

Life Beyond Covid-19, Enforcement Restrictions.

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Introduction

Out with (some of the old), in with the new.

- Debt Respite Scheme Regulations 2020
- Corporate Insolvency and Governance Act 2020

Debt Respite Scheme Regulations

Debt Respite Scheme (Breathing Space Moratorium and Mental Health Crisis Moratorium) (England and Wales) Regulations 2020 come into force on 4 May 2021.

- Two new types of insolvency procedure:
 - The Breathing Space Moratorium (BSM)
 - 60 days
 - Mid-way review (Reg 27)
 - The Mental Health Crisis Moratorium (MHCM)
 - Duration of treatment plus 30 days
- Different entry process, same basic effect

Breathing Space Moratorium (BSM)

Entry process:

- Application via “Debt Advice Provider” (Reg 3)
- Must include certain prescribed information (Regs 23(3) & (4))
- Eligibility criteria (Reg 24):
 - Individual, resident in E&W
 - Owes a qualifying debt
 - Not subject to DRO, IVA, undischarged BR
 - No Previous BSM last 12 months

Breathing Space Moratorium (BSM)

- Qualifying debt?
 - Exclusions in (Reg 5(4))

- Notification
 - DAP must provide to SoS
 - Confirmation that criteria are met
 - The prescribed information provided
 - Information about any other qualifying debt

 - SoS must
 - Cause an entry to be made on register
 - Notify creditors of the start of the BSM
 -

Mental Health Crisis Moratorium (MHCM)

Entry process:

- Receiving mental health crisis treatment (Reg 28(2))
- Key differences
 - Who can apply (Reg 29(1))
 - Information required (Reg 29(2)-(4))
 - No limit to number of times a debtor may enter a MHCM.
 - Treatment plus 30 days (Reg 32)
- Same obligations on SoS to add to the register etc

Register & The Insolvency Service

Reg 35 requires an electronic system to be maintained by the Secretary of State for the administration of the debt respite scheme

- Access (Reg 35(3)&(4))
- Limits of access (Reg 35(5))
- Method of notification (Reg 37)
 - By electronic means
 - Leaving at persons address
 - Posting it to that address

Consequences of a Debt Respite Scheme

What is a Creditor Prevented from Doing?

Precludes certain acts in respect of any moratorium debt (Reg 7(2)):

- Requiring debtor to pay:
 - interest that accrues during moratorium period
 - Fees, penalties or charges that accrue during moratorium period
- Taking 'enforcement action' - see (Reg 7(7))

Consequences of a Debt Respite Scheme

What happens if a Creditor takes prohibited steps?

Actions taken are Null and Void (Reg 7(12))

Liable for Debtor's losses (Reg 12)

- Creditor must tell agent, otherwise creditor remains liable for losses

In respect of Court Proceedings (Reg 10):

- Limitation & Enforcement time limit extended
- Existing Bankruptcy Petitions - stayed
- Existing Proceedings - continue, but no enforcement

Consequences of a Debt Respite Scheme

Debtor Obligations

Debtor Obligations before & during moratorium (Reg 16)

- Before (any Moratorium):
 - Take reasonable care to provide accurate information
 - Not deliberately withhold information
- During (a Breathing Space Moratorium, Not MHCM):
 - Engage with DAP appropriately & Inform of change
 - Not obtain further credit >£500
 - Pay any ongoing liability

Consequences of a Debt Respite Scheme

Creditor Obligations

Positive obligations apply to creditors notified of a moratorium:

- Notify their agent
- Search for additional debts (Reg 14):
 - Other non-moratorium debts
 - Assigned debts
- Failure can cause liability for debtor's losses

Consequences of a Debt Respite Scheme

Creditor Rights and Remedies

Apply for Review - (Reg 17)

- Application to DAP
- Grounds: unfairly prejudice creditor or material irregularity
- DAP conducts reviews under Reg 18, and **MUST** cancel if criteria are met

Challenge in County Court - (Reg 19)

- Essentially an appeal
- Court can cancel in respect of any debt

Consequences of a Debt Respite Scheme

Creditor Rights and Remedies

Application to County Court - (Reg 7)

- Separate/unrelated to appeal from DAP decision
- Independent route to apply for permission to take a prohibited step
- Discretionary decision - may determine ‘in any way that it sees fit’, BUT
- To grant must satisfy 2 stage test:
 - Reasonable to allow creditor’s planned action
 - Not detrimental to debtor, nor significantly undermine protections of moratorium

Consequences of a Debt Respite Scheme

Practical Considerations

- Not a time-limited COVID relief measure, here to stay
- Individual moratoriums are time-limited
- Those dealing with corporate debtors less likely to encounter e.g. commercial vs residential landlord
- Creditor who receives notice of a moratorium debt has obligations to fulfil with risk of liability for failure
- BSM is not a payment holiday
- There are options to challenge - in reality may be impractical

Further Resources

The Regulations:

- <https://www.legislation.gov.uk/ukdsi/2020/9780348209976/contents>

Practice Direction 70B:

- <https://www.justice.gov.uk/courts/procedure-rules/civil/rules/part70/practice-direction-70b-debt-respite-scheme-under-the-financial-guidance-and-claims-act-2018>

Government Guidance for Creditors:

- <https://www.gov.uk/government/publications/debt-respite-scheme-breathing-space-guidance/debt-respite-scheme-breathing-space-guidance-for-creditors>

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CIGA 2020

Current restrictions:

- Moratorium
- Termination clause in supply contracts
- Winding Up Petitions
- Wrongful trading liability

Likely changes?

Moratorium (Corporate)

Reminder

Part 1A Moratorium introduced by CIGA 2020

- Breathing space for 20 business days
- Directors with an IP monitor
- Information provided by both directors and monitor

- Eligibility generally
 - Unavailable if recently subject to moratorium or insolvency procedure
 - If outstanding petition, have to apply to court

- Effect: prevention of enforcement steps or insolvency proceedings by creditors.

Moratorium (Corporate)

Current Position

- Temporary relaxed entry requirements:
 - Can file out of court if subject to a winding up petition
 - Subject to insolvency procedure in the past 12 months
- Extended until 30 September 2021

Supply Contracts

Reminder

S.12 CIGA 2020 - Permanent change to 'Ipso Facto'

- Prevents suppliers terminating supply contracts if the customer enters insolvency procedure

Current Position

- Exception for small companies - do not have to continue to supply
- Extended until 30 June 2021
- Small:
 - Less than £10.2m turnover
 - Balance sheet total less than £5.1m
 - No more than 50 employees

Restrictions on Winding Up Petitions

Current Position

Extended to 30 June 2021

- Third extension
- Went before parliament shortly before scheduled expiry at end of March 2021
- Consequential applicability beyond expiry date - Preliminary Hearings
- Practical considerations - timing

Restrictions on Winding Up Petitions

Future Position

Extension beyond 30 June 2021?

More nuanced applicability?

Floodgates - what happens when the restrictions do expire?

Suspension of Wrongful Trading Liability

Current Position

Extended to 30 June 2021

- Third expiry date, now 30 June 2021.
- Previous applicability has not been coherent since the onset of the pandemic
- Further Extension???

Thank you for listening

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