CORPORATE UPDATE

New Insolvency and Governance Law: Key points for sports organisations

The Corporate Insolvency and Governance Act 2020 ("CIGA") came into force on 26 June 2020. The scope of the Act is extensive, introducing a series of temporary measures to assist organisations navigate the challenges of the COVID-19 pandemic and implementing long-term measures that bring about fundamental change to corporate governance and insolvency law in the UK. The purpose of this note is to draw out the most important points applicable to those involved in the sports industry.

Key changes for sports organisations

The following five areas will be particularly relevant to organisations involved in the sports industry:

(1) changes to the way in which company meetings may be held;
(2) extensions to company filing deadlines;
(3) restrictions on the use of termination clauses in supply contracts;
(4) restrictions on the issuance of statutory demands and winding-up petitions; and
(5) director liability for wrongful trading.

CIGA also provides additional tools for companies facing financial difficulties by means of a new restructuring plan and moratorium procedure. However, these specific reforms to the insolvency regime are outside the scope of this update.

(1) Company meetings

As discussed in our Webinar on Sports Governance in Times of Crisis, COVID-19 has created an unprecedented set of challenges for organisations in effectively organising and administering company meetings while government restrictions on gatherings are in force. In particular, certain sports organisations with a diverse and large shareholder base (reflecting their membership body and stakeholder-driven governance structures) rely on approvals at general meetings in order to make key decisions which, in many cases, are urgently required in the current environment. While many organisations have had to navigate the current landscape in holding these meetings, CIGA provides welcome legal flexibility in relation to how and when these meetings may be held.

What are the changes?

- **Meetings need not be held at a particular place and may be held without persons participating in the meeting being together in the same place. Votes may be cast, electronically.**

CIGA temporarily overrides company law and any provision in an organisation's constitution by providing that the notice of meetings need not specify the location that it is to take place, nor will the meeting have to take place at a physical location.

The meeting still requires a quorum to be present in order to proceed with business. However, the changes clarify that the quorum is not required to be physically present at the same location.

CIGA also permits electronic participation and voting at a company meeting, even if this is not provided for in a company's articles.

- **A member does not have the right to: (i) attend the meeting in person; (ii) participate in the meeting other than voting; and (iii) vote by particular means.**

CIGA suspends the rights of members to participate fully in company meetings, including the right to attend meetings in person and to participate in meetings by any means other than by voting.

This represents a fundamental alteration of shareholders' rights and the directors of sports organisations should carefully consider other ways of engaging with their members if it is deemed appropriate to take advantage of such provisions.

What is the effect of the changes?

The directors of sports organisations will have increased flexibility to determine the format of company meetings.

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The options are:

(1) a physical meeting held behind closed doors (with only two natural persons being physically present (assuming that such persons can fulfil a quorum themselves or by holding the required number of proxies));
(2) a hybrid meeting where physical attendance is limited as set out above and the remainder of attendees participate electronically; or
(3) a virtual-only meeting convened with no physical location with the meeting being held purely electronically via on online meeting tool.

While a hybrid or virtual-only meeting represents an optimum solution from a shareholder engagement perspective, this will require many sports organisations to put in place facilities to enable electronic participation and voting which, depending on the size of the membership base, may be a significant administrative burden. A meeting held in an electronic format (either partially or fully) will require careful planning (e.g. the technology to be used) and clear communication with shareholders as to how such a meeting will run.

The alternative will be holding a physical meeting behind closed doors (the approach adopted by many listed companies in the 2020 AGM season to date). In line with best practice guidelines, sports organisations should consider mitigating the impact of holding a behind closed doors meeting by: (i) encouraging members to submit proxy votes; (ii) enabling shareholders to submit questions in advance; and (iii) providing an opportunity later in the year (where government guidance permits) for members to engage with directors.

Regardless of the format of a meeting, it will be incumbent on sports organisations to ensure any decision on how a meeting will be held or operated is communicated to members in a clear and timely fashion.

Who do these changes apply to?

The provisions apply to companies operating in the UK, but also to registered societies and charitable incorporated organisations.

Are the changes permanent?

No, the flexibility in relation to company meetings applies with retrospective effect to meetings from 26 March 2020 and will last until 30 September 2020, unless this period is extended by the UK Government.

(2) Company filings

CIGA has led to secondary legislation being introduced which temporarily extends the dates by which prescribed documents must be filed at Companies House. The extension of filing deadlines currently applies until 5 April 2021 and includes:

Relevant filing	*Previous timeframe*	*Extended timeframe*
Certain event-driven filings (e.g. appointments and resignations of directors)	14 days	42 days
Annual confirmation statement	14 days	42 days
Accounts (public co.)	6 months	9 months
Accounts (private co.)	9 months	12 months

(3) Termination clauses in supply contracts

One of the core objectives of CIGA is to assist companies in trading through an insolvency procedure, thereby maximising their chances of survival. In pursuit of this aim, CIGA provides that in certain circumstances, suppliers will be prevented from exercising their contractual rights of termination where the counterparty has entered into insolvency proceedings.

Sports organisations will have routinely entered into commercial arrangements which provide for a termination right upon insolvency. The enforceability of such a right should be considered in light of the changes introduced by CIGA.

What are the changes?

Subject to certain exceptions, contractual rights in a supply of goods and services contract which would be triggered upon the commencement of an insolvency procedure will cease to have effect. Most notably, this may prevent termination or variation of a contract, but it may also affect the ability of the supplier to charge default interest and enforce other rights under the contract, purely as a result of the other party entering into an insolvency procedure.

This is the case even if the basis of a default occurred prior to the counterparty entering the insolvency procedure. Therefore, if there are concerns regarding a counterparty's financial position, the supplier will likely need to act quickly if other options to terminate are available.

What constitutes an 'insolvency procedure'?

- A moratorium;
- Administration;
- Administrative receivership;
- A company voluntary arrangement;
- Liquidation; or
- Provisional liquidation.

Are there any safeguards for suppliers?

The supplier may terminate with the permission of the court, if the court is satisfied that the supplier's continued performance of the contract would cause 'hardship' to the supplier. No further guidance has been provided as to what would constitute 'hardship' therefore it will be left to the courts to determine the relevant factors when they begin hearing cases on this issue.

The only alternative grounds for termination will be (i) where the company consents to the termination; (ii) where the administrator, receiver or liquidator consents to the termination; or (iii) if the supplier can terminate on non-insolvency grounds, such as non-payment, provided the breach occurs after the commencement of the insolvency procedure.

Do these provisions apply to all suppliers?

No, there is a temporary exemption for small company suppliers to assist them during the COVID-19 pandemic. Where a supplier meets at least two of the following criteria, it will be classified as a 'small company supplier' for these purposes:

(i) turnover less than £10.2 million;
(ii) balance sheet assets not more than £5.1 million; and
(iii) no more than 50 employees.

Where these criteria are satisfied, the supplier will be exempt, provided that the counterparty became subject to an insolvency procedure before 30 September 2020 (subject to extension).

Are the changes permanent?

Yes.

(4) Statutory demands and winding-up petitions

The government are encouraging companies to take account of the current circumstances and avoid aggressive creditor actions. To this end, CIGA introduces temporary provisions restricting the issuance of statutory demands and winding-up petitions.

What are the changes?

A company will not be subject to winding-up proceedings where unpaid debts are a result of financial distress caused by COVID-19. Winding-up petitions presented from 1 March 2020 to 30 September 2020 will be assessed by the courts. If the courts determine that the cause of non-payment was the financial effects of COVID-19 (which is a "*low threshold*" – see below), then no winding-up order will be made.

Statutory demands presented from 1 March 2020 to 30 September 2020 will be void even if the financial difficulties of the company are unrelated to COVID-19.

Action by the courts

The courts have been quick to apply the changes under CIGA:

- On 2 June 2020, before CIGA had even been enacted, an injunction was granted in the High Court to restrain the presentation of a winding-up petition (*Re: A Company (Injunction to restrain presentation of petition)* [2020] EWHC 1406 (Ch)): "*the grant of an injunction to restrain the presentation of the petition is powerfully supported by the clear policy objectives of [CIGA].*"
- In another case from June 2020 (*Re: A Company* [2020] EWHC 1551 (Ch)), the court confirmed that the evidential bar is low: "*the requirement is simply that 'a' financial effect must be shown: it is not a requirement that the pandemic be shown to be the (or even a) cause of the company's insolvency.*"

(5) Wrongful trading

CIGA provides specific temporary protection for directors in relation to claims of wrongful trading (which in essence puts personally liability on directors if they allow the company to continue to trade once insolvency becomes unavoidable).

When considering an action for wrongful trading, the court is to assume that a director is not responsible for any worsening of the financial position of the company or its creditors that occurs between 1 March 2020 and 30 September 2020. This does not mean that a court cannot determine that a director is liable for wrongful trading, merely that there is an assumption that the director is not liable.