COVID-19: DISTRESSED ENGLISH COMPANIES: ADDITIONAL GRACE BUT DIRECTORS BEWARE

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UK Restructuring and Insolvency Alert

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The United Kingdom Department for Business, Energy and Industrial Strategy has announced that certain temporary measures put in place under the Corporate Insolvency and Governance Act 2020 (CIGA), which became law on 26 June 2020, will be extended.

STATUTORY DEMANDS AND WINDING-UP PETITIONS

Statutory demands and winding-up petitions by creditors of companies affected by coronavirus (COVID-19) will continue to be restricted until 31 December 2020. It appears that there is a relatively low threshold for debtor companies to establish that the pandemic has had a "financial effect" on the company, with the company only required to establish that their financial position has worsened for reasons relating to COVID-19. The Corporate Insolvency and Governance Act 2020 (Coronavirus) (Extension of the Relevant Period) Regulations 2020 came into force on 29 September 2020.

NON-PAYMENT OF RENT

Separately, there has been an extension until 31 December 2020 of the prohibition on commercial landlords' right of re-entry or forfeiture for non-payment of rent. The extension on the prohibition on forfeiture came into effect on 29 September 2020 pursuant to the Business Tenancies (Protection from Forfeiture Relevant Period) (Coronavirus) (England) (No. 2) Regulations 2020. Please see our alert for further details.

These two measures will continue to provide breathing space for those businesses affected by COVID-19, particularly in the retail and hospitality sectors.

DIRECTORS' WRONGFUL TRADING OFFENCE RESTORED

However, the provisions relating to the suspension of liability for wrongful trading have not been extended and will end on 30 September 2020. Therefore, directors will again be at risk of personal liability for any wrongful trading claims for the worsening of the company or creditors' financial position from 1 October 2020. Once a director of an English company concludes that there is no reasonable prospect of the company avoiding an insolvent liquidation or an insolvent administration, the director has a duty to take every step, which a reasonably diligent person would take, to minimise potential loss to the company's creditors. If the court deems that a director failed in this duty, the court can order the director to make such personal contribution to the company's assets as it thinks proper. There may be many thousands of directors who will feel themselves exposed to this liability from the

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beginning of October 2020, having benefitted from a suspension of the offence between 1 March and 30 September 2020.

OTHER EXTENSIONS

Other extensions to the temporary measures announced include:

- Until 30 December 2020, companies and other qualifying bodies with obligations to hold annual general meetings can hold these meetings virtually. Shareholders can continue to examine company papers and vote on important issues remotely;
- Until 30 March 2021, small suppliers (as defined in CIGA) will be able to rely on clauses that allow termination due to the insolvency of the other party, and therefore, will be under no obligation under the terms of their contracts to supply customers facing financial difficulties; and
- Until 30 March 2021, there will be temporary provisions relaxing the entry requirements to the new moratorium procedure. Please see our alert for further information.

WINTER ECONOMY PLAN

The United Kingdom Chancellor of the Exchequer outlined additional government support in the "Winter Economy Plan", introducing amongst other measures, the Job Support Scheme that will be introduced from 1 November 2020 and replace the current furlough scheme for employees, which ends completely at the end of October 2020.

CONCLUSION

The continuation of certain exemptions will be welcomed. However, as the United Kingdom faces a potential second wave of COVID-19 cases and related societal restrictions, directors of English companies will face renewed uncertainty as they navigate through autumn and winter.

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