

# INSOLVENCY ACT 2000

---

## EXPLANATORY NOTES

### COMMENTARY ON SECTIONS

#### *Schedule 1: Moratorium where directors propose voluntary arrangement*

40. *Paragraphs 1, 2, 3 and 4:* These paragraphs amend the Insolvency Act 1986 by the insertion of a new Section and Schedule (Section 1A and Schedule A1) to that Act so that the directors of eligible companies, if they so wish, can obtain a short moratorium for their company during which a proposal for a company voluntary arrangement can be put to its creditors.
41. *Paragraph 1 Schedule A1: Interpretation.* This defines some of the terms which are used in Schedule A1.
42. *Paragraphs 2 to 4 Schedule A1: Eligible companies.* These paragraphs set out which companies are eligible for a moratorium. To be eligible a company must satisfy two or more of the conditions for being a small company specified in Section 247(3) of the Companies Act 1985. Insurance companies as defined in the Insurance Companies Act 1982, certain banks (current and former), companies which are parties to market contracts, money market contracts or a related contract or any of whose property is subject to a market charge, money market charge or system-charge (market contract and market charge being defined by Part VII of the Companies Act 1989 and money market contract, related contract or money market charge being defined by the Financial Markets and Insolvency (Money Market) Regulations 1995 and system-charge being defined by the Financial Markets and Insolvency Regulations 1996) or companies which are “participants” (within the meaning of the Financial Markets and Insolvency (Settlement Finality) Regulations 1999) or any of whose property is subject to a collateral security charge (within the meaning of the Financial Markets and Insolvency (Settlement Finality) Regulations 1999) are ineligible for a moratorium<sup>1</sup>. Also ineligible are companies which are subject to formal insolvency proceedings or where in the previous 12 months a moratorium failed.
- 1 Banks and insurance companies have special insolvency regimes which are designed to protect depositors (banks) and policyholders (insurance companies). Companies covered by Part VII of the Companies Act 1989 or the Financial Markets and Insolvency (Settlement Finality) Regulations 1999 or the Financial Markets and Insolvency (Money Market) Regulations 1995 or the Financial Markets and Insolvency Regulations 1996 are subject to modified insolvency regimes. The modifications are designed to ensure that the financial markets continue to function in the event of the insolvency of one of their participants.
43. *Paragraph 5 Schedule A1* The Secretary of State may, by regulations, amend the eligibility criteria.
44. *Paragraph 6 Schedule A1: Nominee’s statement.* This paragraph places a duty upon the directors seeking a moratorium to provide information to the nominee. They must give him a document setting out the terms of the proposed company voluntary arrangement and another containing details of the company’s assets, debts and other liabilities,

together with any other information the nominee may request. If the nominee considers that the proposal has a reasonable prospect of being approved and implemented, that sufficient funding is available and that meetings of the company and the creditors should be held, he must provide a statement to the directors to that effect. In reaching his view, the nominee may rely on the information provided by the directors unless he has reason to believe it may be inaccurate.

45. *Paragraph 7 Schedule A1: Documents to be submitted to Court.* To obtain a moratorium the directors must file certain documents at court. The list of documents to be filed may be amended by regulations.
46. *Paragraph 8 Schedule A1: Duration of moratorium.* This paragraph sets out the duration of a moratorium. It provides that a moratorium comes into force when the documents required to be submitted to the court are filed.
47. The maximum initial moratorium period is 28 days. This period is capable of extension or reduction by order of the Secretary of State. A meeting of the company and creditors held within the initial period may decide to extend the period of the moratorium by up to a further two months (see Paragraph 32 Schedule A1). The Secretary of State may by order increase or decrease that two month period.
48. The moratorium may be brought to an end by a decision of the meetings of creditors and the company to approve a company voluntary arrangement having effect under paragraph 36. Alternatively, it may be ended:-
  - by a decision of the court;
  - by the withdrawal by the nominee of his consent to act;
  - by a decision of the meetings of creditors and company;
  - on the expiry of the initial moratorium period of 28 days if the nominee has failed to summon either of the first meetings of the company or creditors;
  - if either of those meetings has not met when summoned to be held, unless the moratorium is extended under paragraph 32; or
  - if there is no decision by the meetings to extend it.
49. *Paragraph 9 Schedule A1: Notification of beginning of moratorium.* This places a duty on the directors of the company to notify the nominee that a moratorium has come into force.
50. *Paragraphs 10 to 11 Schedule A1:* When a moratorium comes into force, and when it ends, the nominee must advertise that fact and also notify the registrar of companies and the company. In the case of a moratorium coming into force he must also notify any creditor who has petitioned for the winding up of the company and, where it ends, any creditor of whose claim he is aware.
51. *Paragraph 12 Schedule A1: Effects on creditors, etc.* This deals with the effects of a moratorium upon parties, other than the company, during the period that a moratorium is in force.
52. Save for an excepted petition<sup>1</sup> to wind up a company no insolvency proceedings can be commenced against the company. Except with the leave of the court, in each case, no steps may be taken to enforce any security over the company's property or repossess any goods in the company's possession under any hire-purchase agreement<sup>2</sup>, nor can any other proceedings, execution or other legal process be commenced or continued or distraint be levied, nor can a landlord forfeit the lease of a company's premises by means of peaceable re-entry. No meeting of the company may be held or requisitioned without the consent of the nominee or the court.

53. Where a petition (other than an excepted petition) for the winding up of the company has been presented before the beginning of the moratorium, proceedings on the petition are stayed during the moratorium. Section 127<sup>3</sup> of the Insolvency Act 1986 will not apply during the moratorium or in the 28 day period referred to in paragraph 37(5)(a) of Schedule A1. Where an excepted petition for the winding up of the company has been presented to the court before the beginning of a moratorium it can continue unaffected by the coming into force of the moratorium.
- 1 An *excepted petition* is a petition presented by the Secretary of State pursuant to Section 124A of the Insolvency Act 1986 on the grounds that it is in the public interest to wind up a company or pursuant to Section 72 (1)(b) of the Financial Services Act 1986 or Section 92(1)(b) of the Banking Act 1987 on the grounds that it is just and equitable that the company be wound up.
  - 2 *Hire-purchase agreement* includes conditional sale, chattel leasing and retention of title agreements.
  - 3 *Section 127 Insolvency Act 1986* provides that any disposal of a company's property, and any transfer of shares, or alteration in the status of the company's members made after the presentation to the court of a winding-up petition is invalid unless the court orders otherwise. Because of the disapplication of section 127, disposals will be governed by the moratorium provisions instead of by that section.
54. *Paragraph 13 Schedule A1.* The moratorium, whilst in force, prevents a floating charge from crystallising, or restrictions being imposed on the disposal of any of the company's property.
55. *Paragraph 14 Schedule A1: Security granted during moratorium.* Security given over a company's assets during the moratorium will be unenforceable unless at the time it was granted there were reasonable grounds for believing it would benefit the company.
56. *Paragraph 15 Schedule A1: Paragraphs 16 to 23* apply in relation to a company which is subject to a moratorium. The fact that a company enters into a transaction in contravention of paragraphs 16 to 22 does not make that transaction void or unenforceable against the company.
57. *Paragraph 16 Schedule A1: Company Invoices, etc.* All invoices, orders and letters, on which the name of the company appears, must also state the name of the nominee and refer to the fact that a moratorium is in force. If this provision is breached the company and any officer of the company who, without reasonable excuse, authorises or permits the breach, commits an offence.
58. *Paragraph 17 Schedule A1: Obtaining credit during moratorium.* During the moratorium a company may not obtain credit to the value of £250 or more without first telling the person who is giving the credit that a moratorium is in force. Obtaining credit includes obtaining goods under a hire-purchase agreement and the case where goods are agreed to be sold under a conditional sale agreement. It also includes the receipt of payment in advance for the supply of goods or services. If this provision is breached the company and any officer of the company who knowingly and wilfully authorises or permits the breach commits an offence.
59. *Paragraphs 18 and 19 Schedule A1: Disposals and payments.* During the moratorium the company may only dispose of any of its property or make any payment of a debt which existed at the start of the moratorium if there are reasonable grounds for believing that the disposal or payment will benefit the company and it is approved by the moratorium committee<sup>1</sup>, or, if there is no such committee, by the nominee. There is nothing to stop a company, during a moratorium, selling its property in the ordinary course of its business e.g. a garage selling cars. If the company makes a disposal or payment contrary to these provisions, otherwise than in pursuance of an order of

court, the company and any officer of the company who, without reasonable excuse, authorises or permits the contravention commits an offence.

1 See paragraph 35 of Schedule A1.

60. *Paragraphs 20 to 22 Schedule A1: Disposal of charged property, etc.* These paragraphs permit the disposal, during the moratorium, by the company (by sale or otherwise) of charged property<sup>1</sup> and any goods which are in the possession of the company under a hire-purchase agreement if the court or the holder of the security or owner concerned agrees. Provision is also made for how the property must be dealt with and how the sale proceeds are to be dealt with. If these provisions are breached the company and any officer of the company who, without reasonable excuse, authorises or permits the breach commits an offence.

1 *Charged property* means property on which a creditor has a specific claim (e.g. by way of a mortgage) in respect of money owed to him.

61. *Paragraph 23 Schedule A1:* When a moratorium is in force, a company commits an offence if it enters into a market contract, a money market contract or a related contract grants a market charge, a money market charge or system-charge<sup>1</sup>, gives a transfer order or provides any collateral security. Any officer of the company who, without reasonable excuse, authorises or permits the company to enter into such a transaction also commits an offence. However the fact that a company enters into any of those transactions does not make the transaction void or have the effect of making any such transaction unenforceable by or against the company.

1 See paragraph 1 of Schedule A1 to the Act for the definition of these terms

62. *Paragraph 24 Schedule A1: Monitoring of company's activities.* This paragraph imposes a duty on the nominee to monitor the company's affairs during the moratorium in order to form an opinion as to whether or not the proposed voluntary arrangement (or that arrangement with any modifications of which he has been notified) has a reasonable prospect of being approved and implemented and the company is likely to have sufficient funds to enable it to continue its business through the moratorium. The term "business" refers to that business which the company proposes to carry on during the moratorium. The nominee may seek further information from the directors for the purpose of forming his opinion.

63. *Paragraph 25 Schedule A1: Withdrawal of consent to act.* This paragraph provides that a nominee must withdraw his consent to act if:

- he considers that the voluntary arrangement proposal (or, if he has received notice of modifications, the proposal as modified) no longer has a reasonable prospect of being approved or implemented; or
- he considers that the company will not have sufficient funds to enable it to continue to carry on its business through the moratorium; or
- he becomes aware that on the date of filing the company was not eligible for a moratorium; or
- the directors do not provide him with necessary information which he requests.

64. The paragraph provides that the moratorium comes to an end if the nominee withdraws his consent to act. The paragraph further provides that a nominee may not withdraw his consent to act in other circumstances. Where the nominee does withdraw his consent he must give notice of that to various parties and failure to do so without reasonable excuse is an offence.

65. *Paragraph 26 Schedule A1: Challenge of nominee's actions, etc.* The court on the application of any creditor, director or member of the company or any other person affected by the moratorium who is dissatisfied by any decision or act of the nominee,

may confirm, reverse or modify that decision or act and give directions to the nominee or make any order it sees fit, either during or after the moratorium.

66. *Paragraph 27 Schedule A1* sets out the course of action creditors may take if there are reasonable grounds for believing that the company has suffered a loss as a consequence of any act, omission or decision of the nominee, but the company does not propose to take any action. If the court concludes that the act of the nominee was not reasonable it may order the company to pursue any claim against the nominee or authorise a creditor to do so or make any other order it sees fit.
67. *Paragraph 28 Schedule A1: Replacement of nominee by court.* This paragraph provides that in certain circumstances (for example, if it is impracticable or inappropriate for the nominee to continue) the court may direct that the nominee be replaced by another person with the necessary qualification.
68. *Paragraphs 29 and 30 Schedule A1: Summoning of meetings/conduct of meetings.* These paragraphs provide for the summoning, conduct and reporting to the court of the outcome of such meetings of the creditors and the company as the nominee calls. He must call meetings of the creditors and of the company to be held within the period set out in paragraph 8(3).
69. *Paragraph 31 Schedule A1: Approval of voluntary arrangement.* This paragraph provides that the meetings summoned under paragraph 29 of Schedule A1 shall decide whether or not to approve the proposed voluntary arrangement (with or without modifications). But such modifications may not, without the concurrence of the creditors concerned, affect the right of a secured creditor to enforce his security or the rights of preferential creditors (as defined in Section 386 of the Insolvency Act 1986) to be paid in priority to other debts.
70. *Paragraphs 32 to 34 Schedule A1: Extension of Moratorium.* These paragraphs permit the initial period of the moratorium to be extended for a maximum period of up to two months provided certain conditions are satisfied.
71. The Secretary of State may make an order increasing or reducing the period by which the moratorium period may be extended.
72. *Paragraph 35 Schedule A1: Moratorium Committee.* Where a moratorium is extended this paragraph makes provision for a moratorium committee to be set up to exercise functions conferred on it by the meetings held under paragraph 29 of Schedule A1 where those meetings have approved an estimate of the expenses to be incurred in carrying out the committee's functions.
73. *Paragraph 36 Schedule A1: Effectiveness of decisions.* This paragraph determines when decisions under paragraphs 31, 32 or 35 of Schedule A1 are to take effect. It also provides that in the case of a conflict, the decision of the creditors' meeting is to prevail subject to the right of any member to apply to court for an order that the decision of the company meeting should prevail instead.
74. *Paragraph 37 Schedule A1: Effect of approval of voluntary arrangement.* This paragraph provides that a decision approving a company voluntary arrangement binds all creditors of the company owed money at the start of the moratorium including unknown creditors<sup>1</sup>. If unknown creditors come to light after the voluntary arrangement has been completed they can claim the amount they would have received from the company. If the voluntary arrangement ends prematurely then all creditors cease to be bound by the voluntary arrangement. It also, subject to certain restrictions, requires the court to dismiss any petition (other than an excepted petition) for the winding up of the company.

<sup>1</sup> *Unknown creditors* means persons who were not served with notice of the meeting at which the company voluntary arrangement was approved but who would have been entitled to vote had they had notice of it.



75. *Paragraph 38 Schedule A1: Challenge of decisions.* This paragraph provides, by way of application to the court, for the decision approving a company voluntary arrangement to be challenged on the ground that it unfairly prejudices the interests of a specific person or that there has been some material irregularity in the conduct of a meeting held under paragraph 29 of Schedule A1. Unknown creditors who come to light after the voluntary arrangement has been completed can apply to the court on grounds of unfair prejudice. On such an application the court may, for example, revoke or suspend the decision approving the voluntary arrangement or direct that new meetings be summoned to consider any revised proposal.
76. *Paragraph 39 Schedule A1: Implementation of voluntary arrangements.* This paragraph provides for the implementation of an agreed company voluntary arrangement, and for the person who is carrying out the functions of the nominee to become the supervisor of the voluntary arrangement. It also enables people who are dissatisfied with any action of the supervisor to apply to the court and sets out what the court can do in such circumstances. It also enables the supervisor to apply to court for directions or petition for the winding up of the company or an administration order<sup>1</sup> and enables the court to fill any vacancy in the office of supervisor.
- 1 See Part II of the Insolvency Act 1986
77. *Paragraph 40 Schedule A1: Challenge of directors' actions.* This paragraph provides that any creditor or member of the company can apply to the court if he considers that the company's affairs have been or are being managed in a way which is unfairly prejudicial to the interests of creditors or members or that an actual or proposed act or omission of the directors is or would be so prejudicial. The paragraph only applies in relation to acts or omissions of the directors during the moratorium. On such an application the court may, for example, make an order to regulate the management by the directors of the company's affairs or an order to bring the moratorium to an end. When making an order under this paragraph the court is required to have regard to the need to safeguard the interests of persons who have dealt with the company in good faith and for value. In the event that the company subsequently enters administration or liquidation (on a petition presented before the moratorium) any such application under this paragraph is to be made instead by the administrator or liquidator (as the case may be).
78. *Paragraph 41 Schedule A1: Offences.* This paragraph provides that any person who was an officer of the company who did certain acts in the 12 months prior to the start of the moratorium is to be treated as having committed an offence, e.g. if the officer has fraudulently removed company property worth £500 or more, or destroys or falsifies the company's records in relation to its property in that period. Any person who is an officer of the company during the moratorium who does the same things also commits an offence. The paragraph provides defences which may be raised in relation to the offences.
79. *Paragraph 42 Schedule A1* This paragraph provides that it is an offence for an officer of the company to seek to obtain a moratorium, or an extension of it, by making a false representation or fraudulently doing, or failing to do, anything.
80. *Paragraph 43 Schedule A1: Void provisions in floating charge documents.* This paragraph provides that any provision in a floating charge is invalid if it provides for the obtaining of, or any action to obtain a moratorium, to be an event causing the charge to crystallise<sup>1</sup> or restrictions to be imposed on the disposal of property or a ground for the appointment of a receiver.
- 1 A *floating charge* is a charge over the assets for the time being of a company referred to in the mortgage or other document creating the charge. It only affects those assets under specific circumstances set out in that document, when it crystallises, that is, becomes a fixed charge over the actual assets owned by the company at that time which fall into the class(es) covered by the charge.

*These notes refer to the Insolvency Act 2000 (c.39)  
which received Royal Assent on 30 November 2000*

81. *Paragraph 44 Schedule A1*: This paragraph gives the Financial Services Authority the right to participate in the moratorium procedure if the company is or has been regulated by the Authority.
82. The *remaining paragraphs 5 to 12* of Schedule 1 make consequential amendments to various parts of the Insolvency Act 1986. For example the amendments to Section 233 will not permit suppliers of gas, water and electricity to require a nominee to pay outstanding debts for supply as a condition of supply during the moratorium. The amendment to Section 387 provides that the relevant date for determining preferential claims is the date on which the moratorium comes into force. A new Section 417A is added (order - making power to increase or reduce monetary sums specified in Schedule A1) to take account of the addition of the new company voluntary arrangement moratorium.