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# Getting paid in the era of COVID-19

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# Pre-contract tips

Andrew Davies, Partner, Fenwick Elliott LLP



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Pre-contract tips: down the line (employers/ main contractors when subcontracting)

**Due Diligence:** Check solvency of the contractor/ subcontractor. Companies House/D&B Reports.

**Performance Bond:** Being able/not able to provide one often is often a good litmus test of financial strength.

**Parent Company Guarantee:** Obtain a PCG (if applicable).

**Retention:** Look to secure a higher retention sum. Typically between 3-5%. Can be 10% or higher.

**Termination:** Absent a specific contractual right, insolvency is not a breach of contract under English law. Need express drafting giving a right to terminate for insolvency (define insolvency as widely as possible so that you can act early).

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Pre-contract tips: down the line (continued)

**Step-in rights:** Collateral warranties from supply chain – include ‘step-in rights’ to jump in and take on key packages if contractor becomes insolvent.

**Latent Defect Insurance:** can survive insolvency.

**Project Bank Accounts:** ring-fenced accounts from which payments are made directly and simultaneously by the Employer to all parties in the supply chain. Reduces risk of lower tiers not being paid and disrupting project.

**Off site goods:** Avoid paying for goods until they are on site and integrated.

**Weighted stage payments:** “back-loaded”, with less payable at the start of the project and more as it nears completion.

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Pre-contract tips: up the line (steps contractors should take re employers)

**Due Diligence:** Check solvency of the Employer (main contractor if a subcontractor). Companies House/D&B Reports.

**Termination:** Clause entitling the Contractor to terminate for repeated late payment or Employer insolvency. However, note CIGA restrictions.

**PCG:** Obtain a PCG from Employer (if applicable). Protects against SPVs with no financial standing.

**Retention:** Contractor is often an unsecured creditor for the retention sum held. Look to reduce or delete retention or make the Employer hold retention in a separate account under fiduciary duties

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Pre-contract tips: up the line (continued)

**Weighted stage payments:** “front-loaded”, with more payable at the start of the project and less as it nears completion. Ensure payment terms allow for regular interim payments for work done and avoid a milestone approach.

**Advance Payment:** consider securing an upfront advance payment.

**Escrow Accounts:** A contractor sometimes requests that funds relating to the project are placed in an escrow account and released to the Contractor as they become payable under the building contract. Escrow accounts to make payments via an escrow agent.

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# Tips during the contract

Andrew Davies, Partner, Fenwick Elliott LLP



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## During the contract – getting paid

If some of the tips above are followed, payment prospects are improved.

- Records, records, records.
- Timely and valid applications for payment, default payment notices.
- Adjudication, winding up or other action? CIGA moratorium may apply.

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In contract/ post contract: keeping hold of money

Timely and valid payment and pay less notices

***Bresco Electrical Services Ltd (in liquidation) v Michael J Lonsdale (Electrical) Ltd***

- Adjudication is a weapon back in an IP's arsenal.
- Issues remain at enforcement stage.
- Payment dispute with an insolvent party, distracting adjudications a risk.

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# Corporate Insolvency and Governance Act 2020 (“CIGA 2020”)

## Temporary measures - Winding up petitions

Laura Bowler, Associate, Fenwick Elliott LLP

# Restriction on winding up petitions

*Deadline extended*

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- **Schedule 10, Part 1 of CIGA 2020 (i.e. statutory demand):**

*No petition for the winding up of a registered company may be presented under section 124 of the 1986 Act on or after 27 April 2020 on the ground specified in paragraph (a) of section 123(1) of that Act, where the demand referred to in that paragraph was served during the relevant period.*

- **Deadline extended from 31 December 2020 to 30 March 2021**
- *Corporate Insolvency and Governance Act 2020 (Coronavirus) (Extension of the Relevant Period) Regulations 2020*

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# A complete ban on winding up petitions?

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- **Schedule 10, part 2 of CIGA 2020:**

*The condition referred to in sub-paragraph (1) is that the creditor has reasonable grounds for believing that—*

*(a) coronavirus has not had a financial effect on the company, or*

*(b) the facts by reference to which the relevant ground applies would have arisen even if coronavirus had not had a financial effect on the company.*

- **Re a Company (Application to restrain advertisement) [2020] EWHC 1551 (ch)**
  - *“...clearly intended to be a low threshold; the requirement is simply that “a” financial effect must be shown; it is not a requirement that the pandemic to be shown to be the (or even a) cause of the company’s insolvency...”*
- **Re: Tundrill Limited (unreported)**

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# The new moratorium procedure for companies in trouble

Michael Smith, Barrister, Three Stone



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# The new restrictions on termination clauses

Michael Smith, Barrister, Three Stone



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# The return of HMRC as a preferential creditor

Michael Smith, Barrister, Three Stone



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**Thank you**

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