a list of which courts are open, staffed or suspended during the pandemic: see <https://www.gov.uk/guidance/courts-and-tribunals-tracker-list-during-coronavirus-outbreak>. If the hearing of a petition had been listed and the court has not yet informed the parties that the petition has been adjourned, the parties should contact the relevant County Court hearing centre to confirm whether the petition will be heard. **3.6.16**

**Can the hearing of a bankruptcy petition be avoided if an individual cannot attend the hearing of the petition as a result of the Government's guidance to self-isolate? **3.7****

If a petitioner or a debtor is unable to attend a hearing as a result of the need to self-isolate, the court should be contacted as soon as possible. Even if an individual petitioner or debtor cannot attend the hearing, they should make every effort to have a legal representative appear on their behalf. **3.7.1**

As noted at [para. 3.6](#) above, all bankruptcy petitions in the Insolvency and Companies Court in the Business and Property Courts are now proceeding by way of video link or telephone conferencing, and the individual should still be able to attend a hearing from their home even if they are self-isolating. Even if the individual does not have internet access, participants can join a video link hearing held on Skype for Business by dialling in by telephone. Likewise, from 7 September 2020, bankruptcy petitions in Central London County Court are being dealt with by remote hearing via Skype for Business or BT MeetMe and therefore an individual should still be able to attend a hearing from their home even if they are self-isolating. **3.7.2**

If, however, the hearing is proceeding in person and the individual petitioner or debtor is unable to attend due to the requirement to self-isolate, they should seek to instruct a legal representative to appear on their behalf: see the decision of Swift J in *Agba v Luton* [2020] EWHC 2008 (Admin). In that case the court accepted (at [7]) that the applicant had a good reason for non-attendance due to the guidance to self-isolate, but it did note that the applicant could theoretically have acted sooner to instruct a lawyer on her behalf. The applicant's appeal (in respect of her standing to challenge liability orders which had formed the basis of a bankruptcy order) had been dismissed in her absence. The applicant applied to set aside the order made in her absence, but despite having a good reason for not attending the hearing (due to self-isolating), the court refused the application because the applicant had no reasonable prospect of successfully challenging the liability orders (see [8]). **3.7.3**

If shortly before the hearing of the petition the debtor falls ill with Covid-19 symptoms and would be unable to attend a hearing in person or via video link as a result, an adjournment could be sought on that basis in appropriate circumstances. Evidence, if available, should be adduced, however a failure to produce formal evidence will not be fatal: see *Lambert v Forest of Dean District Council* [2020] EWHC 1728 (Ch), whereby Trower J granted an adjournment where the applicant had been admitted into hospital with Covid-19 symptoms. In that case, the applicant was applying to renew permission to appeal liability orders which had been the basis for a bankruptcy order made against the applicant in 2016. The day before the hearing, the applicant emailed the court seeking an adjournment as he had been admitted to hospital with suspected Covid-19 symptoms, providing a letter from the hospital confirming his admission. The local authority opposed an adjournment on the basis that the applicant had allegedly been suffering with Covid-19 symptoms for over two months and **3.7.4**

there was no evidence as to why counsel could not attend on the applicant's behalf. The court, however, reluctantly granted the application for an adjournment as it considered the matter could not be disposed of justly if an adjournment was not granted. The court indicated that it was "*just, but only just, satisfied*" that the applicant could not attend due to matters beyond his control (i.e. the fact he appeared to be suffering from Covid-19) but laid down a marker that he should make full and complete arrangements for representation if he was unable to represent himself at the adjourned hearing.

**3.7.5** The courts appear to be taking a flexible approach with regard to an individual's ability to attend a hearing during the pandemic, which is not surprising in the current circumstances. However, applicants must bear mind that individual circumstances are being carefully considered by the courts and, as with all applications to adjourn, the courts are scrutinising the specific factual grounds of each application carefully when deciding whether the adjournment is justified in the context of the Overriding Objective. There is no indication of the courts taking a general or standardised approach to all applications for adjournments that relate to consequences of Covid-19.

**3.8 Can the dismissal or withdrawal of bankruptcy petitions be sought on paper e.g. upon payment of the petition debt in full?**

**3.8.1** Yes. The [Insolvency Practice Direction](#) makes provision at para. 14 for orders to be made without attendance. While sub-paras. 14.1 and 14.2, [Insolvency Practice Direction](#), provide for various orders under Part VIII of the Act (Individual Voluntary Arrangements) to be made without attendance, para. 14.3, [Insolvency Practice Direction](#), permits the court to make consent orders without attendance by the parties in suitable cases, including on petitions where there are no supporting or opposing creditors (see r. 10.19, IR 2016), and there is a statement signed by or on behalf of the petitioning creditor confirming that no notices have been received from supporting or opposing creditors, orders:

- (1) dismissing the petition, with or without an order for costs as may be agreed; or
- (2) if the petition has not been served, giving permission to withdraw the petition (with no order for costs).

**3.8.2** During the period 24 March 2020 to 6 September 2020, when the [Protocol for Insolvency and Company Work at Central London dated 24 March 2020](#) was in force, Central London County Court was dealing with all bankruptcy proceedings on the first occasion on the papers. Further, that Protocol provided that HMRC would continue to seek the dismissal or withdrawal of a bankruptcy petition on the papers where the debt has been paid.

**3.8.3** Since 7 September 2020, remote hearings of bankruptcy petitions in Central London County Court have been listed pursuant to the [Protocol for Insolvency and Company Work at Central London dated 1 September 2020](#). It is anticipated, however, that in appropriate circumstances, outlined above, orders will be able to be made without attendance in accordance with the [Insolvency Practice Direction](#).

**3.9 What changes have been brought in by the Temporary Insolvency Practice Direction to bankruptcy proceedings?**

**3.9.1** As explained above, the original [Temporary Insolvency PD](#) came into force on 6 April 2020 and expired on 1 October 2020. It was applicable to all insolvency proceedings in the

Business and Property Courts, subject to any regional variations as directed by the relevant supervising Judge.

A further [Temporary Insolvency PD \(October 2020\)](#) came into force on 1 October 2020, replacing the original. As explained in [para. 3.6](#) above, this replacement practice direction will remain in force until 31 March 2021 unless revoked or amended. It applies equally to all insolvency proceedings in the Business and Property Courts subject to any regional variations as directed by the relevant supervising Judge or subject to variations in London as directed by the Chief ICC Judge. **3.9.2**

Relevant to personal insolvency, the original Temporary Insolvency PD made provision during the period from 6 April 2020 to 1 October 2020: **3.9.3**

- (1) by para. 4 for the adjournment of all pending applications, petitions and claim forms (other than winding-up and bankruptcy petitions to be heard by an ICC Judge in the Rolls Building listed for hearing prior to 21 April 2020) (addressed in further detail at [para. 3.6](#) above);
- (2) by para. 5 for the process for listing urgent hearings in the High Court upon the application of one of the parties by email to the ICC Judges' clerks at [Rolls.ICL.Hearings1@justice.gov.uk](mailto:Rolls.ICL.Hearings1@justice.gov.uk), or the relevant High Court Judge clerk;
- (3) by para. 6 for all hearings to be conducted remotely unless otherwise ordered;
- (4) by para. 7 for a temporary listing procedure for bankruptcy petitions (addressed in further detail at [para. 3.6](#) above); and
- (5) by para. 8 for the process by which all other hearings are to be conducted remotely by Skype for Business or other technology as agreed by the parties and the court.

Relevant to personal insolvency, para. 4 of the new Temporary Insolvency PD (October 2020) makes provision from 1 October 2020 for a temporary listing procedure for bankruptcy petitions whereby all bankruptcy petitions shall be conducted using video link or telephone conferencing (addressed in further detail at [para. 3.6](#) above). The parties are now obliged to provide the court with an email address or telephone number for the purposes of being invited to join the remote hearing as soon as possible and in any event no later than 2 clear business days before the hearing date. **3.9.4**

**Can creditors rely upon personal guarantees provided by individuals to enforce a company's debts, and pursue bankruptcy proceedings in respect of those debts, when the company's debts would otherwise be subject to a moratorium under the Corporate Insolvency and Governance Act 2020?** **3.10**

Creditors who are unable to pursue a company for debts which are subject to a moratorium under CIGA 2020 may wish to pursue the outstanding debt by turning to any personal guarantees which have been provided by individuals (e.g. company directors) in respect of that debt. A creditor's ability successfully to pursue a guarantor in those circumstances will be dependent on the terms of the personal guarantee. **3.10.1**

It is possible that creditors may be prevented from being able to enforce a personal guarantee provided by an individual to recover debts owed by a company if such debts are subject to a moratorium under CIGA 2020. However, whether the creditor is so prevented will be dependent upon the specific terms of the relevant personal guarantee. For example, the personal guarantee may provide that it can only be enforced after specified steps have been **3.10.2**

taken to enforce against the principal debtor which may include steps which are prohibited by the effect of the moratorium under CIGA 2020.

**3.10.3** Furthermore, in circumstances where a guarantee, as a secondary obligation, will generally have the benefit of any defences available to the principal debtor, a guarantor would generally be entitled to raise the principal debtor's defences to the underlying debt. Dependent on the terms of the relationship between the creditor and the principal debtor, such defences may include that the debt is not due because the principal debtor has the benefit of a payment holiday during a moratorium.

**3.10.4** This is likely to be a controversial area, and, inevitably, specific advice should be sought.

**3.11** **To what extent can debtors rely upon their current inability to enforce debts against corporate debtors in support of an application for an adjournment of a bankruptcy petition presented against them on the basis that there is a reasonable prospect of payment in full in a reasonable time?**

**3.11.1** Debtors can of course seek to rely on their inability to enforce debts owing to them from corporate debtors as a result of a moratorium under CIGA 2020. However, in order for an application for an adjournment of a bankruptcy petition on this basis to succeed, it will still be necessary to establish to the court's satisfaction that there is a reasonable prospect of payment in full in a reasonable time according to usual applicable principles (see e.g. *Sekhon v Edginton* [2015] EWCA Civ 816; [2015] 1 WLR 4435). As such, any application on this basis must in the usual way be supported by credible evidence of the debtor's ability to pay and the likely timescale in which payment will be made. The question of what is a 'reasonable time' for payment will inevitably involve considerations of the likely timescale of the moratorium, alternative sources of funding available to the debtor and the willingness and ability of the debtor to seek permission to institute proceedings to enforce the debt, the latter not being a matter of which the bankruptcy court is seized. That said, while the bankruptcy court would not be able to hear any application by the debtor to seek such permission itself, we consider it likely that the court will view a debtor in such a predicament sympathetically. Indeed, debtors in such circumstances may wish to consider inviting the court to adjourn the petition for a sufficient period to allow them to make such an application.

**3.12** **To the extent that landlords were unable to pursue possession of property from individual tenants under Part 55 due to the stay of possession proceedings under PD 51Z and CPR r. 55.29, could landlords pursue rent arrears by way of statutory demand and bankruptcy proceedings?**

**3.12.1** Yes, landlords could pursue bankruptcy proceedings against individual tenants if they owe in excess of £5,000 (the bankruptcy threshold). This may give some landlords an additional means of redress against individual tenants in circumstances where possession proceedings have been stayed.

**3.12.2** There have been a number of rules and regulations introduced in relation to tenancies, possession proceedings and enforcement during the pandemic.

**3.12.3** [Practice Direction 51Z](#) was introduced at the outset of the pandemic to stay proceedings for possession and came into effect on 27 March 2020 (with subsequent amendments coming into force on 20 April 2020 and 11 June 2020). Pursuant to para. 2 of PD 51Z, all proceedings for possession brought under CPR Part 55 and all proceedings to enforce an order for possession by warrant or writ of possession were stayed for 90 days to 25 June

2020. While PD 51Z suspended possession proceedings brought under CPR Part 55, para. 3 of PD 51Z (as amended on 11 June 2020) clarified that it did not preclude the issue of a claim for possession.

PD 51Z was the subject of a number of judicial decisions (see the decisions of Court of Appeal in *Arkin v Marshall* [2020] EWCA Civ 620; [2020] 1 WLR 3284 and *London Borough of Hackney v Kevin Okoro* [2020] EWCA Civ 681; [2020] 4 WLR 85) which confirmed that it placed a blanket ban on CPR Part 55 possession proceedings. **3.12.4**

PD 51Z ceased to have effect on 25 June 2020, and was replaced by a new civil procedure rule which extended the stay on possession proceedings initially for a further 8 weeks (to 23 August 2020) which was subsequently extended for a further 4 weeks (until 20 September 2020). The new rule involved an amendment to CPR Part 55 to introduce [CPR r. 55.29](#) which stayed all possession proceedings under Part 55 from 25 June 2020 until 22 August 2020 pursuant to [The Civil Procedure \(Amendment No. 2\) \(Coronavirus\) Rules 2020](#). The stay of those Part 55 possession proceedings was then extended until 20 September 2020 pursuant to [The Civil Procedure \(Amendment No. 5\) \(Coronavirus\) Rules 2020](#). **3.12.5**

[Practice Direction 55C](#) was introduced by [The Civil Procedure \(Amendment No. 4\) Coronavirus Rules 2020](#), providing temporary modification of CPR Part 55 during the period 20 September 2020 (the end of the stay imposed by CPR r. 55.29) and 30 July 2021 (the end of this “*interim period*” was originally 28 March 2021, but PD 55C was amended by the 127th PD Update to extend the interim period to 30 July 2021). In order to continue possession proceedings after the expiry of the stay, a claimant is required to provide a “*reactivation notice*” informing the court and the defendant of this in writing: paras. 2.1 and 2.3, PD 55C. A reactivation notice is not required if the claim was brought on or after 3 August 2020 or if a final order for possession has been made: para. 2.2, PD 55C. Failure to provide a reactivation notice by 4pm on 30 April 2021 will result in the claim being automatically stayed: paras. 2.6 and 5.3, PD 55C, as amended by the 127th PD Update. **3.12.6**

In addition to the stay of possession proceedings, notice periods for repossession in respect of certain tenancies have been extended. This includes assured shorthold, assured, secured and flexible tenancies. Pursuant to [Schedule 29 of the Coronavirus Act 2020](#), notices served between 26 March 2020 and 28 August 2020 required a minimum notice period of three months. The [Coronavirus Act 2020 \(Residential Tenancies: Protection from Eviction\) \(Amendment\) \(England\) Regulations 2000 SI 2020/914](#) came into force on 28 August 2020. This extends the minimum notice period for certain tenancies to six months for notices served between 29 August 2020 and 31 March 2021, subject to certain exceptions. One exception includes where at the time the notice is served there is over six months’ accumulated rent arrears, whereby the notice period will be four weeks (reg. 3 of the [Coronavirus Act 2020 \(Residential Tenancies: Protection from Eviction\) \(Amendment\) \(England\) Regulations 2000 SI 2020/914](#)). **3.12.7**

Further regulations were brought into force towards the end of 2020 and in early 2021. The [Public Health \(Coronavirus\) \(Protection from Eviction and Taking Control of Goods\) \(England\) Regulations 2020](#) prevents, save in specified circumstances, the attendance at a dwelling house for the purpose of executing a writ or warrant of possession or delivering a notice of eviction from 17 November 2020 until 11 January 2021. That prohibition does not apply, *inter alia*, where the court is satisfied that the claim is against trespassers or the case involves substantial rent arrears (which is at least equivalent to nine months’ rent) predating 23 March 2020. Further regulations came into force on 11 January 2021: [The Public Health \(Coronavirus\) \(Protection from Eviction\) \(England\) Regulations 2021](#) are in force between **3.12.8**

11 January 2021 to 21 February 2021. The 2021 regulations are in similar terms to the earlier regulations, preventing the attendance at a dwelling house for the purpose of executing a writ or warrant of possession or delivering a notice of eviction save in specified circumstances. However, the 2021 regulations have amended the definition of “*substantial rent arrears*” to mean the equivalent of at least six months’ rent.

- 3.12.9** Regulation 3 of The Public Health (Coronavirus) (Protection from Eviction and Taking Control of Goods) (England) Regulations 2020 also prevented the attendance at a dwelling house for the purpose of taking control of goods from 17 November 2020 until the expiry of The [Health Protection \(Coronavirus, Restrictions\) \(England\) \(No. 4\) Regulations 2020](#). The latter regulations were in fact revoked (for the most part) on 2 December 2020, by Reg. 16 of The [Health Protection \(Coronavirus, Restrictions\) \(All Tiers\) \(England\) Regulation 2020](#).
- 3.12.10** As a result of a stay of all CPR Part 55 possession proceedings from 27 March 2020 to 20 September 2020, the requirement to provide a reactivation notice, the extended notice periods, and the prevention of enforcing eviction notices, landlords may seek to use statutory demands and bankruptcy proceedings as a means to pursue rent arrears.
- 3.12.11** Landlords can seek payment of outstanding rent arrears owed by individual tenants by way of statutory demand. The statutory demand should be served on the tenant personally. If the tenant fails to pay the sums sought in the statutory demand within 21 days of service, and the debt is in excess of £5,000, the landlord can use the unpaid statutory demand as a basis to show the tenant’s inability to pay and can present a bankruptcy petition against the tenant.
- 3.12.12** The position, however, differs where the tenant is a company rather than an individual, as the use of a statutory demand served between 1 March 2020 and 31 March 2021 (previously 30 September 2020 until amended pursuant to The [Corporate Insolvency and Governance Act 2020 \(Coronavirus\) \(Extension of the Relevant Period\) Regulations 2020](#) and then until 31 December 2020 until amended pursuant to The [Corporate Insolvency and Governance Act 2020 \(Coronavirus\) \(Extension of the Relevant Period\) \(No. 2\) Regulations 2020](#)) to pursue the winding-up of a company is prohibited under CIGA 2020 (see the discussion in [para. 2.41](#) of Section Two: Corporate Insolvency above).
- 3.12.13** Before presenting a bankruptcy petition, landlords may wish to consider whether it is likely that the petition will be heard in the near future and they should also bear in mind that a bankruptcy petition does not have any effect on a tenant’s possession of a property, unless expressly provided for in the terms of the lease.
- 3.12.14** While there may have been some disparity in the treatment of bankruptcy petitions in the early months of the pandemic between the regional county courts, in the Central London County Court and the High Court, as set out at [para. 3.6](#) above, petitions are now being heard remotely:
- (1) From 1 October 2020, bankruptcy petitions presented in the Insolvency and Companies List in the Business and Property Courts are to be listed and heard by video link in accordance with para. 4 of the new Temporary Insolvency PD (October 2020); and
  - (2) Likewise, from 7 September 2020 bankruptcy petitions in Central London County Court will be proceeding by remote hearing pursuant to the [Protocol for Insolvency and Company Work at Central London dated 1 September 2020](#).
- 3.12.15** In circumstances where all petitions listed in Central London County Court between 24 March 2020 and 6 September 2020 were adjourned for 12 weeks unless a request for a remote

hearing was made by email in accordance with the [Protocol for Insolvency and Company Work at Central London dated 24 March 2020](#) (which has been replaced with the [Protocol for Insolvency and Company Work at Central London dated 1 September 2020](#) with effect from 7 September 2020), it may take longer for bankruptcy petitions to be listed for hearing in Central London County Court as compared to petitions issued in the High Court.

The earlier disparity between regional county courts, the Central London County Court and the High Court in their treatment of bankruptcy petitions at the outset of the pandemic could lead to some arbitrary effects for creditors because the question of where a bankruptcy petition must be presented is not a matter of their free choice. Pursuant to r. 10.11(1), IR 2016 where proceedings are allocated to the London Insolvency District pursuant to r. 12.5, IR 2016, the creditor must present the petition to the High Court where the debt is £50,000 or more. If the debt is less than that amount the petition must be presented to the Central London County Court. Pursuant to r. 10.11(3), IR 2016 where the petition is not allocated to the London Insolvency District the creditor must present the petition to the “*debtor’s own hearing centre*”, which is defined in r. 10.11(4), IR 2016. It follows that the amount of the debt and the location of the debtor by reference to where he has resided or carried on business in the last six months may have an important bearing on how much progress a creditor might expect to make on pursuing his petition. **3.12.16**

**Can a trustee in bankruptcy still seek an order for possession under s. 363 of the Insolvency Act 1986 despite the stay of possession proceedings? **3.13****

Yes, a trustee in bankruptcy can still obtain an order for possession under s. 363, IA 1986; however, for most of the period of the pandemic they have not been able to enforce the order by a warrant or writ for possession: **3.13.1**

- (1) Initially they were unable to enforce the order pursuant to PD 51Z (27 March 2020 to 25 June 2020);
- (2) Subsequently they were unable to enforce the order pursuant to CPR r. 55.29 (from 25 June 2020 to 20 September 2020); and
- (3) They are now unable to enforce the order at a dwelling house between 16 November 2020 and 21 February 2021, save for in specified circumstances (see [para. 3.12](#) above), pursuant to The Public Health (Coronavirus) (Protection from Eviction and Taking Control of Goods) (England) Regulations 2020 (for the period 16 November 2020 and 16 January 2021) and The Public Health (Coronavirus) (Protection from Eviction) (England) Regulations 2021 (for the period 11 January 2021 to 21 February 2021).

Pursuant to para. 9, Schedule 5, IA 1986, a trustee in bankruptcy has the power to sell the bankrupt’s property. This power is often used to sell real property owned by the bankrupt, but in order to do so the trustee in bankruptcy usually requires vacant possession. A trustee in bankruptcy can seek an order requiring a bankrupt to deliver up possession of a property pursuant to s. 363(2), IA 1986, or where the property is held on trust pursuant to s. 335A, IA 1986 and ss. 14 and 15 of the Trusts of Land and Appointment of Trustees Act 1996 (or in particular circumstances pursuant to ss. 336 or 337, IA 1986). **3.13.2**

A trustee in bankruptcy remained able to obtain an order requiring delivery up of possession of a property pursuant to s. 363, IA 1986 (or ss. 335A, 336 or 337) despite the stay of possession proceedings under PD 51Z and CPR r. 55.29. The wording of PD 51Z expressly applied to stays of possession proceedings brought under CPR Part 55 and did not encompass **3.13.3**

possession proceedings brought pursuant to s. 363, IA 1986: see e.g. *London Borough of Hackney v Kevin Okoro* [2020] EWCA Civ 681 at [5]-[6]. Equally, CPR r. 55.29, which replaced PD 51Z with effect from 25 June 2020 until 20 September 2020, also expressly applied to possession proceedings brought under CPR Part 55.

**3.13.4** However, para. 2, PD 51Z stayed all proceedings to enforce an order for possession by warrant or writ of possession for 90 days to 25 June 2020 and all such enforcement proceedings continued to be stayed pursuant to the new CPR r. 55.29 from 25 June 2020 to 20 September 2020. The Court of Appeal, in *obiter* comments in *London Borough of Hackney v Kevin Okoro* [2020] EWCA Civ 681 at [27], stated that para. 2 of PD 51Z “*undoubtedly prevents enforcement of possession orders made under rules other than CPR Part 55*”.

**3.13.5** Therefore, while a trustee in bankruptcy has properly been able obtain an order for possession under s. 363, IA 1986 during the pandemic, it appears that they were not able to enforce the order of possession obtained by writ or warrant of possession during the period of the stay under PD 51Z and CPR r. 55.29 (i.e. up to 20 September 2020).

**3.13.6** Once again, for the period 16 November 2020 to 21 February 2021 if a trustee in bankruptcy has obtained, or obtains, an order for possession under s. 363, IA 1986, they will be unable to enforce the order of possession obtained by writ or warrant of possession, unless they fall within one of the specified exceptions in the Public Health (Coronavirus) (Protection from Eviction and Taking Control of Goods) (England) Regulations 2020 or the Public Health (Coronavirus) (Protection from Eviction) (England) Regulations 2021.

**3.13.7** One reason a trustee in bankruptcy might wish to pursue an order for possession under s. 363, IA 1986 during the pandemic, despite not being able to enforce it for most of the pandemic, would be to ensure they had applied for an order for possession of a bankrupt’s family within the prescribed three-year period from the commencement of the bankruptcy pursuant to s. 283A, IA 1986.

**3.14 What guidance has been issued to insolvency practitioners for the supervision of existing IVAs and the drafting of new IVAs?**

**3.14.1** On 17 April 2020 the Insolvency Service published ‘[Coronavirus \(COVID-19\) Guidance for the Straightforward Consumer IVA Protocol](#)’. It provided that from 20 April 2020 until 20 October 2020, the Straightforward Consumer IVA Protocol, which is a voluntary framework for dealing with relatively simple consumer-based IVAs, should be read in conjunction with this guidance. Recognising that the pandemic may cause individuals difficulty in meeting their obligations under the existing terms of their IVA and may affect the sustainability of any new arrangements, the guidance allowed for flexibility to be applied to IVAs which were already being supervised and were drafted in accordance with the current protocol or previous versions by the IVA Standing Committee and new IVAs that were drafted from 20 April 2020.

**3.14.2** On 7 September 2020, the IVA Standing Committee, having reviewed and agreed that the guidance should be amended:

- (1) published [amended guidance](#) in which amendments to various provisions of the original guidance are simply inserted under the relevant paragraph to which they apply; and
- (2) agreed that the guidance would now be extended until 20 April 2021.



### **How will Brexit affect bankruptcy proceedings?**

**3.15**

The effect of Brexit will no doubt be the subject of much learning in the near future, as the transition period has now ended and the consequences of the [Trade and Cooperation Agreement](#) become clear. Detailed consideration of the impact of Brexit upon personal insolvency proceedings is beyond the scope of this text. There are, however, a couple of headline points to highlight when pursuing bankruptcy proceedings after 31 December 2020.

**3.15.1**

- (1) Only a small part of the Insolvency Regulation has been retained pursuant to The [Insolvency \(Amendment\) \(EU Exit\) Regulations 2019](#). The retained law preserves the meaning of COMI: para. 4 of the Schedule. This allows bankruptcy proceedings to be pursued before the English courts where the individual debtor has his/her COMI in the UK or an establishment in the UK. In accordance with section 6 of the [European Union \(Withdrawal\) Act 2018](#), the UK courts are to have regard to the rulings of European Courts in determining the meaning and application of COMI.
- (2) The Insolvency (Amendment) (EU Exit) Regulations 2019 do not, however, retain the provisions on recognition of insolvency. As a result, UK bankruptcy proceedings will not automatically be recognised by EU Member States, and bankruptcy proceedings in EU Member States will not automatically be recognised in the UK. The English courts will be able to grant recognition to, and relief in support of, foreign insolvencies under the Cross-Border Insolvency Regulation 2006 (“**CBIR 2006**”). Recognition under CBIR 2006 will require an application and is not automatic, as recognition was under the Insolvency Regulation.

The Insolvency (Amendment) (EU Exit) Regulations 2019 do not, however, apply to bankruptcy proceedings which had already commenced before the transition period came to an end: Reg. 4. That includes main proceedings opened in the UK prior to the end of the transition period, or any secondary proceedings in the UK where the main proceedings were opened in an EU Member State prior to the end of the transition period. Accordingly, the Insolvency Regulation shall continue to apply to those proceedings.

**3.15.2**



# Section Four

## COMPANY

*Anna Markham, Gregory Denton-Cox, Nicholas Wright ©*

*Law stated as at: 1 February 2021*

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## Introduction

- 4.0.1** Company law has not yet seen the extensive alterations to the statutory scheme which the pandemic has prompted in the insolvency context. This does not mean, however, either that nothing has changed or that companies and their directors do not face new considerations in conducting their affairs in light of the pandemic.
- 4.0.2** This section deals first with directors' duties, providing guidance on how directors can seek to avoid pitfalls which may arise as a result of the pandemic and explaining the risks which remain if they do not constantly assess whether they are fulfilling their duties in changeable and unpredictable circumstances.
- 4.0.3** It then proceeds to consider aspects of corporate governance which the pandemic has impacted and, in some cases, prompted the relaxation of certain formal requirements upon companies and their directors.

## The Impact of Brexit

- 4.0.4** This is not a book about Brexit. Specialist texts should therefore be consulted for a full treatment of the company law issues raised by the end of the transition period on 31 December 2020. By way of overarching comment however, it should be noted that Brexit has not had a particularly significant impact on company law given that the relevant legislation is largely domestic even where it may be implementing European law.
- 4.0.5** The main changes from 1 January 2021 therefore concern the ways in which English companies are treated in Europe rather than any alteration to English company law. By way of example, since the end of the transition period UK companies are no longer recognised as "companies" under the Treaty on the Functioning of the European Union ("TFEU"). Their status, including the status of offices functioning in EU member states without a separate locally incorporated subsidiary, will therefore be a matter for the domestic law of the member state concerned. This may, in some cases, have implications in terms of the recognition of limited liability status and the duties of directors. Companies operating in Europe may therefore need to take advice as to their position.

## Directors' Duties

- 4.0.6** Directors' duties, as set out in ss. 171 – 177, CA 2006 and supplemented by duties at common law and in equity, remain applicable to directors during the pandemic. Directors must therefore continue to, *inter alia*: act within their powers (s. 171, CA 2006); act so as to promote the success of the company (s. 172, CA 2006); exercise independent judgment (s. 173, CA 2006); exercise reasonable care, skill and diligence (s. 174, CA 2006); avoid conflicts of interest (s. 175, CA 2006); not accept benefits from third parties (s. 176, CA 2006); and declare any interest in a proposed transaction or arrangement of the company (s. 177, CA 2006).
- 4.0.7** Change may be on the horizon for directors' underlying obligations and liabilities in some respects however. CIGA 2020 includes provisions which would in principle enable such alterations. In particular, s. 20, CIGA 2020 provides that:

*"20. (1) The Secretary of State may by regulations amend or modify the effect of corporate insolvency or governance legislation so as to –*

...

*(c) change or disapply any duty of a person with corporate responsibility or the liability of such a person to any sanction.”*

Section 21(2), CIGA 2020 sets out the considerations to which the Secretary of State must have regard in deciding whether to make such regulations: **4.0.8**

*“21. (2) The Secretary of State may only make regulations under section 20(1)(c) if satisfied that the regulations are expedient for the purpose of securing that the duties of persons with corporate responsibility, or the liability of those persons to any sanction, take due account of the effects of coronavirus on businesses or on the economy of the United Kingdom.”*

Whilst it remains more likely that this provision will be used to further alter directors’ responsibilities or liabilities contained in IA 1986, it is possible that this could be used in the context of directors’ duties in future and particularly in relation to directors’ duties which arise in connection with the potential insolvency of a company. **4.0.9**

### **What liability could directors incur if they caused a company to trade whilst insolvent despite the changes to the law on wrongful trading and insolvency as a result of the pandemic?** **4.1**

As explained elsewhere (see the [Suspension of Liability for Wrongful Trading section](#) in Section Two: Corporate Insolvency above), the liability of directors for wrongful trading under s. 214, IA 1986 has been suspended in light of the pandemic: **4.1.1**

- (1) first, by s. 12(1), CIGA 2020, in respect of the period 1 March 2020 to 30 September 2020; and
- (2) again, by Regulation 2 of the Corporate Insolvency and Governance Act 2020 (Coronavirus) (Suspension of Liability for Wrongful Trading and Extension of the Relevant Period) Regulations 2020, in respect of the period 26 November 2020 to 30 April 2021.

In each case the court is required to assume that directors are not responsible for any worsening of the financial position of the company or its creditors that occurs during the relevant period. **4.1.2**

This does not give directors *carte blanche* for the duration of the suspensions, however. In addition to the continuing liability under various other provisions of IA 1986, notably for fraudulent trading under s. 213, IA 1986 and misfeasance under s. 212, IA 1986 (see [para. 2.53](#) of Section Two: Corporate Insolvency), they continue to have potential exposure to personal liability for breach of their directors’ duties or being pursued under the Company Directors Disqualification Act 1986 (“**CDDA 1986**”) by the Secretary of State, or, in some limited circumstances, others. We now deal with each of these risks in turn. **4.1.3**

### ***Directors’ duties***

As explained in further detail below, in circumstances where a company is in the situation envisaged by the wrongful trading provisions of IA 1986, i.e. it has no reasonable prospect of avoiding an insolvent liquidation or administration and the director(s) know or ought to know this, the duty of directors to promote the success of the company under s. 172, CA 2006 is likely to be subject to a duty to consider the interests of its creditors (preserved in s. 172(3), CA 2006), the so-called “*creditors’ interests duty*” (see *BTI 2014 LLC v Sequana SA & Ors* [2019] EWCA Civ 112 at [118]). **4.1.4**

**4.1.5** Consequently, if a company continues to trade in circumstances where the wrongful trading provisions would ordinarily be engaged, and suffers loss as a result, directors may be liable for breach of the creditors' interests duty or for breach of their duty to act with reasonable care, skill and diligence under s. 174, CA 2006. It may also be said that continuing to trade, particularly in a risky manner, in such a case may amount to a breach of the duty under s. 172, CA 2006. Indeed, a breach of duty may form the basis of an application under s. 212, IA 1986, which applies where it appears that a person has "*been guilty of any misfeasance or breach of any fiduciary or other duty in relation to the company*". As a result, if a subsequent insolvency officeholder is determined to pursue directors for their actions in the lead up to a company entering into an insolvency process during the period in which wrongful trading liability was suspended, it may be that the suspension of the wrongful trading provisions simply denies them one mechanism for doing so rather than providing a robust safety net for directors.

### ***Disqualification***

**4.1.6** Turning to disqualification, directors may still be pursued in disqualification proceedings, generally by the Secretary of State. The only change to disqualification proceedings due to the pandemic is consequential upon the suspension of wrongful trading. Section 10, CDDA 1986 provides that where a person is found liable for wrongful trading, the court may, if it thinks fit, also make a disqualification order against that person. The effect of the suspension of the wrongful trading provisions will be to reduce the scope for a finding of liability, and thus of a disqualification order being made at the same time. However, s. 10, CDDA 1986 also empowers the court to make a disqualification order where a director is found liable for fraudulent trading, in respect of which there is no suspension.

**4.1.7** The more general grounds for disqualification contained in CDDA 1986 however remain unchanged. These include the specific instances given in ss. 2-5A, CDDA 1986 (notably criminal acts or regulatory failings) and the general ground of "*unfitness*" under ss. 6 (mandatory disqualification for unfit directors of insolvent companies) and 8 (discretionary disqualification on a finding of unfitness of any director (without the requirement that the company be insolvent)).

**4.1.8** Of the specific grounds for disqualification proceedings, s. 3, covering persistent defaults in relation to legislation requiring "*any return, account or other document to be filed with, delivered or sent, or notice of any matter to be given to the registrar of companies*", may raise particular issues in the context of the pandemic. It is important for directors to be aware that the unique circumstances do not excuse them from their obligations when it comes to reporting and filing as required by the relevant companies legislation, although, as set out further below, certain requirements have been subject to limited relaxation. Despite the "*three strikes*" policy in s. 3(2), CDDA 1986 giving some wiggle room for those with a good history of compliance, this raises a particular risk for those with a less satisfactory record.

**4.1.9** The pandemic may also raise particular risks for directors surrounding disqualification for those "*unfit*" to be concerned in the management of a company. In determining whether a person's conduct makes that person "*unfit*", the court is to have regard in particular, but without limitation, to the matters set out in Schedule 1, CDDA 1986, including, where the person is a director, whether there has been any misfeasance or breach of duty by the director. The potential grounds for disqualification under this head are thus broad, but considerations of unfitness can be divided into those concerned first with incompetence (underscoring the need for directors to keep abreast of legal and regulatory developments as the pandemic

unfolds) and second with “*commercial morality*” which includes, but is not limited to, dishonest conduct.

What will be regarded as a breach of “*commercial morality*” is always fact-sensitive and it is unhelpful to attempt expansive predictions of what might constitute a breach. The novel context may however give rise to new questions surrounding what sort of conduct will amount to a breach of “*commercial morality*” by a director. Just as the suspension of the wrongful trading provisions will not obviate the need to have regard to the interests of creditors (where otherwise appropriate to do so), so too may a director who is regarded as breaching that duty or otherwise trading at the expense of creditors (in a broad sense which may not be co-extensive with liability for wrongful trading) still be at risk of a subsequent finding of unfitness, potentially resulting in disqualification. **4.1.10**

One situation in which the issue may arise could be where a director causes a company to participate in a Government-backed furlough scheme, thereby causing the taxpayer to incur considerable expense, but after the scheme ends dismisses a number of the employees covered. If such a dismissal was always inevitable, or the company itself was hopelessly insolvent, there may be questions about whether the director acted improperly in simply “*delaying the inevitable*” at the taxpayers’ expense, especially if the result is a worse outcome for creditors in a subsequent liquidation. It is notable by comparison that administrators may only make use of the furlough scheme where “*there is a reasonable likelihood of rehiring the workers*”.<sup>27</sup> This may indicate that a director who puts the taxpayer to the expense of the furlough scheme for their company’s employees with no intention of retaining them could be regarded as having breached standards of commercial morality or otherwise acted improperly so as to open up the possibility of disqualification on the ground of unfitness. **4.1.11**

### ***Takeaway message***

Whilst the suspension of liability for wrongful trading removed one weapon in the arsenal of an insolvency practitioner which may be invoked against the former director of a company in an insolvency procedure in relation to their conduct during the period of the suspension, it by no means leaves directors in general immune from liability either at the hands of insolvency practitioners, the company or its shareholders (if it remains solvent), or the Secretary of State. Directors of companies in difficulty and those advising them should be under no illusions about this whilst remaining ready to take advantage of any subsequent relaxations in the law implemented as result of the powers in CIGA 2020. **4.1.12**

## **How should directors decide when they are obliged to have regard to the interests of the company’s creditors over the interests of its shareholders?** **4.2**

Section 172(1), CA 2006 requires directors to act in the way most likely to “*promote the success of the company for the benefit of its members as a whole*”. However, as set out in s. 172(3) this is “*subject to any enactment or rule of law requiring directors, in certain circumstances, to consider or act in the interests of creditors of the company*” including the common law creditors’ interests duty to take account of the interests of creditors where the company is in the vicinity of insolvency. **4.2.1**

It is important to note that although concerned with the interests of the company, this duty is not owed by directors to the creditors but remains owed to the company and actionable **4.2.2**

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<sup>27</sup> <https://www.gov.uk/guidance/claim-for-wage-costs-through-the-coronavirus-job-retention-scheme> (accessed 1 February 2021).

only by it (albeit, in practice, usually by a future liquidator or administrator) (see e.g. *Bilta (UK) Ltd (in liquidation) and others v Nazir* [2015] UKSC 23; [2016] AC 1 at [125] – [127]).

### ***Test for triggering the creditors' interests duty***

- 4.2.3** Precisely what degree of proximity to insolvency will trigger the creditors' interests duty, or indeed whether actual insolvency is required, has posed difficulties in the past given the somewhat inconsistent authorities. Directors are now assisted in determining when the duty will be triggered however by the recent decision of the Court of Appeal in *BTI 2014 LLC v Sequana S.A. & Ors* [2019] EWCA Civ 112; [2019] 2 All ER 784. In this case, the Court of Appeal held at [216] that the duty “*may be triggered when a company's circumstances fall short of actual, established insolvency*” and the circumstances in which it will be triggered can best be summarised (at [220]) as where “*the directors know or should know that the company is or is likely [in the sense of probable] to become insolvent*”.<sup>28</sup>
- 4.2.4** It is important for directors to be aware that such a test means that the duty will apply even in circumstances which would fall short (and potentially some way short) of those engaging the wrongful trading provisions (“*likely to become insolvent*” in the case of the creditors' interests duty, as opposed to there being no reasonable prospect of avoiding entry into an (insolvent) insolvency procedure in the case of wrongful trading).
- 4.2.5** Whether the interests of creditors become “*paramount*” once the creditors' interests duty has been triggered or whether the directors must simply take them into account alongside those of the shareholders of the company has also been the subject of debate and is an issue which the Court of Appeal did not need to decide in *Sequana*. It may be however, as indicated in *Sequana* at [222], that the weight to be given to the interests of the creditors will differ depending on the degree of proximity to insolvency such that the creditors' interests will be paramount where the company is actually insolvent but may have to be weighed more equally with those of the shareholders where insolvency remains only “*likely*”.

### ***Practical implications and considerations for directors***

- 4.2.6** Directors should thus be careful to have regard to the interests of the company's creditors in circumstances where insolvency appears likely. It would be prudent to consider the potential for insolvency, and the impact on and interests of creditors even if the director considers that insolvency is not “*likely*” but that the company's prospects are uncertain. Indeed, the line between the creditors' interests duty being engaged or not may be a fine one, particularly in rapidly changing circumstances caused by the pandemic. Having said this, where the company is likely to remain solvent if trading is continued the interests of the creditors and other stakeholders are more likely to align, as it will be in the interests of creditors that insolvency be avoided (and, for example, an attempt to wind down the business could lead to an insolvent liquidation). Directors should therefore engage in careful consideration when adopting courses of action with the potential to put the interests of creditors at risk whilst at the same time not allowing the risk of personal liability for breach of the creditors' interests duty to exert a chilling effect on taking rational commercial decisions, especially where the duty is not yet engaged. These are all fact specific questions for the judgement of individual directors.

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<sup>28</sup> It should be noted that the decision in *Sequana* has been appealed to the Supreme Court. The appeal was adjourned from March 2020 and has been provisionally relisted for hearing in May 2021. If the appeal is successful however it may extend yet further the circumstances in which the duty is engaged to include where there is a “*real risk*” of insolvency rather than a probability of it.



As the creditors' interests duty may arise where a director ought to know that insolvency is likely (even if the director does not have actual knowledge), directors should keep a close eye on the potential impact of the pandemic on the company's prospects, lest they be held to have failed to have due regard to the interests of creditors in circumstances where they failed to appreciate that insolvency was likely when they ought to have. **4.2.7**

Directors would be well advised to seek legal advice on whether a particular course of action which risks prejudicing the position of the company's creditors, or the effects of the pandemic on the company, could leave them exposed to personal liability. Seeking advice may be particularly important because if directors are concerned by the risk of personal liability, it may cause them to go too far in the other direction by adopting a policy of excessive caution, or by winding a company down early rather than take the risk of later being adjudged to have traded whilst insolvent. Whether or not the company enters into an insolvency process, this may in itself lead to the directors being exposed to claims by shareholders or an insolvency officeholder for a failure to act so as to promote the success of the company (s. 172, CA 2006) or without reasonable care, skill and diligence (s. 174, CA 2006), by "*throwing in the towel*" too early or causing the company to suffer loss as a result of their excessive caution (e.g. as occurred in *Odyssey Entertainment Limited (in liquidation) v Ralph Kamp and Ors* [2012] EWHC 2316 (Ch), albeit in a situation where the director had acted in bad faith and misled the board). **4.2.8**

Finally, given the relative similarity in the content of the creditors' interests duty and the wrongful trading provisions, it should be noted that the duty may be a likely candidate for change or disapplication by the Secretary of State under the powers contained in s. 20, CIGA 2020 in light of the test for doing so set out in s. 21(2), CIGA 2020. **4.2.9**

**How do directors' duties when the company is in the vicinity of insolvency interact with the protections from formal insolvency procedures introduced for companies as a result of the pandemic? **4.3****

As discussed elsewhere (see the [Statutory Demands and Winding-up Petitions section](#) from [para. 2.40.1](#) in Section Two: Corporate Insolvency above) certain protections from the instigation of formal insolvency procedures have been put in place as a result of the pandemic. However, the temporary restrictions on the use of statutory demands and winding up petitions against companies do not mean that directors can act with impunity. Indeed, the risk is that the breathing room afforded by these provisions may simply result in companies digging themselves into deeper and deeper holes (and directors increasing their own exposure) as they seek to avoid formal insolvency processes once the temporary protections are removed. Those acting for creditors may therefore be well-advised to adopt a robust approach when dealing with a company which is temporarily out of reach for the purposes of winding up by pointing out this fact. **4.3.1**

Directors will, as set out above, remain personally liable for breaches of their duties or potentially subject to disqualification proceedings for actions taken whilst the company's creditors are kept at bay by the temporary legal changes. Indeed, it is likely that a dim view will be taken by the courts and the relevant authorities where companies are regarded as having abused the temporary measures put in place to ameliorate the impact of the pandemic by trading to the detriment of their creditors with no realistic hope of recovering the position.

Directors should therefore take a pragmatic long-term view of the position of the company. Where appropriate, they should recognise that the company's difficulties may not have been caused by the pandemic or that the pandemic makes the eventual entry of the company into **4.3.2**

an insolvency process likely. In such cases, they should consider all their duties and options, including, notwithstanding the temporary barriers to compulsory liquidation at the behest of creditors, whether the best option for a company in difficulties may be to place it into administration or creditors' voluntary liquidation thereby protecting the company's creditors (and the position of the directors themselves).

#### **4.4 What duties do directors need to consider when making decisions on furloughing staff and when, or if, to bring them back to work?**

**4.4.1** Two primary considerations are likely to arise for directors when making decisions on furloughing staff and their return to work. These are safety and the position of the company in the long term.

**4.4.2** Whilst employment issues fall outside the scope of this work, it is entirely possible that directors may incur personal liability for breach of duty, or even attract the interests of the relevant authorities for the purposes of disqualification, where they decide upon a return to work for employees in circumstances where it is unsafe for them to do so. This could arise for example where the company's business is adversely impacted by an outbreak of Covid-19 amongst its staff or if the company incurs liability to its staff for personal injury arising from a failure to take reasonable precautions against spread of the disease. Indeed, in addition to liability under s. 174, CA 2006, it is notable that one of the factors set out in s. 172(2), CA 2006 to which directors must have regard when considering how best to promote the success of the company is "*the interests of the company's employees*".

**4.4.3** Decisions about whether to furlough staff will be fact-sensitive to the situation of each specific company and directors will need to consider both the present and future needs of the business. In particular, it is likely that they will have to anticipate what employees the business may need to retain for work during the pandemic and whether, once the furlough scheme has ended, they will in fact be able to afford to pay them. A failure to do so is likely to give rise to questions about whether they have acted in the manner most likely to promote the success of the company (s. 172, CA 2006) or with reasonable care, skill and diligence (s. 174, CA 2006).

**4.4.4** Directors should also be aware that wrongly claiming support from Government schemes, in particular the Coronavirus Job Retention Scheme ("**CJRS**"), may expose their companies and themselves personally to civil and even criminal liability.

**4.4.5** As to civil liability, directors found to have made improper claims to public funds may well find themselves subject to disqualification proceedings. Moreover, under the provisions of Schedule 16 to the Finance Act 2020 ("**FA 2020**"), HMRC has extensive powers to recover wrongly claimed CJRS from companies via the tax system. In the event that the company is in an insolvency procedure or there is a serious possibility that it will become so (and therefore unable to make good the losses to taxpayers itself) the directors may be pursued personally, whether under ordinary legal principles, such as tortious deceit, or via the specific provisions of para. 15, Schedule 16, FA 2020.

**4.4.6** Paragraph 15 provides that an individual may be required to be jointly and severally liable to HMRC for a company's liability to repay sums wrongly claimed to support itself during the pandemic if:

- (1) The company is subject to an insolvency procedure or there is a serious possibility of the company becoming subject to an insolvency procedure (para. 15(3));

- (2) The individual was responsible for the management of the company at the time the company first became liable to repay the sums through the tax system and the individual knew at that time that the company was not entitled to the amount of coronavirus support payment in relation to which the tax is chargeable (para. 15(5)); and
- (3) There is a serious possibility that some or all of the income tax liability will not be paid (by the company) (para. 15(6)).

Liability under para. 15 may extend to individuals beyond directors, including shadow directors (para. 15(7)(a)), and any individual who “*is concerned (whether directly or indirectly) in, or takes part in, the management of the company*” (para. 15(7)(b)). **4.4.7**

In summary therefore, any individual concerned in the management of a company may find themselves facing liability for wrongfully claimed coronavirus support payments if the company cannot make good the loss to HMRC and they knew that the sums should not have been claimed. This should provide a yet further incentive for those involved in the management of companies not to be tempted to take advantage of the support put in place for businesses during the pandemic so as to commit “furlough fraud”. **4.4.8**

**How should directors decide whether it is in accordance with their duties to borrow in the short term to help companies survive the pandemic whilst potentially incurring substantial long-term liabilities in doing so?** **4.5**

Directors will need to give careful consideration to whether they cause companies to borrow in an attempt to survive the pandemic, whether via the Government guarantee schemes in place or on freestanding commercial terms. The most important factor in making this decision is likely to be the long-term prospects of the company. If a loan will keep the company solvent in the short term but will only delay an inevitable entry into an insolvency process, taking on further borrowing may amount to a breach of the creditors’ interests duty (if triggered) or the more general duties under ss. 172 and 174, CA 2006. Even where it is considered that continuing to trade temporarily may result in a better outcome for creditors, it may be that placing the company into administration is the wisest course. **4.5.1**

Personal liability is likely to be a particular issue where the creditors’ interests duty described above is engaged. Where a company adds to its body of creditors by borrowing money in an attempt to continue in business, which it cannot ultimately repay, this is likely at least to lead to a greater deficiency as regards creditors, and a corresponding dilution of potential creditor recoveries, in a future insolvency and may, if security has been granted over the company’s assets in support of the new borrowing, leave the unsecured creditors with little or nothing to recover. **4.5.2**

This is not to say however that directors should not borrow money to help the company over short-term difficulties even if its long-term prospects are far from certain, as may be the case given the generally uncertain economic outlook. Indeed, an overly cautious decision not to borrow money may also be a breach of duty under ss. 172 or 174, CA 2006 and render the director personally liable for losses caused to the company as a result. It is even conceivable that a failure to borrow in order to avoid insolvent liquidation, which will inevitably result in creditors suffering loss, may amount to a breach of the creditors’ interests duty. **4.5.3**

Ultimately such decisions will be highly fact sensitive and reliant upon the judgement of individual directors. So long as directors are not overly optimistic or unduly timid, and act in the manner they believe will best promote the success of the company in relation to its **4.5.4**

members or creditors as appropriate (s. 172, CA 2006 / the creditors' interests duty) and reasonably (s. 174, CA 2006), they are likely to be protected from personal liability.

**4.5.5** Directors should also be careful to ensure that when seeking to borrow they accurately present the financial position of the company to the party providing or guaranteeing the finance. If they fail to do so, they will, in the usual way, be at risk of personal liability to the lender / guarantor for negligent misstatement or even fraudulent misrepresentation / deceit and/or liability to the company for breach of duty where the company incurs liability in relation to any presentation of its financial position by them.

**4.6 Could directors be criticised for deciding not to participate in Government schemes to support businesses adversely affected by the pandemic and what use can legitimately be made of money received under the Government schemes?**

**4.6.1** The Government loan schemes which have been introduced as a result of the pandemic afford unusual protections to lenders, providing, depending upon the particular scheme concerned, partial or complete guarantees in the event that the company is unable to make repayments, initial payment holidays and preferential rates of interest in comparison to market rates.

**4.6.2** Consequently, where a company suffers loss as a result of a failure to participate in a Government loan scheme the directors may be open to criticism for breach of their duties under ss. 172 and 174, CA 2006.

**4.6.3** The various schemes, and restrictions on use of proceeds (where applicable) are as follows:

**4.6.4** The **Bounce Back Loan Scheme**<sup>29</sup> (BBLs) covers loans from £2,000 to 25% of a business's turnover, up to a maximum of £50,000, at an interest rate of 2.5% and for a period of up to 6 years. The scheme provides the lender with a 100% government-backed guarantee against the outstanding principal and interest. The borrower does not have to make any repayments, and the Government will cover interest payments, for the first 12 months. The business must have been carrying on business on 1 March 2020 and must have been adversely affected by the pandemic. From 10 November 2020, borrowers who borrowed less than the maximum amount available to them may "top up" an existing Bounce Back Loan, up to the maximum. So far as restrictions on use are concerned:

- (1) The borrower must confirm to the lender that the loan will only be used to provide an economic benefit to the business, for example providing working capital, and not for personal purposes.
- (2) If the business was a "*business in difficulty*" on 31 December 2019 then a loan under the scheme cannot be used for export-related activities.
- (3) There are no limits on the amount of the facility that can be used for refinancing.

**4.6.5** The **Coronavirus Business Interruption Loan Scheme**<sup>30</sup> (CBILS) covers loans from £50,001 to £5 million, and is available to businesses based in the UK with an annual turnover of up to £45 million, and which were not "*businesses in difficulty*" on 31 December 2019. Loans may be provided in the form of term loans, overdrafts, invoice finance or asset finance. The lender is provided with a government backed guarantee of 80% of the outstanding balance

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29 <https://www.british-business-bank.co.uk/ourpartners/coronavirus-business-interruption-loan-schemes/bounce-back-loans/> (accessed 1 February 2021).

30 <https://www.british-business-bank.co.uk/ourpartners/coronavirus-business-interruption-loan-scheme-cbils-2/> (accessed 1 February 2021).

(principal only), and the Government will cover interest payments and fees for the first 12 months. If a term loan, the maximum term is up to 6 years. For overdrafts and invoice finance facilities, terms are up to three years. Businesses must have a borrowing proposal that the lender would consider viable were it not for the pandemic, and self-certify that they have been adversely affected by the pandemic. Refinancing is limited to a maximum of 20% of a lender's total CBILS lending.

The [Coronavirus Large Business Interruption Loan Scheme](#)<sup>31</sup> (CLBILS) covers loans to businesses based in the UK with a group turnover of more than £45 million that have been impacted by the pandemic. The maximum amount available is £200 million, although the maximum size for invoice finance and asset finance facilities is £50 million. Loans are available for three months to three years, and lenders are provided with a government guarantee of 80% of the outstanding finance. The business must have a borrowing proposal which, were it not for the current pandemic, would be considered viable by the lender and for which the lender believes the provision of finance will enable the business to trade out of any short-to-medium term difficulty. It must not be a “*business in difficulty*” on 31 December 2019. **4.6.6**

Entities borrowing in excess of £50 million under the CLBILS must agree that they and their group will not, until the facility has been paid in full: **4.6.7**

- (1) declare or pay dividends or make other distributions to shareholders (save for limited exceptions including that the dividend was declared prior to entry by the borrower into the facility);
- (2) pay any cash bonuses to senior management, or award any pay rises to senior management, except where such pay rise was (i) agreed in writing before the facility was taken out, or (ii) is in keeping with similar payments made in the preceding 12 months, and (iii) does not have a material negative impact on the borrower's ability to repay the facility.

For facilities of up to £50 million, dividend payments may continue but are not to be increased for as long as any facility under CLBILS remains outstanding. **4.6.8**

Start Up Loans from £500 to £25,000 at an interest rate of 6% may also be available under the British Business Bank's [Start Up Loans programme](#).<sup>32</sup> Businesses that were trading prior to 1 March 2020, are less than two years old and have been negatively impacted by the pandemic, may apply for both a Start Up Loan and Bounce Back Loan. Start Up Loans cannot be used to fund (i) debt repayment, (ii) training, qualifications or education programmes, or (iii) investment opportunities that do not form part of an on-going sustainable business. **4.6.9**

The [Future Fund](#)<sup>33</sup> issues convertible loans to innovative UK companies with good potential that typically rely on equity investment and which are currently affected by the pandemic. The application is to be made by an eligible investor (or lead investor of a group of investors) in connection with an eligible company. The Future Fund will match up to 100% of the amount provided by the investor(s), from £125,000 to £5 million, by way of convertible loans with a minimum interest rate of 8%. Funding must not be used to (a) repay any borrowings, (b) pay any dividends, (c) pay any bonuses, or (d) pay any advisory fees. **4.6.10**

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31 <https://www.british-business-bank.co.uk/ourpartners/coronavirus-business-interruption-loan-schemes/clbils/> (accessed 1 February 2021).

32 <https://www.startuploans.co.uk/coronavirus> (accessed 1 February 2021).

33 <https://www.british-business-bank.co.uk/ourpartners/coronavirus-business-interruption-loan-schemes/future-fund/> (accessed 1 February 2021).

**4.6.11** More recently, in accordance with localised restrictions and then the further national lockdowns, the Government introduced the [Local Restrictions Support Grants](#)<sup>34</sup>, offering financial support for businesses to be delivered through local authorities. Support is offered to businesses required to close due to national or local restrictions, and to businesses that are impacted by local restrictions but not required to close.

**4.7 What considerations for directors arise in relation to corporate groups dealing with the pandemic?**

**4.7.1** Where companies are part of a corporate group, directors will continue to owe their duties to the individual company (or companies) of which they are a director rather than to the broader corporate group or the company's parent.<sup>35</sup> This is so even in the case of a wholly-owned subsidiary. There is a risk therefore that directors of group companies may act in ways which may be detrimental to the interests of the individual company, even though in the interests of the group more broadly. Such potential breaches of duty by directors rarely cause difficulties where a company is solvent since the shareholders, who are generally likely to be one or more other group companies, can ratify any breach.

**4.7.2** Shareholders are not however in position to ratify breaches of the creditors' interests duty (see e.g. *Official Receiver v Stern and another* [2001] EWCA Civ 1787; [2002] 1 BCLC 119 at [32]). Consequently, acting in a way which is prejudicial to the interests of the creditors of an individual group company, even where this is in the overall interests of the group and its creditors, for example by using one company to guarantee or give security for the liabilities of another group company, puts directors at risk of personal liability for breach of the creditors' interests duty (as was found to have occurred in the leading Australian case in the development of the creditors' interests duty *Walker v Wimborne* [1976] 137 CLR 1; [1976] 3 ACLR 529). Directors should therefore carefully consider whether, and if so how, to provide support for other group companies in distress in order to minimise the risk of liability.

**4.7.3** Directors should also consider how best the group companies can avail themselves of government support: which companies are eligible to (and should) seek loans under the various government schemes, and the extent to which the group as a whole may be subject to restrictions whilst any facility is outstanding.

**4.8 Are there any protections for company directors if they fail to act in accordance with their duties as a result of the issues raised by the pandemic?**

**4.8.1** Directors may be relieved from liability for breaches of duty where they have "*acted honestly and reasonably and ... having regard to all the circumstances of the case ... ought fairly to be excused*" under s. 1157, CA 2006. Directors and companies are operating in unique circumstances as a result of the pandemic and are facing issues which they will not have previously encountered and may not have planned for. Those circumstances will likely be taken into account in determining whether directors have breached their duty to act in the way that they consider to be most likely to promote the success of the company. But they may also be relevant to the question whether, even if a director has breached a duty to the company (including the

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<sup>34</sup> <https://www.gov.uk/government/collections/financial-support-for-businesses-during-coronavirus-covid-19#support-for-businesses-affected-by-coronavirus-restrictions> (accessed 1 February 2021).

<sup>35</sup> They may of course owe other duties to their appointer arising from a contractual relationship and/or the law of agency but these are beyond the scope of this discussion.

creditors' interests duty), the circumstances are such that they ought fairly to be excused from liability by operation of s. 1157, CA 2006.

**Are there any other specific steps which directors should take or give consideration to in light of the pandemic in order to ensure that they comply with their duties?** **4.9**

It goes without saying that directors should be astute to keep the developing situation, and its impact on their companies, under constant review. It would be prudent to seek to ensure that their consideration of the issues (in board deliberations or otherwise) is well-documented, and to keep abreast of the developments in the legal framework in which their companies operate and in the attitudes of the Government and other organisations. **4.9.1**

***Avoiding or mitigating business disruption***

Directors should assess key-person risks and ensure that the company has in place a clear succession/disruption plan identifying steps to be taken if senior managers are incapacitated or unavailable due to illness, self-isolation or caring responsibilities. **4.9.2**

In ensuring that the company has a robust business interruption/disruption plan, directors should also consider the following: **4.9.3**

- (1) Employees – assess staffing levels, arrangements for remote working (if applicable), and arrangements covering sickness, self-isolation and parental/carers' leave.
- (2) IT – assess the impact of remote working; review the disaster recovery plan; review data protection protocols to identify any changes needed as a result of altered working practices such as remote working and virtual meetings.
- (3) Supply chain – review contracts in place with suppliers; identify any necessary modifications including alternative suppliers.
- (4) Customer/client base – review contractual terms and identify a strategy for communication with customers or clients about any pandemic-related disruption.
- (5) Lenders – review relevant contractual provisions including as to events of default.
- (6) Insurance – review existing insurance policies for business interruption cover and, if relevant, take advice on the implications of the decision in the recent test case brought by the FCA concerning business interruption insurance, judgment in which was handed down by the Supreme Court on 15 January 2021 (*FCA v Arch Insurance (UK) Limited and Ors* [2021] UKSC 1 – for a full analysis of which see [Business Interruption Insurance](#) from [para. 5.15](#) in Section Five: Banking and Financial Services below).<sup>36</sup> Consider the implications for renewals of cover or new insurance policies.

***Executive remuneration***

Sensitivities may well arise, especially in large companies, in relation to any discretionary or performance-based remuneration for executives in circumstances where the company faces financial difficulties in the light of the pandemic, which may lead to a reduction in dividends or employees being furloughed or taking pay cuts. The Investment Association **4.9.4**

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<sup>36</sup> Judgment: <https://www.supremecourt.uk/cases/docs/uksc-2020-0177-judgment.pdf> (accessed 1 February 2021). FCA press release: <https://www.fca.org.uk/news/press-releases/supreme-court-judgment-business-interruption-insurance-test-case> (accessed 1 February 2021).

(the trade body representing investment managers) has [published its expectations](#)<sup>37</sup> as to how remuneration committees of UK listed companies should be reflecting the impact of the pandemic on executive pay. They recognise that the impact of pandemic will be different for each company, and that remuneration committees will need to sensitively balance the need to continue to incentivise executive performance at a difficult time with the need to ensure that the executive experience is commensurate with that of shareholders, employees and other stakeholders.

## **Further Issues of Corporate Governance and Reporting**

### **4.10 Will the pandemic alter whether or how companies declare dividends?**

**4.10.1** Dividends can only be paid out of distributable profits (see s. 830, CA 2006). Companies that have faced financial difficulties as a result of the pandemic may be less able to pay dividends going forward, even if distributable profits have been generated by a company's operations prior to the onset of the pandemic. In addition, and as noted above at [para. 4.6](#), companies participating in government loan schemes may be restricted in their ability to pay dividends whilst the facility is outstanding.

**4.10.2** In any case, directors must of course consider whether a dividend can and should be declared. In making such a determination, directors must have regard to the interests of the company and whether, if the company has sufficient distributable reserves to pay a dividend, it is in the interests of the company for a dividend to be declared or for the company to conserve cash, especially if income is declining or likely to decline as a result of the pandemic. Directors should consider carefully the future solvency of the company and the potential impact on the company's operations of any dividend payment. Indeed, if the company is experiencing financial difficulties it may be that directors should have regard to the interests of the company's creditors as a whole (see [para. 4.2](#) above): it is likely to be in the interests of creditors that the company choose not to pay a dividend.

**4.10.3** The FRC's '*Guidance for companies on Corporate Governance and Reporting*'<sup>38</sup> (updated 4 December 2020) notes that many companies have already adjusted their approach to dividends. The Guidance emphasises that directors need to consider the position of the company when a dividend is paid, not just when it is proposed, and that the assessment of whether a dividend is appropriate should include consideration of current and likely operational and capital needs, contingency planning, compliance with directors' duties and the need to ensure that the capital maintenance rules of Part 23 of the Companies Act 2006 are complied with.

**4.10.4** In this regard, the Chartered Governance Institute has published [guidance](#)<sup>39</sup> on the withdrawal or amendment of resolutions to pay final dividends in the event that a board concludes that it is no longer appropriate to recommend or declare a dividend that is due to be put to shareholders for approval at the AGM (or concludes that a dividend should still be paid but the amount of the dividend should be reduced).

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<sup>37</sup> <https://www.theia.org/sites/default/files/2020-04/Remuneration%20and%20COVID-19.pdf> (accessed 1 February 2021).

<sup>38</sup> <https://www.frc.org.uk/getattachment/1c657620-7e15-401d-a74f-25e2305f1104/Company-Guidance-Covid-19-Updated-December-2020.pdf> (accessed 1 February 2021).

<sup>39</sup> <https://www.icsa.org.uk/assets/files/pdfs/guidance/withdrawal-or-amendment-of-dividend-resolution-to-annual-general-meeting-web.pdf> (accessed 1 February 2021).



**What accounting issues arise?**

**4.11**

***Going concern***

Careful consideration may need to be given to whether the company is a going concern, and whether it is necessary to disclose “*material uncertainties*” in financial statements.

**4.11.1**

IAS 1 requires financial statements to be prepared on a going concern basis unless management intends to liquidate the entity or to cease trading or has no realistic alternative but to do so. It may be necessary to consider whether the impact of the pandemic leaves management with no realistic alternative but to liquidate or cease trading.

**4.11.2**

If management is aware of material uncertainties which may cast significant doubt on the entity’s ability to continue as a going concern, the uncertainties must be disclosed. The FRC has stated in its Guidance for companies on Corporate Governance and Reporting (updated 4 December 2020) that it thinks it more likely that companies will disclose material uncertainties relating to going concern in the current circumstances. The FRC encourages boards to consider the impact of different potential scenarios (e.g. different time periods for the continuation of social distancing) on their company’s revenues, costs and cash flow requirements, and if a material uncertainty does exist, to disclose it in terms that are as specific to the company as possible. The FRC also encourages companies to provide as much context as possible for the assumptions and predictions underlying the amounts recognised in financial statements, including (i) the availability and extent of support through government support measures, (ii) the availability, extent and timing of sources of cash, including compliance with banking covenants or reliance on those covenants being waived, and (iii) the duration of social distancing measures and their potential impacts.

**4.11.3**

***Strategic report***

The directors of all companies other than those entitled to the small companies exemption are required to prepare a strategic report for each financial year, which must contain a fair review of the company’s business and a description of the principal risks and uncertainties facing the company (ss. 414 & 414C, CA 2006). Similar considerations to those identified above will apply in identifying risks and uncertainties in the strategic report. The FRC’s Guidance suggests that a company should consider the specific resources, assets and relationships that are most under threat and the steps being taken to protect them.

**4.11.4**

***Viability statement***

Companies with a premium listing are required by the UK Corporate Governance Code to include in their annual reports a viability statement: a statement whether the board has a reasonable expectation that the company will be able to continue in operation and meet its liabilities as they fall due over a period of assessment (provision 31 of the Code). Again, the FRC has recognised that many boards will be less confident in making the viability statement in the current circumstances, and the updated guidance stresses the importance of being clear on the company’s specific circumstances and the degree of uncertainty about the future, and drawing attention to qualifications or assumptions as necessary.

**4.11.5**

**4.11.6** The FRC Reporting Lab has published a report (*'Covid-19: Going concern, risk and viability: reporting in times of uncertainty'*)<sup>40</sup> (15 June 2020)), providing further guidance and practice examples in relation to going concern, risk reporting and the viability statement.

## **4.12 How can companies hold meetings and pass resolutions without in-person meetings?**

**4.12.1** Electronic meetings and voting are already facilitated by CA 2006, and in particular s. 360A, CA 2006 (inserted with effect from 3 August 2009), which provides as follows:

*"360A Electronic meetings and voting*

*(1) Nothing in this Part is to be taken to preclude the holding and conducting of a meeting in such a way that persons who are not present together at the same place may by electronic means attend and speak and vote at it.*

*(2) In the case of a traded company the use of electronic means for the purpose of enabling members to participate in a general meeting may be made subject only to such requirements and restrictions as are—*

*(a) necessary to ensure the identification of those taking part and the security of the electronic communication, and*

*(b) proportionate to the achievement of those objectives.*

*(3) Nothing in subsection (2) affects any power of a company to require reasonable evidence of the entitlement of any person who is not a member to participate in the meeting."*

**4.12.2** These provisions have, to date, taken effect subject to the constitution of the relevant company. Many companies have included in their articles of association specific provision for telephone or video conferencing, and the constitutions of others are silent on the issue, but some sets of articles may contain express barriers to virtual or hybrid meetings.

### ***Legislation***

**4.12.3** Time-limited changes to the legislative regime have now been effected by means of provisions in CIGA 2020, which initially came into force on 26 June 2020 and has been updated subsequently.

**4.12.4** Section 37, CIGA 2020 incorporates Schedule 14, which makes provisions about meetings of companies and other qualifying bodies held during the *"relevant period"*. The *"relevant period"* was originally defined as being between 26 March and 30 September 2020 inclusive. This was however subject to amendment by regulation. The *"relevant period"* has been extended twice:

- (1) first, to 30 December 2020 by Regulation 2(4) of the Corporate Insolvency and Governance Act 2020 (Coronavirus) (Extension of the Relevant Period) Regulations 2020;
- (2) again, to 30 March 2021 by Regulation 3(1) of the Corporate Insolvency and Governance Act 2020 (Coronavirus) (Suspension of Liability for Wrongful Trading and Extension of the Relevant Period) Regulations 2020, which came into force on 26 November 2020.

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<sup>40</sup> <https://www.frc.org.uk/getattachment/ef564f3f-d37b-4469-aa30-cc36f0343708/COVID-19-Going-concern-risk-and-viabilityFinal.pdf> (accessed 1 February 2021).

A company (as defined at s. 1(1), CA 2006) is a qualifying body for these purposes, under para. 1(g) of Schedule 14, CIGA 2020 and Regulation 3(2)(d) of the Corporate Insolvency and Governance Act 2020 (Coronavirus) (Suspension of Liability for Wrongful Trading and Extension of the Relevant Period) Regulations 2020. **4.12.5**

Under para. 3(2) of Schedule 14, a meeting is within the scope of the provisions if it is: **4.12.6**

- (1) a general meeting of a qualifying body;
- (2) a meeting of any class of members of a qualifying body; or
- (3) a meeting of delegates appointed by members of a qualifying body.

The new provisions contained in the Schedule in relation to these categories of meetings are, in summary, as follows: **4.12.7**

- (1) the meeting need not be held at any particular place (para. 3(3), Schedule 14);
- (2) the meeting may be held, and any votes may be permitted to be cast, by electronic means or any other means (para. 3(4), Schedule 14);
- (3) the meeting may be held without any number of those participating in the meeting being together in the same place (para. 3(5), Schedule 14);
- (4) a member of the qualifying body does not have a right –
  - (a) to attend the meeting in person (para. 3(6)(a), Schedule 14);
  - (b) to participate in the meeting other than by voting (para. 3(6)(b), Schedule 14), or
  - (c) to vote by particular means (para. 3(6)(c), Schedule 14).

These provisions take effect notwithstanding the terms of any enactment or of the company's constitution, by para. 3(8), Schedule 14. **4.12.8**

Schedule 14 also includes general rule-making powers for appropriate national authorities to make provisions about the form and timing of notices, as well as (more broadly) to make further or different provision by regulation in relation to the holding of meetings of qualifying bodies. **4.12.9**

In addition, for further guidance on company meetings in relation to the operation of the corporate insolvency regime see [paras. 2.26](#) and [2.27](#) of Section Two: Corporate Insolvency. **4.12.10**

### ***Good practice / guidance***

If an AGM is scheduled to be held while pandemic restrictions are in place, companies should consider whether in the particular circumstances of the relevant company it is possible and appropriate to postpone or (in the case of a private company) dispense with the AGM. **4.12.11**

In some companies an EGM may be required during the pandemic, for example if shareholder approval is required for the raising of emergency financing. **4.12.12**

If a hybrid meeting is proposed, best practice while pandemic restrictions are in force will generally be to restrict in-person attendance to the minimum number of people in order to satisfy quorum requirements, with a clear message to all other shareholders that attendance is to be by remote means. Unless shareholders have consented to receive electronic communications, notices and accompanying documents will need to be sent in hard copy in **4.12.13**

the usual way until such time as any provisions to the contrary are made by regulation under the powers in para. 4(2), Schedule 14. Voting by proxy should be actively encouraged.

**4.12.14** Boards and board committees are more likely than the shareholder body to be accustomed to meeting virtually, and directors still have the option to use the written resolutions process if circumstances make that the most convenient method for decision-making. Particular care is needed to protect the security of board packs circulated electronically, which can be addressed by the use of secure board portals.

**4.12.15** The following good practice guidelines on virtual meetings will apply to shareholders' meetings and to board and committee meetings.

- (1) Notices of meetings should be very clear as to access arrangements, and meeting protocols should be circulated well in advance.
- (2) Attendance numbers (including by reference to the quorum) should be monitored and recorded by the host, and the security of the virtual meeting protected by the use of means such as access passwords and virtual waiting rooms.
- (3) Those in attendance should be muted whilst not speaking (if necessary by the host) but have clear instructions as to how to communicate with others during the meeting, whether by messaging within the virtual space or otherwise. Clear rules should be set and communicated as to the appropriate content of any in-meeting messaging, which should be monitored by the host.
- (4) Screen-sharing should be used wherever possible in order to ensure that all in attendance are able to follow the use of documents.
- (5) Adequate time should be provided for questions after any presentations have been concluded, in order that all in attendance have a full and fair opportunity to contribute views and ask questions.
- (6) Virtual meetings should be minuted in the usual way, and as a general rule should not be recorded. Recording is likely to involve the collection of personal data, and a digital recording may be a disclosable document.
- (7) Where possible, hosts should ensure that there is IT support on standby in case any problems arise during the virtual meeting.

**4.13** **Have any other formal requirements on companies been relaxed as a result of the pandemic?**

***Temporary extension of period to hold AGM***

**4.13.1** Paragraph 5 of Schedule 14, CIGA 2020 extended the time for holding an annual general meeting for those companies and other qualifying bodies which, absent these provisions, would have been required to hold one after 25 March 2020 and before 30 September 2020. The effect of the provisions, which are subject to further broad rule-making powers, was to allow all such qualifying bodies until 30 September 2020 to hold their AGM. This time period was not extended under the Corporate Insolvency and Governance Act 2020 (Coronavirus) (Extension of the Relevant Period) Regulations 2020. Although para. 5 of Schedule 14 refers to the “*relevant period*” which was extended under those Regulations, para. 5(3) states that: “*If by reason of regulations made under paragraph 2 the relevant period is a period that ends after 30 September 2020 this paragraph has effect as if the relevant period were a period that ends with*

30 September 2020.” Consequently, the “relevant period” is to be treated as if not extended beyond 30 September 2020 by the Regulations for the purposes of para. 5.

***Temporary extension of time for filing accounts – public companies***

Section 38, CIGA 2020 extends the time for filing accounts with the registrar under s. 441, CA 2006 for those public companies which, absent these provisions, would have been required to file them after 25 March 2020 and before 30 September 2020. The effect of the provisions is to allow all such public companies until 12 months after the end of the relevant accounting period (or 30 September 2020, if earlier) to comply with the relevant filing requirements. **4.13.2**

***Temporary extension of time for other filings***

Section 39, CIGA 2020 provides powers for the Secretary of State to extend time for a number of other filing requirements. **4.13.3**

Under s. 39(2), CIGA 2020 where the existing period for filing is 21 days or fewer, the substituted period cannot exceed 42 days. Where the existing period is 3, 6 or 9 months, the substituted period cannot exceed 12 months. The provisions exclude, by s. 39(3), any power to extend a period which is already 12 months. **4.13.4**

Regulations providing for temporary extensions of time pursuant to s. 39, CIGA 2020 (The Companies etc. (Filing Requirements) (Temporary Modifications) Regulations 2020) were laid before Parliament on 26 June 2020 and came into force on 27 June 2020. The explanatory memorandum explained that the regulations were laid as soon as practicable after the Royal Assent of CIGA 2020, subject to the negative resolution procedure and in breach of the 21-day rule, in order that relevant entities are given immediate help to comply with their filing deadlines at a time when they may be struggling to meet them because of the significant pressure they are being put under because of the pandemic. The modifications made by the Regulations will expire at the end of the day on 5 April 2021 (s. 39(8), CIGA 2020). **4.13.5**

The Regulations provide for the following extensions applicable to companies, by way of amendment to the Companies Act 1985 and CA 2006: **4.13.6**

- (1) registration of alteration of a floating charge (s. 466(4C)(a), Companies Act 1985) – from 21 days to 31 days;
- (2) notice of change of address of registered office (s. 87(4)(b), CA 2006) – from 14 days to 42 days;
- (3) notice of place where register of members is kept (s. 114(5), CA 2006) – from 14 days to 42 days;
- (4) notice of place where register of directors is kept (s. 162(6), CA 2006) – from 14 days to 42 days;
- (5) notice of change in directors, etc. (s. 167(1), CA 2006) – from 14 days to 42 days;
- (6) notice of place where register of secretaries is kept (s. 275(6), CA 2006) – from 14 days to 42 days;
- (7) notice of change in secretaries, etc. (s. 276(1), CA 2006) – from 14 days to 42 days;
- (8) period allowed for filing accounts (s. 442(2), CA 2006) – the period for private companies is extended from 9 months to 12 months, and the period for public

companies is extended from 6 months to 9 months. (For public companies whose original accounts filing deadline fell on or after 30 June 2020 before it was extended by CIGA 2020, this extension will apply and supersede the extension under CIGA 2020);

- (9) register of people with significant control (s. 790M, CA 2006) – from 14 days to 42 days;
- (10) notice of place where PSC register is kept (s. 790N(4), CA 2006) – from 14 days to 42 days;
- (11) notice of change to the PSC register (s. 790VA(2), CA 2006) – from 14 days to 42 days;
- (12) confirmation statements (ss. 853A(1) and 853L(1), CA 2006) – from 14 days to 42 days;
- (13) registration of charge (s. 859A(4), CA 2006) - from 21 days to 31 days;
- (14) registration of charge contained in debentures (s. 859B(6), CA 2006)- from 21 days to 31 days;
- (15) notice of place where copies of instruments creating charges are kept (s. 859Q(5), CA 2006) – from 14 days to 42 days.

**4.13.7** Companies House guidance in relation to the regulations (with examples) has been published.<sup>41</sup>

**4.13.8** In addition to the statutory changes, it is important for companies to note that the registrar has the power to grant an extension of time for filing accounts as a concession, and an application for such an extension can be made online before the normal filing deadline expires.<sup>42</sup>

#### ***Temporary changes to strike-off activity – Companies House***

**4.13.9** Companies House has published guidance<sup>43</sup> concerning temporary changes to its policy relating to strike-off activity.

**4.13.10** The changes to strike-off activity depend on the basis of the proposed strike-off. In the case of applications for voluntary strike-off, a notice will be published in the Gazette as normal in order to place the proposed strike-off in the public domain. However, until 10 September 2020 any further action to strike off and dissolve the company was suspended, in order to protect creditors and any other interested parties who may wish to object to the company being struck off.<sup>44</sup> An exception to this suspension policy, applicable from 1 June 2020, applied in cases where the registrar had evidence that the relevant company is no longer in

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41 <https://www.gov.uk/government/publications/the-companies-etc-filing-requirements-temporary-modifications-regulations-2020/temporary-changes-to-companies-house-filing-requirements> (accessed 1 February 2021).

42 See <https://www.gov.uk/guidance/apply-for-more-time-to-file-your-companys-accounts> (accessed 1 February 2021).

43 <https://www.gov.uk/guidance/coronavirus-guidance-for-companies-house-customers-employees-and-suppliers#changes-to-strike-off-policy-and-late-filing-penalties> (accessed 1 February 2021).

44 <https://www.gov.uk/government/news/companies-house-to-restart-the-voluntary-strike-off-process> (accessed 1 February 2021).

operation following an investigation. In such a case, the registrar continued with strike-off action.

In cases where a proposed strike-off is due to filing defaults, the registrar would ordinarily proceed towards striking off a company by sending two letters to the company and then publishing a notice in the Gazette. Until 10 October 2020, under the temporary concessionary policy, the registrar continued to write to companies if their annual accounts or confirmation statement were overdue but did not publish the Gazette notice. This was intended to give businesses an opportunity to file any outstanding documents and bring their record up to date. However, as from 10 October 2020, Companies House has recommenced the compulsory strike off process for companies which it believes are no longer carrying on business or operation.<sup>45</sup> Companies House announced on 27 January 2021 that it had temporarily paused its voluntary and compulsory strike off processes for one month, from 21 January until 21 February 2021, due to delays resulting from a reduction in staff in its offices in compliance with government guidance.<sup>46</sup> **4.13.11**

### ***Temporary changes to policy on late filing penalties – Companies House***

The new Companies House guidance<sup>47</sup> also covers some aspects of policy relating to late filing penalties. The registrar has very limited discretion not to impose a late filing penalty, so concessions are focused around managing penalties which are imposed. **4.13.12**

The temporarily revised policy includes commitments to: **4.13.13**

- (1) treating late filing penalty appeals sympathetically, if the late delivery of accounts was caused by the pandemic;
- (2) providing a break for companies to pay late filing penalties; and
- (3) providing additional support with payment plans for late filing penalties.

Detailed guidance papers covering these policies, as well as information about lodging an appeal online, have been published.<sup>48</sup> **4.13.14**

The Companies House contact centre has withdrawn its online credit card payment facility, but payment of a late filing penalty incurred on or after 30 March 2020 can be made online using a link included on the penalty notice. **4.13.15**

### ***Stock transfer forms and stamp duty***

HMRC has announced<sup>49</sup> temporary changes to the way it deals with stamp duty. Stock transfer forms must be emailed in electronic form to [stampdutymailbox@hmrc.gov.uk](mailto:stampdutymailbox@hmrc.gov.uk). HMRC has indicated that it will accept e-signatures while pandemic-related measures are in place. **4.13.16**

Any refunds of stamp duty which are due can only be paid electronically, and the guidance provides details of how this will be processed. **4.13.17**

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45 <https://www.gov.uk/government/news/companies-house-to-resume-the-compulsory-strike-off-process> (accessed 1 February 2021).

46 <https://www.gov.uk/government/news/companies-house-to-pause-voluntary-and-compulsory-strike-off-processes-for-one-month> (accessed 1 February 2021).

47 <https://www.gov.uk/guidance/coronavirus-guidance-for-companies-house-customers-employees-and-suppliers#changes-to-strike-off-policy-and-late-filing-penalties> (accessed 1 February 2021).

48 Available at: [www.gov.uk/government/publications/late-filing-penalties](http://www.gov.uk/government/publications/late-filing-penalties) (accessed 1 February 2021).

49 At <https://www.gov.uk/guidance/stamp-duty-on-shares> (accessed 1 February 2021).





# Section Five

## BANKING AND FINANCIAL SERVICES

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*Law stated as at: 1 February 2021*

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## Introduction

The effects of the pandemic on banking and financial matters are far reaching. The pandemic has resulted in an enormous shock to the real economy. By March 2020, the Office of National Statistics (“ONS”) was reporting that the UK economy had contracted almost as much in March 2020 as in the 18 months following the 2008 financial crisis. In its end of year release for 2020, the ONS estimated that the UK’s GDP as at the end of September 2020 was some 8.6% lower than the level at the end of 2019. The, as yet unpublished, figures for the fourth quarter are likely to show further deterioration in light of the further lockdown.

5.0.1

The impact of the pandemic on the stock markets has also been significant. By March 2020, the FTSE 100 had fallen by 35% from the start of the year. The complications and uncertainty related to Brexit (as to which, see below) and the movement in the pound made 2020 a volatile year for the markets, although some sectors have recovered well. Nevertheless, even in January 2021, the FTSE 100 had yet to return to its February 2020 levels. The impact of the pandemic to both the real economy and the financial markets are sure to generate disputes in the sector of banking and financial services. In this section, we consider the legal issues arising in the current business environment in those areas. These issues cover a range of legal disciplines and commercial relationships which can be broadly categorised as follows:

5.0.2

- (1) **Lenders and Borrowers.** The current circumstances and regulatory guidance have placed lenders under significant pressure to forbear from enforcing their strict legal rights under lending agreements, especially where borrowers request payment holidays (para. 5.2). Lenders must, however, be cautious not to waive their rights (para. 5.1), and may still be compelled to lend where they have previously agreed to do so (para. 5.3). The pandemic raises questions about whether Material Adverse Change (MAC) or Material Adverse Event (MAE) clauses, which are often found in facility agreements, are triggered (para. 5.4). We also consider the termination provisions in the CIGA 2020 in the context of financial services contracts (para. 5.5), whether the new moratorium and restructuring plan regime under CIGA 2020 could constitute an event of default (para. 5.6), and the impact of CIGA 2020 more generally on financial services transactions (para. 5.7). Issues of frustration and *force majeure* are addressed in Section One: Contracts (see paras. 1.9 and 1.11 of that section).

The relationship between the new Bounce Back Loans Scheme (BBLs) and the Coronavirus Business Interruption Loan Scheme (CBILs) and the consumer credit regulatory regime are considered in para. 5.8.

- (2) **Mergers and Acquisitions.** In terms of mergers and acquisitions, we analyse the impact of the pandemic on earnouts in corporate acquisitions (para. 5.9).
- (3) **Issuers / Trustees.** For the issuers of securities, the pandemic has brought into focus their obligations to disclose inside information in accordance with the new, post-Brexit UK Market Abuse Regulation and to report “*significant events*” in respect of securitisations which are governed by the post-Brexit UK Securitisation Regulation (paras. 5.10 and 5.11). We also consider the convening of meetings notwithstanding the constraints of social distancing and national lockdown measures (para. 5.12).
- (4) **The Financial Markets.** The considerable volatility in the financial markets has led brokers to impose higher margin calls. This is addressed in question para. 5.13.
- (5) **Customer Complaints.** In relation to complaints, we examine the Financial Ombudsman Service’s approach to complaints arising from firms’ actions during the

pandemic and complaints relating to lending under the BBLs and the CBILs (para. 5.14).

- (6) **Business Interruption Insurance.** The FCA (as the conduct regulator for insurance) brought a test case in relation to business interruption insurance which was heard by the High Court in July 2020. Following the High Court's judgment, permission for a leapfrog appeal to the Supreme Court was given on 2 November 2020, which was heard from 16 to 19 November 2020, with judgment handed down on 15 January 2021. We consider the steps taken by the FCA in relation to business interruption insurance (para. 5.15), the outcome of the test case in the Supreme Court (para. 5.16), and its impact on insurers and policyholders (para. 5.17).

**5.0.3** We refer below to a number of sources that readers may find useful. In addition, readers may find it useful to refer to the FCA's website, which has a specific section dedicated to the pandemic: <https://www.fca.org.uk/coronavirus>.<sup>50</sup>

### ***Brexit***

**5.0.4** At 11pm on 31 December 2020, EU Law ceased to apply in England and Wales under the terms of the transition arrangements following the UK's departure from the EU on 31 January 2020. The UK-EU Trade and Co-operation Agreement which governs the position after the transition period does not address financial services in any material way. Instead, on 31 December 2020, the UK and EU published a [Joint Declaration on Financial Services Regulatory Cooperation Between the European Union and the United Kingdom](#)<sup>51</sup> under which they agreed to establish “structured regulatory cooperation on financial services, with the aim of establishing a durable and stable relationship between autonomous jurisdictions”. It is proposed that the arrangements will allow for (1) bilateral exchanges of views and analysis relating to regulatory initiatives and other issues of interest; (2) transparency and appropriate dialogue in the process of adoption, suspension and withdrawal of equivalence decisions; and (3) enhanced cooperation and coordination including in international bodies as appropriate. The Joint Declaration states that the parties will agree a Memorandum of Understanding by March 2021 establishing the framework for this cooperation and will discuss, inter alia, how to move forward on both sides with equivalence determinations between the EU and United Kingdom, without prejudice to the unilateral and autonomous decision-making process of each side.

**5.0.5** In the circumstances, the future relationship between the UK and the EU in the area of financial services remains subject to a high degree of uncertainty. At the time of writing (1 February 2021), passporting rights have been lost, with little optimism for determinations of equivalence in the near term. Certain aspects of the EU financial services regulatory regime have been onshored<sup>52</sup>, such as EU binding technical standards, but how these onshored rules may develop in the future is unclear. Cross-border financial service contracts will be subject to uncertainty; not only in relation to passporting rights, but also in terms of the jurisdictional rules which will govern the claims for breach of such contracts.

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<sup>50</sup> Accessed 1 February 2021.

<sup>51</sup> [https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:22020A1231\(03\)&from=EN](https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:22020A1231(03)&from=EN) (accessed 1 February 2021).

<sup>52</sup> “Onshoring” is a term used to describe the process of amending EU legislation and regulatory requirements so that they operate in a UK-only context, following the end of the Brexit transition process (see <https://www.fca.org.uk/brexit/onshoring-temporary-transitional-power-ttp>; accessed 1 February 2021).

In relation to passporting, the immediate impact of Brexit has been the loss of passporting rights in relation to financial services provided by UK firms in other EEA member states. Further, the prospect of EU granting equivalence determinations in respect of UK firms seems remote; discussions surrounding equivalence during the Brexit negotiations demonstrated that the EU has little desire (nor indeed any particular incentive) to allow UK firms to enjoy access to the EU financial markets by way of a determination that UK regulatory requirements are equivalent to the relevant EU regulations. It seems likely that many UK financial services firms will be left with little choice in the short term but to relocate at least some operations to EU Member State financial centres such as Frankfurt, Madrid and Paris. For EEA firms operating in the UK, temporary regimes have been put in place to allow EEA firms to both operate in the UK for a limited time following Brexit and to run-off certain cross-border financial services contracts, and equivalence has broadly been granted by the UK. **5.0.6**

Brexit has also required the UK to onshore a large amount of directly applicable EU regulatory rules in relation to financial services. In many cases, this has been done with little change to the substantive rules in place. We discuss below the UK's onshoring of the relevant rules governing market abuse and the reporting of "significant events" in relation to securitisations (paras. 5.10 and 5.11), where in both cases the onshored legislation has been subject to only minor amendments as part of the onshoring process. **5.0.7**

Loss of passporting rights will also impact cross-border financial services contracts, where it may no longer be possible to perform regulated activities in other EEA member states without separate authorisation. The Bank of England identified in a report<sup>53</sup> in November 2017 that insurance contracts and OTC derivatives contracts were most likely to be affected by 'continuity' issues following the loss of passporting. More generally, Brexit has also resulted in significant changes to the rules governing jurisdiction and the enforcement of judgments. The UK is no longer subject to the rules of Regulation (EU) No 1215/2012 (the "Recast Brussels I Regulation"), nor is there any indication from the EU that the UK will soon be subject to equivalent rules through its admission to the Convention on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters 2007 (the "Lugano Convention"). As matters stand, therefore, the rules governing jurisdiction in private international disputes are to be found in CPR rr. 6.36 – 6.37 and Practice Direction 6B. Jurisdiction over claims concerning financial services contracts did not give rise to an easy answer under the European regime, not least because of the difficulties in establishing where the "services were provided" or where the "harmful event occurred" under Article 7 of the Recast Brussels I Regulation for breach of contract and tort claims respectively. Focus will now shift to ascertaining, in respect of financial services contracts which do not include comprehensive jurisdiction or choice of law clauses, whether the contract was made, or a breach of contract committed, within the jurisdiction under Practice Direction 6B. **5.0.8**

## Lenders and Borrowers

**In what circumstances will a lender be taken to have waived their rights in respect of a breach of a loan covenant?** **5.1**

The pandemic has had a severe impact on the ability of many borrowers to meet repayment obligations in the short to medium term. Cash flow for many businesses has suffered as a result of the lockdown regulations, with many firms having to try to meet their usual **5.1.1**

53 <https://www.bankofengland.co.uk/-/media/boe/files/financial-stability-report/2017/november-2017.pdf?la=en&hash=F6D65F714A7DC28394BC4FCC9909CCD39E28AD10> (accessed 1 February 2021).

liabilities without recording any earnings. In those circumstances, the risk of formal defaults under loan contracts has continued to rise. Lenders will have to consider whether they should refrain from exercising their strict contractual rights, such as enforcing security or accelerating the loan balance, following a breach of covenant in the current circumstances. However, they should do so with one eye to the future: once the pandemic is over, borrowers may argue that lenders have waived their rights to enforce those terms.

***Is there any obligation to waive a breach of covenant caused by the pandemic?***

- 5.1.2** Whilst substantial legislation has been enacted to address the insolvency-related consequences of the pandemic, there has been no legislation introduced to assist contractual counterparties who find themselves in breach of contract as a result of the current situation. There is therefore no obligation, either present or contemplated, for lenders to excuse breaches of covenant which were caused by the pandemic and its effects.
- 5.1.3** There is, however, regulatory guidance. The CEO of the PRA sent a “Dear CEO” letter<sup>54</sup> on 26 March 2020 to UK banks in which he advised that lenders should distinguish between “normal” (i.e. borrower-specific) breaches of loan covenants, and breaches which arise as a result of the pandemic and its consequences. In the latter case, he stated that the PRA would expect lenders to consider in good faith whether to waive any resultant covenant breach and not impose any new charges or restrictions.
- 5.1.4** In light of this guidance, and the potential reputational consequences which would follow if a lender were to insist upon its contractual rights where a borrower had defaulted due to the pandemic and through no fault of their own, it is likely that in many cases lenders have not, and during the course of the pandemic will not, choose not to exercise their rights where a default occurs.
- 5.1.5** The question is then whether this will prevent the lender from invoking those same rights once the pandemic is over, because they will be deemed to have waived them. English law does not recognise a unified doctrine of “waiver” but instead applies other contractual and equitable principles to determine whether a party should be prevented from relying on a contractual right as a result of its failure to exercise that right on a previous occasion. The two main principles are election and estoppel, but it is also possible (although less common) for a waiver to amount to a variation of the terms of the contract.

***Election***

- 5.1.6** Election occurs where a party is entitled to exercise one of several rights which are inconsistent with and mutually exclusive of one another. Thus, in response to a breach of contract, the innocent party may be faced with option 1 (e.g. accepting repudiation of the contract) or option 2 (affirming the contract) and only one option can be chosen. The binary nature of election distinguishes it from estoppel and makes it the less flexible of the two types of waiver: *Kosmar Villa Holidays plc v Trustees of Syndicate 1243* [2008] EWCA Civ 147; [2008] 2 All ER (Comm) 14.
- 5.1.7** Because election requires a choice between two mutually exclusive options, it will arise in fewer situations than estoppel. For example, there is unlikely to be an election where a lender provides a borrower with further time to make a repayment, or reduces the rate of default

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<sup>54</sup> <https://www.bankofengland.co.uk/-/media/boe/files/prudential-regulation/letter/2020/covid-19-ifs-9-capital-requirements-and-loan-covenants.pdf?la=en&hash=77F4E1D06F713D2104067EC6642FE95EF2935EBD> (accessed 1 February 2021).

interest, because such actions do not involve choosing between rights which are incompatible with one another.

The situation may be different where the lender is considering whether to exercise an express contractual right of termination in response to the borrower's breach, accelerating the payment of the balance of the loan. Contractual rights of termination can give rise to an election: *BDW Trading Ltd (t/a Barratt North London) v JM Rowe (Investments) Ltd* [2011] EWCA Civ 548. An express statement by the lender that they will not exercise their right to terminate and accelerate the loan is likely to amount to an election to affirm the contract, preventing the lender from revisiting that decision. Similarly, the lender may be held to have elected by conduct in treating the contract as still on foot, for example by continuing to perform its side of the bargain for an extended period or by asserting a right to be paid for sums which became due after the date on which the contract would otherwise have been terminated. In both cases, there is what Rix LJ described in *Kosmar Villa Holidays* (above) as a choice between whether the contract "lives or dies".

**5.1.8**

### ***Estoppel***

A lender may be taken to have waived a contractual right where the borrower has relied to its detriment on a representation from the lender that it would not enforce such rights, such that it would be inequitable for the lender to renege on its representation. This is promissory estoppel, which differs in several respects from election.

**5.1.9**

First, unlike election, the lender does not need to know or have obvious means of knowing the facts giving rise to the right being waived. The borrower will be entitled to rely on the representation even where the lender has no knowledge of it. For example, if a lender inexplicably fails to charge default interest for several months, that may amount to an implied representation in the current circumstances that default interest will not be charged. Second, if the borrower seeks to rely on estoppel, they must demonstrate that they relied on the representation to such an extent that it would be inequitable for the lender to go back on their representation. This usually requires proof of a detrimental change of position as a result of the representation. A borrower might seek to demonstrate this by showing that they had spent funds relying on the representation which would otherwise be available to pay default interest or pay the loan balance under an acceleration. Third, unlike election, waiver by estoppel may only be temporary, in that the lender may only be prevented from relying upon their strict legal rights for as long as it would be inequitable for them to insist upon them. Hence, a party may be able to withdraw its waiver by giving reasonable notice: *PM Project Services Ltd v Dairy Crest Ltd* [2016] EWHC 1235 (TCC) at [39] to [40], [43]. These points are particularly relevant for lenders in the current climate. Once the pandemic finally begins to ease, for example, lenders might argue that it is no longer inequitable for them to be held to a representation made during the height of the pandemic that they would not insist upon their legal rights.

**5.1.10**

### ***Variation***

Conduct which is said to amount to a waiver may prevent a party from asserting their contractual rights because such conduct actually varies the bargain between the parties. However, it is unlikely that the type of waivers discussed here will be capable of varying the parties' bargain, for two reasons. First, any variation to a contract must be supported by adequate consideration: *Williams v Roffey Bros* [1991] 1 QB 1 (CA). It is unlikely that consideration will pass where, for example, a lender is agreeing not to charge default interest

**5.1.11**

or not to enforce its security. Second, many loan agreements will contain clauses that variations are only binding if agreed in writing (known as a “no oral modification” clause). Such clauses will prevent the contract from being varied orally, even where consideration is provided (although note that the lender may still be estopped from reneging on an oral waiver): *MWB Business Exchange Centres Ltd v Rock Advertising Ltd* [2018] UKSC 24; [2019] AC 119 at [10] to [16].

**5.1.12** It is also worth noting that there is nothing to prevent the lender and borrower from executing a formal, written agreement recording the extent of the lender’s agreement to waive its contractual rights. Such agreements must conform to any formality requirements set out in the original loan agreement. The obvious advantage of entering such an agreement is that it would reduce the risk of a borrower raising waiver arguments in the months following the pandemic and would allow the lender to put a defined time limit on the extent to which its rights are waived.

***Can a lender rely on a “no waiver” clause or similar contractual protections?***

**5.1.13** Even if a borrower could demonstrate an election or estoppel which amounted to a waiver, could the lender nevertheless still assert its contractual rights on the basis that the parties’ contract excludes the borrower’s ability to raise a waiver defence? The contract might include a term stating that any waiver, such as an election, will only be effective if recorded in writing. It might also state that a delay in or failure to exercise a contractual right will not amount to a waiver. What are the effects of such terms?

**5.1.14** The answer will depend on the term in question. For example, in the face of a term which states that delay or forbearance in enforcing a provision of the agreement will not amount to a waiver, a borrower might struggle to demonstrate an unequivocal indication that the lender has waived its rights if all it has done is acquiesced in the breach. However, the Court of Appeal considered in *Tele2 International Card Co SA v Post Office Ltd* [2009] EWCA Civ 9 at [54] to [56] that such clauses do not apply to the question of fact of whether a party has elected to affirm the contract, meaning that acquiescence which indicates an election to abandon a contractual right can still be effective in the face of a “no waiver” clause. On the facts, the innocent party’s continued performance of the agreement was an unequivocal communication that it had affirmed the contract. Similarly, in *MWB Business Exchange Centres Ltd* (above) at [16] it was expressly recognised by Lord Sumption that a “no oral variation” clause may be ineffective because a party is estopped from relying on it, although he considered that there would have to be something more than the informal promise itself, and that the representation would have to unequivocally confirm that the variation to the parties’ rights was valid notwithstanding the informality. Lenders therefore cannot simply fall back on such clauses without properly considering whether their conduct amounts to an election or gives rise to an estoppel.

**5.1.15** In the consumer context, lenders must also consider whether such clauses cause a significant imbalance in the parties’ rights and obligations to the detriment of the consumer, such that they are unfair and not binding under the Consumer Rights Act 2015.

**5.2 What rights do borrowers have to request payment holidays?**

**5.2.1** Many borrowers are still struggling to generate enough cashflow to meet recurring payment obligations under credit agreements, because of the marked fall in economic activity caused by the pandemic. As a result, many lenders are in turn being met with both informal and formal requests to restructure loans. In many cases, borrowers are requesting that their payment



obligations be deferred in the short-to-medium term. Such deferrals, known as payment holidays, are often a contractual feature of mortgages and unsecured loan agreements. Several regulatory changes have been made since March 2020 to encourage lenders to accede to requests for payment holidays. These measures have been introduced in respect of both secured and unsecured lending, with the most recent guidance having been published in November 2020.

### **Mortgages**

On 17 March 2020, the Chancellor [announced](#)<sup>55</sup> that, following discussions with the mortgage industry, mortgage lenders would offer at least a three month mortgage holiday to borrowers to help reduce the burden of outgoings in a time of reduced cash flow. That announcement was followed by the publication of FCA guidance on 20 March 2020. The [FCA guidance](#)<sup>56</sup> applied only to the exceptional circumstances arising out of the pandemic. It states:

**5.2.2**

*“Where a customer is experiencing or reasonably expects to experience payment difficulties as a result of circumstances relating to coronavirus, and wishes to receive a payment holiday, a firm should grant a customer a payment holiday for 3 monthly payments, unless it can demonstrate it is reasonable and in the customer’s best interest to do otherwise.”*

It was therefore not compulsory for a firm to grant a payment holiday of 3 months; but any alternative arrangement had to be concluded to be in the customer’s best interest. No fees were to be charged for providing a payment holiday, but interest could continue to accrue on the remaining unpaid sums.

**5.2.3**

The FCA’s guidance was updated on 16 June 2020 to coincide with the date at which the first payment deferrals began to come to an end. This [guidance](#)<sup>57</sup> built upon the FCA’s previous publication and confirmed that payment holidays could be extended for a further three months.

[Additional guidance](#)<sup>58</sup> was then published by the FCA having effect from 16 September 2020, to build on these previous two sets of guidance. The guidance confirmed that firms would be expected to adopt flexible and appropriate forbearance measures for customers who continued to suffer from difficult financial circumstances. There was, importantly, at that stage no express expectation that further payment holidays should be granted. The guidance also confirmed that after the 16 June 2020 guidance expired on 31 October 2020, possession proceedings could be commenced or resumed, although not until all other options have been exhausted.

However, on [31 October 2020](#), in response to the UK Government’s announcement of a second national lockdown, the FCA [announced](#)<sup>59</sup> that it would be proposing further updates

**5.2.4**

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55 <https://www.gov.uk/government/speeches/chancellor-of-the-exchequer-rishi-sunak-on-covid19-response> (accessed 1 February 2021).

56 <https://www.fca.org.uk/firms/mortgages-coronavirus-guidance-firms> (accessed 1 February 2021).

57 <https://www.fca.org.uk/publications/finalised-guidance/mortgages-and-coronavirus-updated-guidance-firms> (accessed 1 February 2021).

58 <https://www.fca.org.uk/publication/finalised-guidance/mortgages-coronavirus-additional-guidance-for-firms.pdf> (accessed 1 February 2021).

59 <https://www.fca.org.uk/news/statements/fca-announce-further-support-mortgage-borrowers-impacted-coronavirus> (accessed 1 February 2021).

to its guidance on mortgage borrowers. Updated guidance was published having effect from 20 November 2020. This consisted of separate [Payment Deferral Guidance](#)<sup>60</sup> and [Tailored Support Guidance](#)<sup>61</sup> documents.

- 5.2.5** Under the Payment Deferral Guidance, the payment deferral application window that expired on 31 October 2020 is reopened. Firms are expected to make payment holidays available to customers experiencing payment difficulties as a result of coronavirus in relation to payments due until 31 July 2021. The cumulative payment holiday available to a customer is limited to 6 months including periods granted under previous FCA guidance. Further, payment holidays are only available after 31 March 2021 to customers granted a payment holiday in a previous consecutive month.
- 5.2.6** The Tailored Support Guidance is an update to the FCA's September 2020 guidance, and applies where a customer is not receiving a payment holiday under the Payment Deferral Guidance. Under this guidance firms are expected not to enforce repossession before 31 January 2021 save in exceptional circumstances. However, the guidance expressly allows for the commencing and continuing of repossession proceedings up to and including obtaining a possession order in appropriate cases. It should also be noted that, in response to the Government's announcement of a third national lockdown in January 2021, the FCA published [draft updated Tailored Support Guidance](#)<sup>62</sup> on 13 January 2021. The effect of this updated guidance (if and when implemented) will be to extend the period in which firms should not enforce possession (absent exceptional circumstances) to 1 April 2021.
- 5.2.7** Additionally, the FCA on 22 October 2020, published [Policy Statement 20/11](#),<sup>63</sup> under which temporary guidance was issued in relation to interest-only and part-and-part mortgages with maturity dates between 20 March 2020 and 31 October 2021. This guidance came into force on 31 October 2020 and expires on 31 October 2021. Under this guidance, where a customer is up to date with their mortgage payments, firms should, on request, allow a deferral on the repayment of any capital on their mortgage until no later than 31 October 2021. For the purpose of this guidance a customer that has taken a payment holiday under FCA guidance is considered as being up to date with their mortgage payments.
- 5.2.8** It is important that mortgage lenders abide by the above guidance. The FCA has confirmed that non-compliance could form the basis of enforcement action on the grounds that conduct had fallen below the standards required under the Principles for Businesses and Mortgages Conduct of Business rules in the FCA Handbook. It stated that there is likely to be a breach of these rules if the guidance is not followed. It also stated that failure to comply could amount an unfair practice under the Consumer Protection from Unfair Trading Regulations 2008.

### ***Other forms of secured and unsecured credit***

- 5.2.9** Mortgages are not the only form of lending impacted by the pandemic. Borrowers are still finding it difficult to service repayment obligations on a wide range of forms of borrowing, such as: personal loans, motor finance agreements, overdrafts, credit cards and high-cost

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60 <https://www.fca.org.uk/publication/finalised-guidance/mortgages-coronavirus-payment-deferral-guidance.pdf> (accessed 1 February 2021).

61 <https://www.fca.org.uk/publication/finalised-guidance/mortgages-coronavirus-tailored-support-guidance.pdf> (accessed 1 February 2021).

62 <https://www.fca.org.uk/publication/guidance-consultation/draft-guidance-mortgages-coronavirus-tailored-support-guidance.pdf> (accessed 1 February 2021).

63 <https://www.fca.org.uk/publication/policy/ps20-11.pdf> (accessed 1 February 2021).

short-term credit agreements (“HCSTC”). Guidance has been consistently published and updated in relation to each type of credit agreement since March 2020. The most recent guidance is effective from 25 November 2020; it comprises a suite of documents applicable to different types of unsecured credit which together form the Payment Deferral Guidance. As with mortgages, the FCA has also published separate Tailored Support Guidance. However, given that each renewed set of guidance builds on the previous version published by the FCA, it is necessary to consider the history of the guidance.

The FCA published temporary [guidance](#)<sup>64</sup> in relation to overdraft facilities, that came into force on 14 April 2020. The guidance recognised the fact that for many borrowers, overdraft facilities are likely to be the easiest and quickest way to access emergency funds to cover shortfalls in income caused by the pandemic. For that reason, and upon a borrower’s request, firms were required not to charge interest in respect of up to £500 of the balance of an arranged overdraft (i.e. the first £500 would be interest free). Borrowers could make such requests for the 3 months beginning on the date of the guidance (i.e. from 9 April 2020), although this timeframe was extended (see below). Further, from 14 April 2020, firms were required to review their overdraft prices to ensure that they set them at a level consistent with their obligations to treat customers fairly, in light of the exceptional circumstances caused by the pandemic. This guidance was updated and finalised on 1 July 2020. The [updated guidance](#)<sup>65</sup> confirmed that the guidelines set out above applied until 31 October 2020. **5.2.10**

The FCA published its most recent [additional guidance](#)<sup>66</sup> to come into force on 2 October 2020, setting out the appropriate measures to be taken by firms on expiry of the 1 July 2020 guidance. The guidance does not extend the interest free overdraft buffer contained in the 1 July 2020 guidance, but expects firms to adopt appropriate and flexible forbearance measures, including where appropriate the reduction or waiver of interest. **5.2.11**

In relation to personal loans, the position was similar to that of mortgages. The FCA published [guidance](#)<sup>67</sup> on 9 April 2020 for regulated firms that issue personal loans i.e. regulated credit agreements which are either secured (other than on land) or unsecured. The guidance confirmed that the FCA expected regulated firms to provide, for a temporary period, exceptional and immediate support to customers facing payment difficulties as a result of the pandemic. This principally involved the grant of a three month payment holiday unless the firm reasonably determined that it was “*obviously not in the customer’s interest to do so*” (note that the word “*obviously*” does not appear in the above-mentioned guidance on mortgages). The borrower will not be considered to be in arrears and the payment holiday will not negatively impact a borrower’s credit score. This guidance was reviewed in June 2020 and [updated, finalised guidance](#)<sup>68</sup> was published by the FCA on 1 July 2020. The updated guidance confirmed that customers who have not yet had a payment deferral should still be offered a 3-month payment holiday unless obviously not in their interests. If customers could resume full payments after an initial deferral period, but could not repay the deferred **5.2.12**

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64 <https://www.fca.org.uk/publications/finalised-guidance/overdrafts-coronavirus-temporary-guidance-firms> (accessed 1 February 2021).

65 <https://www.fca.org.uk/publication/finalised-guidance/finalised-guidance-overdrafts-coronavirus-updated-temporary-guidance-firms.pdf> (accessed 1 February 2021).

66 <https://www.fca.org.uk/publication/finalised-guidance/finalised-guidance-overdrafts-coronavirus-additional-guidance-firms.pdf> (accessed 1 February 2021).

67 <https://www.fca.org.uk/publications/finalised-guidance/personal-loans-coronavirus-temporary-guidance-firms> (accessed 1 February 2021).

68 <https://www.fca.org.uk/publications/finalised-guidance/personal-loans-coronavirus-temporary-guidance-firms> (accessed 1 February 2021).

amounts in full immediately, firms were to allow them to repay the deferred amounts over the remaining term of the agreement or allow a longer period for repayment. If the customer was still experiencing temporary payment difficulties, the firm was to offer a full or partial payment deferral to reduce payments for a period of 3 months to a level the customer indicates they can afford.

**5.2.13** Motor finance loans also received separate treatment by the FCA. [Guidance](#) published on 24 April 2020<sup>69</sup> confirmed that in relation to these agreements, firms would be expected to grant 3-month payment holidays where a borrower was experiencing or reasonably expected to experience temporary payment difficulties as a result of the pandemic. It was expressly stated that firms could consider granting longer payment holidays, although they were to consider the customer impact of depreciating asset values. Although no fees were to be charged, the firm could still charge interest during the deferral period. A specific warning was given that regulated firms should not recalculate the Guaranteed Minimum Future Value or PCH Residual Value of the vehicle based on temporarily depressed market conditions, in order to recover more of the original car value through the borrower's monthly repayments. Seeking to terminate the agreement or recover possession of the vehicle will be "very likely" to contravene the Principles of Business, absent exceptional circumstances. The FCA published a [press release](#) in relation to motor finance loans and HCSTC facilities on 15 July 2020.<sup>70</sup> The press release confirmed that the FCA was introducing new measures to provide further support for motor finance and high-cost credit customers, to take effect from 17 July 2020. These measures were contained in [updated guidance](#),<sup>71</sup> which was finalised after a period of consultation with stakeholders. For motor finance customers that were still facing temporary payment difficulties as a result of the pandemic, regulated firms were to provide support by freezing or reducing payments to a level they could afford for a further 3 months, up until 31 October 2020.

**5.2.14** In relation to credit cards debts, the FCA published [guidance](#) on 9 April 2020.<sup>72</sup> Three month payment holidays were to be granted unless obviously not in the customer's interests; and longer periods may be granted if deemed appropriate. These would not affect a borrower's credit rating. CONC rules which set minimum repayment amounts equal to at least the interest, fees and charges applied to the borrower's account would not apply to the extent that the firm's contracts were varied to comply with the FCA's guidance. The persistent debt provisions of CONC were also disapplied for the duration of the payment holiday. As with overdraft facilities, credit card providers were required to review the rate of interest charge to ensure that they are treating customers fairly in line with the Principles of Business. [Updated guidance](#),<sup>73</sup> published on 1 July 2020, confirmed that additional three month payment holidays should be offered to customers who were still experiencing temporary payment difficulties. The updated guidance also emphasised the fact that firms should treat customers fairly, for example in relation to the practice of charging higher interest rates on products

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69 <https://www.fca.org.uk/publications/finalised-guidance/motor-finance-agreements-and-coronavirus-temporary-guidance-firms> (accessed 1 February 2021).

70 <https://www.fca.org.uk/news/press-releases/fca-confirms-further-support-motor-finance-and-high-cost-credit-customers> (accessed 1 February 2021).

71 <https://www.fca.org.uk/publication/finalised-guidance/motor-finance-agreements-coronavirus-updated-temporary-guidance-firms.pdf> (accessed 1 February 2021).

72 <https://www.fca.org.uk/publications/finalised-guidance/credit-cards-retail-revolving-credit-coronavirus-temporary-guidance-firms> (accessed 1 February 2021).

73 <https://www.fca.org.uk/publication/finalised-guidance/finalised-guidance-credit-cards-coronavirus-updated-temporary-guidance-firms.pdf> (accessed 1 February 2021).

offered to low income customers, in light of the exceptional circumstances arising out of the pandemic.

Finally, separate [guidance](#) was published on 24 April 2020<sup>74</sup> in relation to HCSTC facilities (such as payday loans). Unlike the guidance in relation to mortgages and personal loans, firms providing HCSTC facilities were only expected to agree to a payment holiday of at least one month. The FCA has stressed that, in relation to these types of loan, lenders should not pressure customers to pay a debt in very few repayments or in unreasonably large amounts, or in an unreasonably short period of time; or to sell their property or increase their existing borrowing to repay the balance due. As set out above, [further guidance](#) was published by the FCA on 15 July 2020,<sup>75</sup> to take effect from 17 July 2020. The further guidance, which was finalised after a period of consultation with stakeholders, confirmed that HCSTC customers could only apply for a payment freeze under the guidance once up to 31 October 2020 in respect of each HCSTC agreement. For those customers who have had a payment freeze and are still experiencing payment difficulties, firms should provide a range of support – including formal forbearance – in accordance with the FCA Handbook. The Consumer Credit sourcebook has been [amended](#) to reflect this guidance.<sup>76</sup>

**5.2.15**

The FCA published [additional guidance](#) on 30 September 2020,<sup>77</sup> to make provision for the expiry of the above mentioned 1 July 2020 guidance in relation to personal loans, motor finance, credit card debts, and HCSTC facilities on 31 October 2020. The guidance did not extend the various payment holidays under the 1 July 2020 guidance, and instead recommended that firms provide more tailored support to those in payment difficulties.

**5.2.16**

However, on [2 November 2020](#),<sup>78</sup> in response to the UK Government's announcement of a second lockdown, the FCA announced that it would be proposing updated guidance reintroducing payment holidays for consumer credit borrowers. Finalised guidance was published on 19 November 2020 and came into force on 25 November 2020. This is the guidance which is currently in place.

**5.2.17**

Under Payment Deferral Guidance published in relation to [personal loans](#),<sup>79</sup> [motor finance](#),<sup>80</sup> and [credit card debts](#)<sup>81</sup> (but not overdrafts), firms are to provide for payment holidays as under the previous guidance until 31 July 2021. The maximum cumulative payment holiday to be granted to a customer under current and previous guidance is limited to six months. Further, payment holidays are only available for payments falling due after 31 March 2021 to customers granted a payment holiday in a previous consecutive month. The Payment

**5.2.18**

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74 <https://www.fca.org.uk/publications/finalised-guidance/high-cost-short-term-credit-and-coronavirus-temporary-guidance-firms> (accessed 1 February 2021).

75 <https://www.fca.org.uk/publication/finalised-guidance/hcstc-agreements-coronavirus-updated-temporary-guidance-firms.pdf> (accessed 1 February 2021).

76 <https://www.fca.org.uk/publication/finalised-guidance/covid-19-motor-finance-high-cost-credit-no2-final-instrument-2020.pdf> (accessed 1 February 2021).

77 <https://www.fca.org.uk/publication/finalised-guidance/finalised-guidance-consumer-credit-coronavirus-additional-guidance-firms.pdf> (accessed 1 February 2021).

78 <https://www.fca.org.uk/news/statements/fca-announce-further-proposals-support-consumer-credit-borrowers-impacted-coronavirus> (accessed 1 February 2021).

79 <https://www.fca.org.uk/publication/finalised-guidance/personal-loans-coronavirus-deferral-guidance.pdf> (accessed 1 February 2021).

80 <https://www.fca.org.uk/publication/finalised-guidance/motor-finance-agreements-coronavirus-payment-deferral-guidance.pdf> (accessed 1 February 2021).

81 <https://www.fca.org.uk/publication/finalised-guidance/credit-cards-retail-revolving-credit-coronavirus-payment-deferral-guidance.pdf> (accessed 1 February 2021).

Deferral Guidance published in relation to [HCSTC facilities](#)<sup>82</sup> allows for a payment holiday of one month for payments falling due before 31 March 2021. In addition, [Tailored Support Guidance](#)<sup>83</sup> was published, updating the FCA's guidance of 30 September 2020 to apply in relation to customers not eligible for a payment holiday. As with mortgages, on 13 January 2021 the FCA also published [draft updated Tailored Support Guidance](#)<sup>84</sup> in relation to consumer credit agreements.

### **5.3 Can a borrower enforce a lender's contractual obligation to provide loan facilities?**

**5.3.1** Businesses across the country are suffering cash flow issues as a result of a general fall in trade caused by the pandemic. Credit has therefore become even more important to businesses that still have outgoings to meet notwithstanding the drop in general commercial activity. Figures published on the [gov.uk website](#) show that up to 13 December 2020, UK businesses had borrowed £19.64 billion under the Coronavirus Business Interruption Loan Scheme (CBILS); £4.97 billion under the Coronavirus Large Business Interruption Loan Scheme (CLBILS); and £43.54 billion under the Bounce Back Loan Scheme (BBLS).<sup>85</sup> The significant increase in demand for credit is likely to leave many lenders wary of exposing themselves to higher risks of default and will encourage them to reduce their supply of credit. It might even lead some lenders to refuse to honour contractually agreed access to credit facilities. In those circumstances, is there anything the borrower can do to compel the lender to make credit available?

**5.3.2** The manner by which a contracting party can compel its counterparty to perform its contractual obligations is the equitable remedy of specific performance. Specific performance is an exceptional remedy which lies in the discretion of the court. The court will exercise its discretion to order specific performance where damages at common law are not an adequate remedy: *Cooperative Insurance Society Ltd v Argyll Stores (Holdings) Ltd* [1998] AC 1.

**5.3.3** English law has traditionally adopted the position that specific performance is not available to compel a lender to advance sums which were agreed to be loaned: *The South African Territories Limited v Wallington* [1898] AC 309. This general rule seems to have been based on the notion that there is no "mutuality" in such cases; the borrower could not be compelled to accept the loan if they had refused it in breach of contract, so commensurately the lender could not be compelled to advance the loan: *Sichel v Mosenthal* (1862) 54 ER 932; 30 Beav 371. However, the general rule is more readily explicable as an application of the principle that specific performance will not be ordered where damages are an adequate remedy. For example, specific performance will rarely be ordered in an action for an agreed sum because damages will almost always be an adequate alternative to the payment of a liquidated sum of money. Likewise, applying general principles of compensation, a borrower will be expected to mitigate their loss by going into the market and replacing the original loan by contracting with another lender. If the borrower can obtain this loan at a cheaper rate of interest, they have suffered no loss. If on the other hand the new loan facility is more expensive, or if the borrower loses out on a business opportunity as a result of the delay in obtaining the loaned

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82 <https://www.fca.org.uk/publication/finalised-guidance/high-cost-short-term-credit-coronavirus-payment-deferral-guidance.pdf> (accessed 1 February 2021).

83 <https://www.fca.org.uk/publication/finalised-guidance/consumer-credit-coronavirus-tailored-support-guidance.pdf> (accessed 1 February 2021).

84 <https://www.fca.org.uk/publication/guidance-consultation/draft-guidance-consumer-credit-coronavirus-tailored-support-guidance.pdf> (accessed 1 February 2021).

85 <https://www.gov.uk/government/collections/hm-treasury-coronavirus-covid-19-business-loan-scheme-statistics#Coronavirus-Business-Interruption-Loan-Scheme> (accessed 1 February 2021).

funds, the borrower can claim damages for those losses, subject to those losses being in the reasonable contemplation of the parties at the time of contracting.

That being said, just as there are circumstances where, unusually, damages will not be an adequate alternative to an action for an agreed sum (see e.g. *Beswick v Beswick* [1968] AC 58), so too might borrowers argue that the current climate means that an award of damages will not adequately compensate them and do justice between the parties. That might be the position, for example, where the borrower cannot mitigate their loss by finding an alternative source of credit, because other lenders have restricted their supply in response to the pandemic. Further, the borrower might be relying on the availability of promised credit to continue its business as a going concern, in circumstances where the business will become insolvent if no credit is obtained. Such examples are stark, and a borrower would need to put forward strong evidence to convince the court that damages are truly inadequate. **5.3.4**

**Will the pandemic constitute a Material Adverse Change (MAC) or Material Adverse Event (MAE)? **5.4****

MAC and MAE clauses are a common feature of facility agreements. Similar to Event of Default (“EOD”) clauses (see further [para. 5.6](#) below), MAC and MAE clauses allow one party to exercise certain rights in response to contractually pre-defined events which alter the balance of the bargain struck between the parties. In the context of facility agreements, a MAC or MAE usually entitles the lender to protect their position by, for example, accelerating the balance of the loan. Note that serving a notice of acceleration where an event of default has not occurred will merely invalidate the notice and will not amount to a breach of contract by the lender: *Concord Trust v Law Debenture Trust Corporation plc* [2005] UKHL 27. **5.4.1**

Such clauses are also found in the corporate acquisition context where, prior to closing, a significant event occurs which undermines the original pricing arrangement agreed upon between buyer and seller. In those circumstances, the buyer is given the right to walk away from the transaction. For an example of a MAE clause in this context, see *Travelport & Ors v WEX Inc* [2020] EWHC 2670 (Comm), discussed in [para. 1.10](#) of Section One: Contracts. **5.4.2**

The effect of the pandemic on these clauses is a matter of contractual interpretation, and is therefore dealt with above in Section One: Contracts (see [para. 1.10](#)). **5.4.3**

**Do the new “termination clause” provisions of the Corporate Insolvency and Governance Act 2020 apply to financial services contracts? **5.5****

CIGA 2020 includes provisions that prevent suppliers of goods or services from relying on the fact that a company has gone into an insolvency procedure for the purposes of terminating the contract under which that supply is made. **5.5.1**

However, there are exceptions to these provisions. The permanent exceptions are brought in by Schedule 12 to CIGA 2020, which inserts new Schedule 4ZZA, IA 1986 (provided for by s. 233B(10), IA 1986). This excludes certain contracts and suppliers from the ambit of new s. 233B, IA 1986. **5.5.2**

Where a termination clause is already caught by s. 233A(1), IA 1986 (protection of essential supplies in the case of administration or a company voluntary arrangement), it is excluded from the ambit of s. 233B, IA 1986. **5.5.3**

The main exclusion relates to financial services. Accordingly, s. 233B, IA 1986 does not apply to suppliers involved in financial services, being: insurers; banks; electronic money **5.5.4**

institutions; investment banks and firms; payment institutions; operators of payment systems or infrastructure providers; recognised investment exchanges; and securitisation companies (see Part 2 of Schedule 4ZZA, IA 1986).

**5.5.5** Similarly, s. 233B, IA 1986 does not apply to financial contracts (e.g. loans, financial leasing, guarantees or commitments, securities contracts, commodities contracts, futures and forwards, swaps, inter-bank borrowing agreements of 3 months or less, or master agreements), securities financing transactions, derivatives, spot contracts, capital market investment contracts, or public-private partnership contracts (see Part 3 of Schedule 4ZZA, IA 1986).

**5.5.6** In addition, s. 233B, IA 1986 does not affect various other specific legislative provisions, namely provisions relating to: financial markets and insolvency (specifically, Part 7 of the Companies Act 1989, the Financial Markets and Insolvency Regulations 1996, the Financial Markets and Insolvency (Settlement Finality) Regulations 1999 and the Financial Collateral Arrangements (No. 2) Regulations); set-off and netting arrangements within the meaning of s. 48(1)(c) and (d) of the Banking Act 2009; and interests in aircraft equipment under the International Interests in Aircraft Equipment (Cape Town Convention) Regulations 2015).

**5.5.7** For more information on the impact of CIGA 2020 on termination clauses, please see [The Prohibition of Termination Clauses](#) section from [para. 2.35.1](#) of Section Two: Corporate Insolvency above.

## **5.6 Will a moratorium or restructuring plan under the Corporate Insolvency and Governance Act 2020 constitute an event of default?**

**5.6.1** CIGA 2020 introduces two new rescue measures for companies suffering financial hardship: the moratorium and the restructuring plan. The central features of these two rescue measures are set out in [paras. 2.4](#) and [2.18](#) of Section Two: Corporate Insolvency. Broadly, the moratorium is available where a director of a company confirms that it is or is likely to become unable to pay its debts and an independent, third-party “monitor” confirms that a moratorium is likely to result in the rescue of the company as a going concern. The moratorium generally stays enforcement and insolvency proceedings against the company and provides the company with a payment holiday in relation to pre-moratorium debts (although, importantly, not in respect of debts arising under contracts involving financial services: see [para. 2.3](#) of Section Two: Corporate Insolvency). The restructuring plan is similar to a scheme of arrangement, in that it allows a debtor to enter into a compromise or arrangement with its creditors which is then approved by the court (see [para. 2.17.1](#) et seq for a detailed explanation of the restructuring plan).

**5.6.2** The introduction of these new methods of corporate rescue is likely to be relevant to institutional lenders who are continuing to monitor the increased risk of borrower default. In particular, lenders will be looking carefully at whether the actions taken by borrowers in response to the pandemic will amount to an EOD under their facility agreements. EOD clauses generally allow lenders to exercise certain rights in response to events which prejudice the borrower’s ability to meet their obligations under the facility agreement. For example, the lender might be entitled to accelerate the loan and demand early repayment; to cancel any future or outstanding commitments; and to enforce any security. EODs may also grant the lender the right to terminate the facility agreement, although in those circumstances lenders will need to consider the new *ipso facto* provisions of CIGA 2020, dealt with in more detail above under [The Prohibition of Termination Clauses](#) sub-heading of Section Two: Corporate Insolvency above. In the case of a simple loan agreement between a lender and borrower, EODs will apply to the borrower. However, where the loan facility is syndicated, or where



there are multiple obligors, EOD clauses can be triggered by the defaults of members of the syndicate other than the borrower.

EOD clauses are usually drafted widely by listing numerous different types of defaults. Such drafting ensures that lenders are protected as far as possible against the risk of the borrower failing to make repayments, by allowing the lender to take steps to protect their position before the facility is irreversibly prejudiced. Thus, defaults qualifying as an EOD might include: cross-defaults under related agreements; material misrepresentations by the borrower; non-payment; and Material Adverse Changes. **5.6.3**

Many facility agreements will also list insolvency as a default under an Insolvency Event of Default (“**IEOD**”) clause. If such clauses are drafted to define as a default only formal events of insolvency (such as the presentation of a winding-up petition by the borrower, or a vote by the members to put the borrower into members voluntary liquidation), there is a significant risk that it will be too late for the lender to protect its position. For example, the lender could not accelerate the loan and demand immediate repayment of the balance where a winding-up petition has been presented against the borrower, because any repayments would be void (unless validated) pursuant to s. 127, IA 1986 if a winding-up order is subsequently made. For that reason, in many cases an IEOD clause will be drafted more broadly to include events which occur prior to the formal insolvency process beginning, such as the process of negotiating with creditors to restructure debts. In *Grupo Hotelero Urvasco SA v Carey Value Added SL* [2013] EWHC 1039 (Comm), for example, the credit agreement provided at clause 21.6 that an event of default occurred if: **5.6.4**

*“Any of the following occurs in respect of a Material Company:*

*(a) it is, or is deemed for the purposes of any law to be, unable to pay its debts as they fall due or insolvent;*

*(b) it admits its inability to pay debts as they fall due;*

*(c) it suspends making payments on any of its debts or announces an intention to do so;*

*(d) by reason of actual or anticipated financial difficulties, it begins negotiations with any creditor for the rescheduling of any of its indebtedness; or*

*(e) a moratorium is declared in respect of any of its indebtedness.”*

Blair J held that the condition in clause 21.6(d) had been satisfied: the “*Material Company*” had begun formal rescheduling discussions, because it was experiencing substantial financial difficulties (and not because those discussions were simply in the ordinary course of business). **5.6.5**

It seems that such a clause would be capable of capturing a moratorium or restructuring plan under CIGA 2020. Even notwithstanding the express mention of a moratorium, a formal moratorium under CIGA 2020 would in many circumstances amount to a rescheduling of indebtedness by reason of actual or anticipated financial difficulties. “*Rescheduling*” is arguably broad enough to cover the payment holidays and stays of enforcement which characterise the moratorium. The same can be said for the restructuring plan, which is almost by definition a formal rescheduling of debts by reason of actual or anticipated financial difficulties. This is because, unlike an ordinary scheme of arrangement, it is a requirement for a restructuring plan under CIGA 2020 that the company has encountered, or is likely to encounter, financial difficulties that are affecting, or will or may affect, its ability to carry on business as a going concern: para. 1 of Schedule 9, CIGA 2020, inserting Part 26A to CA 2006. Lenders may **5.6.6**

also begin to make express reference to these types of corporate rescue in future draft facility agreements given that CIGA 2020 has been in force since June 2020.

**5.6.7** An IEOD clause may also be drafted to include as an IEOD a situation where a borrower is (or is deemed) unable to pay its debts. This may be the case where the borrower cannot pay its debts as they fall due (“cash flow” insolvency) or where the value of the borrower’s assets is less than the amount of its liabilities (“balance sheet” insolvency). These clauses are useful for lenders, because they allow them to exercise IEOD rights where the borrower is insolvent (such that their ability to service repayment obligations is compromised), but where formal insolvency proceedings have not yet commenced and restricted the borrower’s ability to dispose of its property. Such a clause was in issue in *BNY Corporate Trustee Services Ltd v Eurosail-UK 2007-3BL plc* [2013] UKSC 28; [2013] 1 WLR 1408, where the contractual documentation governing a series of loan notes included an IEOD in the following terms (see [5]):

*“The issuer, otherwise than for the purposes of such amalgamation or reconstruction as is referred to in sub-paragraph (iv) below, ceasing or, through or consequent upon an official action of the board of directors of the issuer, threatens to cease to carry on business or a substantial part of its business or being unable to pay its debts as and when they fall due or, within the meaning of section 123(1) or (2) (as if the words ‘it is proved to the satisfaction of the court’ did not appear in section 123(2) of the Insolvency Act 1986 (as that section may be amended from time to time), being deemed unable to pay its debts ...”*

**5.6.8** If a clause of this nature is included in a facility agreement, lenders may ask whether the clause is invoked because the borrower has entered into a moratorium or restructuring plan.

**5.6.9** In relation to cash flow insolvency, a borrower which enters into a moratorium will probably satisfy these requirements: it is a condition precedent to a moratorium that a director provides a statement that, in their view, the company is or is likely to become unable to pay its debts (s. 1, A6(1)(d), CIGA 2020). This is clearly very similar to (although not exactly the same as, given the wording “*is likely to*”) the test for cash flow insolvency set out in s. 123(1)(e), IA 1986. However, the fact that a borrower has entered into a restructuring plan will probably not of itself mean that the requirements of cash flow insolvency are satisfied. For a restructuring plan, it is a condition precedent that the company has encountered, or is likely to encounter, financial difficulties that are affecting, or will or may affect, its ability to carry on business as a going concern. This pre-condition is broader than that applicable for a moratorium, given that it refers to “*financial difficulties*” which may affect a company’s ability to continue as a going concern. It is therefore unlikely that a lender could rely without more on the borrower having entered into a restructuring plan as demonstrating that it is cash flow insolvent.

**5.6.10** In relation to balance sheet insolvency, moratoriums and restructuring plans are likely to be less relevant. The Supreme Court confirmed in *Eurosail* that the relevant question is whether the creditor can show, on the balance of probabilities, that the borrower has insufficient assets to meet all its liabilities (including prospective and contingent liabilities). A lender will therefore not simply be able to rely on a borrower entering into a moratorium or restructuring plan. Whilst these rescue packages might demonstrate that the borrower is suffering financial distress, they will not prove that the borrower has insufficient assets to meet all its liabilities.

**5.6.11** Whether a borrower has triggered an IEOD clause will always depend on a proper construction of the terms of the contract.

## **What impact does the Corporate Insolvency and Governance Act have on financial services transactions?** 5.7

CIGA 2020 effects important and fundamental changes in the corporate insolvency regime. Several of these changes raise matters concerning financial services transactions in particular. 5.7.1

One of the new rescue measures introduced by CIGA 2020 is the moratorium. There are restrictions on the types of companies which may make use of the new moratorium procedure. For example, banks, insurance companies, electronic money institutions etc. are unable to take advantage of the moratorium. For more information, see [para. 2.2](#) of Section Two: Corporate Insolvency above. Further, contracts involving financial services are exempted from the rule that companies which have entered a moratorium enjoy a payment holiday in relation to pre-moratorium debts (see [para. 2.4](#) of Section Two: Corporate Insolvency above). 5.7.2

Pre-moratorium debts in respect of instruments involving financial services also enjoy enhanced priority when a winding-up petition or a resolution for a voluntary winding-up is passed within 12 weeks of the end of the moratorium. They are included as “*priority pre-moratorium debts*” which rank in priority to all other claims save only the prescribed fees or expenses of the official receiver (s. 174A, IA 1986; inserted by para. 13, Schedule 3, CIGA 2020). Note, however, that these provisions expressly exclude accelerated debts from having priority status; this is intended to prevent lenders from accelerating debts during a moratorium to obtain “*super-priority*” status. For more information, see [para. 2.15](#) of Section Two: Corporate Insolvency. Their status as priority pre-moratorium debts also affects the ability of financial services institutions to participate in a meeting summoned under Part 26A, CA 2006 where an application for an order convening meetings of creditors is made before the expiry of 12 weeks beginning with the day after the end of a moratorium under Part A1 of IA 1986. In such circumstances, financial services institutions are unable to participate in the meeting summoned by the court (s. 901H(3), CA 2006) (see [para. 2.26](#) of Section Two: Corporate Insolvency above). 5.7.3

Finally, as explained above in [para. 5.5 of this section](#), there are specific rules as to the applicability of the new “*termination clause*” provisions to financial services contracts. 5.7.4

## **Are credit agreements entered into under the Bounce Back Loans Scheme (BBLs) and the Coronavirus Business Interruption Loan Scheme (CBILS) subject to the consumer credit regulatory regime?** 5.8

The rules which regulate the provision of credit to consumers in England and Wales are principally found in the Consumer Credit Act 1974 (“**CCA 1974**”), FSMA 2000, and the FCA’s Consumer Credit sourcebook (“**CONC**”). Whether a particular agreement between a firm and a customer falls within this regime depends on whether it can be characterised as a “*regulated credit agreement*” (or a regulated consumer hire agreement, although these are not relevant for present purposes). The answer to that question is provided by Chapter 14A of the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001/544 (“**RAO**”). Regulated agreements are defined in the negative: they are agreements for the provision of credit which are not exempted under Articles 60C to 60H, RAO. 5.8.1

The UK Government has launched two loan guarantee schemes to help small to medium-sized businesses which have been impacted by the pandemic.<sup>86</sup> The CBILS was launched in 5.8.2

<sup>86</sup> A third loan scheme is aimed specifically at large businesses: the Coronavirus Large Business Interruption Loan Scheme (CLBILS).

March 2020. Under this scheme, the Government guarantees 80% of the finance provided by the lender and pays the interest and fees on the loan for the first 12 months. Businesses can borrow up to £5 million. The BBLs was launched on 4 May 2020 and allows businesses to borrow up to £50,000, at an interest rate of 2.5% per annum. The Government guarantees 100% of the loan and covers interest for the first 12 months.

**5.8.3** There are several differences between the BBLs and the CBILs. Under the BBLs, the interest rate is fixed at 2.5% and there are no fees payable by the borrower. The business may borrow up to £50,000, capped at 25% of turnover. Lenders cannot insist on personal guarantees being provided and are prohibited from taking enforcement action over the borrower's personal assets such as their main home or car. BBLs loans are intended to act as "microloans" and should be quicker to obtain than CBILs funding.

**5.8.4** A key question for lenders is whether loans which are provided under either of these schemes fall within the consumer credit regulations.<sup>87</sup> That depends on whether such loan agreements are exempt credit agreements under RAO.

**5.8.5** There is a clear answer in the case of loans advanced under the BBLs. On 4 May 2020, the Financial Services and Markets Act 2000 (Regulated Activities) (Coronavirus) (Amendment) Order 2020/480 ("RACAO") was passed. The explanatory memorandum to RACAO states that the RAO needed to be amended to "urgently remove loans made under BBLs from a highly prescriptive consumer credit regulatory regime which is currently inhibiting lenders from granting loans to small businesses." RACAO therefore amends Article 60C, RAO by inserting new subparas. 4A to 4C as follows:

*(4A) A credit agreement is an exempt agreement if—*

*(a) the lender provides the borrower with credit of £25,000 or less,*

*(b) the agreement is entered into by the borrower wholly for the purposes of a business carried on, or intended to be carried on, by the borrower, and*

*(c) the agreement is entered into by the lender and the borrower under the Bounce Back Loan Scheme.*

*(4B) For the purposes of paragraph (4A), "Bounce Back Loan Scheme" means the scheme of that name operated from 4th May 2020 by the British Business Bank plc on behalf of the Secretary of State.*

*(4C) An agreement exempt under paragraph (4A) may not also be an article 36H agreement by virtue of paragraph (4) of that article."*

**5.8.6** Thus, loans of £25,000 or less which are taken out under the BBLs are exempt from the consumer credit regime. Any loans for more than £25,000 taken out under the BBLs, and all loans taken out under the CBILs, are not exempted under this new provision and therefore must comply with all elements of the consumer credit regime unless the lender can show that the agreement is exempt under another provision of RAO.

**5.8.7** BBLs loans of £25,000 or under are therefore not subject to the rigorous rules of the consumer credit regime. Usually, even an exempt agreement is subject to the unfair relationship provisions of ss. 140A to 140C, CCA 1974. However, the Chancellor wrote a [letter](#) to

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<sup>87</sup> Outside of the consumer credit context, the PRA has also published [guidance](#) as to the application of credit risk approaches under the CBILs and the CLBILs: <https://www.bankofengland.co.uk/prudential-regulation/publication/2020/statement-on-the-regulatory-treatment-of-the-uk-cbils-and-the-uk-clbils> (accessed 1 February 2021).

lenders on 1 May 2020<sup>88</sup> in which he indicated that the Government will introduce primary legislation to “disapply ss. 140A to 140C of the CCA for BBLs lending” with retrospective effect, thus curtailing a borrower’s ability to complain about their treatment by a lender. The relevant amendment was included in s. 12 of the Business and Planning Act 2020, which received royal assent on 22 July 2020. Section 12 amends s. 140A of CCA 1974 so that “An order under section 140B shall not be made in connection with a credit agreement entered into under the Bounce Back Loan Scheme.” The legislation applies to all BBLs loans (not just loans for £25,000 or less). BBLs loans for £25,000 or less are therefore outside the scope of the consumer credit regime entirely; and all other BBLs loans will be subject to all aspects of the consumer credit regime other than the unfair relationship provisions.

## Mergers and Acquisitions

### **How will the pandemic effect earnouts in corporate acquisitions?**

5.9

The pandemic raises particular concerns for sellers in acquisitions where part of the consideration is to be determined via an earnout mechanism. By their nature, earnout clauses depend on a business’s earnings in a relevant period, and accounting policies and the method of calculation of the earnout are areas that frequently give rise to post-acquisition disputes. Should a relevant window cover a period in which the relevant business ceased to trade or saw reduced income, sellers are likely to see their anticipated consideration from the sale dip significantly and may wish to know what can be done about it.

5.9.1

Much will depend on the wording of the acquisition agreement, and, most particularly, on the definition of the earnout benchmark(s). At one end of the spectrum, an acquisition agreement that specifies the relevant period by date, refers to the business’s “income” rather than “trading” in that period, and does not provide for an amendment to the calculation of the earnout in the present circumstances, is likely to leave little room for arguing that the earnout period should be extended or the income adjusted to negate the effect of the pandemic. At the other end of the spectrum, a seller might have scope to argue that an earnout mechanism drafted by reference, say, to “five years’ trading” should be calculated by excluding any period in which the business was not trading.

5.9.2

The reality is that most cases will fall somewhere in between these scenarios, perhaps because the business has undertaken some trade during the pandemic but it did not constitute what the sellers consider “normal trading”, or because the decision to cease trading was one taken by the purchasers in order to benefit from the Government’s Coronavirus Job Retention Scheme. In such cases, the terms of the acquisition agreement will have to be carefully examined to ascertain the seller’s rights.

5.9.3

Sellers may also wish to consider engaging with the buyer to discuss the issue where practicable. Where earnout mechanisms are drafted to cover a significant length of time – several years or more – and are deployed to incentivise the seller to stay engaged with the business, buyers may well be open to renegotiating the terms of the earnout mechanism so that the seller stays motivated to achieve performance targets, which will benefit the business as a whole. Buyers who are concerned about the negative impact of the pandemic on the seller’s engagement can likewise consider approaching the seller earlier rather than later to discuss extending the term

5.9.4

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88 [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/882875/01052020\\_CX\\_Letter\\_to\\_banks\\_-\\_pricing\\_and\\_CCA\\_.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/882875/01052020_CX_Letter_to_banks_-_pricing_and_CCA_.pdf) (accessed 1 February 2021).

of the earnout period, or lowering the earnout target for the same period to take account of the pandemic's impact on the business.

## **Issuers / Trustees**

### **5.10 What effect has the pandemic had on issuers' obligations to disclose inside information in accordance with the Market Abuse Regulation?**

**5.10.1** The EU Market Abuse Regulation (Regulation 596/2014) (EU MAR) came into effect on 3 July 2016 and was onshored into UK law on 31 December 2020 by the European Union (Withdrawal) Act 2018 (as amended by the European Union (Withdrawal Agreement) Act 2020), and amended by the Market Abuse (Amendment) (EU Exit) Regulations (2019/310). The onshored legislation is now commonly referred to as "**UK MAR**".

**5.10.2** Article 17 of UK MAR requires issuers of certain financial instruments to publicly disclose inside information as soon as possible. It applies to issuers with financial instruments admitted to trading, or in respect of which a request for admission to trading has been made, on a regulated market in an EU Member State. It also applies to issuers who have financial instruments traded only on a multilateral trading facility ("**MTF**") or organised trading facility (OTF), or have requested admission to trading of their financial instruments on an MTF in a Member State.

**5.10.3** An issuer is obliged to ensure that the inside information is made public in a manner which enables fast access and complete, correct and timely assessment of the information by the public (Article 17(1)). Guidance on meeting this obligation is contained in, *inter alia*, guidance published by the European Securities and Markets Authority ("**ESMA**") and Chapter 2 of the Disclosure Guidance and Transparency Rules ("**DTR**") of the FCA Handbook.

**5.10.4** The pandemic has not affected this broad obligation. However, both [ESMA](#) and the [FCA](#), in statements dated 11 March 2020<sup>89</sup> and 17 March 2020<sup>90</sup> respectively, addressed the interaction of this obligation with the impact of the pandemic on an issuer's business. In particular, they underlined that issuers should disclose relevant significant information concerning the impact of the pandemic on their business, and should provide transparency on the actual and potential impacts of the pandemic in their 2019 year-end report (if not yet finalised), or otherwise in their interim financial reporting disclosures. The FCA stated that, while conscious of the challenges posed by the current situation, it continued to expect listed issuers to make every effort to meet their disclosure obligations in a timely fashion. It also said that an issuer's operational response to the pandemic may itself meet the requirements for disclosure under UK MAR.

**5.10.5** In addition, on 12 October 2020, the FCA published a speech given by the FCA Market Oversight Director on market abuse during the pandemic.<sup>91</sup> That speech underlined that what constitutes inside information might change "*radically*" during the pandemic – for example, knowledge of whether a company has utilised the furlough scheme or any of the pandemic lending schemes. It noted that companies and their advisers should be alert as

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89 [https://www.esma.europa.eu/sites/default/files/library/esma71-99-1290\\_esma\\_statement\\_on\\_markets\\_and\\_covid-19.pdf](https://www.esma.europa.eu/sites/default/files/library/esma71-99-1290_esma_statement_on_markets_and_covid-19.pdf) (accessed 1 February 2021).

90 <https://www.fca.org.uk/publications/newsletters/primary-market-bulletin-issue-no-27-coronavirus-update> (accessed 1 February 2021).

91 <https://www.fca.org.uk/news/speeches/market-abuse-coronavirus> (accessed 1 February 2021).

to what information is likely to drive their valuations and that a wider range of issues than normal might need to be discussed at disclosure committees.

There are also particular situations of which companies, advisers and others should be aware in the context of the pandemic. **5.10.6**

### ***Recapitalisation and other capital raising events***

Firms should be mindful of their obligations to disclose inside information in the context of recapitalisation and equity raising through the issuance of shares. In a [statement](#) dated 8 April 2020,<sup>92</sup> the FCA made it clear that a business's policy in response to the pandemic might alter the nature of information that is material to a business's prospects and in relation to market recapitalisation. **5.10.7**

Guidance has been given by the FCA as to how issuers and advisers should assess what information a reasonable investor would be likely to use as part of their investment decisions in the context of the pandemic (see [Market Watch issue 63](#) dated May 2020<sup>93</sup>). Information that could have a significant effect on a company's share price includes detail on future financial performance, such as access to finance and funding (which may in turn include government grants in response to the pandemic) and the company's ability to continue or resume business (including arrangements for staff returning to work). In addition, issuers should consider whether any information is materially different from previous disclosures such that previous disclosures would now be rendered misleading; if so, issuers should consider whether the new information is inside information and whether disclosure is required. **5.10.8**

Accordingly, a firm undertaking a recapitalisation or other equity raising program should carefully consider whether action taken in response to the pandemic will have an effect on business prospects and ought to be disclosed accordingly. **5.10.9**

For those preparing to raise equity finance, the FCA published a '[Dear CEO' letter](#) on 28 April 2020<sup>94</sup> intended to ensure the fair treatment of corporate customers preparing to raise equity finance and to discourage banks from using their lending relationship "*to exert pressure on corporate clients to secure roles on equity mandates that the issuer would not otherwise appoint them to*". The FCA reminded banks of their obligations concerning the identification, handling and disclosure of inside information received in connection with renegotiating a corporate client's existing facilities (including details of a potential equity capital markets transaction) and noted that sharing such information within a lending bank might be inconsistent with that bank's obligations under the Market Abuse Regulation. **5.10.10**

### ***Financial reporting***

The FCA gave listed companies an extra month to complete and publish their half yearly financial reports (so that listed companies had four, rather than three, months in which to publish them), reflecting capacity concerns as a result of the pandemic (see [Primary Market Bulletin Issue No. 28](#) dated 27 May 2020). Notwithstanding the extension, both ESMA and the FCA reiterated that issuers should comply with their obligations to disclose inside information that directly concerns them as soon as possible (see [ESMA's statement](#) of 27 **5.10.11**

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92 <https://www.fca.org.uk/news/statements/listed-companies-recapitalisation-issuances-coronavirus> (accessed 1 February 2021).

93 <https://www.fca.org.uk/publication/newsletters/market-watch-63.pdf> (accessed 1 February 2021).

94 <https://www.fca.org.uk/publication/correspondence/dear-ceo-ensuring-fair-treatment-corporate-customers-preparing-raise-equity-finance.pdf> (accessed 1 February 2021).

March 2020 on financial reporting deadlines in light of Covid-19<sup>95</sup> and the [FCA's Market Watch newsletter, issue 63](#)). Firms were also given a 2 month extension for filing annual reports and accounts. However, the final date the FCA allowed reporting deadline flexibility was 30 September 2020. All regulatory returns scheduled for submission from 1 October 2020 should be submitted by their usual deadlines.

### ***Dividends***

- 5.10.12** In light of the pandemic, some companies will have concluded that it is no longer appropriate to recommend or declare a dividend and will have withdrawn or amended resolutions tabled for the Annual General Meeting. The Chartered Governance Institute has published [guidance](#)<sup>96</sup> to the effect that such decisions are likely to constitute inside information (see p. 4 of the guidance).

### ***Handling of inside information in the context of altered working arrangements***

- 5.10.13** In [issue 63 of its Market Watch newsletter](#) dated May 2020,<sup>97</sup> the FCA reiterated the importance of ensuring that systems and controls are in place for the handling of inside information. It noted that the movement to alternative worksites or working from home might create challenges for existing arrangements, and that market participants are obliged to consider whether their systems and controls continue to mitigate effectively against risks. In the same newsletter the FCA also suggested that changed working arrangements mean that issuers should be extra vigilant about the possibility of leaks and rumours, and identify whether there has been a breach of confidentiality. Companies should prepare holding announcements to be used in the event that there is a breach or likely breach. Similar points were made and expanded upon in the Director of Market Oversight's speech published on 12 October 2020 (see above).

## **5.11 What effect has the pandemic had on issuers' obligations to report "significant events" in respect of securitisations which are governed by the EU Securitisation Regulation?**

- 5.11.1** The EU Securitisation Regulation (Regulation (EU) 2017/2402) came into effect on 1 January 2019 and was onshored into UK law on 31 December 2020 by the European Union (Withdrawal) Act 2018 (as amended by the European Union (Withdrawal Agreement) Act 2020) and amended by the Securitisation (Amendment) (EU Exit) Regulations (2019/660). The new regime is now referred to as the "**UK Securitisation Regulation**".
- 5.11.2** Article 7 of the UK Securitisation Regulation sets out the ongoing transparency requirements which apply to the "*originator, sponsor and SSPE [securitisation special purpose entity, i.e. the issuer]*". The aim of these requirements is to ensure that regulators and investors have easy access to relevant information which would impact the overall quality of the underlying debt, for securitisations which fall outside the scope of UK MAR. It is important that originators, sponsors and SSPEs comply with the terms of these transparency requirements; failure to do so could amount to breach of terms of the underlying contractual documentation and may attract regulatory penalties.

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95 [https://www.esma.europa.eu/sites/default/files/library/esma31-67-742\\_public\\_statement\\_on\\_publication\\_deadlines\\_under\\_the\\_td.pdf](https://www.esma.europa.eu/sites/default/files/library/esma31-67-742_public_statement_on_publication_deadlines_under_the_td.pdf) (accessed 1 February 2021).

96 <https://www.icsa.org.uk/assets/files/pdfs/guidance/withdrawal-or-amendment-of-dividend-resolution-to-annual-general-meeting-web.pdf> (accessed 1 February 2021).

97 <https://www.fca.org.uk/publication/newsletters/market-watch-63.pdf> (accessed 1 February 2021).



In those circumstances, originators, sponsors and SSPEs will be keen to know how the pandemic might affect their obligations under Article 7. In particular, the severe economic and financial impact of the pandemic will potentially lead to the occurrence of “*significant events*” which must be disclosed pursuant to Article 7(1)(g) of the UK Securitisation Regulation. Article 7(1)(g) of the UK Securitisation Regulation provides:

5.11.3

*“The originator, sponsor and SSPE of a securitisation shall, in accordance with paragraph 2 of this Article, make at least the following information available to holders of a securitisation position, to the competent authority referred to in Article 29 and, upon request, to potential investors:*

...

*(g) where point (f) does not apply, any significant event such as:*

*(i) a material breach of the obligations provided for in the documents made available in accordance with point (b), including any remedy, waiver or consent subsequently provided in relation to such a breach;*

*(ii) a change in the structural features that can materially impact the performance of the securitisation;*

*(iii) a change in the risk characteristics of the securitisation or of the underlying exposures that can materially impact the performance of the securitisation;*

*(iv) in the case of STS securitisations, where the securitisation ceases to meet the STS requirements or where competent authority has taken remedial or administrative actions;*

*(v) any material amendment to transaction documents.”*

The list set out in Article 7(1)(g) is non-exhaustive. Thus, there are several circumstances in which originators, sponsors and SSPEs may have to make disclosures as a result of the impact of the pandemic. The most obvious example is Article 7(1)(g)(iii), which requires disclosure of a change in the risk characteristic of the securitisation or of the underlying exposures that can materially impact its performance. This is likely to be particularly relevant for mortgage-backed securities (both commercial and residential) in circumstances where cash flow is likely to have been severely restricted since global lockdown measures have repeatedly been put in place since March 2020, and in circumstances where borrowers are being provided with payment holidays by lenders. Other types of security are likely to suffer as a result of a sudden increase in defaults on the underlying assets: Collateralised Loan Obligations are a good example.

5.11.4

There is a marked risk that the pandemic may also lead to breaches of the terms of the securitisation documents, which itself may constitute a significant event. Article 7(1)(g)(i) defines as a significant event “*a material breach of the obligations provided for in the documents made available in accordance with point (b)*”. Article 7(1)(b), in turn, refers to “*all underlying documentation that is essential for the understanding of the transaction*”. That definition is wide, and there are therefore several types of breaches which may be caused by the pandemic and which in turn require disclosure as significant events. One obvious example is breach of any covenants in the securitisation documents concerning ratios of debt-service coverage and loan-to-value. Although the pandemic has not yet caused a fall in asset values equivalent to the position after the 2008 financial crisis, debt-service coverage ratios are likely to worsen in circumstances where the cash flow available to pay debt obligations has stalled as a result

5.11.5

of global lockdown measures. Other examples of material breaches might include Events of Default, including Insolvency Events of Default which can occur prior to a borrower entering into a formal insolvency process (for more information on Events of Default, see the answer to [para. 5.6](#), above).

- 5.11.6** In what circumstances might the above examples constitute a “significant” event, such as to engage the transparency requirements? ESMA provided guidance on what constitutes a significant event in its [Opinion](#)<sup>98</sup> on amendments to its draft technical standards on the disclosure requirements. According to ESMA, the transparency requirements necessitate:

*“the disclosure of information following an event that would be likely to materially impact the performance of the securitisation as well as have a significant effect on the prices of the tranches/bonds of the securitisation. In this regard, ESMA considers that changes to the underlying exposures and investor report information constitute such an event and that, in order to thoroughly update their assessments of the securitisation, investors, potential investors, and other entities listed in Article 17(1) of the Securitisation Regulation, require additional information in particular on the securitisation itself, the programme, the transaction, the tranches/bonds, the accounts, the counterparties, as well as additional features of relevance for synthetic and/or Collateralised Loan Obligation securitisations” (underlining added).*

- 5.11.7** Originators, sponsors and SSPEs will therefore need to consider carefully on a case-by-case basis whether the examples of pandemic-related events given above, or indeed any other events caused by the pandemic, will materially impact the performance of the securitisation and have a significant effect on the prices of the tranches or bonds.

**5.12 Can a virtual meeting of bondholders be convened during the pandemic?**

- 5.12.1** Lockdown measures introduced by the UK Government have severely restricted the ability of groups of people to convene in one place. These measures have potential ramifications for meetings of bondholders or other creditors.

- 5.12.2** In *Re Castle Trust Direct Plc* [2020] EWHC 969 (Ch),<sup>99</sup> the court considered the question of whether a meeting, in the context of a scheme of arrangement under Part 26, CA 2006, required the creditors to all attend a physical meeting in one place. In the case, three group companies had applied for an order convening a meeting of the companies’ creditors to consider and approve four linked schemes of arrangement. The companies sought special directions as to how the meeting should be convened, in circumstances where social distancing measures had already been implemented by the UK Government, and where more than half of the companies’ creditors were over the age of 70 so that many of them fell within one of the vulnerable groups identified by the Government.

- 5.12.3** In those circumstances, the directions proposed by the companies for the convening of the meeting were: (a) directions for the conduct of the scheme meetings by telephone; (b) directions to provide a facility for scheme creditors to dial into the meeting in order to consult with one another at the meeting and ask questions in relation to the schemes, having received an opening address from the chairman and representative of the companies; (c)

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<sup>98</sup> [https://www.esma.europa.eu/sites/default/files/library/esma33-128-600\\_securitisation\\_disclosure\\_technical\\_standards-esma\\_opinion.pdf](https://www.esma.europa.eu/sites/default/files/library/esma33-128-600_securitisation_disclosure_technical_standards-esma_opinion.pdf) (accessed 1 February 2021).

<sup>99</sup> Applied in *Re Swissport Fuelling Ltd* [2020] EWHC 1499 (Ch) and *ED&F Man Treasury Management Plc* [2020] EWHC 2290 (Ch).

directions that the opening address be transmitted on a webinar or by other electronic video means available for access and viewing by all scheme creditors; (d) directions for the provision of a further telephone facility for the conduct of the meeting to be paused in order for a vote to be taken, including the creditors registering their votes by telephone and, if necessary, overriding any previous proxy, if that is what they wish to do; and (e) directions for the resumption of the telephone meetings after the votes have been cast and tallied in order to declare the results.

In considering whether these directions were permissible on a proper construction of Part 26, CA 2006, Trower J observed at [38] that: **5.12.4**

*“the word “meeting” has to be construed in the context of the purpose for which it is used. The purpose is the mechanism by which creditors or shareholders are able to come together and consult with each other, should they choose to do so, in order to make a collective decision on the rearrangement or compromise of their rights against the company. It follows that the question is whether what is proposed enables that to happen by a process which has the essential characteristics of a meeting. In my judgment those essential characteristics are a coming together sufficient to enable a consultation to take place.”*

Applying those considerations, Trower J held that the meeting could be convened in the manner proposed by the companies. In short, the key element appears to be that the mechanism adopted must be sufficient to amount to a “coming together” of participants with the ability to consult. The participants must be able to hear and ask questions and express opinions between each other. **5.12.5**

As a result, it is permissible (at least in theory) for a meeting to take place remotely. However, the court will require evidence at the sanction hearing as to how the technology worked and whether or not there were any difficulties in relation to participation at the meeting (in particular in relation to participating creditors’ ability to hear, ask questions or express opinions at the meeting or otherwise contribute to the business of the meeting) (*Castle* at [43]; *Re ColourOz Investment 2 LLC* [2020] EWHC 1864 (Ch) at [128] to [129]; *Matalan Finance Plc* [2020] EWHC 2345 (Ch) at [8] to [11]; *ED&F Man Treasury Management Plc* [2020] EWHC 2290 (Ch) at [20]). In the ordinary course, these are matters which ought to be addressed in the Chairman’s report on the meeting (*Hema UK I Ltd* [2020] EWHC 2558 (Ch) (Falk J) at [5]). If serious difficulties arise, the court hearing the sanction application may conclude that a coming together of creditors in a manner that was sufficient to amount to a meeting had not occurred (*Castle* at [44]). **5.12.6**

In *African Minerals Limited (In Administration)* [2020] EWHC 1702 (Ch), Zacaroli J considered whether a hybrid meeting was appropriate in light of the prospect of the easing of social distancing restrictions following the first national lockdown but considered that this would cause significant difficulties and opted for a fully remote meeting (see [26]). **5.12.7**

Trower J’s approach has been applied in a number of recent scheme cases arising out of the pandemic (see *In the Matter of Swissport Fuelling Ltd* [2020] EWHC 1499 (Ch) (Miles J) at [67]; *In the Matter of African Minerals Limited (In Administration)* [2020] EWHC 1702 (Ch) (Zacaroli J) at [23] to [27]; *New Look Financing Plc* [2020] EWHC 2793 (Ch) (Miles J) at [50]; *ColourOz Investment 2 LLC* (Snowden J) at [128] to [129]; *ED&F Man Treasury Management Plc* [2020] EWHC 2290 (Ch) (Zacaroli J) at [20]; *Selecta Finance UK Ltd* [2020] EWHC 2689 (Ch) (Adam Johnson J) at [73]; *KCA Deutag UK Finance Plc* [2020] EWHC 2779 (Ch) (Trower J) at [65]; *Steinboff International Holdings NV* [2020] EWHC **5.12.8**

3455 (Ch) (Sir Alastair Norris) at [26]). In *New Look Financing Plc* [2020] EWHC 2793 (Ch), Miles J, in making the convening order, requested that the remote scheme meeting should provide for a virtual breakout facility to enable scheme creditors to confer amongst themselves if required at any point during the meeting [50].

- 5.12.9** The position is slightly different in relation to meetings of members (as opposed to creditors) under Part 26, CA 2006: see [paras. 2.26](#) and [2.27](#) of Section Two: Corporate Insolvency above.
- 5.12.10** In circumstances where the formal requirements of scheme meetings can be met (during the course of the pandemic) through a virtual meeting, there seems no reason why the court would not view bondholder meetings in the same way. In this respect, it is worth noting that in the first reported decision to consider the new restructuring plan provisions of Part 26A, CA 2006 (introduced by para. 901A of Schedule 9, CIGA 2020), *Re Virgin Atlantic Airways Ltd* [2020] EWHC 2191 (Ch), the High Court had no issue in applying the principles of *Re Castle Trust* to conclude that a virtual meeting was appropriate in that different legislative context.
- 5.12.11** Naturally, conducting a meeting either partially (through a part physical, part virtual meeting) or wholly in a virtual environment raises various logistical issues including ensuring that participants are genuinely entitled to attend, have a right to vote and establishing the size of their holding.
- 5.12.12** Trustees convening such meetings will need to put in place procedures to ensure their smooth running. Although each case will turn on the precise construction of the trust deed, it is usual practice for the deed to give the trustee power to make rules regarding the conduct of bondholder meetings. As a result, bondholder and issuer consent will not ordinarily be required to hold a virtual meeting.

## The Financial Markets

- 5.13 In what ways will the pandemic affect brokers' abilities to make margin calls?**
- 5.13.1** The effect of the pandemic on stock markets is understood to have triggered widespread urgent margin calls by brokers. The Bank of England has reported that daily variation margin calls by UK central counterparties (CCPs) in derivatives markets at the height of the pandemic's disruption in March 2020 were around five times the average daily margin calls for January and February 2020.<sup>100</sup>
- 5.13.2** Prior to the pandemic, the Basel Committee on Banking Supervision (“**BCBS**”) and the International Organization of Securities Commissions (“**IOSCO**”) were in the process of implementing the final phases of compulsory margin requirements for non-centrally cleared derivatives which were due to commence in September 2020. This has been deferred by a year due to the pandemic (see their [announcement](#) dated 3 April 2020<sup>101</sup>). In broad terms, the pandemic has not affected brokers' abilities to make calls.
- 5.13.3** In the context of derivatives subject to the ISDA Master Agreement, there are clear methods for calculating when a margin call will be triggered, set out in the 1995 Credit Support Annex,

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100 <https://www.bankofengland.co.uk/bank-overground/2020/what-role-did-margin-play-during-the-covid-19-shock> (accessed 1 February 2021).

101 <https://www.iosco.org/news/pdf/IOSCONEWS560.pdf> (accessed 1 February 2021).

the 2016 Credit Support Annex for Variation Margin, the 2016 Phase One Credit Support Deed for Initial Margin and the 2018 Credit Support Deed For Initial Margin.

Borrowers, under such arrangements, should be aware of their rights to dispute margin calls. Disputes tend to arise most often in relation to the calculation of the margin, either by reference to the collateral already posted (i.e. that the lender has calculated it to be less than the borrower believes it to be) or to the 'Delivery Amount' (i.e. the borrower believes that the exposure of the lender is less than the lender has calculated it). However, under the 2016 Credit Support Annex any dispute must be raised by no later than the close of business on the day that the transfer of collateral is due, meaning that borrowers must act quickly. Further, they are obliged to transfer any undisputed amount of margin: raising a dispute will not necessarily act as a holding measure so as to permit a borrower to avoid posting extra collateral altogether. In any event, under the dispute resolution procedure of the 2016 Credit Support Annex, such disputes are likely to be resolved quickly; if the outcome of the process is a requirement to post further collateral, borrowers are obliged to do so or to face an Event of Default for failure to pay. Events of Default will, of course, permit a lender to terminate the agreement early which may lead to heavy losses for the borrower in a volatile market. **5.13.4**

As to margin calls outside the ISDA context, much will depend on the wording of the relevant contractual provisions. There may, however, be scope for challenging a margin call, depending on the calculation method set out in the agreement and the nature of the asset, but decisions will need to be taken quickly if a call is to be disputed to avoid the lender closing out the position. **5.13.5**

Investors would be wise to be familiar with the precise terms of their margin agreement with their counterparty in the current climate and to ensure that they are able to post margin on their trading activities even in the most volatile trading conditions. Whilst brokers may have permitted a grace period for posting margin in more benign conditions, investors should expect that in the current conditions, brokers are likely to rely on their strict rights and to act quickly if margin payments are missed. **5.13.6**

If margin payments are missed, any close out is likely to be exercised swiftly and with limited regard to the investor's (rather than the broker's) interest. A broker owes no duty of care in tort or by implied contractual term when closing out a defaulting borrower's position and is only obliged to act rationally (*Euroption Strategic Fund Ltd v Skandinaviska Enskilda Banken AB* [2012] EWHC 584 (Comm); [2013] 1 BCLC 125; *Marex Financial Ltd v Creative Finance Ltd* [2013] EWHC 2155 (Comm); [2014] 1 All ER (Comm) 122). **5.13.7**

## Customer Complaints

**What approach is the Financial Ombudsman Service taking to: (1) complaints arising from a firms' actions during the pandemic; and (2) complaints relating to lending under the Bounce Back Loans Scheme and the Coronavirus Business Interruption Loan Scheme?** **5.14**

### *Complaints arising from a firm's actions during the pandemic*

The powers of the Financial Ombudsman Service ("FOS") are set out in Part XVI and Schedule 17 of FSMA 2000. The Financial Ombudsman must determine complaints by reference to what is, in her opinion, fair and reasonable in all the circumstances of the case (s. **5.14.1**

228(2), FSMA 2000). Further guidance as to the exercise of the FOS's powers are set out in the DISP section of the FCA Handbook.

- 5.14.2** The FCA<sup>102</sup> and the FOS<sup>103</sup> originally exchanged letters on 15 and 16 April 2020 in which both entities sought to clarify the approach the FOS would be taking during the present circumstances. In its letter, the FOS noted that in deciding what is fair and reasonable in each case, it takes into account relevant law, regulators' rules, guidance and standards, codes of practice, and what the ombudsman considers to have been good industry practice at the time relating to the relevant complaint. It reiterated that it does not make decisions with the benefit of hindsight. The FOS's position was reiterated in a more recent exchange of letters between the FCA<sup>104</sup> and the FOS<sup>105</sup> in November 2020. Thus, there has been no change in the FOS's approach to complaints, but it has confirmed that it will take account of the FCA's revised expectations of what constitutes compliance with its rules, guidance and standards, as well as good industry practice during the pandemic.

***Complaints relating to lending under the Bounce Back Loans Scheme and the Coronavirus Business Interruption Loan Scheme***

- 5.14.3** Both the BBLs and the CBILs were introduced by the Government as part of its response to the pandemic.
- 5.14.4** As noted above, the BBLs allows small and medium-sized businesses to borrow a sum of up to 25% of their turnover (up to a maximum of £50,000) from a range of accredited lenders, at an interest rate of 2.5% per annum. The Government covers interest repayments for the first 12 months. In tandem with this scheme, the Government also made changes to RAO so that some lending under the BBLs that would otherwise have resulted in regulated credit agreements (i.e. loans of £25,000 or under to sole traders, certain small partnerships and other relevant small businesses) will fall outside of regulated lending activity (see RAO, Art. 60C(4A)). The Business and Planning Act 2020 has been passed, s. 12 of which disapplies ss. 140A-140C, CCA 1974 with retrospective effect for BBLs lending.<sup>106</sup> As such, there is no requirement in BBLs for lenders to conduct creditworthiness or affordability checks.<sup>107</sup>
- 5.14.5** Loans of more than £50,000 are available under a different scheme, the CBILs. This scheme helps small and medium sized businesses with turnover of less than £45 million to access loans and other finance up to £5 million, with the Government guaranteeing 80% of the finance to the lender as well as paying interest and any fees for the first 12 months.<sup>108</sup> In contrast to the BBLs, lending under the CBILs is likely to be a regulated activity. However, provided that

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102 <https://www.financial-ombudsman.org.uk/files/273749/FCA-letter-to-FOS-on-circumstances-from-Covid-19-15042020.pdf> (accessed 1 February 2021).

103 <https://www.fca.org.uk/publication/correspondence/letter-fos-reply-fca-re-complaints-handling-coronavirus-2020.pdf?LinkSource=PassleApp> (accessed 1 February 2021).

104 <https://www.fca.org.uk/publication/correspondence/letter-sheldon-mills-ombudsman.pdf> (accessed 1 February 2021).

105 <https://www.fca.org.uk/publication/correspondence/letter-ombudsman-sheldon-mills.pdf> (accessed 1 February 2021).

106 See HM Treasury's announcement dated 1 May 2020: [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/882875/01052020\\_CX\\_Letter\\_to\\_banks\\_-\\_pricing\\_and\\_CCA\\_.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/882875/01052020_CX_Letter_to_banks_-_pricing_and_CCA_.pdf) (accessed 1 February 2021).

107 See the confirmation from the FCA at: <https://www.financial-ombudsman.org.uk/files/273434/FCA-letter-to-Financial-Ombudsman-Service-about-CBILs-and-BBL-04052020.pdf> (accessed 1 February 2021).

108 <https://www.gov.uk/guidance/apply-for-the-coronavirus-large-business-interruption-loan-scheme> (accessed 1 February 2021).

they comply with the requirements of the CBILS, the FCA has confirmed that lenders will not be expected to comply with CONC 5.2A.4-34 (i.e. the provisions of the FCA Handbook dealing with the assessment of creditworthiness).<sup>109</sup> Under CBILS, the central requirement around creditworthiness and affordability assessment is that the lender considers that the business (or its group) has a viable business proposition. This is to be determined without regard to any concerns over the business's short-to-medium term business performance due to the uncertainty and impact of the pandemic (although forecasts on expected levels of income and expenditure in a period post the stresses connected to the pandemic may be relevant). For smaller value facilities (e.g. those of £30,000 or below), in determining the eligibility of the applicant, lenders may decide to determine the business's creditworthiness based on its internal credit scoring models from time to time.<sup>110</sup>

The FCA<sup>111</sup> and the FOS<sup>112</sup> exchanged letters on 4 May 2020 clarifying the FOS's approach to complaints arising from lending under the scheme. The FOS has acknowledged that it will take account of the changes in approach to lending under the scheme, and will take into account and give due weight to, the need for firms to comply with the relevant scheme's requirements as part of what is "fair and reasonable" under the rules applicable the FOS's resolution of disputes in the FCA Handbook (DISP 3.6.4R). On 5 August 2020, the FCA published [information for small businesses](#)<sup>113</sup> setting out the complaints procedures available in relation to CBILS and BBLs.

5.14.6

## Business Interruption Insurance

**What action has the Financial Conduct Authority taken in relation to business interruption insurance?**

5.15

The pandemic has left many businesses with severely reduced revenue streams as a result of lockdown measures introduced around the world. As a result, these businesses have had to turn to business interruption insurance policies as a lifeline to stay afloat. Business interruption insurance typically covers expenses, such as loss of profits, which arise as a result of physical damage to a business's property. However, many policies also include additional wording which also covers losses which arise other than as a result of physical property damage i.e. non-damage extensions to the standard cover. A key question which arose in the wake of the pandemic was whether losses caused by the pandemic were covered by these non-damage extensions.

5.15.1

The FCA first published [guidance](#)<sup>114</sup> on its expectations of insurance providers during the pandemic on 19 March 2020. This included guidance on ensuring operational resilience,

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109 <https://www.fca.org.uk/news/statements/uk-coronavirus-business-interruption-loan-scheme-cbils-and-new-bounce-back-loan-scheme-bbl> (accessed 1 February 2021).

110 As confirmed by the FCA in its letter to the FOS dated 4 May 2020: <https://www.financial-ombudsman.org.uk/files/273434/FCA-letter-to-Financial-Ombudsman-Service-about-CBILS-and-BBL-04052020.pdf> (accessed 1 February 2021). See also the guidance on the website of the British Business Bank: <https://www.british-business-bank.co.uk/ourpartners/coronavirus-business-interruption-loan-scheme-cbils-2/> (accessed 1 February 2021).

111 <https://www.financial-ombudsman.org.uk/files/273434/FCA-letter-to-Financial-Ombudsman-Service-about-CBILS-and-BBL-04052020.pdf> (accessed 1 February 2021).

112 <https://www.financial-ombudsman.org.uk/files/273433/Financial-Ombudsman-Services-reponse-to-FCA-about-CBILS-and-BBL-04052020.pdf> (accessed 1 February 2021).

113 <https://www.fca.org.uk/firms/coronavirus-information-small-businesses> (accessed 1 February 2021).

114 <https://www.fca.org.uk/firms/insurance-and-coronavirus-our-expectations> (accessed 1 February 2021).

and requests that any exclusions impacting cover for pandemic related losses be clearly communicated.

**5.15.3** On 15 April 2020, the FCA published a “Dear CEO” letter<sup>115</sup> to insurance firms specifically addressing the issue of business interruption insurance. The FCA estimated that most business interruption policies only had basic cover, which would not entitle the policyholder to a pay-out in relation to the pandemic. The FCA advised that insurers make interim payments in cases where an obligation to pay is admitted or where it is otherwise clear that there is an obligation to pay, but quantum is disputed.

**5.15.4** Several questions of construction arose which were common to many different policies held by businesses across the country. In particular, it was not clear whether, on a proper construction of these policies, the insured was able to claim a pay-out for pandemic-related losses. As a result, on 9 June 2020, the FCA issued proceedings under the Financial Market Test Case Scheme contained then in Practice Direction 51M (now found in para. 6, Practice Direction 63AA) against a selection of eight insurers: Arch Insurance (UK) Limited, Argenta Syndicate Management Limited, Ecclesiastical Insurance Office plc, Hiscox Insurance Company Limited, MS Amlin Underwriting Limited, QBE Limited, Royal & Sun Alliance Insurance plc, and Zurich Insurance plc. Declarations were sought on the proper construction of 21 extended business interruption policies, pursuant to a Framework Agreement<sup>116</sup> of 31 May 2020 between the FCA and the eight insurers which provided that the parties have a mutual objective of achieving the maximum clarity possible for the maximum number of policyholders and their insurers. A finalised guidance document<sup>117</sup> in relation to the test case was published by the FCA on 17 June 2020.

**5.15.5** A trial of proceedings was heard on an expedited basis before Flaux LJ and Butcher J between 20-30 July 2020. Judgment was handed down on 15 September 2020: *FCA v Arch Insurance (UK) Limited* [2020] EWHC 2448 (Comm). All parties except Zurich Insurance plc and the first intervener sought permission for a leapfrog appeal to the Supreme Court. Ecclesiastical Insurance Office plc withdrew their application for permission to appeal before it was heard. On 2 November 2020, the Supreme Court granted permission for a leapfrog appeal, which was heard from 16 to 19 November 2020. Judgment was handed down on 15 January 2021. The court unanimously dismissed the appeals of the insurers, while partially allowing the appeals of the FCA.

**5.15.6** On 3 August 2020 the FCA issued a statement<sup>118</sup> on deductions to be made to business interruption payments as a result of government support, a topic not covered in the test case proceedings. The statement sets out the relevant factors to be taken into account by insurers in assessing the appropriateness of a deduction for government support.

## **5.16 What has been decided in the test case proceedings?**

**5.16.1** The courts considered the proper interpretation of clauses under 21 lead policies issued by the insurer defendants. These policies were placed into three categories: (1) “disease clauses”

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115 <https://www.fca.org.uk/publication/correspondence/dear-ceo-insuring-sme-business-interruption-coronavirus.pdf> (accessed 1 February 2021).

116 <https://www.fca.org.uk/publication/corporate/bi-interruption-test-case-framework-agreement.pdf> (accessed 1 February 2021).

117 <https://www.fca.org.uk/publication/corporate/bi-interruption-test-case-framework-agreement.pdf> (accessed 1 February 2021).

118 <https://www.fca.org.uk/news/statements/non-damage-bi-settlements-deductions-relation-government-support> (accessed 1 February 2021).



covering business interruption caused by disease; (2) “*prevention of access clauses*” covering a prevention or hindrance of access to or use of business premises as a result of government or local authority restriction; and (3) “*hybrid clauses*” covering a restriction of access arising specifically on the outbreak of a disease. These latter terms gave rise to issues of construction common to both disease clauses and prevention of access clauses.

While the courts’ findings naturally differed from policy to policy, certain general themes emerge through the judgments. The High Court and Supreme Court took markedly different approaches to interpreting the policies, however both reached conclusions broadly favourable to policyholders. **5.16.2**

### ***Disease and hybrid clauses***

Most of the disease and hybrid clauses considered covered the occurrence of a “*notifiable disease*” under UK public health regulations within a specified radius of the business, typically 25 miles. It was argued by the insurers that such policies covered business interruption losses arising solely from the occurrence of coronavirus within the specified radius. Therefore, insofar as the losses would have been suffered in any event as a result of coronavirus occurring outside the specified radius, there would be no cover. **5.16.3**

The High Court rejected this construction as too narrow, holding that if the appearance of coronavirus within the specified radius could be shown, the insured peril under the relevant policies covered all impact of the disease both inside and out of the specified radius. Reliance was placed on the categorisation of diseases such as SARS as notifiable diseases at the time the policies were agreed, the epidemiology of which made it unlikely that cover solely of narrow local impacts of disease were contemplated by the parties. Further it was noted that the policies did not expressly limit the insured peril to only cover cases within the specified radius. **5.16.4**

A majority of the Supreme Court in *FCA v Arch Insurance (UK) Limited* [2021] UKSC 1, however, accepted the arguments of the insurers on this issue. The majority judgment of Lord Hamblen and Lord Leggatt (Lord Reed agreeing), held that the High Court’s construction of the various policies went contrary to what a reasonable reader would understand the wordings to mean.<sup>119</sup> To read a policy insuring business interruption losses caused by the occurrence of coronavirus within a specified radius, as instead insuring all losses caused by coronavirus generally so long as coronavirus occurred within the radius was held to “*stand the clause on its head.*” As such the insured peril was held to be the occurrence of coronavirus within the specified radius, rather than coronavirus generally. **5.16.5**

The majority held that the High Court was right to have regard to the epidemiology of the notifiable diseases covered by these clauses, and the lack of express exclusion of losses caused by notifiable diseases outside of the specified radius, but that these factors could not alter the unambiguous meaning of the insured perils defined. Instead these factors were relevant in construing how causation was to operate under the terms of the relevant policies. As discussed below, the Supreme Court ultimately reached the same outcome as the High Court through its conclusions on the issue of causation. **5.16.6**

Policies which required an “*occurrence*” of Covid-19 were held to require that the disease be diagnosable regardless of whether the disease had in fact been diagnosed or the case was **5.16.7**

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<sup>119</sup> Lord Briggs in his concurring judgment (Lord Hodge agreeing) disagreed with the majority on this point and endorsed the reasoning of the High Court.

symptomatic. Conversely, policies which require that the disease be “*manifested*” were held to require that the disease make itself apparent, either by the display of symptoms or a diagnosis.

***Prevention of access and hybrid clauses***

- 5.16.8** A distinction was drawn by the High Court between policies which only covered government acts carrying legal force, and those covering the consequences of government advice. It was held that policies which referred to an “*inability*” to use business premises, “*restrictions imposed*” or “*enforced closure*” required restrictions having force of law to be in place for an insured to claim on the policy. Conversely policies that referred specifically to the effects of “*actions or advice*” were held to cover those who adhered to government statements calling for the closing of businesses before they were given force of law.
- 5.16.9** The FCA successfully appealed this point before the Supreme Court. The Supreme Court held that “*restrictions imposed*” and similar wordings, referred to mandatory measures imposed by a public authority, but disagreed that such measures required the force of law to fall within the policy. The analogy was given of a public health inspector who discovers vermin at a restaurant and orders it to close. All those concerned would reasonably expect such an order to be followed forthwith even if the inspector’s order does not have legal force until a later date. On this basis the Supreme Court held that the Prime Minister’s speech of 20 March 2020, in which he instructed certain classes of businesses to close “*tonight*” constituted “*restrictions imposed*”, even though his instructions were not at that date legally enforceable.
- 5.16.10** The High Court drew a further distinction between clauses covering a prevention of access, and those also covering a hindrance of access. The court rejected arguments by insurers that prevention required physical or legal prevention from entering the business premises. It was instead required that the business as detailed in the policy be unable to operate from the premises, and not simply be hindered in its operation. The example was given of a pub or restaurant that serves in person meals but also has a delivery service. Use of the business premises would be hindered by regulations preventing in person dining, but it would not be prevented as delivery services could continue. The same was not held to follow as regards a business that began a delivery service after in person dining was prohibited, as the new branch of business would not have been specified in the policy.
- 5.16.11** On this issue, the FCA were again successful before the Supreme Court. While the court maintained the distinction between clauses covering a prevention and those covering hindrance, it was held that prevention of access clauses could cover the closure of part of a business or business premises. Taking the above example, a restaurant with a delivery business would fall under a prevention of access clause, if its in person dining was forced to cease.
- 5.16.12** Many of the prevention of access clauses specified that the government action must have been caused by a matter in the “*vicinity*.” As with the specified radii in the disease clauses, the insurers argued that the clauses only covered government action in response to local emergencies. If the government would have enacted the relevant regulations regardless of what was happening in the business’s local vicinity there would be no cover.
- 5.16.13** Here the insurers’ arguments found more favour. The word vicinity was held to signify an immediacy of distance. Most of the policies were construed as covering strictly local events that would trigger business interruption, such as the placing of police tape around a premise following a local bar-brawl or murder. This decision was not appealed.

**Causation**

In the High Court judgment, the issue of causation was not of much significance, as the court's conclusions largely turned on its construction of the insured perils under the various policies. The High Court held that the insured peril under most of the disease clauses was coronavirus generally, rather than the individual occurrences of coronavirus within the specified radius. As such the arguments of the insurers, that the occurrences of coronavirus within the specified radius did not cause the loss on a "*but for*" basis, were not subjected to significant analysis. **5.16.14**

The Supreme Court majority however, held that the insured peril under the disease clauses was the occurrences within the specified radius. Applying a "*but for*" causation test, business interruption loss was highly unlikely to be caused by the insured peril, as the policyholder's business would still be disrupted by government measures taken in response to the coronavirus outbreak outside of the specified radius. **5.16.15**

The Supreme Court held on a true construction of the policy terms a "*but for*" test did not apply to the insured perils. The starting point of the court, was that under an insurance policy an insurer is normally liable where the insured peril is the "*proximate cause*" or efficient cause of the loss. While normally a proximate cause must satisfy the "but for" test, it was noted that this was not always the case. It was possible for multiple concurrent causes, some covered by a policy, and other not, to function as concurrent proximate causes. **5.16.16**

The analogy was given of a bus being pushed over a cliff by a group of 20 people, where only 13 or 14 would have been sufficient to achieve the task. In such circumstances, applying a "but for" test to determine which of the participants caused the damage to the bus would lead to absurd results. This is because no one of the individual persons would be either necessary or sufficient to bring about the loss. **5.16.17**

The Supreme Court held that on the proper construction of the disease clauses it was not reasonable to attribute to the parties an intention to apply a "but for" test to causation. Having regard to the epidemiology of the diseases covered, it was held contrary to the commercial intent of the clauses to deprive policyholders of an indemnity where cases of the disease outside the specified radius concurrently caused the loss. It was noted that this would in practice have the same effect as an exclusion in the policy for any loss caused by disease outside the specified radius. Such an exclusion would be incumbent on the insurer to expressly include within the policy. **5.16.18**

On this basis the Supreme Court concluded, that each individual case of the disease functioned as a concurrent effective cause, that functioned to inform the government restrictions imposed. **5.16.19**

In reaching this conclusion the Supreme Court overruled the High Court's decision in *Orient-Express Hotels Ltd v Assicurazioni Generali SpA* [2010] EWHC 1186 (Comm); [2010] Lloyd's Rep IR 531. **5.16.20**

In *Orient-Express*, the policyholder, a hotel company, claimed under a business interruption policy for losses caused by Hurricane Katrina. The court held that applying a "*but for*" analysis of causation, the only losses recoverable were those caused by hurricane damage to the hotel specifically. Insofar as the business would have sustained losses due to hurricane damage to the area surrounding the hotel this was not recoverable. **5.16.21**

The High Court considered the case to be "*clearly distinguishable*" from the policies considered, as on its construction of the insured peril under the policies a "*but for*" test was satisfied. The **5.16.22**

Supreme Court held that the case was wrongly decided. This is because the insured peril and uninsured peril both arose from the same hurricane and operated concurrently to cause the loss.

***Trends clauses***

- 5.16.23** The insurers sought to argue that the “*trends clauses*” in the policies, requiring the quantum of the pay-out to reflect the business trends that would have occurred anyway but for the insured peril, operated to expressly incorporate a “*but for*” test into the insurance policies. In relation to the disease clauses, it was claimed that applying the machinery in trends clauses required factoring in the damage caused by coronavirus outside the specified radius. Similarly, in relation to prevention of access clauses it was argued that all that was to be stripped out under the trends clauses was the loss caused by the government action, not the loss caused by the underlying pandemic.
- 5.16.24** The Supreme Court set out general guidelines for the interpretation of trends clauses. It was noted that the purpose of such clauses is to quantify loss, rather than to set out the scope of cover under the policy. As such it held that the clauses should be construed if possible so as to not take away cover provided under the insuring clauses, so as to transform the trends clause into a form of exclusion.
- 5.16.25** As such the Supreme Court held that, absent clear wording, a trends clause should be construed as reflecting the business trends that would have occurred “*but for the insured peril and circumstances arising out of the same underlying or originating clause.*”

***Prevalence of Covid-19***

- 5.16.26** As noted above, certain of the disease and hybrid clauses required coronavirus to have manifested or occurred within a specified radius. It was anticipated by the parties that sometimes this would not be possible to directly evidence from the available statistical data. The FCA sought declarations that the use of “*averaging methodologies*” or the application of “*undercounting ratios*” to recorded cases of coronavirus could be used to discharge the burden of proof.
- 5.16.27** The FCA initially sought to adduce expert evidence on this issue, but this was refused by the court at a CMC on 16 June 2020. The FCA sought declarations in principle as to whether such types of evidence could satisfy the burden of proof.
- 5.16.28** It was accepted by the insurers that it was in principle possible for the use of such methodologies to discharge the burden of proof. However, they opposed any specific averaging methodology or undercounting ratio being endorsed without the hearing of expert evidence. In the absence of expert evidence, the court did not make any such findings.
- 5.16.29** No appeal to the Supreme Court was made on this issue.

**What is the effect of the courts' decisions on insurers and policyholders?**

5.17

Following the High Court's judgment, a hearing took place, on 2 October 2020, to deal with the consequential matters arising from that judgment. One such matter was the appropriate wording of the declarations the court was to make as a result of the judgment. The court's declarations on the proper construction of the business interruption policies were sealed on 16 October 2020, and were [published by the FCA](#).<sup>120</sup> As noted above, not all issues determined by the High Court were appealed to the Supreme Court. As such, some of these declarations of the High Court are binding on the insurers who were party to the proceedings, notwithstanding the Supreme Court's judgment. The FCA on 4 November 2020, published a [table](#)<sup>121</sup> setting out which declarations and policies were not subject to appeal. This table was [updated](#)<sup>122</sup> on 22 January 2021, to set out the effect of the Supreme Court judgment on the sample policies. The FCA have also on 29 January 2021 created a '[policy checker](#)'<sup>123</sup> that can be used by policyholders to assess if, applying the test case judgments, their policy may cover business interruption losses caused by coronavirus. The declarations of the Supreme Court are in the process of being prepared following the judgment having been handed down.

5.17.1

The courts' decisions are not technically binding on other insurers with similarly worded policies. However, under paras. 7.11 to 7.14 of the FCA's [Finalised Guidance](#) of 17 June 2020,<sup>124</sup> insurers are expected on final resolution of the test case to apply the final judgment to their policies and reassess all rejected claims potentially affected by the judgment. The FCA also published a "[Dear CEO](#)" [letter](#)<sup>125</sup> on 18 September 2020 following the High Court judgment, encouraging insurers to resolve claims where possible pending the ongoing appeals. Following the Supreme Court judgment the FCA published a further "[Dear CEO](#)" [letter](#)<sup>126</sup> on 22 January 2021, encouraging insurers to resolve the large majority of claims as soon as possible and to reassess previously rejected claims that may be affected by the Supreme Court judgment.

5.17.2

On 11 December 2020, the FCA published [draft guidance](#)<sup>127</sup> in relation to proving the presence of Covid-19 under business interruption insurance policies, the High Court decision on this matter not being subject to appeal. The draft guidance sets out the forms of statistical data that can be utilised to demonstrate the occurrence or manifestation of Covid-19 within a designated radius. The FCA had a general consultation period on their draft guidance until 18 January 2021, with an extended consultation period until 22 January 2021 solely in relation to matters arising from the Supreme Court judgment.

5.17.3

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120 <https://www.fca.org.uk/publication/corporate/bi-insurance-test-case-high-court-declarations-order.pdf> (accessed 1 February 2021).

121 <https://www.fca.org.uk/publication/corporate/bi-insurance-test-case-table-appeal-status-declarations-policy-type.pdf> (accessed 1 February 2021).

122 <https://www.fca.org.uk/publication/corporate/bi-insurance-test-case-table-high-court-supreme-court-outcomes.pdf> (accessed 1 February 2021).

123 <https://www.fca.org.uk/firms/business-interruption-insurance/policy-checker> (accessed 1 February 2021).

124 <https://www.fca.org.uk/publication/finalised-guidance/finalised-guidance-bi-test-case.pdf> (accessed 1 February 2021).

125 <https://www.fca.org.uk/publication/correspondence/dear-ceo-letter-business-interruption-insurance.pdf> (accessed 1 February 2021).

126 <https://www.fca.org.uk/publication/correspondence/dear-ceo-letter-business-interruption-insurance-january-2021.pdf> (accessed 1 February 2021).

127 <https://www.fca.org.uk/publication/guidance-consultation/draft-guidance-business-interruption-insurance-test-case.pdf> (accessed 1 February 2021).

- 5.17.4** The Financial Ombudsman Service has stated [on its website](#)<sup>128</sup> that it will take the test case judgment into account when handling complaints in relation to business interruption insurance claims.
- 5.17.5** The FCA maintains a [list of business interruption policies](#)<sup>129</sup> that may be affected by the court's decision in the test case.

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128 <https://www.financial-ombudsman.org.uk/consumers/complaints-can-help/coronavirus> (accessed 1 February 2021).

129 <https://www.fca.org.uk/publication/corporate/bi-insurance-test-case-list-affected-insurers-policies-15-july.pdf> (accessed 1 February 2021).

# Section Six

## CIVIL PROCEDURE AND ADR

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*Law stated as at: 1 February 2021*

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## Introduction

On 17 March 2020, the Lord Chief Justice made a [statement](#)<sup>130</sup> about the latest guidance from the Government on how to respond to the pandemic. He said there was an urgent need to increase the use of technology to hold remote hearings where possible. **6.0.1**

In the ten months since then, civil litigation has primarily been conducted remotely. Our experience is that although the High Court moved onto video-conferencing quickly, the County Court has faced technological problems and a greater percentage of hearings are heard via teleconference. Temporary practice directions and emergency regulations have changed the court's approach on extensions of time (see [paras. 6.7](#) and [6.8](#) below) and enforcement ([para. 6.15](#)). Some of these temporary changes have been extended: it remains to be seen for how long. No specific guidance has been given on the practicalities of remote evidence ([paras. 6.16](#) to [6.18](#)), perhaps on the understanding that the CPR was already flexible enough to cope with the move. [MOJ civil statistics](#) show the 'workload' (including possession claims) falling from a baseline of 38,521 claims per week to as few as 8,991 claims in the week ending 21 June 2020. In that week, only 7,933 claims were listed compared to a weekly baseline of 14,815 hearings. The statistics for the most recent week (ending 22 November 2020) show that only 75 hearings were adjourned due to the pandemic, but they also state that just 10,017 hearings were listed. This suggests a significant number of claims are being delayed and will, presumably, be returning to the courts in the coming months. **6.0.2**

There are presently 19 operational "[Nightingale courts](#)", intended to tackle the impact of the pandemic on the justice system. **6.0.3**

On 7 May 2020, the Cabinet Office issued guidance encouraging "[responsible contractual behaviour](#)" and promoting the use of ADR. Mediation ([paras. 6.20](#) to [6.23](#)), early neutral evaluation ([para. 6.24](#)), arbitration ([paras. 6.25](#) to [6.28](#)) and adjudication ([para. 6.29](#)) have also had to adapt to avoid face-to-face contact. This chapter sets out the primary considerations for preparing for ADR remotely, bringing together advice from ADR institutions and our own personal experience. **6.0.4**

Practical guidance for remote hearings can be found in [Section Seven: Litigation in a Virtual World](#). **6.0.5**

## Court Operation

**What cases will be heard by courts?** **6.1**

The County Court is still operating on a priority based system and so even listed cases which could be heard remotely may be adjourned for lack of resource. The most recent listing priorities can be found online.<sup>131</sup> Work that must be done ('priority 1') includes freezing orders, injunctions, trials deemed to be 'urgent' and applications where there is a substantial hearing in the next month or a trial in the next three months. Whether the remaining work will be heard, either partly or fully remotely, is a matter for the Judge. Cases will be listed for triage to consider whether in principle the hearing should be listed, and whether in practice all arrangements can be made to enable it to take place safely. **6.1.1**

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<sup>130</sup> <https://www.judiciary.uk/announcements/coronavirus-update-from-the-lord-chief-justice/> (accessed 1 February 2021).

<sup>131</sup> [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/897641/Ops\\_Update\\_Civil\\_Listing\\_priorities\\_w-c\\_6\\_July\\_2020.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/897641/Ops_Update_Civil_Listing_priorities_w-c_6_July_2020.pdf) (accessed 1 February 2021).

- 6.1.2** The High Court list is presently operating as ‘business as usual’. The [QBD](#),<sup>132</sup> the [Administrative Court](#),<sup>133</sup> the [Insolvency and Companies Court](#),<sup>134</sup> the [Central London County Court](#)<sup>135</sup> and the [Senior Courts Costs Office](#)<sup>136</sup> have produced recent updates for court users on their current practice. The Court of Appeal still [states](#)<sup>137</sup> in its weekly business priorities update that it ‘continues to prioritise urgent applications’. ‘Urgent’ is defined as an application where it is essential in the interests of justice that there be a substantive decision within the next 7 days.
- 6.1.3** In the Supreme Court and Judicial Committee of the Privy Council, hearings will be conducted remotely via WebEx video conferencing, and are available to watch live and on-demand: see the [Supreme Court website](#),<sup>138</sup> the [summary document](#) concerning arrangements during the pandemic,<sup>139</sup> and the Annex to Lord Reed’s [Practice Note](#) (concerning filing papers electronically).<sup>140</sup> (Note that the JCPC website has not, at the time of writing, been updated, but the summary document referred to is expressed to apply to the JCPC, and the JCPC Practice Directions have been amended. Further, it may be prudent to read the amended Supreme Court and JCPC Practice Directions in conjunction with the summary document.) One important change is that time limits for written cases, core volumes and bundle of authorities have been brought forward by two weeks in each instance. Parties are not permitted to amend the electronic bundle in the two-week period before the hearing. Hard copy papers are unlikely to be required. Further, time limits will be applied flexibly, parties are encouraged to avoid unnecessary disputes over procedural matters, and there is no need to make a formal application for an extension of time of less than three weeks unless the application relates to a hearing listed in the next eight weeks (an email to the Registry, copied to the parties, will suffice).
- 6.1.4** There is a helpful collection of Covid-19 related advice and guidance on the Judiciary.uk website.<sup>141</sup>

## **6.2 When will a case be heard in person?**

- 6.2.1** The reader is referred to the discussion in [para. 7.1](#) of Section Seven: Litigation in a Virtual World below.

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132 [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/939167/Rcj\\_Notice\\_QB\\_General\\_30\\_Nov\\_2020.pdf.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/939167/Rcj_Notice_QB_General_30_Nov_2020.pdf.pdf) (accessed 1 February 2021).

133 [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/939155/Rcj\\_Administrative\\_Court\\_Information\\_for\\_Court\\_Users\\_30\\_Nov.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/939155/Rcj_Administrative_Court_Information_for_Court_Users_30_Nov.pdf) (accessed 1 February 2021).

134 <https://www.judiciary.uk/wp-content/uploads/2020/10/Guidance-for-ICC-London-on-TIPD-2-October-2020-1.pdf> (accessed 1 February 2021).

135 <https://4stonebuildings.com/wp-content/uploads/Covid-protocol-CCCL.pdf> (accessed 1 February 2021).

136 [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/903704/Senior\\_Courts\\_Costs\\_Office\\_update.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/903704/Senior_Courts_Costs_Office_update.pdf) (accessed 1 February 2021).

137 [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/952946/Rcj\\_COA\\_urgent\\_business\\_priorities\\_18\\_January\\_2021.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/952946/Rcj_COA_urgent_business_priorities_18_January_2021.pdf) (accessed 1 February 2021).

138 <https://www.supremecourt.uk/news/arrangements-during-the-coronavirus-pandemic.html> (accessed 1 February 2021).

139 <https://www.supremecourt.uk/docs/Arrangements-during-the-Coronavirus-Pandemic.pdf> (accessed 1 February 2021).

140 <https://www.supremecourt.uk/docs/covid-practice-note.pdf> (accessed 1 February 2021).

141 <https://www.judiciary.uk/coronavirus-covid-19-advice-and-guidance/> (accessed 1 February 2021).

**What courts are physically open? 6.3**

HMCTS has now re-opened most of its courts. It has stopped publishing a tracker detailing which courts are open, but the status of each court is displayed along with its contact details online.<sup>142</sup> 6.3.1

HMCTS has also published its [risk assessments](#)<sup>143</sup> for those entering into its buildings. Current [guidance](#)<sup>144</sup> is that court users are asked to keep a 2m distance from others and are encouraged to get a rapid (lateral flow device) Covid-19 test if they are available. HMCTS has installed plexiglass screens in over 300 courtrooms and jury deliberation rooms. See [para. 7.1](#) of Section Seven: Litigation in a Virtual World below. 6.3.2

The position of HMCTS is that since the courts and tribunals are a public service, they do not anticipate closing upon the imposition of a local or regional lockdown. The Health Protection (Coronavirus, Local COVID-19 Alert Level) (Very High) (England) Regulations 2020 provide an exception for indoor gatherings to participate in legal proceedings: see [para. 4\(5\)](#), Schedule 1. 6.3.3

On 5 January 2021, the Lord Chief Justice [said](#)<sup>145</sup> that it was important that footfall in the courts be kept to a minimum, and that no participant in legal proceedings should be required to attend court unless it is necessary in the interests of justice. In *R v Mohammed Nawaz* [2020] EWCA Crim 1715 a defendant was denied entry into the Royal Courts of Justice to attend his own application for permission to appeal a confiscation order made under the Proceeds of Crime Act 2002. The Court of Appeal held that this was justified in circumstances where the applicant had refused to provide medical evidence as to whether he had the virus (so that it was unclear whether the self-isolation regulations applied), the court could not take the risk that an infected and possibly infectious person be allowed into the court building, the safety and health of court staff and users were crucial considerations, and it was not necessary for the applicant to be present in person since he was represented by counsel. 6.3.4

**Do I need a face-covering? 6.4**

Current HMCTS guidance is that a court user must wear a face covering at all times in public and communal parts of a court or tribunal building unless they (i) have a disability or health issue that makes it difficult; (ii) feel severe distress wearing one; (iii) are giving support to a deaf person lip-reading; (iv) are eating, drinking or taking medicine; or (v) are under the age of 11 in England and Wales, or under 5 in Scotland. This includes robing rooms for counsel. 6.4.1

**What rules apply to remote hearings? 6.5**

As a general rule, the Court of Appeal in *Gubarev v Orbis Business Intelligence Ltd* [2020] EWHC 2167 (QB); [2020] 4 WLR 122 stated at [50]: “[W]hether a court hearing is a remote hearing or a hybrid hearing, that is one that is partially face to face and partially remote, or a 6.5.1

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142 <https://courtribunalfinder.service.gov.uk/courts/> (accessed 1 February 2021).

143 <https://www.gov.uk/guidance/coronavirus-covid-19-courts-and-tribunals-planning-and-preparation#assessing-and-managing-coronavirus-risk> (accessed 1 February 2021).

144 <https://www.gov.uk/guidance/what-to-expect-coming-to-a-court-or-tribunal> (accessed 1 February 2021).

145 <https://www.judiciary.uk/announcements/message-from-the-lord-chief-justice-latest-covid-19-restrictions/> (accessed 1 February 2021).

*conventional face to face hearing, it must be conducted in a way that is as close as possible to the pre-pandemic norm”.*

- 6.5.2** Prior to the pandemic the CPR contained video conference guidance in Annex 3 to PD 32. This guidance continues to apply. There is a change to the CPR in respect of remote hearings concerning when hearings will proceed in private when they would normally have been public proceedings. Pursuant to paras. 2 and 4, PD 51Y, where it is not practicable for a remote hearing to be broadcast in a court building, the court may direct that a hearing must take place in private where it is necessary to do so to secure the proper administration of justice; and such a hearing must be recorded, where practicable, in a manner directed by the court. (Unofficial recording or transmission is not permitted; see s. 55 and Schedule 25, Coronavirus Act 2020, amending the Courts Act 2003.) The recording can be listened to or watched by request with the consent of the court.
- 6.5.3** The [Judiciary’s Civil Justice in England and Wales: Protocol Regarding Remote Hearings](#)<sup>146</sup> (revised on 26 March 2020) states that remote hearings should, so far as possible, still be public hearings. This can be achieved in a number of ways: (a) one person (whether Judge, clerk or official) relaying the audio and (if available) video of the hearing to an open court room; (b) allowing a media representative to log in to the remote hearing; and/or (c) live streaming of the hearing over the internet, where broadcasting hearings is authorised in legislation (such as the new s. 85A recently inserted into the Courts Act 2003 by s. 55 and Schedule 25, Coronavirus Act 2020). The principles of open justice remain paramount.
- 6.5.4** Practitioners should be alive to the possible implications for collateral use rules if hearings proceed in private.
- 6.5.5** Practical guidance for remote hearings (including private hearings) can be found in [Section Seven: Litigation in a Virtual World](#).

## **6.6 What about the backlog?**

- 6.6.1** [HMCTS statistics from 10 December 2020](#)<sup>147</sup> show a total of 30,547 civil hearings were adjourned due to the pandemic from the week ending 8 March 2020 to 22 November 2020. The number of adjourned cases has, however, fallen from a peak of 3,915 in the week ending 5 April 2020 to 75 in the week ending 22 November 2020. 35,508 claims were received in the week ending 22 November 2020, the most since 8 March 2020, indicating that claims are no longer being delayed due to the pandemic.
- 6.6.2** HMCTS brought out a [pandemic recovery plan](#)<sup>148</sup> in early November 2020. It has five pillars: (i) maximising the capacity of the judiciary to sit as many sitting days as possible; (ii) re-opening courtroom capacity; (iii) ensuring remote hearings continue to be effectively supported; (iv) recruitment of administrative staff; and (v) continuing to build online services. The plan predicts the level of final hearings for tracked civil claims has already, or will shortly return to pre-pandemic levels. HMCTS expects to be able to support the ‘delivery’ of up to two-thirds of planned hearings face-to-face, with the remainder heard remotely.

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<sup>146</sup> [https://www.judiciary.uk/wp-content/uploads/2020/03/Remote-hearings.Protocol.Civil\\_GenerallyApplicableVersion.f-amend-26\\_03\\_20-1.pdf](https://www.judiciary.uk/wp-content/uploads/2020/03/Remote-hearings.Protocol.Civil_GenerallyApplicableVersion.f-amend-26_03_20-1.pdf) (accessed 1 February 2021).

<sup>147</sup> [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/942857/10\\_12\\_20\\_MI\\_tables.xlsx](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/942857/10_12_20_MI_tables.xlsx) (accessed 1 February 2021).

<sup>148</sup> [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/932496/HMCTS\\_CFT\\_Recovery\\_Plan\\_v2b.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/932496/HMCTS_CFT_Recovery_Plan_v2b.pdf) (accessed 1 February 2021).

The backlog of hearings caused by the pandemic may be relevant to case management decisions and interim applications. For example, in *Scott v Harbinder Singh* [2020] EWHC 1714 (Comm) HHJ Eyre QC refused the claimants permission to amend those parts of the particulars of claim which would have resulted in the loss of the trial date. It was relevant that a new trial date would have had to be found in a period when the court would also be likely to be seeking to accommodate trials adjourned because of the pandemic: [64]. Further discussion about adjournment is at [para. 6.8](#) below. **6.6.3**

## Changes to the Civil Procedure Rules

### **When can parties agree an extension of time? **6.7****

CPR r. 3.8(3) and 3.8(4) provides that where a rule, practice direction or court order (a) requires a party to do something within a specified time and (b) specified the consequence of failure to comply, the time for doing so may be extended by prior written agreement of the parties up to a maximum of 28 days, provided that the extension does not put at risk any hearing date. **6.7.1**

PD 51ZA, which provided for this time period to be extended to 56 days, ceased to be effective on 30 October 2020. At the time of writing, it has not been replaced. **6.7.2**

It is also worth checking whether an existing directions order makes specific provision enabling the parties to agree an extension of time. **6.7.3**

### **When will the court order an adjournment of a hearing? **6.8****

The courts have now been operating remotely for ten months. Judges will assume that where the parties are well-resourced, a remote hearing will offer equal disadvantages to both sides and refuse to order an adjournment purely on the grounds that the hearing cannot take place in person (see for example *SC (A Child) v University Hospital Southampton NHS Foundation Trust (Rev 2)* [2020] EWHC 1445 (QB) at [20]). **6.8.1**

The decision of Kimbell QC sitting as a Deputy High Court Judge in *In Re Blackfriars Limited (in liq)* [2020] EWHC 845 (Ch) has set the tone for applications to adjourn a commercial trial due to concerns about the conduct of a remote hearing: **6.8.2**

- (1) The Judge reviewed the applicable regulations and held that the legislature is sending a very clear message that it expects the courts to continue to function so far as they able to do safely by means of the increased use of technology to facilitate remote trials.
- (2) The parties are expected to work with available technology to overcome the challenges of hearing live witness evidence.
- (3) Where both sides are well-resourced, there is no potential unfairness due to the challenges of a remote hearing.

The consequence was that the five-week trial was ordered to take place remotely. **6.8.3**

*In Re Blackfriars Ltd* was applied by HHJ Eyre QC in *Municipio De Mariana v BHP Group Plc* [2020] EWHC 928 (TCC). The Judge identified the following principles which govern whether a particular hearing should be adjourned if the case could not be heard face-to-face or whether instead there should be a remote hearing. **6.8.4**

- (1) Regard must be had to the importance of the continued administration of justice.

Justice delayed is justice denied even when the delay results from a response to the currently prevailing circumstances.

- (2) There is to be a recognition of the extent to which disputes can in fact be resolved fairly by way of remote hearings.
- (3) The courts must be prepared to hold remote hearings in circumstances where such a move would have been inconceivable only a matter of months ago.
- (4) There is to be rigorous examination of the possibility of a remote hearing and of the ways in which such a hearing could be achieved consistent with justice before the court should accept that a just determination cannot be achieved in such a hearing.
- (5) Inevitably the question of whether there can be a fair resolution is possible by way of a remote hearing will be case-specific. A multiplicity of factors will come into play and the issue of whether and if so to what extent live evidence and cross-examination will be necessary is likely to be important in many cases. There will be cases where the court cannot be satisfied that a fair resolution can be achieved by way of a remote hearing.

**6.8.5** The Judge held that applications for extensions of time in the context of the pandemic are to be determined by having regard to the overriding objective: para. 4 of PD 51ZA (N.B. PD 51ZA ceased to have effect on 30 October 2020); and the protocols and guidance referred to in the judgment. In addition, regard is to be had to the approach to the adjournment of trials. He summarised the following principles against which to assess the application for an extension of time:

- (1) The objective, if it is achievable, must be to keep to existing deadlines, and where that is not realistically possible to permit the minimum extension of time which is realistically practicable.
- (2) The court can expect legal professionals to make appropriate use of modern technology. Just as the courts are accepting that hearings can properly be heard remotely in circumstances where this would have been dismissed out of hand only a few months ago so the court can expect legal professionals to use methods of remote working and of remote contact with witnesses and others.
- (3) While recognising the real difficulties caused by the pandemic and by the restrictions imposed to meet it the court can expect legal professionals to seek to rise to that challenge. Lawyers can be expected to go further than they might otherwise be expected to go in normal circumstances and particularly this is so where there is a deadline to be met (and even more so when failing to meet the deadline will jeopardise a trial date). So the court can expect and require from lawyers a degree of readiness to put up with inconveniences; to use imaginative and innovative methods of working; and to acquire the new skills needed for the effective use of remote technology.
- (4) The approach which is required of lawyers can also be expected from those expert witnesses who are themselves professionals. However, rather different considerations are likely to apply where the persons who will need to take particular measures are private individuals falling outside those categories.
- (5) The court should be willing to accept evidence and other material which is rather less polished and focused than would otherwise be required if that is necessary to achieve the timely production of the material.

- (6) However, the court must also take account of the realities of the position and while requiring lawyers and other professionals to press forward care must be taken to avoid requiring compliance with deadlines which are not achievable even with proper effort.
- (7) It is in the light of the preceding factor that the court must be conscious that it is likely to take longer and require more work to achieve a particular result (such as the production of evidence) by remote working than would be possible by more traditional methods.
- (8) In the same way the court must have regard to the consequences of the restrictions on movement and the steps by way of working from home which have been taken to address the pandemic. In current circumstances the remote dealings are not between teams located in two or more sets of well-equipped offices with fast internet connections and with teams of IT support staff at hand. Instead they are being conducted from a number of different locations with varying amounts of space; varying qualities of internet connection; and with such IT support as is available being provided remotely. In addition, those working from home will be working from homes where in many cases they will be caring for sick family members or for children or in circumstances where they are providing support to vulnerable relatives at another location.
- (9) Those factors are to be considered against the general position that an extension of time which requires the loss of a trial date has much more significance and will be granted much less readily than an extension of time which does not have that effect. That remains the position in the current circumstances and before acceding to an application for an extension of time which would cause the loss of a trial date the court must be confident that there is no alternative which is compatible with dealing fairly with the case.

*Bilta (UK) Ltd (in liq) v SVS Securities* [2021] EWHC 36 (Ch) provides an example of a request for an adjournment for a second time during the pandemic. A five-week trial was listed for 25 January 2021. Certain witnesses were ready and willing to attend for trial until late December 2020, but then changed their minds. Marcus Smith J held that the usual tests concerning adjournments were “*at best irrelevant and at worst unhelpful*”: [15]. In the circumstances nothing turned on the fact the adjournment application was made late, that this was a second adjournment application, and that the first adjournment application had been successful. The trial was ordered to continue, albeit subject to tight case-management and on a hybrid basis: [19].

**6.8.6**

In some cases adjournments can be avoided by appropriate directions being given to mitigate the risks of any unfairness arising out of a hearing being conducted remotely. For example, the court can direct that hearings have scheduled breaks between witnesses to allow instructions to be sought and given, and scheduled breaks during the court day to limit the amount of continuous screen time: *SC (A Child) v University Hospital Southampton NHS Foundation Trust (Rev 2)* [2020] EWHC 1445 (QB) at [38]. The court can also give directions allowing more time for the various stages of litigation than would normally be requested/granted: *Jalla v Shell International Trading and Shipping Co Ltd* [2020] EWHC 738 (TCC) at [16].

**6.8.7**

The courts may be reluctant to allow a litigant to derive a separate benefit from the delay caused by a pandemic-related adjournment (see for example *Ludlow v Buckinghamshire Healthcare NHS Trust and another* [2020] EWHC 1720 (QB) at [26]).

**6.8.8**

The general rule in CPR r. 2.11 is that parties can agree to extend time for compliance with a rule or direction without applying for a court order. An exception in CPR r. 29.5(1) is that

**6.8.9**

an application is necessary to vary the date for a CMC, PTR, the trial or the trial period. The Queen's Bench Guide at paras. 20.1.4 and 20.1.5 emphasise that changes to the trial window, even by consent, must be considered by the Judge in charge of the Queen's Bench Civil List and not a Master. This is not the position in the Chancery Guide (see para. 14.4). In any event, we expect the court will be amenable to an adjournment of a hearing by consent.

## **6.9 How does the pandemic affect applications for relief from sanctions?**

**6.9.1** Until 30 October 2020, para. 4, PD 51ZA provided that “*In so far as compatible with the proper administration of justice, the court will take into account the impact of the Covid-19 pandemic when considering applications for the extension of time for compliance with directions, the adjournment of hearings, and applications for relief from sanctions*”. This PD has now expired, although judges are still likely to consider the impact of the pandemic when exercising discretion to grant relief from sanctions.

## **6.10 How does the pandemic affect service?**

**6.10.1** In Johnson J's *ex tempore* judgment in *Serious Fraud Office v Karimova* [2020] 6 WLUK 383, the court granted an extension of time for the SFO to serve proceedings against two respondents, the daughter of the former President of Uzbekistan and her partner. Although the SFO had previously been given an extension of time, the Judge held that the SFO had made efforts to effect service and had a good reason for not having served them. The Judge accepted the SFO's submission that service had been hampered by the pandemic, in both the UK and in Uzbekistan. Johnson J held that the justice of the case merited a further six-month extension.

**6.10.2** A different situation occurred in *Stanley v Tower Hamlets London Borough Council* [2020] EWHC 1622 (QB), where a solicitor served particulars of claim by post on 25 March 2020, two days after the “lockdown”. The local authority did file an acknowledgment of service, and the claimant applied for judgment in default successfully. The local authority then applied to set aside default judgment under CPR r. 13.3 both on the grounds that it had a real prospect of successfully defending the claim, and for some other good reason, namely it was unreasonable to effect service by post when the claimant knew the local authority's offices would be closed. Julian Knowles J agreed there were real prospects of success, but also held that he would have also granted relief on the ‘some other good reason’ limb. He held at [34] that: “*The world shifted on its axis on 23 March 2020 and it was incumbent on him as a responsible solicitor and an officer of the court to contact the Council to acknowledge that the situation had changed, and to discuss how proceedings could best and most effectively be served*”. Having found that the jurisdictional requirements were met, the Judge applied PD 51ZA to the three stage *Mitchell/Denton* test, and granted relief.

**6.10.3** Both of these cases illustrate that the court is unlikely to impose the standard CPR sanctions for technical breaches when the failure to adhere to the rules can be attributed to the impact of the pandemic. We are not aware of problems effecting personal service during the pandemic. Paragraph 3.5 of Section Three: Personal Insolvency above discusses the requirement for personal service in bankruptcy proceedings.

**6.10.4** In *Schwartz v VGV (UK) Ltd* [2020] EWHC 3500 (Ch), Roth J directed that a committal order could be served by email in lieu of personal service, in view of the pandemic: [34]. However, the defendant was based in Ecuador and the same may not be granted in respect of an English resident.



Practitioners should also be aware that the rules regarding service outside of the jurisdiction to countries within the EU has changed following the end of the transition period under the Civil Procedure Rules 1998 (Amendment) (EU Exit) Regulations 2019/521. The UK is no longer a party to the Lugano Convention and the retained EU law version of the Recast Brussels Regulation has been revoked. **6.10.5**

**How will the pandemic affect applications for security for costs? **6.11****

The economic disruption which is anticipated and already felt as a result of the pandemic, may be expected to result in more defendants seeking to secure their costs in actions brought by claimants whose financial future is consequently uncertain. **6.11.1**

A relevant gateway to interim relief for these purposes is CPR r. 25.13(2)(c). This applies to a claimant company where there is reason to believe that it will be unable to pay the defendant's costs if ordered to do so. **6.11.2**

In *International Pipeline Products Ltd v IK UK Ltd* [2020] EWHC 1602 (Ch), David Stone (sitting as a Deputy Judge of the Chancery Division) considered evidence as to the likely impact of the pandemic on the business of the claimant. The Judge regarded the following dictum of Nicolls VC in *Re Unisoft Group (No 2)* [1993] BCLC 532 at 534, as particularly apposite: “*Thus the question is, will the company be able to meet the costs order at the time when the order is made and requires to be met? That is a question to be judged and answered as matters stand when the application is heard by the court, although the court will take into account and give appropriate weight to evidence about what is expected to happen in the interval before the costs order would fall to be met.*” **6.11.3**

Security for costs was not granted in that case, since the evidence of economic downturn before the court was not from the same industry as the claimant's. The claimant's business was successful and the impact it had seen as a result of the pandemic (although negative) had not harmed the trading outlook so as to cast doubt on its ability to pay costs. The court decided that it was simply too early to tell about the effects of the apprehended economic downturn. **6.11.4**

Courts may therefore be expected to approach evidence in support of an application relying on CPR r. 25.13(2)(c) as follows: (1) the focus of assessment will be on the financial position and outlook of the particular company; (2) it will take into account the effect of the pandemic on the company so far as it is known; (3) the court will be cautious in applying evidence of the effect of the pandemic on one industry to a company operating in another industry; and (4) the court will be wary of making pessimistic assumptions about the general economic effects of the pandemic, at least while these are uncertain. A defendant's approach to evidence should therefore focus closely on the financial position of the claimant, supported where possible by targeted evidence about the negative effects of the pandemic upon the relevant industry and the claimant in particular, and how this will affect the particular company's capacity to pay costs. **6.11.5**

In circumstances where a case has been stayed to allow time for ADR to be pursued, a court may be inclined to adjourn an application for security for costs, given the uncertain effects of the pandemic. That was the decision reached by Roger Ter Haar QC sitting as a Deputy Judge in *Accessible Orthodontics (O) Ltd v NHS Commissioning Board* [2020] EWHC 785 (TCC), who noted that the effects of the pandemic were so fast moving and uncertain that the factors relevant to an order for security could only be considered at that later time, since it seemed unlikely that the claimants would be in the same position then. **6.11.6**

**6.12 What provision has been made for limitation periods?**

**6.12.1** As yet no widespread measures have been taken in response to the pandemic on the issue of limitation periods. In these circumstances, litigants should take every step to ensure they are within the applicable periods provided for in the Limitation Act 1980. Whilst Part II of that Act provides for the extension or exclusion of limitation periods in defined circumstances, none of these appear readily applicable to general business causes of action, the expiry of which has been caused by matters relating to the pandemic (absent specific circumstances which might engage particular provisions).

**6.12.2** A limited exception applies to certain clinical negligence claims dealt with via the [Covid-19 protocol](#) dated 20 October 2020<sup>149</sup>. The protocol provides for the running of expired limitation periods to be suspended until 3 months after the end of the protocol provided proper notice is given (see para. 1). The protocol is to be reviewed every 8 weeks.

**6.13 When will the court vary its previous orders?**

**6.13.1** The court has the power under CPR r. 3.1(7) to vary or revoke its previous orders. There is a distinction between interim and final orders.

**6.13.2** Interim orders may be varied if there is something out of the ordinary to lead to variation or revocation of an order. The inclusion of “*liberty to apply*” in an interim order is judicial recognition that further applications are likely to be necessary. However, the absence of such a provision does not preclude an application to vary an interim order.

**6.13.3** Final orders are generally only varied or revoked where either (a) the original order was based on erroneous information, or (b) there have been subsequent events unforeseen at the time the order was made, which have destroyed the basis on which the order was made: see the White Book at 3.1.17 and following.

**6.13.4** In *Dinglis v Dinglis & Ors* [2020] EWHC 1363 (Ch); [2020] 2 BCLC 607, the applicant wished to vary an order which valued shares as at July 2019. The shares had fallen in value, and the applicant sought a new order which reflected this. Adam Johnson QC (as he was) held that the earlier order was a final order and was not prepared to vary it. He held at [44]: “*it seems to me that the interest in the finality of litigation is a, if not the, primary concern. True it is that the world has moved on since December 2019, and I accept it is fair to describe the impact of the Coronavirus pandemic as something out of the ordinary. But I do not think that in the circumstances of this case it justifies any variation to the terms of the final order made*”.

**6.13.5** In contrast, in *Kingsley v Kingsley* [2020] EWHC 2017 (Ch), the defendant applied for an extension of time in respect of a final order to complete the purchase of certain farm land within 2 months. The original order had been made on 1 May 2019. This decision was appealed, and by agreement the order was stayed. The appeal judgment was handed down on 3 March 2020 and it upheld this part of the order. The defendant had difficulty raising finance during the pandemic. Therefore, she applied for a variation of the 2 month period. The Judge granted an extra 10 days because the pandemic had been a material change in circumstances and the claimants had not demonstrated that there would be any prejudice from the delay.

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<sup>149</sup> <https://resolution.nhs.uk/wp-content/uploads/2020/11/Download-COVID-19-Clinical-Negligence-Protocol-2020-amended10.2020.pdf> (accessed 1 February 2021).

<b>When will the court vary an undertaking?</b>	<b>6.14</b>
The test for varying an undertaking is the same as varying an interim injunction: the threshold is not lower due to the fact it was voluntarily given. In the absence of liberty to apply, a party typically has to show “good cause”, typically a significant change in circumstances which makes the continuation of the undertaking unnecessary, oppressive or unjust: <i>Emailgen Systems Corp v Exclaimer Ltd</i> [2013] EWHC 167 (Comm); [2013] 1 WLR 2132.	<b>6.14.1</b>
We consider it possible that the consequences of the pandemic might, in some cases, have caused a significant change in circumstances which would justify an undertaking being varied.	<b>6.14.2</b>
<b>How does the pandemic affect the enforcement of judgments or orders?</b>	<b>6.15</b>
The pandemic continues to affect enforcement of judgments and orders.	<b>6.15.1</b>
Business tenancies currently have protection from forfeiture until 31 March 2021, by virtue of The Business Tenancies (Protection from Forfeiture: Relevant Period) (Coronavirus) (England) (No. 3) Regulations 2020 and the Coronavirus Act 2020.	<b>6.15.2</b>
Stays on enforcement of writs of control and possession appear to have mostly expired. Enforcement agents are encouraged to socially distance and undertake risk assessments. However, in <i>Just Digital Marketplace Ltd v High Court Enforcement Officers Association</i> [2021] EWHC 15 (QB), Master McCloud made a declaration that a virtual visit by High Court Enforcement Agents is sufficient to enter into a controlled goods agreement, i.e. to identify property which the enforcement agent will be entitled to seize if the agreement is broken.	<b>6.15.3</b>
A search order may incorporate “COVID undertakings” ( <i>Calor Gas Ltd v Chorley Bottle Gas Ltd</i> [2020] EWHC 2426 (QB)).	<b>6.15.4</b>
The Taking Control of Goods (Amendment) (Coronavirus) Regulations 2020 have made various changes to an action for the recovery of unpaid commercial rent. The action must be for a minimum of 276 days’ rent where notice of enforcement was given between 29 September 2020 until 24 December 2020, and 366 days’ rent when given from 25 December 2020. This will continue until 31 March 2021, although this date has been extended before and may be extended again.	<b>6.15.5</b>
In <i>Kea Investments Ltd v Watson</i> [2020] EWHC 2786 (Ch), Nugee LJ considered the impact of the pandemic on the defendant to contempt proceedings and on the impact to the prison service more broadly: [37]. This was one of the mitigating factors which reduced the contemnor’s sentence from six months to four.	<b>6.15.6</b>
One of the few areas where the pandemic does not apparently affect enforcement is in the application of third party debt orders.	<b>6.15.7</b>
Whilst not strictly enforcement of a judgment or order, it should be noted that by virtue of PD 51Z and r. 55.29, most possession proceedings were automatically stayed until 21 September 2020. PD 55C makes provisions for reactivating stayed possession claims and creates new procedural requirements for the issue of new claims. It applies between 20 September 2020 and 30 July 2021. See further <a href="#">para. 3.12</a> in Section Three: Personal Insolvency above.	<b>6.15.8</b>
Practitioners should also be aware that following the end of the Brexit transition period, the European enforcement regime will not apply to any orders made from 1 January 2021.	<b>6.15.9</b>

## **Formalities of Sworn Evidence**

### **6.16 Can court documents be validly signed electronically?**

**6.16.1** CPR r. 5.3 permits the electronic signature of documents. It provides that “*Where any of these Rules or any practice direction requires a document to be signed, that requirement shall be satisfied if the signature is printed by computer or other mechanical means*”.

**6.16.2** Prior to 28 July 2020, the Queen’s Bench Action Department accepted unsigned documents as an emergency measure. This no longer applies, but their [guidance](#)<sup>150</sup> expressly states that it will accept all documents signed with electronic signatures.

**6.16.3** Practitioners in the Business and Property Courts should be aware that from 6 April 2021, by virtue of PD 57AC, a trial witness statement requires a new certificate of compliance by both the witness and the legal representative.

### **6.17 What documents can be witnessed remotely?**

**6.17.1** In the context of civil litigation, the only document which requires witnessing is an affidavit. Affidavits are required in applications for search orders, freezing orders and for contempt of court: para. 1.4, PD 32.

**6.17.2** Pursuant to para. 5.2(2), PD 32, an affidavit must be sworn before someone authorised to witness affidavits (as set out in para. 9.1, PD 32). A solicitor from the firm acting for the client cannot witness an affidavit. This means that during the pandemic it may be difficult to find a witness, particularly on an urgent basis. It is unclear whether witnessing can be done remotely: there are no express words to limit “*before whom*” to an in-person oath or affirmation. However, para. 25.1, PD 32 provides that where an affidavit does not comply with the practice direction, the court may refuse to admit it as evidence. It seems to us that there is a reasonable likelihood that a court will show some flexibility. It will be prudent to do all that one can, but (depending on the circumstances of the particular case) the court may be willing to admit an unsworn affidavit or an affidavit sworn remotely as evidence. An undertaking to swear as soon as practicable could be offered, or perhaps the deponent could attend by video link and swear to the document orally. The Temporary Insolvency PD (October 2020) permits remote witnessing of a statutory declaration: see [para. 2.60](#) in Section Two: Corporate Insolvency.

### **6.18 Can a witness give sworn testimony remotely?**

**6.18.1** Yes. This is something that was already provided for prior to the pandemic: para. 3, Annex 3 to PD 32.

**6.18.2** [Guidance from the Commercial Bar Association](#) (dated 23 June 2020)<sup>151</sup> has generally helpful points on witness evidence, including recommending that counsel ask the witness during examination-in-chief to confirm under oath/affirmation that they are alone in the room and that they are not receiving assistance from any third parties during the course of the hearing. It also recommends that a question at the PTR be whether appropriate steps been

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<sup>150</sup> [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/909569/QB\\_Information\\_for\\_Court\\_Users\\_updated.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/909569/QB_Information_for_Court_Users_updated.pdf) (accessed 1 February 2021).

<sup>151</sup> <https://www.combar.com/wp-content/uploads/2020/06/COMBAR-Guidance-Note-on-Remote-Hearings-2nd-edition-23-June-2020-002.pdf> (accessed 1 February 2021).

taken to have the appropriate holy book (if required) at the place from which the witness of fact gives evidence.

In *Navigator Equities Ltd & Anor v Deripaska* [2020] EWHC 1798 (Comm), Andrew Baker J indicated that if a witness is to give evidence remotely, then the parties should discuss in advance where the witness will be, who (if anyone) will be with them, and (if relevant) why the witness would not be alone. An arrangement other than the witness being alone would require approval by the court: [9]. **6.18.3**

The reader is also referred to paras. 7.7 and 7.11 of Section Seven: Litigation in a Virtual World for guidance on the practicalities of remote evidence. **6.18.4**

## Alternative Dispute Resolution (ADR) and the Pandemic

**Is ADR encouraged during the pandemic?** **6.19**

On 7 May 2020 the Cabinet Office issued a [Guidance Note](#)<sup>152</sup> on responsible contractual behaviour in both the public and private sectors in the performance and enforcement of contracts impacted by the pandemic. The guidance encourages ‘responsible and fair’ performance and enforcement of contracts, and at para. 17 “*strongly encourage[s] parties to seek to resolve any emerging contractual issues responsibly – through negotiation, mediation or other alternative or fast-track dispute resolution – before these escalate into formal intractable disputes*”. **6.19.1**

**How is mediation affected by the pandemic?** **6.20**

Remote mediation has been possible for some years, but its practice has been limited. The pandemic is leading to much greater focus on this practice. For example, [the LCIA Mediation Rules](#)<sup>153</sup> which came into force on 1 October 2020 now promote the use of virtual meetings and efficient conduct of the mediation, establish electronic communication as the default means of communication (including provision for the electronic signature of any settlement agreement) and include consequent provisions to address data protection and information security. **6.20.1**

Given the clear encouragement of ADR in the CPR and Pre-Action Protocols it is unlikely that practical or procedural differences in the practice of remote mediation would be treated by the courts as excusing, in the context of the exercise of its costs and case management powers, a failure by a party or its advisers to consider or to participate in mediation in an appropriate case. There may be some latitude in terms of courts’ willingness to grant or extend stays for this purpose, for example where unrepresented parties are involved, or there is evidence that reasonable efforts have failed to find a suitable mediator capable of working remotely. But unless particular circumstances apply, given the courts’ expectations on the adjournment of hearings referred to in *In Re Blackfriars Limited* [2020] EWHC 845 (Ch) and *Municipio De Mariana v BHP Group PLC* [2020] EWHC 928 above at para. 6.8, parties should prepare to consider and engage in ADR as before. **6.20.2**

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<sup>152</sup> [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/883737/\\_Covid-19\\_and\\_Responsible\\_Contractual\\_Behaviour\\_\\_web\\_final\\_\\_7\\_May\\_.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/883737/_Covid-19_and_Responsible_Contractual_Behaviour__web_final__7_May_.pdf) (accessed 1 February 2021).

<sup>153</sup> [https://www.lcia.org/Dispute\\_Resolution\\_Services/lcia\\_mediation\\_rules\\_2020.aspx](https://www.lcia.org/Dispute_Resolution_Services/lcia_mediation_rules_2020.aspx) (accessed 1 February 2021).

**6.21 How is remote mediation conducted?**

**6.21.1** The conduct of remote mediation via Zoom, Skype for Business, Microsoft Teams or similar providers is in outline very similar to a physical mediation.

**6.21.2** Physically separated teams of parties and their advisers will be placed together in electronic rather than physical private ‘Breakout Rooms’ by the mediator at the outset. This permits private communication within teams. Mediators are invited or may enter into parties’ individual ‘Breakout Rooms’ to progress discussion. Open sessions are typically conducted by the Mediator closing separate ‘Breakout Rooms’ and returning all participants to the main conference call hosted by the mediator.

**6.22 How does remote mediation differ from ‘normal’ mediation?**

**6.22.1** Experience and anecdotal reports confirm consistently that the process of remote mediation remains highly effective. There are intuitive concerns about loss of the ability to read body language, difficulty in building rapport with the mediator, greater levels of participant distraction/disengagement and the lack of pressure to settle created by the ‘lock in’ at a physical mediation.

**6.22.2** However, experience suggests that these concerns are not serious impediments and can be effectively managed. Close up video streaming of parties’ faces is proving to be an effective (if not complete) way of reading emotions and reactions and capable mediators can begin to build confidence and trust through pre-mediation contact (see below) and see the [observations](#)<sup>154</sup> of the Government’s IT adviser on the experience of remote hearings.

**6.22.3** Further, remote/video mediation offers significant countervailing advantages: (i) the involvement of technology can encourage greater participant focus – this manifests itself in a somewhat faster movement through the stages to offers and a more rapid engagement in mutual problem solving; (ii) a less intimidating environment in the absence of opposing parties benefits clients in some cases and may encourage clear thinking; and (iii) the venue is always neutral.

**6.22.4** Aside from the ‘soft’ considerations remote mediation offers hard-edged advantages:

- (1) cost savings in the form of travel, accommodation and room hire costs can be significant, particularly where the dispute involves international clients;
- (2) clients can save fees, and advisers can be freed up to do other work during ‘down time’ in the mediation simply by advisers muting and turning off video connections temporarily;
- (3) complex mediations can be far more easily broken down into shorter, sequential sessions, allowing parties/experts to rest (remote mediation is mentally tiring), carry out investigations or take time over the formulation of detailed offers which can lead to better informed and drafted settlements.

**6.23 What do I need to do to prepare for a remote mediation?**

**6.23.1** The key practical considerations are summarised below. Detailed guidance has been prepared by a number of bodies, e.g.: [The Centre for Dispute Resolution \(CEDR\)](#);<sup>155</sup> [The Civil](#)

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<sup>154</sup> <https://committees.parliament.uk/oralevidence/462/default/> (accessed 1 February 2021).

<sup>155</sup> <https://committees.parliament.uk/oralevidence/462/default/> (accessed 1 February 2021).

Mediation Council;<sup>156</sup> and The International Council for Online Dispute Resolution in the USA.<sup>157</sup>

*In advance of the mediation*

The usual considerations for preparation for a physical mediation – agreement as to exchange of position statements, preparation and exchange of materials, attendee lists, signing of the mediation agreement etc. apply. Parties to remote mediation should discuss and agree the following in addition:

6.23.2

- (1) **Appoint a mediator who offers remote mediation:** the mediator's chambers will likely indicate their preferred video conferencing software. Mediators should have appropriate GDPR compliant file sharing policies in place.
- (2) **Agree video conferencing software:** for mediations the video conferencing software which has waiting room and breakout room facilities and screen sharing facilities is helpful. A whiteboard function and stylus interface should be considered. Consideration should be given in particular cases to the desirability of sharing documents, Power Point slides, photographs and videos etc.
- (3) **Critical practical considerations mirror those required for remote court hearings:** stable, secure and fast internet; paid video service account for the host; effective audio and microphone; suitable venue/background/lighting etc; large or double screens for document sharing.
- (4) **Rest and engagement:** experience has shown that remote court hearings can prove more tiring than physical hearings and that rest breaks may need to be built in – the same is true of remote mediations. In longer mediations (e.g. those expected to last a full day or more) consider agreements as to periodic breaks, or sequential 'half day' sessions with half day breaks.
- (5) Working environments and timetables for participants and the implications for privacy, absences from the conference call, time zones, etc.
- (6) **Logistics of communication of information and documents:** for example, screen sharing allows other parties to see but not to have copies of documents. Document sharing applications (such as DropBox Pro) and emails allow parties to exchange documents, drafts and signed settlements agreements. These must be GDPR compliant. Practitioners should consider the logistics of document access and exchange between participants on their own side as well as with opponents and the mediator.
- (7) **'Plan B':** back up methods of participating in the mediation should be considered and agreed in the event that any of the participants lose the video conferencing functionality – back up devices or telephone might be suitable options.
- (8) **Privacy:** agree that no participant shall record video, chat and shared screen information. Protocols for ensuring no 'eavesdroppers' or attendees who have not signed the mediation agreement.

<sup>156</sup> <https://civilmediation.org/wp-content/uploads/2020/03/CMC-Guidance-on-Online-and-Remote-Mediation-31.3.20.pdf> (accessed 1 February 2021).

<sup>157</sup> <http://odr.info/standards/> (accessed 1 February 2021).

- (9) **Mediation agreement:** ensure that the mediation agreement reflects the remote context. See CEDR's sample remote mediation agreement.<sup>158</sup>

**6.23.3** Practitioners should be familiar with the chosen video conferencing software and ensure that their clients are too. Technical IT assistance should be considered if there are concerns.

### *Pre-Meetings*

**6.23.4** One or more pre-meetings with the mediator should be envisaged – bear in mind that the mediation commences when the first such meeting takes place so the mediation agreement must have been signed by all participants beforehand. All communications from this point will be governed by confidentiality and without prejudice privilege. These meetings enable the mediator to begin to build rapport and confidence and to demonstrate competence with and control over the chosen remote format. Pre-meetings should double as 'dry runs' for the use of the technology, and for the parties and the mediator to map out the logistics for document viewing, collaboration and exchange.

### *At the mediation*

**6.23.5** The mediator will be expected to manage the process.

**6.23.6** To ensure continued engagement:

- (1) Parties should expect to be set tasks during periods when the mediator is with the other party.
- (2) Time in breakout rooms in the absence of the mediator is likely to be shorter.
- (3) There will likely be rest breaks. These should be clearly indicated and all participants encouraged to take time away from the computer screen and, if necessary, discouraged from trying to 'multi-task' during periods of active engagement in the mediation.

**6.23.7** The mediator should make a clear statement at the end of the process informing the parties that the mediation process has ended and that privacy, confidentiality and without prejudice provisions have come to an end.

### *After the mediation*

**6.23.8** Post mediation correspondence should be for limited purposes and appropriately marked as private, confidential or without prejudice.

**6.23.9** If no settlement has resulted, or new issues arise, parties should keep the mediation open and reconvene rather than conduct negotiations in post mediation correspondence.

## **6.24 How is Early Neutral Evaluation approached during the pandemic?**

**6.24.1** Early Neutral Evaluation ("ENE") may be a Judge-led process or conducted by a senior practitioner at the request of parties – sometimes (if agreed) as part of a mediation process. The process is best suited to cases which turn on disputed issues of pure law or the likely exercise of judicial discretion rather than when a Judge has to decide between competing factual accounts.

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158 <https://www.cedr.com/wp-content/uploads/2020/05/Model-Mediation-Agreement-for-Online-and-Telephone-Mediations-1-May-2020.pdf> (accessed 1 February 2021).



The court has a discretion to order ENE in an appropriate case as part of the case management process: CPR r. 3.1(2)(m); *Lomax v Lomax* [2019] EWCA Civ 1467. There is some anecdotal evidence that lower courts are exercising this discretion during the pandemic. However, because the evaluator expresses a preliminary, non-binding view on the merits of the case, the matter will still progress to trial if not settled. A court ordered ENE process therefore involves parties in delay and additional costs. **6.24.2**

A particular advantage of voluntary ENE in the present circumstances is that it avoids the need for the attendance of witness or participants, and consequent remote working complications, and if adopted early (and settlement results) can result in significant cost savings. **6.24.3**

There are few if any impacts of the pandemic on the parties' preparation for and conduct of ENE. **6.24.4**

### **How are arbitration disputes being conducted during the pandemic?** **6.25**

This is a large topic, with a plethora of new guidance issued by global arbitral bodies. Most bodies have continued to operate throughout the pandemic. This note focusses on the impacts on and responses of the arbitral bodies commonly adopted in domestic arbitration clauses. **6.25.1**

The leading arbitral bodies are co-operating to formulate coordinated and collaborative responses to the virus, including the best use of digital technologies for working remotely: see their statement of principle.<sup>159</sup> **6.25.2**

The LCIA's [new rules](#),<sup>160</sup> in force from 1 October 2020, now establish electronic communications as the default (including Requests for Arbitration: Article 4; and signature of Awards: Article 26.2) and include consequent provisions on information security and data protection: Article 30A. Revised provisions enable greater scope for combining and consolidation arbitrations through composite requests: Articles 1.2, 2.2 and 22A. Arbitral tribunals now have express power to make early determinations and awards in cases of jurisdictional, admissibility and 'without merits' challenges: Article 22.1. Arbitrators' case management discretions now receive greater emphasis with express provisions for limiting the length of parties' written statements and witness evidence: Article 14.6 and for the employment of technology to enhance the efficiency and expedition of the arbitration, including an express provision in Article 19.2 to direct a virtual hearing. **6.25.3**

The ICC issued a detailed [Guidance Note](#)<sup>161</sup> on possible measures aimed at mitigating the effects of the pandemic on 9 April 2020. Revised [2021 ICC Rules of Arbitration](#)<sup>162</sup> came into force on 1 January 2021 and apply to all ICC arbitrations commenced after that date. They are accompanied by a revised [Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration under the ICC Rules of Arbitration](#).<sup>163</sup> The revised rules contain provisions in relation to consolidation and joinder, and, similar to the LCIA, signal a shift towards electronic communication and confer on the tribunal the discretion to order virtual hearings. **6.25.4**

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<sup>159</sup> <https://sccinstitute.com/media/1658123/covid-19-joint-statement.pdf> (accessed 1 February 2021).

<sup>160</sup> [https://www.lcia.org/Dispute\\_Resolution\\_Services/lcia-arbitration-rules-2020.aspx](https://www.lcia.org/Dispute_Resolution_Services/lcia-arbitration-rules-2020.aspx) (accessed 1 February 2021).

<sup>161</sup> <https://iccwbo.org/content/uploads/sites/3/2020/04/guidance-note-possible-measures-mitigating-effects-covid-19-english.pdf> (accessed 1 February 2021).

<sup>162</sup> <https://iccwbo.org/dispute-resolution-services/arbitration/rules-of-arbitration/> (accessed 1 February 2021).

<sup>163</sup> <https://iccwbo.org/publication/note-parties-arbitral-tribunals-conduct-arbitration/> (accessed 1 February 2021).

**6.25.5** The inherent flexibility of arbitration enables parties to agree to determination, or partial determination, of their dispute on the basis of written submissions only. Disputants might usefully consider whether the nature of their particular dispute makes this appropriate. Obvious instances will be where the dispute concerns an agreed and documented factual context and matters of law are in dispute. A halfway house may be to agree that certain issues be determined on the basis of written submissions first, leaving other matters to be dealt with through remote hearings as necessary.

**6.26 How do I serve new notices to arbitrate?**

**6.26.1** Most arbitral bodies are continuing to operate, but now require service of notices referring new disputes to arbitration electronically, e.g. see the [LCIA](#),<sup>164</sup> [ICC](#),<sup>165</sup> and [SCC](#).<sup>166</sup> It must be doubted whether many users were not doing so already.

**6.27 What should parties do if an ADR hearing is already scheduled?**

**6.27.1** The Paris-based DELOS independent arbitral body has published a [checklist](#)<sup>167</sup> of considerations of when / whether to proceed with an existing arbitral (or mediation) hearing during the pandemic.

**6.27.2** In deciding whether to proceed with physical hearings the checklist currently recommends considering (amongst other things):

- (1) the hearing location;
- (2) the hearing participants and who needs to attend, and their risk profiles;
- (3) restrictions on their ability to travel from home and to the hearing location; and
- (4) costs and time implications of maintaining or postponing the hearing.

**6.27.3** If the hearing is to proceed:

- (1) carrying out a general check of the hearing venue;
- (2) greeting etiquette;
- (3) masks;
- (4) logistics of coffee and lunch breaks;
- (5) online hearings;
- (6) what to do if a participant develops coronavirus symptoms; and
- (7) follow up checks to see if participants develop symptoms within 14 days.

**6.27.4** Similar considerations are addressed in the ICC [Guidance Note](#)<sup>168</sup> referred to above.

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<sup>164</sup> <https://www.lcia.org/lcia-services-update-covid-19.aspx> (accessed 1 February 2021).

<sup>165</sup> <https://iccwbo.org/dispute-resolution-services/arbitration/rules-of-arbitration/> (accessed 1 February 2021).

<sup>166</sup> <https://sccinstitute.com/about-the-scc/news/2020/covid-19-how-the-scc-is-responding/> (accessed 1 February 2021).

<sup>167</sup> <https://delosdr.org/index.php/2020/03/12/checklist-on-holding-hearings-in-times-of-covid-19/> (accessed 1 February 2021).

<sup>168</sup> <https://iccwbo.org/content/uploads/sites/3/2020/04/guidance-note-possible-measures-mitigating-effects-covid-19-english.pdf> (accessed 1 February 2021).

- How are remote arbitration hearings conducted?** **6.28**
- The conduct of remote arbitration hearings requires early consideration between the parties' advisers and the proposed arbitrator of a range of matters including participants, venues, safety and security, timetabling, video conferencing facilities, technical protocols, security protocols, rehearsals and testing, logistics of document transmission and presentation, electronic bundles. **6.28.1**
- Guidance on the conduct of remote hearings**<sup>169</sup> including helpful checklists has been published by the Chartered Institute of Arbitrators. **6.28.2**
- The **ICC guidance**<sup>170</sup> includes draft clauses for cyber protocols and pro-forma procedural orders. **6.28.3**
- What is the approach to an adjudication during the pandemic?** **6.29**
- By its nature adjudication only relatively rarely requires physical meetings (site visits perhaps being the major exception). Experienced practitioners can expect to be able to use existing practices to send electronic referral notices and relevant documents and submissions to appointed adjudicators. Adjudicators likewise will typically transmit awards electronically in the usual way. This is unlikely to need to change in the current circumstances. **6.29.1**
- Where meetings between the parties is necessary, this can readily be done by telephone or by remote video conferencing. In the case of the latter, similar preparatory work will be needed to establish and operate safe, secure and robust communications as with other forms of remote hearing. **6.29.2**
- Where physical distancing requirements may impact adjudication is in the ease with which parties can obtain the necessary physical documents and witness evidence and conduct expert investigations and analysis on site or of physical items. This issue, which is of general concern, is highlighted in the case of adjudication which is typically required to be completed within tight timescales. **6.29.3**
- Where one party claims that these matters make it unable to prepare its case, adjudicators must consider whether, having regard to the requirements of natural justice, it is possible for them to conduct the adjudication. If the adjudicator concludes that he cannot do so, he is obliged to resign his appointment. **6.29.4**
- In a recent decision of the TCC the court observed that there may be circumstances in which an injunction could be granted to restrain the continuation of an on-going adjudication, but followed existing authority to the effect that an injunction to restrain an on-going adjudication would be granted only "*very rarely and in very clear cut cases*": *Millchris Developments Ltd v Waters* [2020] EWHC 1320 (TCC). The court also found that the real reason the contractor had not been able to obtain evidence in time was not due to the pandemic. **6.29.5**
- Given the prospect of widespread disruption to contractual arrangements and insolvency, the Supreme Court's decision in *Bresco Electrical Services Ltd v Michael J Lonsdale (Electrical) Ltd* [2020] UKSC 25; [2020] 2 BCLC 147 is significant. The court held unanimously that an adjudicator retains jurisdiction to determine a dispute referred to him by the liquidators **6.29.6**

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169 [https://www.ciarb.org/media/9013/remote-hearings-guidance-note\\_final\\_140420.pdf](https://www.ciarb.org/media/9013/remote-hearings-guidance-note_final_140420.pdf) (accessed 1 February 2021).

170 <https://iccwbo.org/content/uploads/sites/3/2020/04/guidance-note-possible-measures-mitigating-effects-covid-19-english.pdf> (accessed 1 February 2021).

of an insolvent company. The claims referred to adjudication retained their separate identity notwithstanding the operation of insolvency set-off and adjudication in insolvency was not futile but remained a potentially useful exercise for the liquidators. It is possible that at the time of enforcement the court may not enforce an adjudicator's decision but that does not deprive adjudication of its potential usefulness to liquidators and appropriate undertakings as regards security could be given. The judgment enthusiastically endorsed adjudication as offering every party a prescribed, speedy and relatively low cost dispute resolution mechanism by an independent person with relevant subject matter expertise.

# Section Seven

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## LITIGATION IN A VIRTUAL WORLD

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*Law stated as at: 28 January 2021*

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## Introduction

- 7.0.1** This Section is intended to provide some practical pointers for remote litigation in the courts of England and Wales. The reader is also referred to [Section Six](#): Civil Procedure and ADR and [Section Eight](#): Offshore Litigation, which contain closely related information.

## Specific Issues

### **7.1 What is the general approach being taken by the courts?**

- 7.1.1** This is a rapidly evolving area, as best practice develops, reflecting also the different stages of the pandemic and of the Government's (and people's) reaction to it. Furthermore, we clearly cannot yet tell what impact the arrival and distribution of a number of different Covid-19 vaccines this year will have on the continuing widespread adoption of remote hearing measures in our courts. Broadly, our own experience is that whilst matters continue ultimately to proceed according to established principles (including the overriding objective and the court's usual case management powers), practitioners need to be flexible in their approach to litigation, and will be expected to co-operate and communicate clearly both with one another and with the courts, in order to ensure that as far as possible the litigation process continues, for the benefit of its users and other stakeholders; and they need to embrace the use of technology, some of which will be unfamiliar.

- 7.1.2** The starting point is that it is a matter for the Judge(s) to manage the case and decide which type of hearing will take place, paying regard to the interests of justice. Parties should cooperate and should proactively assist the Judge with appropriate proposals, but should not trespass on the Judge's discretion (see for example the "*peremptory and inappropriate*" terms deprecated in *Gubarev v Orbis Business Intelligence Ltd* [2020] EWHC 2167 (QB)).

- 7.1.3** The HMCTS [operational summary](#)<sup>171</sup> (regularly updated) provides practical guidance. The justice system remains open as an essential public service, and courts and tribunals continue to operate. All those essential to keeping the justice system running are considered "*critical workers*" for the purpose of current lockdown regulations. The existing mitigation measures (social distancing, hand hygiene, ventilation and mask usage) must be rigorously adhered to, and everyone must unfailingly follow the hands-face-space guidance. If you live in an area where rapid (lateral flow device) Covid-19 tests are being offered, you are encouraged to get a test; and if you test positive, you should not come to a court or tribunal building, but rather contact the court or tribunal to let them know, and follow NHS advice (as an aside we note that a negative lateral flow test is not necessarily *carte blanche*). While the legislation may allow those involved in legal proceedings to come out of self-isolation when necessary, you must consult with the court or tribunal first who will consider and decide on appropriate arrangements (but we observe that if alternative arrangements can be made, these must be preferable). See *R v Mohammed Nawaz* [2020] EWCA Crim 1715 for an instance in which a party was refused access to the Royal Courts of Justice because of concerns about infection risk. Current HMCTS [guidance](#)<sup>172</sup> provides that court users are required to wear a face covering inside, unless they are exempt, and are expected to provide their own face covering. On 15 January 2021, the Senior Presiding Judge and Deputy Senior Presiding Judge issued guidance stating that Judges should strongly encourage the wearing of face coverings by

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171 <https://www.gov.uk/guidance/hmcts-weekly-operational-summary-on-courts-and-tribunals-during-coronavirus-covid-19-outbreak> (accessed 28 January 2021).

172 <https://www.gov.uk/guidance/what-to-expect-coming-to-a-court-or-tribunal> (accessed 28 January 2021).

everyone in the courtroom except for the Judge, the advocate who is speaking and the witness giving evidence.

On 5 January 2021, the Lord Chief Justice issued a [note](#)<sup>173</sup> that confirms that the courts and tribunals must continue to function notwithstanding the latest lockdown and that attendance in person is permitted, and underlines the importance of following public health guidance. Importantly, it also makes clear that, subject to the requirements of the interests of justice, hearings should wherever possible proceed remotely: *“The success of the courts and tribunals in England and Wales in continuing to uphold the rule of law and sustain the administration of justice since March has been remarkable. The significant increase in the incidence of COVID-19 coupled with the increase in rates of transmission makes it all the more important that footfall in our courts is kept to a minimum. No participant in legal proceedings should be required by a judge or magistrate to attend court unless it is necessary in the interests of justice. Facilitating remote attendance of all or some of those involved in hearings is the default position in all jurisdictions, whether backed by regulations or not. The next few weeks will present difficulties in all jurisdictions. But as before judges, magistrates, staff, the legal profession and others involved in the system will meet them and ensure that the administration of justice continues to function in the public interest.”* (underlining added). This guidance carries substantial weight, and contact with others should take place only when *“clearly necessary”*; nevertheless, it does not relieve the Judge of the responsibility to take a judicial decision as to the conduct of the hearing and the interests of justice in the particular case in question (*Bilta (UK) Ltd (in liq) v SVS Securities* [2021] EWHC 36 (Ch) at [14], [17], [19]).

7.1.4

A previous, similar [note](#)<sup>174</sup> issued by the Lord Chief Justice and the Senior President of Tribunals on 1 November 2020 also commented that *“[t]he interests of justice are wide and extend beyond the interests of parties in a hearing to encompass the consequences of delay in the case and to the system as a whole. ... Judges and magistrates must continue to make full use of these provisions so that cases can be dealt with as soon and as efficiently as possible.”*

7.1.5

Lord Hodge gave an interesting overview of the courts’ response to the pandemic in a [speech](#) on 5 November 2020.<sup>175</sup>

7.1.6

In the Supreme Court and Judicial Committee of the Privy Council, hearings will be conducted remotely via WebEx video conferencing, and are available to watch live and on-demand. For the Supreme Court and Privy Council, there is much useful guidance on the [Supreme Court website](#),<sup>176</sup> the Privy Council website,<sup>177</sup> the [summary document](#) concerning arrangements during the pandemic,<sup>178</sup> and the Annex to Lord Reed’s [Practice Note](#) (concerning filing papers electronically).<sup>179</sup> It may be prudent to read the amended Supreme Court and JCPC Practice Directions in conjunction with the summary document. One important change is that time limits for written cases, core volumes and bundle of authorities have been brought forward by

7.1.7

173 <https://www.judiciary.uk/announcements/message-from-the-lord-chief-justice-latest-covid-19-restrictions/> (accessed 28 January 2021).

174 <https://www.judiciary.uk/announcements/message-from-the-lord-chief-justice-and-senior-president-of-tribunals-new-covid-19-restrictions-for-england/> (accessed 28 January 2021).

175 <https://www.supremecourt.uk/docs/BICBA%20Annual%20Law%20Forum%20%20lecture%2011.20.pdf> (accessed 28 January 2021).

176 <https://www.supremecourt.uk/news/arrangements-during-the-coronavirus-pandemic.html> (accessed 28 January 2021).

177 <https://www.jcpc.uk/news/arrangements-during-the-coronavirus-pandemic.html> (accessed 28 January 2021).

178 <https://www.supremecourt.uk/docs/Arrangements-during-the-Coronavirus-Pandemic.pdf> (accessed 28 January 2021).

179 <https://www.supremecourt.uk/docs/covid-practice-note.pdf> (accessed 28 January 2021).

two weeks in each instance. Parties are not permitted to amend the electronic bundle in the two-week period before the hearing. Hard copy papers are unlikely to be required. Further, time limits will be applied flexibly, parties are encouraged to avoid unnecessary disputes over procedural matters, and there is no need to make a formal application for an extension of time of less than three weeks unless the application relates to a hearing listed in the next eight weeks (an email to the Registry, copied to the parties, will suffice). See also the Annex to JCPC Practice Direction 6.

- 7.1.8** In the [Court of Appeal](#), most hearings remain remote with some onsite hearings taking place (observing social distancing).<sup>180</sup> See also the Remote Hearings Protocol referred to below.
- 7.1.9** At first instance, a hearing may proceed remotely, which means the people involved do not come to court in person, but instead join by telephone or video link (either with the Judge at home, or with the Judge in their chambers or in a court room); or it may be a “hybrid” hearing, with the Judge and some participants in court, and others participating remotely; or it may be a normal physical hearing, in which all the participants attend court in person.
- 7.1.10** As noted above, parties should generally expect the default position to be for a hearing to be carried out remotely (even more so in the case of interlocutory hearings). The principle that the pandemic requires the use of remote hearings where possible was recognised as early as the Judiciary’s *Civil Justice in England and Wales: Protocol Regarding Remote Hearings (revised on 26 March 2020)* (the [Remote Hearings Protocol](#)<sup>181</sup>), which concerns matters proceeding in the County Court, High Court and Court of Appeal (Civil Division), including the Business and Property Courts. Further, the [Chancery Guide](#)<sup>182</sup> states (at 14.22) that “[s]ince March 2020, remote hearings have been the default mode for all hearings not involving oral evidence. Trials with oral evidence may also be conducted remotely”.
- 7.1.11** However, decisions will be taken on a case-by-case basis. Much, of course, will depend on the relative importance of the hearing in the proceedings (interlocutory hearing or trial), the nature of the material before the court at the hearing (live witness evidence or on papers) and the parties (their sophistication and resources).
- 7.1.12** The level of public health risk will also be relevant: Judges had been returning to their court rooms after the summer, and physical and hybrid hearings were increasing, but this trend was reversed following new national restrictions as the winter wore on, including a return to the requirement of working from home. Nevertheless, we understand that hearings are being held in person in the Rolls Building where necessary, including hybrid hearings (for example, the Kids Company directors’ disqualification case proceeded as a 10 week hybrid hearing in the Chancery Division in the autumn of 2020). As stated above, the position may change yet again as vaccines are more widely distributed in 2021, although any such changes are unlikely to be swift or sudden.
- 7.1.13** It is important that proceedings be conducted as close as possible to the norm, but departures from the norm are justified where the broader interests of public justice and the efficient conduct of proceedings require (*Neurim Pharmaceuticals (1991) Ltd and another v Generics UK Ltd* [2020] EWHC 3270 (Pat) at [18]).

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<sup>180</sup> [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/954993/HMCTS\\_RCJ\\_Update\\_Template\\_25\\_January\\_2021.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/954993/HMCTS_RCJ_Update_Template_25_January_2021.pdf) (accessed 28 January 2021).

<sup>181</sup> [https://www.judiciary.uk/wp-content/uploads/2020/03/Remote-hearings.Protocol.Civil\\_.GenerallyApplicableVersion.f-amend-26\\_03\\_20-1.pdf](https://www.judiciary.uk/wp-content/uploads/2020/03/Remote-hearings.Protocol.Civil_.GenerallyApplicableVersion.f-amend-26_03_20-1.pdf) (accessed 28 January 2021).

<sup>182</sup> [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/939622/chancery-guide-eng.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/939622/chancery-guide-eng.pdf) (accessed 28 January 2021).



Regard should be had to CPR r. 32.3 (evidence given by video link) and para. 29.1 of, and Annex 3 to, PD 32 (which pre-date the pandemic). **7.1.14**

In *Surrey Heath Borough Council v Robb & Ors* [2020] EWHC 1650 (QB) Freedman J said, *“the onus is on a party to draw attention to a requirement to have a hearing in Court and to provide reasons why it would not be just for the hearing to take place remotely”* at [5]. Since he held it was not *“necessary”* for the parties to be all in one court room, he ordered a video hearing. This is consistent with the Queen’s Bench Division [guidance](#) from 8 January 2021,<sup>183</sup> which provides that all hearings before Masters will be heard remotely unless the Master considers that legal representatives and parties should be present. A party with *“good reasons”* can apply for the hearing to be in person. A hearing will only take place in person in the Master’s room if no more than two people intend to attend. Otherwise it will be heard in a larger courtroom. All attendees must sit two meters apart. Documents and skeleton arguments must still be sent electronically and, by implication, will not be handed up to the Judge. **7.1.15**

The latest advice and guidance from the judiciary is collated at <https://www.judiciary.uk/coronavirus-covid-19-advice-and-guidance/>.<sup>184</sup> Court users should consider both general judicial guidance, and guidance and rules issued by the particular court in question. **7.1.16**

A good deal of practical guidance has also been published – examples of useful, relevant documents are the [COMBAR Guidance Note](#)<sup>185</sup> (see especially paras. 5-6), the [guidance](#) for Circuit and District Judges from the Lord Chief Justice, Master of the Rolls and President of the Family Division,<sup>186</sup> which in many respects has wider application, and the Judicial College [guidance](#) on good practice<sup>187</sup> (although it is important to bear in mind that some of this guidance was published much earlier in the pandemic). The [minutes](#) of the November Commercial Court User Group meeting are also instructive.<sup>188</sup> **7.1.17**

The following paragraphs contain illustrations of some of the considerations that may be relevant in deciding whether to proceed remotely or otherwise. **7.1.18**

There is some helpful discussion of various factors in *Bilta (UK) Ltd (in liq) v SVS Securities* [2021] EWHC 36 (Ch). The decision repays reading in full. In particular: questions of adjournment and of how – if at all – a trial is to be heard are intertwined, and must be considered holistically; the general law regarding adjournments may be irrelevant or even unhelpful, and the court must consider whether the hearing can *“fairly and properly”* proceed, either in person or some other way; significant weight should be given to the Lord Chief Justice’s injunction to keep footfall to a minimum and his point that attendance at court should occur only when necessary, and to the concerns of the witnesses; hearings with witnesses need to be case managed with circumspection and care, because of the importance of hearing witnesses (see further [para. 7.7](#) of this section); the size of a party’s team permitted **7.1.19**

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183 [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/950960/RCJ\\_Notice\\_QB\\_Masters\\_\\_\\_Action\\_Department\\_-\\_8.1.2021.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/950960/RCJ_Notice_QB_Masters___Action_Department_-_8.1.2021.pdf) (accessed 28 January 2021).

184 Accessed 28 January 2021.

185 <https://www.combar.com/wp-content/uploads/2020/06/COMBAR-Guidance-Note-on-Remote-Hearings-2nd-edition-23-June-2020-002.pdf> (accessed 28 January 2021).

186 <https://www.judiciary.uk/wp-content/uploads/2020/04/Message-to-CJJ-and-DJJ-9-April-2020.pdf> (accessed 28 January 2021).

187 <https://www.judiciary.uk/wp-content/uploads/2020/05/Good-Practice-for-Remote-Hearings-May-2020-17.09.20.pdf> (accessed 28 January 2021).

188 <https://www.judiciary.uk/wp-content/uploads/2020/12/CCUG-Minutes-November-2020-0112.pdf> (accessed 28 January 2021).

to be in court might be limited; witnesses can be given fixed start times to avoid them waiting at court, even if this would mean loss of time; and court hours might need to be adjusted.

**7.1.20** In *SC (A Child) v University Hospital Southampton NHS Foundation Trust (Rev 2)* [2020] EWHC 1445 (QB) the claimant applied to adjourn a clinical negligence trial, involving expert witness evidence, which they said could not be fairly conducted remotely. Johnson J considered that the hearing could be conducted fairly, because all parties were legally represented and were able to access and utilise the technology necessary to conduct the hearing. His view was that there was no reason to think that the disadvantages of having a remote hearing would have an unequal impact on the parties.

**7.1.21** However, Johnson J held that even though a remote hearing could be conducted fairly, it was undesirable to do so having regard to the likely length of hearing, the nature of the issues, the volume of written material and the complexity of the lay and expert evidence. He noted that (a) a hearing that is wholly remote lacks many of the features and benefits of a hearing that takes place in court (b) the solemnity, formality and focus of the courtroom is not easily replicated by a remote hearing (c) the complex multi-layered human communications and observations that take place during a substantial witness trial are significantly impeded when the hearing is conducted remotely (d) a video-conference is necessarily two-dimensional and permissive only of bilateral communication and observation. In the event, the Judge was able to hold the trial in person and ordered it to commence on 15 June 2020, with case management directions in order to reduce the number of people who were in court at any one time.

**7.1.22** As this case makes clear, practical issues (with remote hearings and with hearings in person) can be addressed by directions being given (see [38]). The court can also be asked to allow more time when giving directions: *Jalla v Shell International Trading and Shipping Co Ltd* [2020] EWHC 738 (TCC) at [16].

**7.1.23** Speaking extra-judicially to the Chancery Bar Association when he was Chancellor, Vos MR expressed the view that remote hearings are likely to be unsuitable where there are (a) vulnerable or technologically challenged parties or witnesses; (b) witnesses accused of dishonesty where it may be suggested that their evidence will be interfered with if not in the same room as the court; (c) committal hearings with a likelihood of an immediate term of imprisonment; or (d) hearings with such public interest that large numbers of people may seek to join the call or disrupt the hearing. In these circumstances, a Judge's default position would be to order an adjournment unless or until the hearing can be held in person.

**7.1.24** In *Ameyaw v McGoldrick* [2020] EWHC 1741 (QB), the claimant was acting in person. Warby J had previously made an order that the hearing should proceed remotely, although he permitted the claimant to make further representations. Steyn J heard the claimant's application for the hearing to be in person. She decided that although she considered that a remote hearing could be conducted fairly, she would – as a result of the claimant's perceptions that she would be disadvantaged by a remote hearing – permit the hearing to be in person. Another example of a case in which a remote hearing would have been difficult for a litigant in person is *Roberts v Royal Bank of Scotland PLC* [2020] EWHC 3141 (Comm), discussed further below. By contrast, in *Senna v Henderson* [2020] EWHC 3345 (QB), Julian Knowles J declined to permit a hearing in person, because no evidence had been provided to support the claimant's assertion that a remote hearing would cause mental health difficulties and the claimant had attended a remote hearing previously and appeared to be comfortable with technology.

The [Chancery Guide](#)<sup>189</sup> records that a remote hearing may not be appropriate for certain types of litigants who cannot access or may struggle to use the appropriate technology; that, generally, the speaking participants in a hearing should either both attend in person or both attend remotely – to avoid disadvantaging the remotely attending participant; and that a remote hearing may not be appropriate for particular types of hearing e.g. where the decision is momentous, such as whether to order the sale of house. **7.1.25**

In considering the impact of remote hearings on vulnerable persons, it will be necessary to make changes to ensure that the procedure is fair: “*Where a party or a witness has a learning disability, the adaptation needs to be sufficient to ensure that they are genuinely able to participate effectively in the hearing, both in and out of the witness box*” (*Re S (Vulnerable Parent: Intermediary)* [2020] EWCA Civ 763 at [26]). **7.1.26**

The court has heard contempt proceedings remotely. For example, *Yuzu Hair and Beauty Ltd v Selvathiraviam* [2020] EWHC 1209 (Ch) was initially heard remotely via video link. We expect that the seriousness of these hearings would justify them being held in person where possible. **7.1.27**

Parties seeking an in-person hearing should be aware of the possibility of a hybrid hearing, and should consider whether it is possible to find a solution to the particular difficulty that has been identified with a remote hearing. An example would be where counsel attend court, but a witness who is self-isolating gives evidence remotely. It may be appropriate for oral evidence to be given in person, and closing arguments to be delivered remotely (*Martin v Kogan* [2021] EWHC 24 (Ch) at [20]). **7.1.28**

Parties seeking an in-person hearing should also be aware that, as a result of social distancing guidelines, even the larger courts in the Rolls Building are unlikely to be able to accommodate large teams of people. In one case in which a member of chambers was involved, the parties were informed that the maximum number that a large court room could accommodate was twelve, which would include any transcribers and the usher. Court room capacity should always be checked with the court if it is likely to be an issue, but parties should be aware that if larger teams are required to be involved, a hybrid hearing (as in *Neurim Pharmaceuticals (1991) Ltd and another v Generics UK Ltd* [2020] EWHC 3270 (Pat)) or a fully remote hearing may be the only option even if an in-person hearing might otherwise be appropriate. **7.1.29**

As to applications to adjourn a commercial trial due to concerns about the conduct of a remote hearing, the decision of Kimbell QC sitting as a Deputy High Court Judge in *In Re Blackfriars Limited* [2020] EWHC 845 (Ch) is instructive: courts should continue to function so far as they are able to do safely by means of the increased use of technology to facilitate remote trials; the parties are expected to work with available technology to overcome the challenges of hearing live witness evidence; and where both sides are well-resourced, there is no potential unfairness due to the challenges of a remote hearing. *In Re Blackfriars Ltd* was applied by HHJ Eyre QC in *Municipio De Mariana v BHP Group Plc* [2020] EWHC 928 (TCC), which concerned whether a particular hearing should be adjourned if the case could not be heard face-to-face or whether instead there should be a remote hearing (the court also considered applications for extensions of time, as to which see [para. 6.8](#) of Section Six: Civil Procedure and ADR). Regard must be had to the importance of the continued administration of justice, and to the fact that justice delayed is justice denied. The courts must be prepared to hold remote hearings in circumstances where such a move would have **7.1.30**

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<sup>189</sup> [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/939622/chancery-guide-eng.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/939622/chancery-guide-eng.pdf) (accessed 28 January 2021).

been inconceivable only a year ago. There is to be rigorous examination of the possibility of a remote hearing and of the ways in which such a hearing could be achieved consistent with justice before the court should accept that a just determination cannot be achieved in such a hearing. Inevitably the question of whether there can be a fair resolution is possible by way of a remote hearing will be case-specific. A multiplicity of factors will come into play and the issue of whether and if so to what extent live evidence and cross-examination will be necessary is likely to be important in many cases. There will be cases where the court cannot be satisfied that a fair resolution can be achieved by way of a remote hearing. As noted above, the general law regarding adjournments may be irrelevant or even unhelpful, and the court must consider whether the hearing can “*fairly and properly*” proceed, either in person or some other way (*Bilta (UK) Ltd (in liq) v SVS Securities* [2021] EWHC 36 (Ch) at [15]).

**7.1.31** Added to the various modes of hearing outlined above, of course, is the possibility that a dispute is decided on the papers, circumventing the need for a hearing of any kind. In appropriate circumstances, albeit unlikely to arise often in cases of substance, that may be the neatest solution to any special difficulties in arranging remote, hybrid or physical hearings. In the Commercial Court case of *Roberts v Royal Bank of Scotland PLC* [2020] EWHC 3141 (Comm), Cockerill J granted the defendant bank’s application for summary judgment / strike out following a determination of its application, by consent, on the papers in circumstances where the claimant, a litigant in person, indicated that he was unable to attend a physical hearing for health reasons, or to attend a hearing by remote video link (for technical reasons), or even to attend by telephone (as this would make it impossible to consult with his McKenzie Friend during the hearing).

**7.1.32** Where a proposed attendee is outside the jurisdiction, a hybrid hearing may not be appropriate for the reasons given in [para. 7.11](#) of this section.

**7.1.33** Certainly, at its best, remote litigation can work very well. As noted in the Lord Chief Justice’s [Annual Report](#) to Parliament<sup>190</sup> (see pages 7-8), there have been challenges and lessons learnt, and it is to be expected there will be greater use of technology in appropriate cases in the future. It may be that in certain circumstances, it will become the norm – for example, there may be savings of cost and time (although anecdotally it has been suggested remote hearings can take longer). In *CMA v Martin* [2020] EWHC 1751 (Ch), which lasted 4 days (the first contested disqualification application under s. 9A, CDDA 1986), the Judge sat from home, and the hearing was fully remote. At short notice, shortly before the trial, the court fixed a remote PTR to deal with an adjournment application, and also with various practical matters concerning the conduct of the trial. At the trial itself, four counsel appeared, and three witnesses were cross examined – certain issues of fact were hotly contested. ICC Judge Jones commented that the remote hearing “*worked extremely well*”. In particular, he noted that “*the absence of the formalities of the court room environment and immediate proximity of counsel appeared to create a more relaxed environment for the witnesses and was beneficial*”, and that the defendant’s denials and evidence were received “*with the same force/impact as it would have done in a physical courtroom*”. We have personal experience of a month-long witness trial in which similar comments were made by the trial Judge (this was a BVI matter, with counsel, witnesses and experts participating from five continents, but it naturally gave rise to similar practical challenges as remote hearings in England and Wales). It is becoming increasingly apparent that preparing for, and discharging one’s obligations during, a remote hearing can be more tiring than operating in the traditional way, and, inevitably, not every court or

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190 [https://www.judiciary.uk/wp-content/uploads/2020/11/6.6901\\_JO\\_Lord\\_Chief\\_Justices\\_AR\\_2020\\_WEB2.pdf](https://www.judiciary.uk/wp-content/uploads/2020/11/6.6901_JO_Lord_Chief_Justices_AR_2020_WEB2.pdf) (accessed 28 January 2021).

Judge will find the process to be as efficient. Nevertheless, practitioners should be prepared to accept that from this period, lasting changes may emerge, at the very least while global and national travel issues remain. (Although see also [para. 7.7](#) of this section, which discusses considerations arising in relation to oral evidence.)

## **What sort of technology is used for remote hearings?**

**7.2**

Remote hearings (or hybrid hearings, to the relevant extent) can proceed by way of telephone conference or video conference, although for the simple and obvious reason that participants cannot see one another, telephone hearings tend to be more difficult, and should if possible be avoided for anything other than the most straightforward matters. (However, where there is particular public interest and a telephone conference call would involve no detriment, that may be the more appropriate course: *Urynowicz v The Regional Court of Lodz, Republic of Poland* [2020] EWHC 2267 (Admin) at [2]-[3].)

**7.2.1**

In the Supreme Court and Judicial Committee of the Privy Council, hearings will be conducted remotely via WebEx video conferencing, and are available to watch live and on-demand. See further [para. 7.1](#) of this section.

**7.2.2**

Elsewhere, hearings will take place *via* the “cloud video platform” or “CVP”, Skype for Business, Microsoft Teams, Zoom, Video Hearing Service, BT conference call, BT MeetMe, and ordinary telephone call. The following web pages may be of assistance:

**7.2.3**

<https://www.gov.uk/government/publications/how-to-join-a-cloud-video-platform-cvp-hearing/how-to-join-cloud-video-platform-cvp-for-a-video-hearing><sup>191</sup> (a helpful guide on CVP hearings that also includes a link to training for advocates at the end)

<https://www.gov.uk/guidance/hmcts-telephone-and-video-hearings-during-coronavirus-outbreak><sup>192</sup>

<https://www.gov.uk/guidance/what-to-expect-when-joining-a-telephone-or-video-hearing><sup>193</sup>

<https://www.gov.uk/guidance/hmcts-video-hearings-service-guidance-for-joining-a-hearing><sup>194</sup> (note the possibility of a private consultation).

See also the Judiciary’s *Civil Justice in England and Wales: Protocol Regarding Remote Hearings (revised on 26 March 2020)* (the “**Remote Hearings Protocol**”),<sup>195</sup> the Queen’s Bench guidance of [24 November 2020](#)<sup>196</sup> and [8 January 2021](#),<sup>197</sup> and the [minutes](#) of the November Commercial Court User Group meeting.<sup>198</sup>

**7.2.4**

It is beyond the scope of this work to identify the specific features and possibilities of these different technologies.

**7.2.5**

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191 Accessed 28 January 2021.

192 Accessed 28 January 2021.

193 Accessed 28 January 2021.

194 Accessed 28 January 2021.

195 [https://www.judiciary.uk/wp-content/uploads/2020/03/Remote-hearings.Protocol.Civil\\_.GenerallyApplicableVersion.f-amend-26\\_03\\_20-1.pdf](https://www.judiciary.uk/wp-content/uploads/2020/03/Remote-hearings.Protocol.Civil_.GenerallyApplicableVersion.f-amend-26_03_20-1.pdf) (accessed 28 January 2021).

196 [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/939167/RCJ\\_Notice\\_QB\\_General\\_30\\_Nov\\_2020.pdf.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/939167/RCJ_Notice_QB_General_30_Nov_2020.pdf.pdf) (accessed 28 January 2021).

197 [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/950960/RCJ\\_Notice\\_QB\\_Masters\\_\\_Action\\_Department\\_-\\_8.1.2021.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/950960/RCJ_Notice_QB_Masters__Action_Department_-_8.1.2021.pdf) (accessed 28 January 2021).

198 <https://www.judiciary.uk/wp-content/uploads/2020/12/CCUG-Minutes-November-2020-0112.pdf> (accessed 28 January 2021).

- 7.2.6** In the Chancery Division (before Judges and ICC Judges) and the Commercial Court, the courts have previously generally favoured using Skype for Business, but we understand that Skype for Business (which is operated by Microsoft) is being phased out in favour of Microsoft Teams. At the time of publication the majority of remote hearings in the Business and Property Courts appear to be taking place using Microsoft Teams, and the Court of Appeal is conducting at least some hearings using Microsoft Teams.
- 7.2.7** We understand anecdotally that Zoom has been used for remote hearings. Although we do not have personal experience of the use of this platform in hearings in England and Wales, we have extensive recent experience using Zoom for a BVI trial.
- 7.2.8** In most cases the Judge’s clerk has circulated by email either a link for the whole hearing, or separately a new link for each day. These emails – which may take the form of a Microsoft Outlook invitation – should be studied with care because in our experience they sometimes contain specific instructions from the court regarding the hearing (such as microphone / camera etiquette and whether parties are required to attend before the time at which the case is listed to commence). Pre-hearing tests can be arranged (see [para. 7.3](#) of this section).
- 7.2.9** Where the value or complexity of the case warrants it, and if the parties agree, the court may allow the use of “all in one” platforms offered by firms such as Opus2. These platforms can provide a suite of services such as videoconferencing, electronic bundling, electronic document presentation and real-time transcription services, all set up and controlled by the platform provider. Members of chambers have been involved in a number of cases in both the High Court and the Court of Appeal where such platforms have been utilised. Because such services generally require a reasonable amount of lead time to set up, and require the hearing software to be controlled by the third-party operator, the parties will need to ensure that they approach the court in good time before the hearing to seek permission to use such a platform (and in doing so will need to be prepared to justify its use). As the decision is for the court, this can present difficulties where – as in most cases – the parties (and very often the court staff) will not know which Judge or Panel has been assigned to the case until shortly before the hearing. In such cases the parties’ first port of call would generally be the relevant listing office, or the Civil Appeals Office in relation to appeals. In the case of trials, such questions can be raised for determination at the PTR.
- 7.2.10** See also the resources referred to in [para. 7.1](#) of this section.
- 7.3** **What issues should be considered or might arise?**
- 7.3.1** In all cases, the parties should cooperate so far as possible in agreeing arrangements (this is to be regarded as being in accordance with the parties’ duty to help the court further the overriding objective, and it is particularly important when the courts and parties are grappling with unusual circumstances). However, decisions in respect of case management are for the court, and the court’s permission for particular arrangements must be sought where necessary (see for example *Gubarev v Orbis Business Intelligence Ltd* [2020] EWHC 2167 (QB)). Generally, hearings “*must be conducted in a way that is as close as possible to the pre-pandemic norm*”.
- 7.3.2** In the Supreme Court and Judicial Committee of the Privy Council, hearings will be conducted remotely via WebEx video conferencing, and are available to watch live and on-demand. See further [para. 7.1](#) of this section.

A useful specimen PTR checklist for remote hearings (to be considered in addition to existing checklists) is contained in the [COMBAR Guidance Note](#).<sup>199</sup> As to the technology to be used, in many cases it will be possible for the court or a participant to host the hearing on one of the platforms identified in [para. 7.2](#) of this section (and a great number of participants can be accommodated). However, as mentioned in that question, in a more complex case, the parties might consider engaging a consultant to advise on, and assist with setting up, the platform and hardware to be used; to host the hearing and manage testing, access and any technical issues; to establish a webcast or livestream platform for the purpose of meeting open justice requirements for hearings held in open court, where this is permitted (see further [para. 6.5](#) of Section Six: Civil Procedure and ADR); and to provide document hosting services.

**7.3.3**

Particularly in larger or more complex hearings, it is important to contact and liaise closely with the court and all participants to test the technology thoroughly before the hearing, to establish whether the court, parties and witnesses are able to access the hearing satisfactorily and locate documents from the bundle. It may be possible in part to use the PTR for this purpose (if the main hearing is a trial). However, this may not be the case for interim hearings: in our recent experience, cases in the interim lists have simply proceeded at the designated time without any test of the technology or the court expecting the parties to liaise with it. One is simply sent the link and told the time.

**7.3.4**

For the purposes of any test, the aim should always be to set things up to reflect as closely as possible the circumstances that will exist during the hearing itself. As a minimum, the Judge's clerk should be requested to host and run a short test session – in our experience, they are always happy to do so. In cases where the court has given permission for a third-party provider to host the hearing it is generally prudent to ensure that the Judge is invited to at least one test session, as he or she may well be less familiar with platforms other than Skype for Business or CVP.

**7.3.5**

Thought should be given to each participant's facilities, and the creation of an appropriate, fitting environment. Overall, one should keep firmly in mind that despite not being physically present in a court, participants are nonetheless engaging in a formal, important process, and must act accordingly and as far as possible, do so from an appropriate place and be properly equipped and attired. Bear in mind that not every client will have access to, or be comfortable using, technology, and they may not have easy access to a quiet space, or they may have other distractions or difficulties. Proper attention must be paid to all these questions at an early stage.

**7.3.6**

Consider the following:

**7.3.7**

- (1) Keep the court informed if circumstances change, for example a participant has received a positive Covid-19 test.
- (2) Ascertain at an early stage whether the court and participants will be using electronic or hard copy bundles (or both); and if electronic, whether simple (bookmarked) PDF files or more complex e-bundles. (Further guidance on bundles is set out in [para. 7.6](#) of this section.)
- (3) How many devices and screens will be required to participate comfortably? It can be useful to have one device/screen to view the video feed, one for the bundles (another may be required if a document management provider will be “pushing” pages to

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<sup>199</sup> <https://www.combar.com/wp-content/uploads/2020/06/COMBAR-Guidance-Note-on-Remote-Hearings-2nd-edition-23-June-2020-002.pdf> (accessed 28 January 2021).

participants), another for submissions and/or note taking, another for communicating with other participants (see [para. 7.4](#) of this section), and yet another if there is a live transcript. When a party is appearing in person, the represented party should advise ahead of time of the need to have the appropriate technology at a hybrid hearing, and if that is not possible, arrangements must be made for access to a laptop for the unrepresented party's use (*Re BM Electrical Solutions Ltd (in liquidation)* [2020] EWHC 2749 (Ch)).

- (4) Has proper provision been made for speakers/headphones, microphones and webcams?
- (5) Do all participants have sufficient bandwidth (upload and download speeds)? Bandwidth constraints can sometimes be addressed by non-active participants turning off their video (and of course microphones should always be switched onto mute by everyone other than the Judge, the advocate addressing the court, and any participating witness).
- (6) Check all software is installed and updated to the latest version, and check the browser to be used is compatible.
- (7) It is important that the court retains control of any virtual hearing, just as it would in a physical hearing. Where Microsoft Teams or a similar platform is used by the court, it will generally be the Judge's clerk who is responsible for sending out invitations, beginning the virtual hearing, opening and closing any live stream (s. 85A, Courts Act 2003, as inserted by s. 55 of, and Schedule 25 to, the Coronavirus Act 2020) and bringing the Judge into and out of the hearing. Where a third-party provider is to host the hearing, however, these roles will often be taken by the provider. If that is the case, make sure that the provider's role is explained fully to the court before the hearing, and that the division of responsibility between the court and the provider is understood and agreed with the court. In particular, it is important to ensure that the provider does not make any recording of the hearing (e.g. for the purposes of transcription) without the express permission of the court and that any live stream of the hearing is only opened and closed with the Judge's agreement or at the Judge's direction.
- (8) Note that s. 85A, Courts Act 2003 applies – and permits a broadcast – only where the hearing proceeds wholly remotely (i.e. it does not apply to hybrid hearings): see *Gubarev v Orbis Business Intelligence Ltd* [2020] EWHC 2167 (QB) at [21] (and see also [para. 7.11](#) of this section).
- (9) Think about the practical environment. What arrangements need to be made to minimise the chances of interruption? Is the lighting appropriate – neither too dim nor too dazzling; is the background distracting; might there be any noise disturbances (a funny example being the flushing toilet apparently heard during a live-streamed US Supreme Court hearing), and what might be done to minimise or avoid them? All of these things might affect the impression given not only by an advocate but (just as importantly) by a witness, which might affect their credibility, and the outcome of the case. For reasons of this sort, might it be sensible for parties and witnesses to participate from a room at the solicitor's offices, where, in addition, technical assistance and assistance with bundles is likely to be more readily at hand? If so, consideration should be given either to using a neutral firm, or alternatively agreeing



that a solicitor nominated by the opposing party may attend to observe (subject to suitable precautions being taken).

- (10) Where the expense can be justified, it may be appropriate to seek permission (usually at the PTR) for a live transcript, to enable everyone to follow oral evidence and submissions and to minimise disruption where there are minor connection issues or where participants might find it more difficult to follow proceedings (for example because they are not fluent in English or they are hard of hearing). The transcriber should also be able to provide the parties with a daily transcript at the end of each day. The transcriber will be able to join the remote hearing and provide login details for each of the legal teams to access the live transcript. In practice, we have found a live transcription service to be invaluable, especially for witness hearings. Ensure the correct formalities are observed (see for example the discussion in *Gubarev v Orbis Business Intelligence Ltd* [2020] EWHC 2167 (QB)).
- (11) If the parties do not engage a transcriber, and if the hearing is recorded, the parties may be able to access a copy of the recording.
- (12) Consider whether it will be of assistance to provide for screen sharing.
- (13) Do not forget to make arrangements (similar to those made for witnesses) for any interpreters. If possible, the interpreter will be in the same physical location as the witness. However, it is also possible for interpreters to operate remotely.
- (14) Experience suggests that participants can find remote hearings to be especially tiring – there is some additional strain or effort involved in communicating in this way; possibly for some, heightened anxiety. Remote hearings also introduce the possibility of witnesses and others participating from a wide range of different time zones. To deal with this, we have found courts have been flexible in starting and ending days at different times (although this depends on availability of court staff as well as judges), and building into the day regular short breaks. (See for example *SC (A Child) v University Hospital Southampton NHS Foundation Trust (Rev 2)* [2020] EWHC 1445 (QB).)
- (15) Consider the specific circumstances of the participants, and if necessary, raise them with the other side, and the court. For example, some may have caring responsibilities meaning that they are unavoidably unavailable at certain times, and others might find it difficult to engage with a remote hearing and/or the technology involved.
- (16) If a litigant in person is using a McKenzie Friend, you might need to assist the litigant in person to ensure the [appropriate arrangements](#) are made.<sup>200</sup>
- (17) Consider arrangements for the hearing to be held in public (see further [para. 6.5](#) of Section Six: the Civil Procedure and ADR section).
- (18) The court will usually direct recording of the hearing. It is, in the usual way, not permissible for a participant without permission to record or transmit the hearing, and constitutes a contempt of court – see CPR r. 39.9(2), s. 9, Contempt of Court Act 1981, and ss. 85B and 85C, Courts Act 2003 (as inserted by s. 55 of, and Schedule 25, to the Coronavirus Act 2020). This includes images e.g. a screen shot (*HRH The Duchess of Sussex v Associated Newspapers Ltd* [2020] EWHC 3222 (Ch);

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<sup>200</sup> <https://www.gov.uk/guidance/how-to-have-someone-to-support-you-during-a-remote-hearing> (accessed 28 January 2021).

*SLF Associates Inc v HSBC (UK) Bank plc* [2021] EWHC 5 (Ch). Legal practitioners must take particular care in this respect (see *Gubarev v Orbis Business Intelligence Ltd* [2020] EWHC 2167 (QB)).

- (19) Bear in mind that some clients are very concerned that a remote hearing is “second best”. This is something that is sensibly raised and discussed with them well before any hearing, and tends to mean that early preparation and discussion of skeleton arguments or oral submissions will be particularly important in providing a good service.
- (20) Check any communications received from the court in relation to any remote or hybrid hearing (and in particular any “invite” or link to the hearing itself) with care to see whether it contains any specific directions from the court as to the preparation for or conduct of the hearing.

**7.3.8** Of course, despite best efforts, technical or practical problems may arise – be prepared for that, and so far as possible, be in a position to mitigate or deal with them. Points to consider include the following:

- (1) Ensure clients and witnesses know they can speak up if they are having difficulties.
- (2) Participants should log in at least 15 minutes early, to allow time for any technical issues to be remedied before the start of the hearing.
- (3) Do participants have back-up internet connections (for example, a mobile phone data connection) and hardware to deal with an unexpected loss of connection?
- (4) Would it be sensible to download and/or print the bundle (or a core bundle, if agreed) or at least, to have hard copies of the most important documents – for all participants? Cross-examination of witnesses is substantially impossible (or at best, significantly slowed down) if they cannot readily access the documents – sometimes moving quickly between documents, or back and forth, or even comparing them – all of which might be difficult or possibly even beyond some witnesses.
- (5) How will notification be provided to other participants if a technical issue occurs – perhaps by email or text message, or by using the chat function, or by means of a phone call? Who will be responsible for this?
- (6) When they are not speaking, participants should mute their microphones, and ordinarily, when not directly involved in what is happening, solicitors and parties/witnesses should turn off their cameras.
- (7) Useful [guidance](#) on advocacy at remote hearings (and some discussion of common technological mistakes) has been published by the Inns of Court College of Advocacy.<sup>201</sup>

**7.3.9** As noted, “hybrid” hearings are those in which some participate physically present in a courtroom, and others do so remotely. In one such trial in the Commercial Court in which we were instructed, two counsel and two solicitors were in a room at the Rolls Building, and the parties/witnesses (and one of the solicitors) participated/watched remotely. Appropriate preparation for the hearing (insofar as partly remote) was much as it is in respect of a fully remote hearing, though with certain points of practical difference:

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<sup>201</sup> <https://www.icca.ac.uk/wp-content/uploads/2020/04/Principles-for-Remote-Advocacy-1.pdf> (accessed 28 January 2021).

- (1) Counsel and their solicitors took their laptops to court and were connected to the hearing by means of the same link as those who were participating remotely – so that, for example, it was by these means that cross-examination took place, and the witness was able to see and engage with counsel. At the same time, there was a screen in the court which also displayed that which was taking place.
- (2) In some respects, the presence of a number of people in one place made matters much simpler and more comfortable – for example, communication between counsel and solicitor during cross-examination, and the greater scope for more lively and natural interaction between Judge and counsel (a reminder of why debate between people physically present with one another is not to be casually discarded).
- (3) In other respects, matters were made more complicated – for example, the presence of both the Judge and the screen in court meant that counsel would often not look directly into the camera on his laptop, and would therefore become less clearly or only partially visible to those accessing the hearing remotely. In addition, the presence in one place of a number of participants meant greater scope for interference between the operation of their different computers, and of the court’s facilities – in particular in respect of sound, where the microphones and loud speakers of all but the person talking had to be turned off to prevent feedback.
- (4) Where any part of the hearing is taking place in person, ensure you have checked what procedures apply. See the overview of the HMCTS operational summary and guidance in [para. 7.1](#) of this section.

[Guidance for experts](#) has been provided by the Academy of Experts.<sup>202</sup>

**7.3.10**

Opportunities for counsel to communicate with their opponent will not arise naturally ahead of the hearing, and so thought should be given to whether a direct approach should be made (in an attempt to narrow the issues or explore opportunities for settlement). In our experience Judges recognise this, and may leave counsel to attempt to resolve issues that have arisen during short adjournments or transcribers’ breaks.

**7.3.11**

### **How should participants communicate during the hearing?**

**7.4**

If a hearing is fully remote, or hybrid, arrangements must be made for individuals (on the same side – clients, solicitors and counsel) to communicate with one another as quickly and effectively as possible during the hearing. This aspect of remote litigation does present obvious difficulties, but essentially, do as much as is possible to reproduce the traditional personal experience. A number of steps can help:

**7.4.1**

- (1) commonly, a WhatsApp group is created for team members (if at a hybrid hearing, to be used from within the court with the Judge’s permission); it is worth bearing in mind that although WhatsApp desktop can be quicker to type on than using a phone, one disadvantage is that while muted messages on a phone will not disturb you, muted messages on WhatsApp desktop will still flash to the top of the pile and can be a distraction;
- (2) it may be sensible to create more than one group – for example, counsel only, whole legal team, and solicitors/client;

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<sup>202</sup> <https://academyofexperts.org/wpcms/wp-content/uploads/2020/09/Guidelines-on-Remote-Evidence.pdf> (accessed 28 January 2021).

- (3) take particular care, of course, not to communicate inadvertently with the wrong person;
- (4) it is sensible to ensure that the advocate is not bombarded with too many messages from numerous sources; where there are a number of team members, this can be achieved by designating one team member (preferably the junior barrister, if there is one) as the gatekeeper for messages that are passed to the advocate;
- (5) Judges can simply be asked whether a moment can be taken to speak privately – our experience is that Judges have been extremely accommodating in this respect;
- (6) all members of the legal team must be prepared to liaise quickly where time is allowed, and it can help to agree in advance when it might be helpful for counsel and solicitors to liaise;
- (7) it is critical to ensure that the client is fully included in the process, which might otherwise seem to be continuing without any reference to them – particularly so if the hearing is “hybrid”. To manage this, schedule conference calls to be held directly before and/or after the hearing, or for example, on breaking for lunch.

#### **7.4.2** Three other points are also worth keeping in mind.

- (1) However participants choose to communicate with one another, the manner in which they do so must not interfere with conduct of the hearing itself – for example, by producing noisy and distracting notifications.
- (2) Whatever method is chosen, care must be taken avoid any unauthorised recording or transmission of an image or sound contrary to ss. 85B or 85C, Courts Act 2003 (as inserted by s. 55 of, and Schedule 25, to the Coronavirus Act 2020).
- (3) As noted, care must be taken not to communicate inadvertently with the wrong person. (Readers will no doubt be aware of media coverage of inadvertent sharing of communications intended to be private.) If possible, use a separate device (or at the very least a different technology platform) to communicate privileged messages (and if you are not able to use a separate device, take care to ensure your cursor is in the appropriate place before typing; it is very easy to type a quick message and send it using the return key before noticing it is going to the wrong recipient). Take care to check your microphone is muted when necessary. The need to guard against inadvertent communications applies as much (if not more) to communications during short breaks in the hearing (during which the live audio and video feeds will normally continue) as during the hearing itself: invariably these breaks are used for calls between leading and junior counsel and/or between counsel, solicitors and client, one of whom will often just have been addressing the court – so great care must be taken to ensure that that person’s microphone has been muted and that his or her video connection turned off before any post-mortem discussion takes place. The same applies at the end of the hearing: ensure the session has been closed (or that you are properly disconnected) before communicating.

#### **7.4.3** Data protection considerations must of course be borne in mind. The [Bar Council](#) has provided some thoughts on the question.<sup>203</sup>

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<sup>203</sup> <https://www.barcouncilethics.co.uk/documents/videoconferencing-software-data-protection-and-confidentiality/> (accessed 28 January 2021).

## **What role do written submissions play in a remote hearing?**

7.5

Our experience suggests that skeleton arguments, and other written arguments or summaries of evidence or submissions produced during hearings (for example, written closing submissions, or an *aide memoire* for closing or to deal with specific points arising) have assumed increased importance in the context of remote hearings. Judges have tended to be less interventionist (for practical reasons) but have, in return, expected advocates to take particular care to make succinct and well directed submissions – and if possible, to do so by reference to a shared document. That being so, it may be appropriate in some cases to depart from the page number limits that apply in certain courts (for example, under para. J6.5 of the Commercial Court Guide) and/or to ensure that the written submissions are provided earlier than the dates usually provided for (for example, under para. J6.2 of the Commercial Court Guide).

7.5.1

One practical consequence of this is that the time required to prepare written submissions may increase, which given also the particular desirability of sharing documents with clients well in advance of remote hearings, means that there is a premium on agreeing, creating and delivering bundles as promptly as possible. (Bundles are discussed further at [para. 7.6](#) below.)

7.5.2

## **How should the parties approach bundles for a remote hearing?**

7.6

In a hearing proceeding wholly or partly remotely, it is even more important than normal that bundles are easy to use. This requires thought about their content, their structure, and their delivery. (See, for example, the comments in *Phoenix v Phoenix & Anor* [2020] EWHC 1409 (Ch).)

7.6.1

It is important to check whether specific guidance has been provided by the court or tribunal hearing the case (see further [para. 7.1](#) of this section). Detailed [Guidance](#)<sup>204</sup> has been provided by Mann J (with the President of the Family Division and the Senior Presiding Judge; note it is not for use in the tribunals). [Guidance](#) has been provided for the Queen's Bench Division.<sup>205</sup> For Court of Appeal hearings, the most recent 'urgent business priorities' [update](#) from the Court of Appeal<sup>206</sup> (w/c 18 January 2021) states that "*Bundles should not be provided electronically unless specifically requested by the Court*". It is understood that the Civil Appeals Office will give directions to the parties on the type and format of bundles to be used for any application or hearing. Anecdotally it appears that electronic PDF bundles are generally being required for applications (including applications for permission to appeal) with hard copy bundles remaining the default for substantive appeals. For Supreme Court and Privy Council hearings, the reader is referred to [Practice Directions 5, 6, 7 and 14](#)<sup>207</sup> and [Practice Directions 5, 6, 7 and 9](#)<sup>208</sup> respectively, to the [summary document](#) on arrangements during the pandemic,<sup>209</sup> and to the Annex to Lord Reed's [Practice Note](#)<sup>210</sup> (see the comments

7.6.2

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204 <https://www.judiciary.uk/wp-content/uploads/2020/05/GENERAL-GUIDANCE-ON-PDF-BUNDLES-f-1.pdf> (accessed 28 January 2021).

205 [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/939167/RCJ\\_Notice\\_QB\\_General\\_30\\_Nov\\_2020.pdf.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/939167/RCJ_Notice_QB_General_30_Nov_2020.pdf.pdf) (accessed 28 January 2021).

206 [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/952946/RCJ\\_COA\\_urgent\\_business\\_priorities\\_18\\_January\\_2021.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/952946/RCJ_COA_urgent_business_priorities_18_January_2021.pdf) (accessed 28 January 2021).

207 <https://www.supremecourt.uk/procedures/practice-directions.html> (accessed 28 January 2021).

208 <https://www.jcpc.uk/procedures/practice-directions.html> (accessed 28 January 2021).

209 <https://www.supremecourt.uk/docs/Arrangements-during-the-Coronavirus-Pandemic.pdf> (accessed 28 January 2021).

210 <https://www.supremecourt.uk/docs/covid-practice-note.pdf> (accessed 28 January 2021).

about these documents in [para. 7.1](#) above). Guidance is also provided in *Re TPS Investments (UK) Ltd* [2020] EWHC 1135 (Ch); [2020] BCC 437 (also known as *Re Tailby*; this case will be of general assistance even though it considers guidance issued in the Business and Property Courts in Manchester).

- 7.6.3** The reader is encouraged to look at that guidance; this section is confined to adding further comments from our experience.
- 7.6.4** Thought should be given to limiting the documents in the bundles to those necessary. Involve the advocate who will be appearing at the hearing in this process as early as possible, so that their input can be sought on what will be required.
- 7.6.5** Ask the court whether it would prefer hard copy or electronic bundles. If the intention is to use electronic bundles only, it is prudent to have hard copies of the key material (for example, pleadings, witness statements, expert reports, the core bundle (if any), written submissions, and notes for submissions or cross-examination).
- 7.6.6** For the purposes of preparing electronic bundles and for working with them, it is advisable to use professional PDF software. Familiarise yourself with the functionality of the software. For example, in addition to equipping you to meet the relevant guidance (for example, compiling bundles, paginating, and using bookmarks), it can also be very useful (for example) to be able to extract pages or passages, and to highlight them. Use hyperlinks to enable navigation within witness statements and bundles.
- 7.6.7** If the bundles are voluminous and resources permit, it can be useful to engage a document management provider, who can host the bundles, “push” documents to the court and witnesses, and deal with any technical problems. Participants may need an extra screen to facilitate this.
- 7.6.8** Ensure that any documents handed up during the course of the hearing make their way into an electronic bundle. Cooperate with the other parties to ensure that the court has clearly navigable supplementary bundles and duplication is avoided. In a recent matter, we used supplementary bundles with the index organised to reflect the main corpus of the hearing bundles, and used continuous pagination and tab numbering throughout these bundles.
- 7.6.9** One practical difference between electronic bundles for use in a remote hearing and hard copy bundles for use in a physical court room is that it is often far easier and quicker for documents to make their way into an electronic bundle unnoticed (whether by the advocates or the court). Care needs to be taken to ensure that there is a reliable method of making both the parties and the court aware, in advance, of any document a party wishes to add to the bundle. This serves two functions. First, as a matter of courtesy it alerts everyone to the document so that it is not overlooked. Secondly, it ensures that the parties and the court have an opportunity to make and consider any objection to the admissibility of the document. Particular care needs to be taken in appeals, where the ease of adding documents to electronic bundles (a role which in complex cases may fall on the most junior members of the legal team) can easily lead to inadvertent breach of the rules under CPR Part 52 covering (i) the permissible content and length of core and supplementary bundles and/or (ii) the admissibility of evidence on an appeal.
- 7.6.10** It is worth emphasising – because it can make a substantial difference to the ease of the hearing and the mood of the Judge, and because in our experience this is often overlooked – that the page numbering of the electronic bundles should match the page numbering of the hard copies (so that a user can simply type the relevant number in and be taken directly to

the correct page). The issue arises because the cover pages and contents pages of hard copy bundles are often not paginated (pagination instead commencing with the first substantive document), but then when the bundle is converted into a PDF, the page numbering in the PDF file will (by default) start at the beginning of the PDF (e.g. the cover pages or contents pages) rather than the first substantive document. There are two ways to avoid this problem: either paginate the hard copy bundle from the very first page, including any cover pages and contents pages, rather than having the pagination begin with the first substantive document in the bundle, or use PDF software to match the electronic page numbering to the hard copy page numbering.

To send electronic bundles to the court, parties should use CE-file (if available), or send a link to an online data room (preferred) or an email; they should not use USB sticks (see para. 26 of the [Remote Hearings Protocol](#)<sup>211</sup>). **7.6.11**

Where there is a litigant in person who would ordinarily be responsible for preparation of bundles, represented parties are encouraged to offer their assistance. **7.6.12**

### **How does oral evidence (cross-examination in particular) work in practice?** **7.7**

Some of the issues surrounding cross-examination by video are not of course entirely novel – it has long been possible for witnesses to be examined in this way, with the court’s permission: see CPR r. 32.3 (and para. 29.1 of, and Annex 3 to, PD 32), and *Polanski v Conde Nast Publications Ltd* [2005] UKHL 10; [2005] 1 WLR 637. What has changed is that this method has become, for the time being at any rate, entirely commonplace, and that in the context of a fully remote hearing, all participants are taking part by video link, rather than the witness alone. The practice has become everyday rather than exceptional. **7.7.1**

Preparation and prior testing of the witness’s technology, appropriate environment and ready access to documents (in particular, help in navigating the witness through the hearing bundle) is critically important – as explained in [paras. 7.2 and 7.3](#) of this section. Unquestionably, whether fairly or not, a failure to attend properly to these aspects can affect the quality of a witness’s evidence and the weight attached to it by a Judge (if for no other reason than that anxiety is unlikely to enhance quality). **7.7.2**

Unless the court gives permission, there should not be anyone in the room with a witness when they are participating in the hearing, and they must not consult any notes or other documents during the hearing, other than the trial bundles. This must be explained to the witness ahead of time, and it is good practice, in examination in chief, to ask the witness to confirm these circumstances. In some cases, it might be appropriate for one or more people to be physically present with the witness for certain purposes, for example, to assist with the trial bundle or with technical management. In those circumstances, it may also be appropriate to allow for a legal representative of the other side to be present, to ensure that only permitted assistance is given. Useful guidance has been given by Andrew Baker J in *Navigator Equities Ltd & Vladimir Anatolevich Chernukhin v Oleg Vladimirovich Deripaska* [2020] EWHC 1798 at [9] of the judgment. **7.7.3**

It is often (when it happens) reasonably obvious that a witness is being assisted in some way. For example, in *CMA v Martin* [2020] EWHC 1751 (Ch), at an early point of Mr Martin’s cross-examination, Judge Jones explicitly asked him whether he was relying on extant notes **7.7.4**

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<sup>211</sup> [https://www.judiciary.uk/wp-content/uploads/2020/03/Remote-hearings.Protocol.Civil\\_GenerallyApplicableVersion.f-amend-26\\_03\\_20-1.pdf](https://www.judiciary.uk/wp-content/uploads/2020/03/Remote-hearings.Protocol.Civil_GenerallyApplicableVersion.f-amend-26_03_20-1.pdf) (accessed 28 January 2021).

in answering questions (and instructed him not do so). The question was prompted by Mr Martin's fluent recitation of page references to documents relevant to a given issue, which plainly caused the Judge some concern. Tell-tale signs include, for example, frequently looking down or to one side of the camera, which may suggest the witness is gaining assistance from another person or from material other than the trial bundle. If there is any doubt, it could be suggested that the witness should be accompanied by a solicitor or other independent person, or the witness could be asked to pan their camera around the room or to use a mirror so that the other participants have greater visibility.

**7.7.5** As to taking an oath or making an affirmation at the commencement of examination, previous HMCTS guidance provided that if a witness is joining remotely and is required to take an oath or to make an affirmation, and they would like to take an oath using a sacred object, they must provide their own Holy Book or Scripture. Alternatively, they can take an oath without a sacred object, if they consider it will still be binding on them. They can of course still choose to make an affirmation rather than take an oath. As a matter of principle, this would still appear to be appropriate guidance. Regardless of how the witness chooses to approach this, they are still bound legally to tell the truth. In practical terms, provide your client's witness(es) with a copy of the oath or affirmation for their use. The same principles will apply to interpreters (who will of course always be sworn in or affirmed in advance of the witness).

**7.7.6** As noted, [guidance](#) for experts has been produced by the Academy of Experts.<sup>212</sup>

**7.7.7** Questions are often asked about the ability of the Judge to assess a witness's credibility at a remote hearing. That concern can cut both ways – some clients worry that the Judge will not receive their evidence with its genuine force, that their evidence will be undermined; others worry that it will prove impossible to attack the other side's witnesses with sufficient vigour and undermine their evidence.

**7.7.8** Hearings with witnesses need to be case managed with circumspection and care, because of the importance of hearing witnesses (*Bilta (UK) Ltd (in liq) v SVS Securities* [2021] EWHC 36 (Ch) at [14]).

**7.7.9** It can be important for a Judge to see a witness in person (and HHJ Eyre QC in *Municipio De Mariana v BHP Group Plc* [2020] EWHC 928 (TCC) noted that the issue of whether and if so to what extent live evidence and cross-examination will be necessary is likely to be important in many cases). The view has been judicially expressed that giving evidence remotely “*ranks as second best*”; that any form of artificial intermediation interposed between the questioner of a witness and the judge is a derogation from the “*gold standard*”; and that, wherever possible, the judge and the advocates should be in the same place so they “*see the same oral evidence*” (*Bilta (UK) Ltd (in liq) v SVS Securities* [2021] EWHC 36 (Ch) at [14], [19]). However, the Judge in that case also noted that the question is not whether remote evidence is second best, but whether a remote hearing would be fair. Further, the Privy Council has rejected the idea that evidence by video link is necessarily “*second best*” (*Attorney General of the Turks and Caicos Islands v Misick* [2020] UKPC 30 at [67]-[74]). It is also important to note that some Judges consider observation of a witness's demeanour to be the “*lowest*” of the court's tools – an unreliable guide to truth – and indeed, experience tells one that confidence and fluency are not necessarily hallmarks of honesty. Lieven J in *A Local Authority v Mother* [2020] EWHC 1086 (Fam), noted at [27]-[29] that the ability to

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<sup>212</sup> <https://academyofexperts.org/wpcms/wp-content/uploads/2020/09/Guidelines-on-Remote-Evidence.pdf> (accessed 28 January 2021).



observe a witness's demeanour in the courtroom was not a reliable way to judge credibility. See also *R (SS (Sri Lanka)) v Secretary of State for the Home Department* [2018] EWCA Civ 1391 at [36]-[41], and *Lucas v Gatward* [2020] EWHC 3040 at [14]-[15]. In practice, the use of a video link may enable some witnesses to give more truthful and complete evidence, because they may feel less defensive than when in a courtroom; and indeed many counsel seem to have relished the proximity afforded by the appearance of the witness on a screen placed immediately in front of, and quite close to, the examiner. In *CMA v Martin* [2020] EWHC 1751 (Ch), Judge Jones explicitly noted in his Judgment that that “*the absence of the formalities of the court room environment and immediate proximity of counsel appeared to create a more relaxed environment for the witnesses and was beneficial*”, and that the defendant's denials and evidence were received “*with the same force/impact as it would have done in a physical courtroom*”.

The limitations of remote evidence, or hearings, have not yet to our knowledge been pronounced upon by the Court of Appeal as a material appellate issue, although it is easy to see it doing so. **7.7.10**

Further, the Judicial College has issued [guidance](#)<sup>213</sup> on good practice to ensure that remote hearings are fair to all court users, which indicates a degree of Judicial concern about the fairness issues involved in remote hearings. **7.7.11**

Where it is necessary for oral evidence to be given in person, closing arguments could nevertheless be delivered remotely (*Martin v Kogan* [2021] EWHC 24 (Ch) at [20]). **7.7.12**

Overall, our view is that, in a Covid-19 era, video evidence has proved invaluable in keeping civil justice operating in the UK (and worldwide), and there is (to our knowledge) little sense that such hearings have caused material injustice in any specific instance. **7.7.13**

However, many Judges and practitioners are keen to resume in-person hearings as soon as it is safe to do so in accordance with Government guidelines, and one can readily understand the desire to resume the orthodox approach, to side-step any concerns about potential unfairness, including perceived limitations on the testing of both evidence and submissions. **7.7.14**

## **How should participants dress? **7.8****

Remote hearings remain court hearings and the solemnity of the occasion should be observed as closely as it is in a courtroom. It follows that advocates and others who may appear in some way, or be visible, should dress precisely as if they were attending court physically – subject of course, as ever, to the Judge's permission (for example, in respect of robes, which have been dispensed with in most cases of which we have had recent experience – for example, *CMA v Martin* [2020] EWHC 1751 (Ch) and *Fine Care Homes v NatWest* [2020] EWHC 874 (Ch), where business suits were worn). **7.8.1**

HMCTS has published its [risk assessments](#)<sup>214</sup> for those entering into its buildings. Current [guidance](#)<sup>215</sup> is that court users are exhorted to wear a face covering inside, unless they are exempt. Users are requested to bring their own face coverings. On 15 January 2021, the Senior Presiding Judge and Deputy Senior Presiding Judge issued guidance stating that **7.8.2**

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213 <https://www.judiciary.uk/wp-content/uploads/2020/05/Good-Practice-for-Remote-Hearings-May-2020-17.09.20.pdf> (accessed 28 January 2021).

214 <https://www.gov.uk/guidance/coronavirus-covid-19-courts-and-tribunals-planning-and-preparation> (accessed 28 January 2021).

215 <https://www.gov.uk/guidance/what-to-expect-coming-to-a-court-or-tribunal> (accessed 28 January 2021).

Judges should strongly encourage the wearing of face coverings by everyone in the courtroom except for the Judge, the advocate who is speaking and the witness giving evidence.

## **7.9 What about costs hearings?**

**7.9.1** A revised Senior Courts Costs Office Guide has been published.<sup>216</sup> A [Practice Note](#)<sup>217</sup> and [Guidance](#)<sup>218</sup> have been provided for the conduct of remote costs hearings (these are directed, in large part, at detailed assessment hearings, but also contain guidance of more general application). The Remote Hearing Protocol also applies.<sup>219</sup> Aside from this guidance, we would expect remote hearings at which costs and other consequential matters are argued to proceed in accordance with the principles outlined in this section, and indeed this has been our experience.

## **7.10 What about private hearings?**

**7.10.1** Circumstances may arise where one or both parties wish for some or all of the remote hearing to take place in private. The substantive law governing the use of private hearings has not been changed by the increased use of remote hearings, save that pursuant to paras. 2 and 4, PD 51Y, where it is not practicable for a remote hearing to be broadcast in a court building, the court may direct that a hearing must take place in private where it is necessary to do so to secure the proper administration of justice. See further the answer to [para. 6.5](#) of Section Six: Civil Procedure and ADR.

**7.10.2** Private hearings held remotely can, however, give rise to practical issues which would be unlikely to arise in an in-person hearing. In particular, care needs to be taken to ensure that participants in any private session are limited to those permitted to attend. In an in-person hearing this is generally a straightforward exercise, as an appropriate sign can be placed on the door and those present (including the Judge) can spot people entering and exiting the room. Where there is a remote element to the hearing, however, points to consider may include the following:

- (1) Is there a public live stream in operation and, if so, who has control over it? Check before the hearing commences who has responsibility for ensuring the live stream is switched on and off at the appropriate points. Before commencing a private session, double check that any public live stream has been switched off and – just as importantly – check that it is switched on again when the public session recommences.
- (2) If any individuals who have been provided with log-in credentials to the remote hearing are not permitted to be present during a private session, ensure that they have left the hearing before the private session commences and that they do not re-join during the private session. In our experience the court may well make clear that it is the parties' responsibility to monitor participants in the private session and not that

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<sup>216</sup> <https://www.judiciary.uk/wp-content/uploads/2021/01/Senior-Courts-Costs-Guide-2021-final-version-with-cover-FINAL-AMENDS-21-JAN.pdf> (accessed 28 January 2021).

<sup>217</sup> [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/903704/Senior\\_Courts\\_Costs\\_Office\\_update.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/903704/Senior_Courts_Costs_Office_update.pdf) (accessed 28 January 2021).

<sup>218</sup> <https://www.judiciary.uk/wp-content/uploads/2020/04/Guidance-for-the-Conduct-of-Remote-Costs-Hearings-v.4-1.docx> (accessed 28 January 2021).

<sup>219</sup> [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/954993/HMCTS\\_RCJ\\_Update\\_Template\\_25\\_January\\_2021.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/954993/HMCTS_RCJ_Update_Template_25_January_2021.pdf) (accessed 28 January 2021) and [https://www.judiciary.uk/wp-content/uploads/2020/03/Remote-hearings.Protocol.Civil\\_GenerallyApplicableVersion.f-amend-26\\_03\\_20-1.pdf](https://www.judiciary.uk/wp-content/uploads/2020/03/Remote-hearings.Protocol.Civil_GenerallyApplicableVersion.f-amend-26_03_20-1.pdf) (accessed 28 January 2021).

of the court. In any event the court staff may well not know the identities of those permitted to attend a private session and of those who are not. Consider assigning a specific member of the legal team to monitor those logged-in during any private session to ensure that there is no unauthorised attendance.

- (3) If the hearing is to be held partly in public and partly in private, try to ensure that there is a way to quickly and efficiently notify any participants who are only permitted to attend a public session when it has commenced or recommenced so that as little time as possible is wasted waiting for them to join the hearing.

**What is the position where a participant is outside the jurisdiction?**

**7.11**

Witnesses of fact and expert witnesses can give their evidence by video link, whether they are in the jurisdiction or not (CPR r. 32.3 (evidence given by video link) and para. 29.1 of, and Annex 3 to, PD 32 (which pre-date the pandemic)).

**7.11.1**

The court can permit remote attendance at a fully remote hearing by individuals outside England and Wales pursuant to s. 85A, Courts Act 2003 (as inserted by s.55 of, and Schedule 25 to, the Coronavirus Act 2020; *Huber v X-Yachts (GB) Ltd* [2020] EWHC 3082 (TCC)). However, the court will be cautious in granting such permission, and is likely to require safeguards (such as requiring those attending to provide their details and to confirm they understand the rules by which they must abide).

**7.11.2**

There is some uncertainty as to remote attendance at a hybrid hearing by individuals outside England and Wales (see, for example, the discussion in *Huber* and *Gubarev v Orbis Business Intelligence Ltd* [2020] EWHC 2167 (QB)). If a hybrid hearing is to be proposed and such attendance is mooted, a party would be well advised to consider this point, and these (and related) authorities, carefully.

**7.11.3**



# Section Eight

## OFFSHORE JURISDICTIONS

*Jonathan Crow QC, Donald Lilly, Alexander Cook, Joseph Wigley ©*

*Law stated as at: 16 January 2021*

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## **General Introduction**

We at 4 Stone Buildings have long enjoyed a close and collaborative relationship with clients and practitioners in many offshore centres, including both well-established jurisdictions such as Bermuda and the British Virgin Islands, and also more recent ones such as the Dubai International Financial Centre. Many members of Chambers appear regularly in the courts and tribunals of these jurisdictions, and/or provide advice in relation to proceedings and transactions there. The inclusion of this section in the book reflects the importance we attach to our overseas practices.

**8.0.1**

The chapters that follow explore a range of different issues, dealing both with substantive legal developments and also with the procedural and logistical considerations which have come into play since the onset of the pandemic. We deal in turn with issues arising in relation to our core practice areas of company law, corporate insolvency, personal insolvency and civil procedure. More generally, we also discuss the wider impact which the pandemic has had on civil litigation in these jurisdictions, and we consider some of the possible longer-term consequences that may flow from the practices that have developed and the experience that has been gained in recent months.

**8.0.2**

## BERMUDA

*Donald Lilly ©*

*Law as stated at: 15 January 2021*

### Introduction

- 8.1.1** Bermuda entered into lockdown relatively swiftly and strongly, with flights being grounded in late March 2020 through the Quarantine (Travel Ban) Order 2020. On 21 March 2020, specified meeting places, such as swimming pools and places of worship, were closed pursuant to s. 88 Public Health Act 1949 and a rolling curfew was put in place on 27 March 2020. A full lockdown of Bermuda took effect on 4 April 2020, after a state of emergency under s. 14(3) of the Constitution of Bermuda had been declared three days earlier. The lockdown has been referred to as the “Shelter in Place”, and it took effect through the Occupational Safety and Health (Covid-19) Temporary Regulations 2020 and the Emergency Powers (Covid-19 Shelter in Place) Regulations 2020.
- 8.1.2** From 1 July 2020, Bermuda entered ‘Phase 4’ re-opening. Bermuda remains within this category as at the date of writing. As a consequence, a curfew continues to operate between 12pm and 5am under Regulation 2A of the Public Health (Covid-19 Emergency Powers) (No. 3) Regulations 2020, as amended by the Public Health (Covid-19 Emergency Powers) (No. 3) Amendment Regulations 2021. However, under those regulations, restrictions upon grocery shopping, retail stores and restaurants have greatly eased, with retail stores now generally re-opening, subject to the [Directions for Retail Stores](#).<sup>220</sup> From 8 December 2020, indoor bars and nightclubs were closed once again, and whilst restaurants may offer both indoor and outdoor dining, there are health and safety requirements, set out within the [Guidance for Indoor and Outdoor Dining](#),<sup>221</sup> with which restaurants are advised to comply.
- 8.1.3** Working from home is no longer mandated, although “*those who can, should continue to work from home*”. Where workers have returned to business premises, the Government has urged business leaders to “*do their due diligence to ensure that employees are adequately protected when returning to work*”. Masks are to be worn whenever two metre social distancing is not possible, subject to only limited exceptions, such as when individuals are at home or are under the age of 2. These mask requirements apply to workplace premises and outside.
- 8.1.4** International travel is discouraged. Any travel to the island is governed by the Quarantine (COVID-19) (No. 3) Order 2020, which requires any traveller, whether a resident or visitor, to have authorisation to travel one to three days in advance of their departure. To obtain such authorisation, a negative COVID-19 PCR test is required, and all residents and visitors are required to wear a “Traveller Wristband” for the first 14 days of their stay on the island. In addition to these requirements, travellers from the United Kingdom must also quarantine in their accommodation for four days after arrival and they may only be released from their accommodation upon a further negative COVID-19 PCR test result.
- 8.1.5** During the crisis, the courts in Bermuda have operated on a reduced basis, but did not at any stage cease business entirely. On 17 March 2020, the court implemented a number of

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<sup>220</sup> [https://www.gov.bm/sites/default/files/11436-Coronavirus-2020-Directions-for-Retail-Shops\\_1.pdf](https://www.gov.bm/sites/default/files/11436-Coronavirus-2020-Directions-for-Retail-Shops_1.pdf) (accessed 15 January 2021).

<sup>221</sup> <https://www.gov.bm/guidance-indoor-and-outdoor-dining> (accessed 15 January 2021).



precautionary measures to reduce its operations and to reduce direct interactions between court staff and members of the public. These measures were increased on 23 March 2020 by way of Circular No. 6 of 2020, including an administrative adjournment of all matters listed before the Supreme Court during the period of 23 March and 3 April 2020. Facilities did remain operational for new applications that were “urgent or time sensitive”, or responses on “urgent active applications” within the Probate Division. By Circular No. 07 of 2020, the administrative adjournment was extended to 17 April 2020, and the court remained active only for applications of “extreme urgency”. Although the period of the administrative adjournment has not been extended, the earliest listing date for adjourned matters was 2 July 2020.

The court has subsequently issued the further Circulars No. 08 to 15 of 2020, which provide guidance as to the conduct of electronic hearings and the transition for the re-opening of the courts. Circular No. 15 dated 30 June 2020 is the latest, and it provides (among other things) that: (i) the Supreme Court continues to “prioritize” the listing and hearing of “urgent” business; (ii) for non-urgent matters, any case that was administratively adjourned will be given priority for re-listing over new matters; and (iii) the court “may” require the parties to attend at court or via telephone or an “alternative form of audio visual technology” in accordance with Circular No. 8. The court has adopted what appears to be a broad approach to the meaning of urgent (see for example *Marshall Diel & Myers Limited v Crisson* [2020] SC (Bda) 27 Civ at [11], an urgent listing regarding *Angel Bell* exceptions under a *Mareva* injunction).

8.1.6

Unemployment benefits were available to eligible workers “whose employment has been effected as a result of COVID-19” under the Public Treasury (Administration and Payments) (Temporary Unemployment Benefit) Regulations 2020; however, the time to apply for such benefits expired on 30 June 2020. Despite the expiry of those payments, two forms of protection remain in place: the Government of Bermuda has issued [Covid-19 Rent Relief Guidelines](#),<sup>222</sup> which provide suggestions to landlords as to how they may assist their tenants to cope with rental payments despite the loss of income during the pandemic. The document is merely guidance and is dependent upon a mutually agreed variation of the lease, for which a *pro forma* addendum agreement is appended to the guidance. The Ministry of Home Affairs has also established an online [Price Gouging Complaint Form](#)<sup>223</sup> for individuals to raise complaints in relation to vendors who have increased the prices of goods, services or commodities “to a level much higher than is considered reasonable or fair, and is considered exploitative, potentially to an unethical extent”. This is a similar service that has historically been available in other times of national crisis, such as in the wake of a hurricane.

8.1.7

## Corporate Insolvency

### **Can Bermudian companies be wound up during the pandemic?**

8.2

Due to the administrative adjournment of all matters, including those involving the winding up of companies, the non-urgent insolvency work of the Supreme Court was effectively suspended for a large part of 2020. Although the Supreme Court commenced the re-listing of non-urgent matters on 2 July 2020, there remain examples of the administration of justice being delayed due to the impact of the pandemic: see, for example, the costs ruling in *Rodrigues v Clearwater Development Limited* [2020] SC (Bda) 54 Com at [1].

8.2.1

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222 <https://www.gov.bm/sites/default/files/COVID-19-Rent-Relief.pdf> (accessed 15 January 2021).

223 <https://forms.gov.bm/covid-19/reportaprice> (accessed 15 January 2021).

- 8.2.2** Unlike the United Kingdom, there has not been any contemplated prohibition on the presentation of a winding-up petition. Whilst winding-up petitions in the normal course may not be heard as quickly as could normally be expected, the court remains open for appropriate applications for the appointment of provisional liquidators, including so-called ‘light touch’ provisional liquidators, appointed for the purposes of restructuring rather than winding-up (established by Ward CJ in *Re ICO Global Communications (Holdings) Ltd* [1999] Bda LR 69 and recently commented upon by Kawaley CJ in *Re Z-Obee Holdings Limited* [2017] SC (Bda) 16 Com at [6] and Hargun CJ in *Raswant v Centaur Ventures Ltd* [2019] SC (Bda) 55 Com at [7] to [11]). Indeed, the availability of ‘light touch’ provisional liquidation has meant that the court has had the discretion to deal with insolvent companies during the lockdown flexibly. Since provisional liquidators may be appointed in Bermuda for the purposes of rescuing a company as a going concern, as well as for the more orthodox reasons for appointment, such as preservation of assets, provided that the court is satisfied that a matter is urgent, it has been, and remains, available to wind up companies on a provisional basis, even if for restructuring purposes.
- 8.2.3** Indeed, only three days after the first administrative adjournment of matters before the Supreme Court, George’s Bay Limited, one of the companies involved in the construction of the Ritz Carlton Hotel and residential development on Morgan’s Point, was placed into provisional liquidation after an *ex parte* telephone hearing before the Chief Justice. The appointment was then confirmed at an *inter partes* hearing on 3 April 2020, also conducted by telephone before the Chief Justice.
- 8.2.4** Another example of the flexibility and importance of the provisional liquidation remedy in Bermuda is in *Re FDG Electric Vehicles Limited* [2020] SC (Bda) 32 Com, where the appointment was made for restructuring purposes only, but then granted full powers in July 2020 in the context of the restructuring having failed due to a breakdown in co-operation between the company and the petitioner. The hearing of this matter was considered urgent and was conducted remotely: see *FDG* at [8].
- 8.2.5** Appointments of this type, in the midst of the pandemic, may present provisional liquidators with the unusual difficulty that, whilst the court may be available to effect their appointment, it may not be as readily available to assist in the actual administration of such provisional liquidations (e.g. orders for examination under s. 195, Companies Act 1981). Moreover, given the international nature of many of the companies incorporated in Bermuda, there is a significant prospect that key directors, officers and assets will not be located in Bermuda. As noted within the introduction to this section, Bermuda has lifted the travel ban and business travellers, subject to their adherence to the Quarantine (COVID-19) (No. 3) Order 2020, may enter the country. Whilst that Order undoubtedly will cause inconvenience and some delay in comparison to similar business prior to the pandemic (especially for British directors and officers facing the stricter quarantine periods imposed upon travellers from the United Kingdom), the rules presently in force regarding travel to Bermuda should allow directors and officers located in foreign jurisdictions to travel to Bermuda for any examination or other purpose related to an Bermuda insolvency. However, the efficiency with which insolvency practitioners are able to conduct such business will not just depend upon the Bermudian regulations and the availability of the Supreme Court, but also upon lockdowns and travel bans that are imposed in other jurisdictions in which key directors, officers and assets of the company are located. Thus, the actual job of winding-up a company, including the identification and protection of its assets, is likely to face at least some, potentially significant, delays in the short to medium term.

Having said that, the court may be available to deal with such matters on the papers, without a hearing, where the circumstances of the case justify it doing so. This might in some cases alleviate the difficulties of listing matters pursuant to Circular No. 15. Furthermore, the same difficulties may not arise in respect of provisional liquidations for restructuring purposes sought at the instigation of the company itself, since the directors will have already necessarily been in a position to co-operate with the provisional liquidators in order to obtain their consent to act and thereafter their appointment. The recent judgment of *Re Agritrade Resources Limited* [2020] SC (Bda) 28 Com is a good example of how a ‘light touch’ provisional liquidation has remained an effective means of restructuring an insolvent company, even when the restructuring concerns cross-border elements (in that case, Hong Kong and Singapore, in relation to which letters of request for recognition were issued by the court). 8.2.6

**How can a creditor establish that a Bermudian company is insolvent?** 8.3

The “Shelter in Place” lockdown presented logistical difficulties in serving a demand compliant with s. 162(a), Companies Act 1981. Moreover, if a company’s registered office is the premises of their corporate agents, often associated with Bermudian law firms, even if the demand could be served there, the closure of those offices as part of the “Shelter in Place” lockdown is likely to result in delays in the demand coming to the attention of the directors. There may be an increased tendency of creditors to rely upon evidence of insolvency other than a statutory demand (such as in *Re CTRAK Ltd* [1994] Bda LR 37 and *Re Gerova Financial Group Limited* [2011] Bda LR 20, in particular at [31] to [32]). However, now that the shelter in place has been lifted for some time, it is unlikely that a Petitioner will now need to rely upon such authorities, rather than the statutory mechanism under s. 162(a), Companies Act 1981. 8.3.1

**Can counterparties argue that the ‘Shelter in Place’ has frustrated a contract, or is a *force majeure* or material adverse change?** 8.4

**Section One: Contracts** above already addresses these topics and it is likely that Bermuda will follow the English approach, perhaps save in relation to one potential difference between the lockdown measures in the United Kingdom and those in Bermuda. 8.4.1

Unlike in the United Kingdom, Bermuda has a written constitution which has express provisions under s. 14(3) in relation to declarations of national emergencies. Once a national emergency has been declared – as occurred on 1 April 2020 – laws may be passed by the Bermuda legislature which are not subject to the constraints of ss. 5 to 12 of the Constitution (save for ss. 6(4) and 6(6)), provided that such laws are “*reasonably justifiable*” in the context of the national emergency. In particular, s. 11, which normally guarantees the freedom of movement in Bermuda, would not apply to laws passed under a state of emergency. 8.4.2

The ability of the Bermuda Government to pass its Covid-19 related legislation in pursuance of these Constitutional provisions means that the actions taken by the Bermuda Government may be less susceptible to challenge and also take on a more mandatory character than those in the United Kingdom. The British Government has already taken the position that at least some of the lockdown measures – for example, the closure of schools during the first lockdown – were not mandatory requirements, but merely ‘requests’: see the Defence of the Secretary of State for Health & Social Care and the Secretary of State for Education at para. 73 in the *Dolan v Secretary of State for Health and Social Care* judicial review proceedings. Although permission in respect of these judicial review proceedings was refused by Lewis J on 8.4.3

6 July 2020 ([2020] EWHC 1796 (Admin)), the ramifications of the British Government's stance as to the non-mandatory nature of at least some of the lockdown provisions remains to be seen in the context of private disputes. Whether a particular measure amounts to, for example, a *force majeure*, could turn on such fine distinctions.

**8.5 Does the pandemic cause complications to recognition of winding-up proceedings in other jurisdictions?**

**8.5.1** Insolvencies in Bermuda are, on the whole, more likely to take on an international character than insolvencies in some other jurisdictions due to the fact that Bermuda companies often have businesses (and therefore assets) that are not solely located within the jurisdiction. This poses additional complications for provisional liquidators and liquidators of Bermuda companies, since their ability to conduct the work of the winding-up may be hampered not only by the pandemic measures adopted by the Bermudian Government, but also those in other jurisdictions. Liquidators of companies that have foreign assets may need to investigate the abilities of the relevant foreign courts to handle recognition requests (e.g. Chapter 15 requests in the United States) at an early point in the liquidation, and likely will also need to account for delays, at least in the near future, as many courts in various jurisdictions continue to operate below 2019 capacities and face substantial backlogs of work once restrictions have been lifted.

**8.6 Has there been a suspension of wrongful trading as in the United Kingdom?**

**8.6.1** The Bermudian Government has not passed or proposed legislation equivalent to s. 12, CIGA 2020.

**Personal Insolvency**

**8.7 Is there expected to be a surge in the number of personal insolvencies in Bermuda?**

**8.7.1** Although Bermuda has not put in place equivalent support schemes such as furloughing in the United Kingdom (save for the Bermudian Covid-19 unemployment benefit), that is not an indication that the economy of the country has been unaffected by the pandemic. Indeed, temporary unemployment benefits afforded by the Public Treasury (Administration and Payments) (Temporary Unemployment Benefit) Regulations 2020 until 30 June 2020 underscores the economic effect that the pandemic has had on some Bermudians. In particular, any industry linked to tourism or travel has necessarily been hardest hit, and a number of Bermudians rely upon jobs in those sectors.

**8.7.2** Personal insolvencies may therefore be expected out of the crisis, although Bermuda is an affluent country with a high GDP, so personal wealth may be sufficient to see many individuals through the crisis.

**8.8 What will the court's approach to bankruptcy petitions be?**

**8.8.1** As noted above, the administrative adjournment means that any bankruptcy petitions were unlikely to be heard before 2 July 2020, unless there were grounds for urgency. There is no equivalent to the 'light touch' provisional liquidation in the personal insolvency context, so the scope for seeking such an urgent hearing is more limited than in the corporate context.

**8.8.2** Now that bankruptcy petitions can be heard in the normal course, subject to the Court's discretion, there are no statutory safeguards passed to prevent adjudging an individual

bankrupt on indebtedness arising out of or exacerbated by the pandemic. The guidance to landlords, referred to in the introduction section, merely encourages landlords to find bespoke solutions on a case by case basis with tenants to help them through the crisis.

Bermuda may be guided to some extent by the approach adopted in England & Wales, insofar as it concerns the exercise of discretion, rather than statutory intervention (see [Section Three: Personal Insolvency](#) above). **8.8.3**

## Company

**Are directors of Bermudian companies protected from the consequences of a company becoming insolvent during the pandemic?** **8.9**

Unlike in the United Kingdom, there is no proposal in Bermuda to suspend wrongful trading, or otherwise diminish the obligations of the directors during the pandemic. However, as observed in [para. 4.1](#) of Section Four: Company, the suspension of wrongful trading merely removes one source of liability for directors, and even directors of UK incorporated companies remain susceptible to claims, for example, for breaches of their fiduciary duties. **8.9.1**

Therefore, directors of Bermudian companies face the same uncertainties as directors of companies incorporated in the United Kingdom, along with the added risk of a wrongful trading claim. Whether the Bermudian courts grant directors a degree of leniency, given that most companies in Bermuda have been forced to stop trading as a consequence of the Regulations enacted under the Constitutional emergency powers, remains to be seen. However, Bermudian directors must be particularly aware of the solvency (or insolvency) of their companies at the stage when the restrictions on trading for their business are lifted. If, at that stage, a company is hopelessly insolvent, a director who nonetheless decides to cause the company to re-enter the market and commence trading once again is likely to render himself or herself personally liable for debts incurred during that period of trading, if the company ultimately is wound up. **8.9.2**

**How can company meetings take place during the pandemic?** **8.10**

Bermudian company law already caters for telephonic and similar electronic meetings of directors or general meetings of members by operation of s. 75A, Companies Act 1981, provided that the Bye-Laws of the company do not expressly require meetings in person. **8.10.1**

Further, any business other than the removal of directors or the appointment or removal of an auditor that otherwise is required to be done at a general meeting can be done by way of resolution in writing, subject to the Bye-Laws: see s. 77A, Companies Act 1981. Thus, the shareholders of a Bermudian company may dispense with an annual general meeting that was due to take place during the pandemic (see s. 71A, Companies Act 1981) by way of the written resolution procedure. **8.10.2**

**Have companies been given longer to file necessary accounts and records at the Registry?** **8.11**

No general extension of time for filings has been given, however the Registrar of Companies has implemented an electronic filing system to reduce physical contact within the Registry. From 18 March 2020, all filings are to be done electronically for which a detailed guidance note entitled [Industry Notice Coronavirus \(COVID-19\) dated 18 March 2020](#)<sup>224</sup> was **8.11.1**

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<sup>224</sup> [https://www.gov.bm/sites/default/files/Industry\\_notice-Covid-19\\_procedures.pdf](https://www.gov.bm/sites/default/files/Industry_notice-Covid-19_procedures.pdf) (accessed 15 January 2021).

published. In it, the Registrar provides the email addresses to which filings must be sent, and the format that the emails and attachments must take to facilitate the quick processing of documents. This note remains in force as at the time of writing.

## Civil Procedure

### **8.12 What changes to Civil Procedure have there been in light of the pandemic?**

**8.12.1** The administrative adjournment and relevant court circulars have already been discussed above. Circular No. 08 of 2020 makes it clear that the use of electronic means to conduct hearings is intended to be temporary. As early as Circular No. 10 of 2020, the court had already indicated that in some cases the parties “may” be required to attend the court in person, but subject to appropriate safeguards (such as the wearing of face masks) being undertaken. There have been publicly reported examples of the Court conducting in person hearings, even for matters that do not concern witness handling, such as the provisional liquidation applications in *Samson Paper Holdings Limited*, heard on 24 July 2020 and *Ping An Securities Group Holdings Limited*, heard on 28 September 2020. It has also been reported that a ‘hybrid’ approach to trials has been adopted by the Supreme Court on a few occasions, although no official guidance has yet been issued by the Court in relation to such trials. A hybrid trial is one where some individuals attend in person and others attend by video conference or similar technology.

**8.12.2** It has also become apparent that the Supreme Court is willing to take in account the Shelter in Place restrictions, and the disruption caused by the pandemic generally, when determining whether there has been a delay in bringing an application or undertaking a step in litigation: see, for example, *Medlands (PTC) Limited v The Attorney General* [2020] SC (Bda) 30 Com at [70]. However, such arguments have not been universally successful, and substantial delays, even in the context of the ongoing pandemic, will not be tolerated: see *Ivanishvili v Credit Suisse Life (Bermuda) Limited* [2020] SC (Bda) 55 Civ at [49].

### **8.13 What might be the legacy of these temporary changes?**

**8.13.1** The success of the electronic hearings conducted by the Supreme Court during the pandemic may have a lasting impact on court business in Bermuda, as it may have in other jurisdictions such as England & Wales.

**8.13.2** Other jurisdictions such as the Cayman Islands have turned to electronically based hearings more generally, especially for matters concerning internationally based counsel and clients. A question that the Bermudian Government, Judiciary, Bar Council and advocates will likely face coming out of this pandemic is whether it is in the best interests of Bermuda to adopt an electronic based court system more widely, even after the pandemic has subsided, or whether it is in the country’s best interest to revert to pre-pandemic norms. The language of Circulars No. 8 and 10-15 of 2020 suggest that there is a present view from the Judiciary that electronic hearings should be a temporary feature in the Bermudian legal landscape.

**8.13.3** No doubt Bermudian advocates and anyone interested in Bermuda’s legal system will await with some anticipation any feedback from the Judges as to the efficacy of the electronic hearings conducted during this time, and whether the temporary measures endure beyond the end of the pandemic.

# THE BRITISH VIRGIN ISLANDS

*Alexander Cook ©*

*Law as stated at: 16 January 2021*

## Introduction

Like many countries, the British Virgin Islands (“BVI”) took swift action to control the spread of Covid-19 following its first detected cases, with a 24-hour lockdown being imposed from late March 2020, and lasting until late April 2020. This was replaced by a 17-hour curfew, under which residents were permitted to leave their homes only between 6.00 a.m. and 1.00 p.m. From late April 2020, the BVI underwent a phased internal re-opening, with certain businesses and public spaces re-opening, subject to restrictions. On 1 August 2020, the BVI announced a further positive case, having had a significant period without any infections, which necessitated further measures over the ensuing months. As at the time of writing, a daily curfew is in place between the hours of 2.00 a.m. and 5.00 a.m. All businesses are allowed to operate, subject to social distancing measures being in place, with the wearing of masks being required in all public settings.

**8.14.1**

As at the time of writing, there are limited commercial flights to and from the BVI. With effect from 11 January 2021, however, a travel ban is in place for persons travelling through or from the United Kingdom except for nationals, belongers, residents, work permit holders, persons permitted to reside in the territory, diplomats and persons employed by BVI Government and statutory agencies. Eligible travellers arriving in the BVI from the UK are required to provide a five day RT-PCR negative test prior to entry and must undergo a mandatory 14-day quarantine, and a periodic testing regime.

**8.14.2**

The impact of the pandemic on the way in which litigation is conducted in the BVI has been significant. The courts have largely continued to operate, with a number of measures having been implemented to facilitate the continued administration of justice including, most significantly, the swift introduction, by the Eastern Caribbean Supreme Court (“ECSC”), of the [ECSC Covid-19 Emergency Measures Practice Direction](#) on 25 March 2020 (“**Emergency Measures PD**”)<sup>225</sup>, currently in its 3<sup>rd</sup> re-issue.

**8.14.3**

Under the Emergency Measures PD, which will remain in force until the Chief Justice otherwise directs, hearings are generally to be conducted by remote means, while the rules for the filing and service of documents have been relaxed. The Chief Justice has also issued a press release expressly recommending that legal practitioners and members of the public utilise mediation as a first port of call for the resolution of disputes in an effort to relieve the pressure which the pandemic has put on the court system.

**8.14.4**

As at the date of writing, the BVI has not put in place statutory measures such as legislation suspending wrongful trading, nor has it placed any limits on the circumstances in which companies may be placed into liquidation equivalent to those measures in England & Wales. That is not, of course, to say that it will necessarily be “business as usual”. This section will focus on some selected legal implications of the Covid-19 pandemic from a BVI law perspective.

**8.14.5**

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<sup>225</sup> <https://www.eccourts.org/wp-content/uploads/2020/06/COVID-Emergency-Measures-Practice-Direction-3rd-Re-issue-Final-5.pdf> (accessed 16 January 2021).

## **Corporate Insolvency**

### **8.15 Can liquidators still be appointed over BVI companies during the pandemic?**

**8.15.1** The BVI has not, at present, enacted legislation which limits the operation of the Insolvency Act 2003 (“**IA 2003**”). It therefore remains possible for an application to be made for the appointment of liquidators in respect of a BVI or a foreign company. A liquidator may be appointed in respect of a foreign company where that company has a “*connection with the Virgin Islands*”. An application to appoint liquidators can be made by persons which include the company itself, a creditor or a shareholder. A company may be wound up where *inter alia* (i) it is insolvent; (ii) the court is satisfied that it is just and equitable that liquidators be appointed; or (iii) it is in the public interest for a liquidator to be appointed.

**8.15.2** A recent decision of the Privy Council helpfully confirmed that the principles set out in the English authorities in relation to just and equitable winding up are applicable to such applications brought under the IA 2003 (see *Chu v Lau* [2020] UKPC 24; [2020] 1 WLR 4656).

**8.15.3** Unlike under English law, when the BVI Court orders the appointment of a liquidator, the liquidation will commence on the date of appointment and will not “*relate back*” to the date of the application for the appointment of liquidators.

### **8.16 What are the possible implications of the pandemic for BVI liquidations?**

**8.16.1** It remains to be seen whether the financial pressure which the pandemic will inevitably place on businesses around the world will result in a surge in the number of applications for the appointment of liquidators over BVI companies. That said, the global nature of the pandemic may have implications for BVI liquidations in a number of possible ways:

- (1) A common corporate structure in the BVI is for a BVI company to act as the holding company for one or more overseas operating subsidiaries. Financial difficulties experienced by the operating subsidiary as a result of the pandemic may affect the solvency of the BVI company, e.g. where the holding company has guaranteed the borrowing of, or offered assets as security for, the subsidiary. In such a scenario, the board of a BVI company may have to consider whether to apply for the appointment of liquidators over the BVI company. This is likely to be a difficult decision in any case (as discussed in question 16 below), but that difficulty may be exacerbated by the fact that the board is likely to require a full understanding of the subsidiary’s position which, in turn, may depend not only upon the insolvency regime to which the subsidiary is subject, but also the local laws (if any) enacted in response to the pandemic. As discussed below, given that a degree of protection is afforded to directors of BVI companies in circumstances where they take professional advice, it is important that such advice is taken as early as possible.
- (2) Conversely, the shares in a BVI company or a bank account in the BVI might be an asset identified by a creditor of a foreign company in financial distress. In this scenario, liquidators may be appointed over a foreign company under s. 163, IA 2003 on the basis that the foreign company has assets in the BVI (s. 163(2), IA 2003). This could be particularly useful if, for example, the assets in the BVI are the foreign company’s shares in a BVI company, especially where (as is common) that company itself has subsidiaries. In this scenario, the BVI liquidator can seek to exercise the foreign company’s powers as shareholder in the BVI subsidiary to remove the board



and otherwise secure the BVI company, and any subsidiaries and/or assets which it may have.

- (3) The advantage of appointing BVI liquidators over a foreign company, at least where, for example, the foreign country in question does not have a well-developed insolvency regime, is that the liquidation can be handled by experienced BVI professionals who are well-versed in tracking down and safeguarding assets. On the other hand, the impact of the pandemic may make it more difficult to satisfy the BVI Court that “*there is a reasonable prospect that the appointment of a liquidator of the company under this Part will benefit the creditors of the company*”, as required by s. 163(2), IA 2003. This may be because, for example, the BVI liquidator will not be recognised by the foreign court or due to the fact that, because of restrictions imposed by local legislation to tackle the pandemic, the liquidator is unable to deal adequately with the foreign company’s assets.
- (4) It has been predicted by some that the advent of the pandemic is likely to bring with it an increase in the incidence of fraud and fraudulent conduct, including in the corporate governance of companies.<sup>226</sup> If this proves to be correct, it may well have implications for the winding-up process in the BVI. A potentially powerful weapon in the BVI litigant’s armoury is the appointment of a provisional liquidator, which will enable the control of the company to be taken immediately out of the hands of its current management and into the hands of a professional office holder (s. 170, IA 2003). The main advantage of this route is that the applicant obtains an immediate remedy, often without notice to the board of the company in question, which will be particularly useful in cases of suspected fraud.
- (5) Finally, the possibility of an increasing number of large corporate insolvencies in foreign jurisdictions of groups with BVI assets may herald more applications being made for the appointment of provisional liquidators over BVI companies with “*soft touch*” powers (i.e. leaving the management of the company in the hands of the directors, while seeking to protect the company against actions by individual creditors), in order to support the foreign insolvency process. In *Re Constellation Overseas Limited & Ors* BVIHC (COM) 2018/0206, it was held that the BVI Court has jurisdiction to make such an order, which was sought in that case to support a *recuperação judicial* (judicial reorganisation) by the Brazilian Court. While the IA 2003 does not impose an automatic moratorium upon filing of an application for the appointment of a liquidator, s. 174(1) of the IA 2003 gives the court the power to stay or restrain proceedings in such circumstances – a power which, in practice, seems likely to be exercised in the applicant’s favour if the court is sufficiently convinced of the merits of the application to appoint joint provisional liquidators in the first place.

**Is the statutory demand route the best way to establish insolvency during the pandemic? 8.17**

One practical area where the closure of businesses in the BVI may have an impact on applications to appoint liquidators is where an applicant for an order under s. 162, IA 2003 seeks to rely on the statutory demand procedure in order to demonstrate insolvency. 8.17.1

How might that statutory demand be served if the company’s registered office is closed due to governmental restrictions? 8.17.2

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<sup>226</sup> See, for example, <https://www.bvibeacon.com/pandemic-could-cause-rise-in-fraud-cases-in-vi/> (accessed 16 January 2021).

- 8.17.3** The Emergency Measures PD provides, at para. 4.4, that “*notwithstanding the provisions of CPR 5.7 and CPR 6.2, a claim form or other document may be served on a limited company by sending it by e-mail to the registered office or Registered Agent of that limited company*”.
- 8.17.4** However, s. 155(2)(g), IA 2003 requires a statutory demand to be served in accordance with the Insolvency Rules 2005 which, in turn, requires a statutory demand to be served physically at the company’s registered office, or at the company’s last known principal place of business in the Virgin Islands, or by leaving the document “*in such a way that it is likely to come to the attention of a person coming to the office*” (r. 26(2), Insolvency Rules 2005).
- 8.17.5** Would, say, affixing the demand to the door of an office closed due to the pandemic, whilst at the same time notifying the directors that the document has been left there, suffice? It seems doubtful that the test would be satisfied if it was known that, due to a lockdown imposed in response to the pandemic, no one would be coming to the office for a substantial period of time. In the light of the fact that s. 156(2), IA 2003 requires an application to set aside a statutory demand to be made 14 days after the date of service of the demand, there would be a real risk to a creditor proceeding with an application to appoint liquidators due to non-compliance with that statutory demand in these circumstances. Given the gradual re-opening of businesses in the BVI, this will hopefully not pose any difficulty in the future. However, applicants would be well advised to consider seeking to establish insolvency using further or alternative routes under s. 8, IA 2003, such as by adducing independent evidence of cash flow or balance sheet insolvency (s. 8(1)(c), IA 2003).
- 8.17.6** For a recent case helpfully summarising the legal principles on applications to set aside a statutory demand, see *Pacific Fertility Institutes Holding Co Ltd v Pacific Fertility Institutes (Hk) Holding Co Ltd* BVIHC (COM) 142 of 2019.
- 8.18** **How might the duties of directors of BVI companies be affected by financial pressure caused by the pandemic?**
- 8.18.1** Directors will need to continue to consider carefully their statutory duties given the financial pressure likely to be experienced by companies under their stewardship. Duties which are likely to be of particular relevance include the duty to act in what the director believes to be in the best interest of the company, as well as a duty of care and skill (ss. 120-122, Business Companies Act 2004 (“**BCA 2004**”)).
- 8.18.2** There is no statutory provision in BVI law which provides expressly the point at which directors of BVI companies must consider the solvency of the company and the interests of creditors. However, it seems likely that the BVI Court would follow the approach in England, which requires directors who know, or ought to know, that their company is, or is more likely than not to become, insolvent, to take into account the interests of creditors as opposed to managing the company principally for the benefit of its shareholders (*BTI 2014 LLC v Sequana SA* [2019] EWCA Civ 112; [2019] 2 All ER 784: see further [para. 4.1](#) of Section Four: Company above). The *Sequana* decision appears to have been treated as authoritative by the High Court in Anguilla (another member of the Organization of Eastern Caribbean States) in *Satay Limited et al v Martin Dinning et al* AXAHCV2016/0051.
- 8.18.3** There are obviously significant difficulties for directors in making the assessment as to when this duty will be engaged in the circumstances of the pandemic. For example, an evaluation as to whether the company is cash flow or balance sheet insolvent may involve difficult calculations based on assumptions about the future operations of the business, which may turn out to be inaccurate (e.g. forecasts of income may prove to be overly-optimistic, or

asset valuations may, in hindsight, prove unrealistic). While this difficulty is not unique to directors of BVI companies, given the multi-jurisdictional nature of many BVI corporate structures (see subsection [para. 8.16.1\(2\)](#) above), this may pose a significant challenge.

A possible silver lining for a director of a BVI company is that, unlike the position under the English CA 2006, directors of BVI companies are protected by statute if they rely on advice received from professional advisers (including lawyers and accountants), provided that the director believes, on reasonable grounds, that those matters are within the person's professional or expert competence (s. 123(1), BCA 2004). Although this statutory provision does provide some protection for directors, ultimately it will be the director (and not the professional advisers) who will be responsible for deciding what action a company takes.

8.18.4

Finally, as under English law, BVI law does not necessarily limit "director" liability to persons who are formally appointed as *de jure* directors. The definition of a director for the purposes of the BCA 2004 "*includes a person occupying or acting in the position of director by whatever name called*", while the IA 2003 defines a director as "*a person who exercises, or is entitled to exercise or who controls or is entitled to control, the exercise of powers which, apart from the memorandum or articles, would fall to be exercised by the board*". Whether a person is likely to be found to be a *de facto* or shadow director will be a question of fact and degree: *Mark Byers & Ors v Chen Ningning* BVIHC VAP20150011 at [38].

8.18.5

It is not uncommon for the *de jure* directors of BVI companies to be professional nominee directors, who act on the instructions given to them by the beneficial owner of the company or other individuals. Depending on the circumstances, those individuals who give instructions may unwittingly fall within the definition of a shadow director (or, in some circumstances, a *de facto* director), and may therefore be exposed to liability as if they had been a director.

8.18.6

### **What liabilities could directors of BVI companies incur if they cause a company to trade whilst insolvent?**

8.19

As mentioned in the introduction section above, the BVI has not implemented equivalent measures to the English provision in s. 12, CIGA 2020 (suspension of liability for wrongful trading) (see [para. 2.52](#) in Section Two: Corporate Insolvency above). The matter will therefore continue to be governed by the current statutory regimes; principally, IA 2003 and BCA 2004.

8.19.1

It remains to be seen whether the BVI Court will grant directors a greater degree of latitude given the advent of the pandemic. The statutory tests appear to provide sufficient flexibility to enable the court to evaluate a director's conduct in the light of the current unusual circumstances. For example:

8.19.2

- (1) **Insolvent Trading (s. 256, IA 2003):** The court will have the opportunity to weigh in the balance the difficult choices facing directors during the pandemic when deciding whether a director "*knew or ought to have concluded that there was no reasonable prospect that the company could avoid going into insolvent liquidation*" and/or whether, once the director knew that the company was going into insolvent liquidation, "*he took every step reasonably open to him to minimise the loss to the company's creditors*". As regards the court's power to require a director to make "*such contribution, if any, to the company's assets as the Court considers proper*", the BVI Court is likely to follow the English approach set out in [para. 2.52](#) in Section Two: The Corporate Insolvency section above.

- (2) **Fraudulent trading (s. 255, IA 2003):** By contrast, where fraud is involved, it seems unlikely that the court will take a materially different approach to evaluating fraudulent conduct to that taken before. As mentioned above, it has been suggested by various commentators that the current environment will lead to an increase in the number of frauds. It is noteworthy that, under s. 255, liability extends to any person (not just a director) who, prior to an insolvent liquidation “*was knowingly a party to the carrying on of the business*”: (i) with the intention to defraud the company’s creditors or any other person; or (ii) for any fraudulent purpose.
- (3) **Disqualification (ss. 261-263, IA 2003):** The court has the power to make a disqualification order against a director on the application of the Official Receiver following the insolvency of a company of which they were a director. The statutory criteria, which *inter alia* requires the court to be of the view that the person’s conduct as director “*makes him unfit to be concerned in the promotion, formation or management of companies*”. The standard is sufficiently flexible that the court will be able to take into account the pandemic in assessing the conduct of the directors, in line with the approach in the English cases such as *Re Grayan Building Services Ltd* [1995] Ch 241 at 253 (which held that, in determining unfitness, the court is required to: “*decide whether [the relevant] conduct, viewed cumulatively...has fallen below the standards of probity and competence appropriate for persons to be fit to be directors of companies*”) and *Re Barings plc (No 5)* [1999] 1 BCLC 433 at 483 (which emphasised that “*the defendant’s conduct must be evaluated in context*”).

## **8.20 Will any transactions be liable to be set aside if the company enters liquidation?**

**8.20.1** BVI law provides for the avoidance of certain transactions entered into during the “twilight” period prior to insolvency. The voidable transaction provisions under ss. 245-248, IA 2003 (unfair preferences, transactions at an undervalue, voidable floating charges and extortionate credit transactions) apply to transactions which are made:

- (1) at a time when the company was insolvent in the sense of being unable to pay its debts as they fell due (but not necessarily balance sheet insolvent) at the time, or the transaction caused the company to become insolvent (a so-called “**insolvency transaction**”);
- (2) within 6 months prior to the “*onset of insolvency*”, which is usually the date of an application to appoint a liquidator (or 2 years if the transaction was with a “*connected person*”), or within 5 years of the onset of insolvency in the case of an “*extortionate credit transaction*” (“**vulnerability period**”).

**8.20.2** Directors will face the risk that, where a company is insolvent or of doubtful solvency, every transaction entered into by the company will be the subject of heightened scrutiny by a liquidator subsequently appointed, especially if that transaction was with a person who is a “*connected person*” to the company within the meaning of s. 5, IA 2003. If the counterparty is “*connected*”: (i) the vulnerability period will stretch back for a longer period; and (ii) it will be presumed that the transaction is an “*insolvency transaction*”, and that it did not take place in the ordinary course of business.

**8.20.3** Again, it remains to be seen how these provisions will be applied in the circumstances of the pandemic. Although these transactions are described in the IA 2003 as “*voidable*”, the court in fact has a very broad discretion as to the relief which may be granted (s. 249, IA 2003).

It is noteworthy that s. 245, IA 2003 (unfair preferences) imposes an objective standard (looking at whether the transaction “*has the effect of*” putting the creditor into a better position), as opposed to the position in England where the test is whether there is an “*intention to prefer*”. Thus, under the IA 2003, it is not necessary for the company to be influenced by a desire to prefer the creditor. This distinction may prove crucial where the court is examining a payment made to a creditor in circumstances where the company did not intend to prefer the creditor in question, although this was the effect of the transaction. **8.20.4**

## Company Law

**How might a shareholder’s position be affected by the pandemic?** **8.21**

As in any economic crisis, there are threats and opportunities. This is likely to be truer than ever as the economic pressure on companies deepens. In the BVI, as elsewhere, there is the risk that controlling shareholders will take steps to favour their own interests at the expense of those with a minority stake. **8.21.1**

As a major incorporation centre, the BVI seems likely to see an increase in shareholder disputes being litigated before its courts as the fallout from the pandemic unfolds. The BCA 2004 has a wide range of remedies available for shareholders in such circumstances, including unfair prejudice relief (s. 184I), derivative claims (s. 184C) and applications to appoint liquidators on the just and equitable ground (s. 184I(2)(f) or s. 162(1)(b), IA 2003), all of which are likely to be well-utilised over the coming months and years. **8.21.2**

Given the likely squeeze on asset and company values, majority shareholders may have less to fear from traditional minority protections such as unfair prejudice relief under s. 184I – if, for example, the value of the company in which they are a shareholder has fallen, majorities may be less concerned about an order of the court requiring them to buy out the minority shareholder because it may enable the majority to do so at a relatively low price. **8.21.3**

The pandemic may also increase the need for shareholders or other litigants to obtain interim relief in the BVI to protect the assets of BVI companies which are the subject matter of litigation, either in the BVI or elsewhere, or where the BVI companies are themselves the property of a party to litigation against which the claimant proposes to enforce. **8.21.4**

Two recent developments are worth noting in this regard. **8.21.5**

First, shockwaves from the recent decision of the Eastern Caribbean Court of Appeal in *Broad Idea International v Convoy Collateral* BVIHCMAP2019/0026 led to urgent statutory intervention in relation to the BVI Court’s jurisdiction to grant freezing injunctions in the BVI in support of foreign proceedings. In *Broad Idea*, the Court of Appeal held that the decision in *Black Swan Investment ISA v Harvest View Limited* BVIHC (Com) 2009/399 – which held that the BVI Court had jurisdiction to impose a free-standing freezing injunction in BVI in support of foreign proceedings, without the need to bring a substantive claim in the BVI – was wrongly decided. **8.21.6**

Notwithstanding that the decision in *Broad Idea* is subject to an appeal to the Privy Council (which is due to be heard in mid-February 2021), on 7 January 2021, the BVI rapidly enacted an amendment to the Eastern Caribbean Supreme Court (Virgin Islands) Act in the form of s. 24A, which now expressly confers on the BVI Court jurisdiction to grant free-standing interim relief in aid of existing or anticipated foreign proceedings. The new section defines interim relief broadly, and includes not only an injunction but also any other relief which **8.21.7**

may be granted in BVI proceedings including orders for the provision of information or documentation (such as *Norwich Pharmacal* or *Banker's Trust* orders) and orders against non-cause of action defendants (i.e. the jurisdiction established by *TSB Private Bank International SA v Chabra* [1992] 1 WLR 231) in support of foreign proceedings. This amendment is a welcome one, and one which will avoid litigants having to find inventive ways around the Court of Appeal's decision in *Broad Idea*, such as the unnecessary joinder of the substantive defendant to BVI proceedings, or bringing a cause of action against the BVI company.

**8.21.8** It is worth noting that, where the foreign proceeding in question is an arbitration, s. 43, Arbitration Act 2013 already gave the BVI Court the power to grant an “*interim measure*” in support of a foreign arbitral proceeding, provided that the award may be enforced in the BVI.

**8.21.9** Secondly, in *FHL v LTC & Ors* BVI HC (COM) 2020/0048, the Commercial Court confirmed that it had jurisdiction to grant *Norwich Pharmacal* relief not only against the registered agents of several companies alleged to be part of a scheme for hiding and dissipating assets, but also against a former voluntary liquidator and professional nominee director of the companies. This decision is significant for claimants seeking information about the affairs of BVI companies because liquidators and professional nominee directors may well have more voluminous – and, crucially, more relevant – documentary records than those held by a company's registered agent.

## **8.22 Can company meetings be held remotely by electronic means?**

**8.22.1** Although the restrictions in the BVI have generally been relaxed, and businesses are now able to re-open, directors or members of BVI companies may either wish to conduct corporate meetings remotely, or they may be physically located outside the BVI in a country in which the local laws do not permit a physical meeting.

**8.22.2** Even before the pandemic, BVI company law provided significant flexibility. Subject to any contrary provision in the company's memorandum and articles of association:

- (1) the directors can determine when, where, and how meetings should take place (s. 126(1), BCA 2004); and
- (2) a meeting of the members of a company may be held at such time and in such place, within or outside the Virgin Islands, as the convener of the meeting considers appropriate (s. 82(3), BCA 2004).

**8.22.3** A director or a member of the company shall be deemed to be present at a meeting if he participates by telephone or other electronic means, and all directors or members participating in the meeting are able to hear each other (ss. 126(2) and 82(4)(b), BCA 2004, respectively).

**8.22.4** Directors may also execute written consents to pass resolutions *in lieu* of holding meetings (s. 129(1), BCA 2004). Likewise, a members' resolution may be adopted instead of a vote being taken at a meeting (s. 81, BCA 2004).

**8.22.5** For both of the above types of meetings, the quorum and notice requirements must be followed in the same way as if the meeting were to be a physical meeting.

## Contract

### **Might the pandemic entitle a party to rely on a *force majeure* clause?** **8.23**

The pandemic is likely to see parties seek to resile from, or renegotiate, their contractual arrangements in response to economic hardship. The nature and scope of a *force majeure* clause is the subject of a wealth of common law authority, and is explored in detail in [para. 1.8](#) of Section One: Contracts above (see that section for the discussion of other relevant issues of contract law, such as frustration and also material adverse change clauses). **8.23.1**

It is likely that the BVI Court will follow the approach in the English decisions as far as *force majeure* clauses are concerned. In *Applied Enterprises Ltd v Interisle Holdings Ltd et al* BVIHCV (COM) 2012/0135, the Commercial Court had to consider the issue of a *force majeure* defence in the context of an application for summary judgment. **8.23.2**

The defendant argued *inter alia* that its failure to pay under the contract been hindered by circumstances beyond its control – namely, the general economic downturn and difficulty of obtaining credit following the 2008 financial crisis. The claimant cited the English authority of *Tandrin Aviation Holdings Ltd v Aero Toy Store LLC* [2010] EWHC 40 (Comm); [2010] 2 Lloyd’s Rep 668 as being authority for the proposition that changes in economic circumstances or market conditions are not a *force majeure* event. The Judge refused to grant summary judgment against the defendant, holding that: **8.23.3**

*“each force majeure clause must be construed upon its particular wording in the context of the contract within which it appears and against the relevant surrounding circumstances, in order to come to a decision what a reasonable person would have understood the parties to have meant”.*

The Judge went on to conclude that the clause in question was extremely wide in terms, and that it was “*far from obvious*” that the clause would not operate to exclude an inability to obtain credit, particularly where (at least initially), it was envisaged that the payment would be funded by means of a loan.<sup>227</sup> **8.23.4**

Overall, it will, in all cases, be for the court to construe the precise terms of the *force majeure* clause, so there is inevitably a limit on what may be drawn from the court’s interpretation of one clause when considering another. **8.23.5**

## Civil Procedure

### **What impact has the pandemic had on litigating in the BVI?** **8.24**

As mentioned in the introduction, the ECSC acted decisively to implement the Emergency Measures PD, which puts into place a number of measures to minimise the risks associated with the pandemic on the conduct of litigation and hearings, while still enabling the court and hearings to continue to operate. **8.24.1**

Particular areas covered by the Emergency Measures PD include: **8.24.2**

- (1) **Service and filing of documents:** Service of court documents is permitted by e-mail

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<sup>227</sup> In the context of an argument to similar effect, Mathurin J, in the High Court of Anguilla, remarked that “*in the absence of anything in contradiction or other compelling authority... in order for economic circumstances to be considered as a force majeure defence it has to be specifically contracted as a term*” (*Temenos Development Inc. v Luxury Properties et al* AXAHCV2013/0078 at [15]).

(para. 4.1) and filed at court using the court's existing e-litigation portal (in default of which email may be used (para. 3)).

- (2) **Operation of the Commercial Court:** The Court will continue to operate, but “*all in-person appearances are discouraged*” (para. 5). Where the judicial officer deems it fit for a hearing to be conducted in person, attendance will be limited to attorneys, parties, and necessary witnesses only. The Emergency PD provides detailed guidance for remote hearings, including provisions concerning attendance and recording of hearings (para. 5.8).
- (3) **Electronic bundles:** Detailed guidance on the preparation of electronic hearing bundles and trial bundles appears in Schedule 2 of the Emergency Measures PD.

**8.24.3** In our experience, the BVI Court has been very flexible, recently accommodating (i) a month-long witness trial with counsel, witnesses and experts participating from five continents; and (ii) a “hybrid” 4-day trial in which counsel and certain witnesses participated via video link from a single location in central London. The Court will, however, remain in control of its own processes. In *PT Ventures SGPS SA v Vidatel Limited* BVIHC (COM) 2015/0117, the Court refused the parties’ application for the use of a third party video conferencing system, operated by the International Dispute Resolution Centre in London, for the trial. The Court held that its own conferencing system was to be preferred *inter alia* so that the Court could ensure the security and control of its own proceedings. The Court also rejected the parties’ request that an unofficial recording of the trial be made for the purposes of the Live Note transcription service, holding that there was no good reason for departing from the prohibition on unofficial recordings of court proceedings in para. 10.2 of the Emergency Measures PD.

**8.24.4** The BVI Court has also had to grapple with the impact of the pandemic in other jurisdictions insofar as that has an impact on litigation in the BVI.

**8.24.5** A recent example is provided by *Starr Investments Cayman II Inc v Ou Wen Lin* BVIHC (COM) 2018/0225. In that case, the applicant sought an adjournment of the return date of a hearing due to the fact that service of the application on the respondent in China under the Hague Convention was impossible because of the closure of the Service of Process Unit in London as a result of the pandemic. Jack J observed that, under the overriding objective of the CPR, the court must ensure that cases are “*dealt with expeditiously*”. The learned Judge indicated that he was not minded to grant a further adjournment of the return date, and invited the applicant to consider ways in which the matter could be progressed in the meantime using the court’s power to order alternative service by a specified method under CPR r. 5.14 (including possibly service on the BVI registered agent of the respondent) or the court’s power to dispense with service under CPR r. 42.12. Although no order was made in *Starr Investments*, this case demonstrates that the BVI Court will be prepared to deal robustly with the progression of litigation, notwithstanding the exigencies caused by the current pandemic.

**8.24.6** What, then, does the future hold for the way in which litigation is conducted in the BVI? While physical hearings will undoubtedly resume once again (particularly, one would imagine, for heavy trials), certain aspects of litigation are unlikely to return to the way they were prior to the pandemic. The court and legal practitioners have become very well-used to conducting hearings (including hearings where witnesses are cross-examined) by remote means. Video link hearings may be utilised more often than they were previously, especially for shorter or more straightforward hearings and/or hearings where the parties wish for foreign counsel to



appear at short notice. Similarly, while the ECSC had implemented the Electronic Litigation Portal for the filing of court documents prior to the outbreak of the pandemic, the pandemic may accelerate moves towards further ways of working electronically, such as provision of electronic bundles as standard for all hearings.

# DUBAI INTERNATIONAL FINANCIAL CENTRE

*Joseph Wigley ©*

*Law as stated at: 16 January 2021*

## Introduction

- 8.25.1** From March 2020 until the end of May 2020, the DIFC courts were physically closed and court employees conducted operations remotely from home. On 31 May 2020, all DIFC court premises re-opened and all staff returned to the workplace by 14 June 2020. However, as explained further below, even during the period of physical closure, the DIFC courts continued to operate and to offer a full range of services.
- 8.25.2** In response to the pandemic, the DIFC has taken a number of measures. Of particular relevance, the DIFC issued [Presidential Directive No. 4 of 2020 in Respect of COVID-19 Emergency Measures](#) (the “**DIFC COVID-19 Directive**”),<sup>228</sup> which was effective from 21 April 2020 to 31 July 2020 (the “**Emergency Period**”).
- 8.25.3** In addition to seeking to provide more flexibility for employees and employers to allow them to deviate from their obligations under DIFC Employment Law during the Emergency Period, as explained further below, the DIFC COVID-19 Directive suspended during the Emergency Period rules relating to wrongful trading. As the [official press release](#) announcing the DIFC COVID-19 Directive explained, the measure to suspend wrongful trading provisions “...eases concerns of DIFC company directors that they may be held personally liable for continuing to trade amid the heightened uncertainty created by the COVID-19 pandemic”<sup>229</sup>.
- 8.25.4** In this section, in addition to considering the impact of the DIFC COVID-19 Directive on the DIFC’s wrongful trading provisions, the impact of the pandemic more generally on the operations of the DIFC courts and the measures which have been taken to provide assistance and/or regulatory relief to the DIFC’s financial services community, a number of relevant issues which may arise in the context of the pandemic in the areas of insolvency and contract law are explored below.

## Company / Insolvency Law: Directors’ Duties and Liability

- 8.26** **Are directors of DIFC companies protected from the consequences of a company becoming insolvent during the pandemic?**
- 8.26.1** As in the United Kingdom, the DIFC suspended liability for wrongful trading for a limited period during the pandemic, as explained further below.
- 8.26.2** However, it is important to emphasise that, notwithstanding the suspension of wrongful trading, directors of DIFC companies remain susceptible to claims brought on other bases, for example, for breaches of their fiduciary duties.

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<sup>228</sup> [https://www.difc.ae/files/7015/8761/6710/DIFC\\_Presidential\\_Directive\\_-\\_COVID19\\_Measures.pdf](https://www.difc.ae/files/7015/8761/6710/DIFC_Presidential_Directive_-_COVID19_Measures.pdf) (accessed 16 January 2021).

<sup>229</sup> <https://www.difc.ae/newsroom/news/difc-announces-presidential-directive-aimed-providing-greater-protection-companies-and-employees/> (accessed 16 January 2021).

- Suspension of liability for wrongful trading – to whom did it apply and for how long?** **8.27**
- The suspension of liability for wrongful trading applied for an emergency period from 21 April 2020 to 31 July 2020 to directors (including alternate directors or persons not validly appointed as a director, but acting in the position of a director) of companies established in the DIFC. **8.27.1**
- Under Art. 113, DIFC Insolvency Law (Law No. 1 of 2019) (the “**DIFC Insolvency Law**”), where a director of a company knew, or ought to have known, that there was no reasonable prospect of the company avoiding insolvent liquidation, in order to avoid potential liability the director must have taken every step with a view to minimising the potential loss to the company’s creditors as the director ought to have taken. The facts which a director of a company ought to know or ascertain, the conclusions which he ought to reach and the steps which he ought to take are those which would be known, ascertained, reached or taken, by a reasonably diligent person having both: (a) the general knowledge, skill and experience that may reasonably be expected of a person carrying out the same functions as are carried out by that director; and (b) the general knowledge, skill and experience that that director has. **8.27.2**
- If the director does not take those steps, and if the company does subsequently go into insolvent liquidation, then the court, on the application of the company’s liquidator, may order the director to make such contribution to the company’s assets as it thinks proper pursuant to Art. 115, DIFC Insolvency Law. **8.27.3**
- Given the potentially serious personal consequences, the possibility of being found to have breached such provisions unsurprisingly makes directors nervous and may cause them to cease trading before strictly necessary. In an effort to avoid businesses ceasing trading unnecessarily in the context of the pandemic, para. 15(1), DIFC COVID-19 Directive, which took effect from 21 April 2020, provided that the wrongful trading provisions and related liability provided for in Arts. 113 and 115, DIFC Insolvency Law, were suspended for the duration of an emergency period from 21 April 2020 to 31 July 2020. **8.27.4**
- Paragraph 15(2), DIFC COVID-19 Directive, states by way of explanation that such suspension is “...*intended to ensure that directors of DIFC companies in the current uncertain environment are able to take decisions to continue to trade, incur new credit and make decisions which may otherwise cause directors concern about the potential for personal liability under the wrongful trading regime set out in Articles 113 and 115 of the Insolvency Law*”. **8.27.5**
- The DIFC COVID-19 Directive therefore appears temporarily to have removed the threat of personal liability arising from Arts. 113 and 115, DIFC Insolvency Law, for directors who continued to trade during the pandemic. However, just as in relation to the equivalent measure in the United Kingdom, as explained in some detail in the [Suspension of Liability for Wrongful Trading](#) section from [para. 2.52](#) in Section Two: Corporate Insolvency above, there remain a number of uncertainties as to how the suspension is to operate in practice, including, for example, if a company does eventually go into liquidation sometime after the relevant period, how it will be possible to determine which element of the loss is to be excised from any claim as having arisen during the relevant period. **8.27.6**

## **Corporate Insolvency**

### **8.28 What tools are potentially available under the DIFC's existing insolvency regime to assist companies in financial difficulty?**

**8.28.1** The recently introduced DIFC Insolvency Law, which came into force on 13 June 2019, has proved to be a timely update to the DIFC's insolvency regime in light of the advent of the pandemic. In particular, the DIFC Insolvency Law, in addition to retaining previously available tools (namely company voluntary arrangements (CVAs), receiverships, and liquidations) now makes provision for:

- (1) a new rehabilitation (debtor-in-possession) process (see Part 3, Arts. 13-31, DIFC Insolvency Law); and
- (2) a new administration process (see Part 4, Arts. 32-41, DIFC Insolvency Law).

**8.28.2** The rehabilitation process allows a DIFC company to apply for a Rehabilitation Plan (an arrangement proposed by the creditors or shareholders of the company under Part 3, DIFC Insolvency Law) where the debtor is, or is likely to become, unable to pay its debts and there is a reasonable likelihood of a successful Rehabilitation Plan being agreed between the company and its creditors and shareholders (see Art. 13).

**8.28.3** If at least three-quarters in value of any class of creditors or shareholders agree to the Rehabilitation Plan and it is sanctioned by the court, it is then binding on all persons within the relevant class (see Art. 25).

**8.28.4** The rehabilitation process allows the debtor to retain control and the debtor's directors to continue to manage the debtor's affairs, although the debtor must appoint at least one registered insolvency practitioner as a rehabilitation nominee whose role is to assist the debtor with the implementation of the rehabilitation plan (see Art. 22).

**8.28.5** Key relevant features of the rehabilitation regime include:

- (1) upon the application for a Rehabilitation Plan being made to the DIFC court, a 120-day moratorium applying to all creditors (secured or unsecured and irrespective of whether they have consented) in respect of the company thus preventing any enforcement proceedings from being brought or continued (see Arts. 15(2), 16 and 18); and
- (2) an additional limitation on the application of so-called "*ipso facto*" clauses (which make provision for termination rights upon insolvency) during the moratorium period (see Art. 18(2)).

**8.28.6** As to the new administration process, pursuant to Art. 32(1) a creditor may only apply for the appointment of an administrator in circumstances where an application for rehabilitation has been made and there is evidence of misconduct. If appointed, the administrator, who must be a registered insolvency practitioner, takes control of the company's affairs (see Art. 32(6)).

**8.28.7** In determining whether to appoint an administrator, the court must be satisfied that the company is, or is likely to become, unable to pay its debts; and the appointment of an administrator is likely to make it more likely to achieve a Rehabilitation Plan, a company voluntary arrangement, a scheme of arrangement under the DIFC Companies Law (Law No.5 of 2018) or to investigate mismanagement or illegality related to the company's affairs. During the period of appointment of an administrator, a moratorium shall also apply, any

application for winding-up dismissed and any administrative receiver vacate office (see Arts. 33-34).

## **Contract Law**

### **Might a party be able to terminate a contract on account of failure of performance caused by the impact of the pandemic? 8.29**

Arts. 86 to 88, DIFC Contract Law (DIFC Law No.6 of 2004) (the “**DIFC Contract Law**”) provide that a party, upon giving notice, may terminate a contract where a party fails to perform an obligation under the contract, or it is clear that he will fail to do so, and the failure amounts to a fundamental non-performance. Pursuant to Art. 86(2), in determining whether a failure to perform constitutes ‘fundamental non-performance’ the court should have regard to, among other things, whether: **8.29.1**

- (1) the non-performance substantially deprives the aggrieved party of what it was entitled to expect under the contract;
- (2) strict compliance with the obligation which has not been performed is of the essence under the contract;
- (3) the non-performance is intentional or reckless; and
- (4) the non-performance gives the aggrieved party reason to believe that it cannot rely on the other party’s future performance.

Art. 90 provides that upon termination under Arts. 86 to 88 either party may claim restitution of whatever it supplied provided that such party concurrently makes restitution of whatever it has received. **8.29.2**

It appears that the DIFC courts may look sympathetically upon contractual parties seeking to terminate contracts owing to a party’s non-performance, notwithstanding that the failure to perform was caused by the impact of the pandemic. In *Liberty v (1) Lance Real Estate Broker (2) Lucian (3) Lilyana (4) Lucille (5) Lucca (6) Lacey (7) Lexi (8) Lawsan* 2020 [DIFC] SCT 128 (June 18, 2020) SCT Judge Maha Al Mehairi held that the claimant purchaser of residential property was entitled to, and did, terminate an agreement to purchase due to the defendant seller’s non-performance of the said agreement owing to the inability of the defendant seller’s representative to travel to the UAE due to the travel disruption caused by the pandemic. The claimant purchaser was also held to be entitled to repayment of the purchase deposit by way of restitution. **8.29.3**

### **Might the pandemic entitle a party to rely on a *force majeure* clause? 8.30**

A party to a contract may seek to rely upon *force majeure* to excuse non-performance. **8.30.1**

As explained in further detail in [para. 1.9](#) of Section One: Contracts, generally, as a matter of English law there are two requirements which must be satisfied for an event to constitute *force majeure*: **8.30.2**

- (1) first, that it could not reasonably have been foreseen by the parties; and
- (2) secondly, that both it and its consequences were not within the parties’ control.

As again explained in further detail in [para. 1.9](#) of Section One: Contracts above, however, in English law, in circumstances where there is no statutory or common law basis for the **8.30.3**

operation of *force majeure*, if an express *force majeure* clause is not contained in a contract, it is unlikely that a court would imply a term to that effect.

**8.30.4** In contrast, in the DIFC, Art. 82, DIFC Contract Law, in effect implies a *force majeure* provision into contracts which are governed by DIFC law (as was confirmed in *DIFC Investments LLC v Mohammed Akbar Mohammed Zia* “[2017] DIFC CFI 001 (May 15, 2017)). Art. 82(1), DIFC Contract Law, provides:

*“Except with respect to a mere obligation to pay, non-performance by a party is excused if that party proves that the non-performance was due to an impediment beyond its control and that it could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome it or its consequences.”*

**8.30.5** It should be noted, however, that parties are able to vary or exclude Art. 82 (see Art. 11, DIFC Contract Law).

**8.30.6** As will be apparent, Art. 82(1) mirrors the general requirements for *force majeure* to apply referred to above, namely that the event could not reasonably have been foreseen and was beyond the parties’ control.

**8.30.7** There is, however, an important exception, namely in respect of obligations to pay. As a result of this exception, Art. 82(1) alone will not excuse a party from payment of sums due under a contract governed by DIFC law if payment cannot be made due to the pandemic.

**8.30.8** As to the effect of *force majeure*, Art. 82(2) provides that:

*“When the impediment is only temporary, the excuse shall have effect for such period as is reasonable having regard to the effect of the impediment on performance of the contract.”*

**8.30.9** What is ‘reasonable’ for these purposes will be dependent on various factors, including the nature of the contract and the connection between the effects of the impediment consequential upon the pandemic and the affected party’s performance.

**8.30.10** In circumstances where the effects of the pandemic are likely only to be temporary, it is unlikely that a party claiming to have been impeded could successfully rely on Art. 82 in order to seek the cancellation of the contract (although not impossible dependent upon the circumstances).

**8.30.11** Pursuant to Art. 82(3), within a reasonable time after the impeded party knew or ought to have known of the impediment, that party must give notice to its counterparty of the impediment and its effect on its ability to perform. A failure to do so will render the affected party liable for damages.

**8.30.12** The author is not aware of a case in which Art. 82 has been successfully relied upon to excuse non-performance since the onset of the pandemic. In *Lerdan Rental Llc v Linana Engineering Llc* [2020] DIFC SCT 330 (November 1, 2020), the defendant to a claim for monies due under a rental agreement for the lease of equipment does appear to have sought to rely on *force majeure*. The defendant contended that the difficulties it faced in using the equipment and its inability to complete work which it had contracted with a third party to perform as a result of restrictions imposed on account of the pandemic amounted to *force majeure*. However, SCT Judge Nassir Al Nasser rejected the defendant’s arguments, holding that (1) the agreement claimed upon was solely between the claimant and the defendant and did not relate to the third party; and (2) the agreement did not contain a provision

which would relieve the parties of their obligations towards one another in the event of *force majeure*. While the latter limb of the Judge's reasoning may seem surprising given that, as explained above, Art. 82, DIFC Contract Law, in effect implies a *force majeure* provision into all contracts governed by DIFC law, it may perhaps be justified in the circumstances of the case given that the relevant obligation was a mere obligation to pay and therefore excluded pursuant to the terms of Art. 82(1).

In *Landin v (1) Lakhan (2) Lakshmi* [2020] DIFC SCT 177 (July 29, 2020), the claimant sought to recover unpaid legal fees from the defendants. The defendants had refused to pay the claimant's invoices in April 2020, explaining in an email to the claimant that the economic situation caused by the pandemic had caused their customers to default on payments and that “[u]nder such economic force major [sic] situation [Covid-19]” they could no longer afford the claimant's fees. However, it does not appear from the judgment that the defendants sought to rely on *force majeure* in their defence. It is nevertheless worth noting that SCT Judge Nassir Al Nasser, in finding in favour of the claimant, observed at paragraph 39 of his judgment (albeit *obiter*) that “[t]he COVID-19 pandemic does not release a party from its obligations to honour the Agreement”. Further, it is perhaps surprising that *force majeure* does not appear to have been relied upon in *Liberty v (1) Lance Real Estate Broker (2) Lucian (3) Lilyana (4) Lucille (5) Lucca (6) Lacey (7) Lexi (8) Lawsan* 2020 [DIFC] SCT 128 (June 18, 2020) referred to above. **8.30.13**

For an example of a case in which the DIFC courts have considered in more detail the operation of *force majeure*, see *Gert v Germaine* “[2016] DIFC SCT 097 (September 25, 2016), in which the court held that the defendant landlord was unable to rely on *force majeure* to excuse his failure to carry out maintenance in a property. **8.30.14**

Furthermore, in circumstances where common law authorities, and in particular English case law, are generally persuasive in the DIFC, the reader is referred to the detailed guidance set out in [para. 1.9](#) of Section One: Contracts above, which deals with *force majeure* clauses as a matter of English law. **8.30.15**

### **Will the pandemic frustrate DIFC contracts?** **8.31**

There is no specific provision governing the frustration of contracts in the DIFC Contract Law or elsewhere in DIFC legislation. However, in such circumstances, the DIFC courts are able to look beyond DIFC law and supplement it with the application of the common law. **8.31.1**

As explained in detail in [para. 1.11](#) of Section One: Contracts, the frustration of a contract is the automatic discharge of the contract by reason of a supervening event for which neither party to the contract is responsible. The essential element is that the supervening event renders fulfilment of the contract impossible, or radically transforms the performance obligation from that undertaken at the outset. Upon a contract being frustrated in this way, the contracting parties will no longer be bound to perform their obligations and will thus be excused from liability for damages for any such non-performance. **8.31.2**

Whether the pandemic has the effect of frustrating a contract will be dependent upon the nature of the contract itself and the effect that the pandemic has had on the parties' ability to perform their obligations under the contract in question. In order to assess whether frustration might be arguable in respect of any particular case, the reader is referred to the detailed guidance set out in [para. 1.11](#) of Section One: Contracts above, which deals with frustration. **8.31.3**

**8.31.4** Interestingly, in *DIFC Investments LLC v Mohammed Akbar Mohammed Zia* [2017] DIFC CFI 001, referred to above, the defendant does appear to have relied on the doctrine of frustration, contending that various acts of the claimant bank had “frustrated” the contracts in question. However, the Judge, considering that the defendant’s “...brief mention that the acts of the bank “frustrated” the [c]ontracts ha[d] not been fully pleaded...” went on to assess simply whether the acts of the bank constituted a *force majeure* pursuant to Art. 82, DIFC Contract Law, holding that they did not in circumstances where the obligation in question was an obligation to pay, and therefore Art. 82 did not apply.

**8.32 What impact, if any did the DIFC COVID-19 Directive have on contracts?**

**8.32.1** Other than suspending wrongful trading provisions addressed in further detail above, the measures introduced by the DIFC COVID-19 Directive were overwhelmingly focussed on employment contracts and employment law more generally which are beyond the scope of this book.

### Financial Services

**8.33 What initiatives have been introduced in order to provide assistance and/or regulatory relief to the DIFC’s financial services community?**

**8.33.1** The Dubai Financial Services Authority (“**DFSA**”) has introduced a number of initiatives aimed to provide assistance and regulatory relief to the DIFC’s financial services.

**8.33.2** On 24 March 2020 the DFSA issued a [letter](#)<sup>230</sup> outlining its various responses to the pandemic, including how it intended to continue its operations in the context of the pandemic, how it had engaged with international financial services regulators, and how it intended to continue to engage with regulated firms.

**8.33.3** On 7 April 2020 the DFSA [announced](#)<sup>231</sup> a number of measures it was taking to support the DIFC’s financial services community, including:

- (1) ensuring that new businesses coming into the DIFC:
  - (a) are given more time to complete the application and authorisation processes and meet the set-up requirements to commence business;
  - (b) receive a reduction in application fees for the remainder of 2020 and flexibility in requirements for permanent premises;
- (2) ensuring that existing authorised firms will be able to obtain:
  - (a) an extension of time for filing a number of returns and reports;
  - (b) flexibility in meeting authorised individual obligations, including extending the amount of time that temporary cover can be in place;
  - (c) a waiver of fees for applications relating to authorised individuals;

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<sup>230</sup> [https://dfsae.thomsonreuters.com/sites/default/files/net\\_file\\_store/Covid-19\\_Media\\_Release\\_final.pdf](https://dfsae.thomsonreuters.com/sites/default/files/net_file_store/Covid-19_Media_Release_final.pdf) (accessed 16 January 2021).

<sup>231</sup> [https://dfsae.thomsonreuters.com/sites/default/files/net\\_file\\_store/20200406\\_-\\_Regulatory\\_Relief\\_Media\\_Release\\_-\\_FINAL.pdf](https://dfsae.thomsonreuters.com/sites/default/files/net_file_store/20200406_-_Regulatory_Relief_Media_Release_-_FINAL.pdf) (accessed 16 January 2021).



- (d) temporary relief from capital requirements for those firms which do not hold or control client assets or hold insurance monies;
- (e) a waiver of various fees for applications for waivers and modifications for the remainder of 2020.

## **Procedure**

### **What impact has the pandemic had on litigating in the DIFC?**

**8.34**

The DIFC courts have operated an online Court Registry system for several years, and more recently have introduced e-bundling requirements. Furthermore, the DIFC courts are experienced in facilitating hearings with some or all participants attending remotely via telephone or video conference, and the DIFC Court Rules are sufficiently flexible to cater for such remote or hybrid hearings.

**8.34.1**

In the circumstances, the advent of the pandemic and the physical closure of the DIFC courts had more limited impact than it might otherwise have done as the DIFC courts were well-equipped to move to entirely online procedures and remote hearings. In particular, matters have continued to be listed for hearing, and case management timetables are not generally being stayed or subject to material delay, at least, solely on grounds that the restrictions imposed as a consequence of the pandemic have impacted upon the courts' operational capability.

**8.34.2**

The DIFC courts issued an [update on 17 March 2020](#).<sup>232</sup> The guidance contained in the update, provides, among other things, that:

**8.34.3**

- (1) generally speaking, all hearings in the Court of First Instance will be via teleconference, ideally using the e-bundling platform;
- (2) all hearings conducted for Small Claims Tribunal (SCT) cases will be either through videoconference (for overseas litigants) or teleconference (for those situated in the UAE) and in line with the SCT's usual process, all documents must be filed electronically;
- (3) practitioners and court users are encouraged to email the Registry for all enquiries using the email addresses provided;
- (4) for urgent queries and applications, practitioners and court users are to contact the Registry by telephone using the telephone numbers provided; and
- (5) court filing fees may be paid either through wire transfer or online through the payment link received upon filing a document on the Case Management System as explained in further detail in the guidance.

### **What approach have the DIFC courts taken to extending time for compliance with court deadlines on account of the impact of the pandemic?**

**8.35**

The DIFC courts are likely to take a sympathetic approach to applications to extend time in the context of the pandemic. By way of example:

**8.35.1**

- (1) in CFI 029/2019 *Bassam Khalifa v S.W.I.F.T (Dubai) Limited* (June 9, 2020), H.E.

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232 <https://www.difccourts.ae/media-centre/newsroom/covid-19-difc-courts-update> (accessed 31 January 2021)

Justice Omar Al Muhairi retrospectively extended the time for filing an Appellant's Notice in circumstances where, while the Appellant's Notice itself had been submitted to the e-registry on time, payment of the filing fee was late and such late payment was attributed to the context of the pandemic; and

- (2) in CFI 015/2020 *Mohammad Juma Khamis Buamaim v Falcon Golf Management Ltd* (August 10, 2020), on an application to set aside judgment in default of a defence to counterclaim which was due to be served and filed by 31 March 2020, H.E Justice Ali Al Madhani, having cited with approval the judgment of Knowles J in the recent English authority of *Melanie Stanley v London Borough of Tower Hamlets* [2020] EWHC 1622 (QB) held on the facts of that case that the pandemic and the situation which it gave rise to were by themselves good reasons to set aside default judgment.

**8.35.2** However, see also CFI 024/2020 *Hana Habib Mansoor Habib Al Herz v (1) Sunset Hospitality Holdings Limited (2) Peatura Fz Llc* (October 1, 2020) for an example of a case in which H.E Justice Shamlan Al Sawalehi refused a late application to adduce additional evidence in circumstances where the Judge was unpersuaded by the defendant's contention that, among other things, restrictions introduced on account of the pandemic had prevented it from adducing such evidence previously.

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## Litigation in the Time of Covid-19

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