Unbending the Insolvency Rules 2016

Andrew Brown lays out, in crystal clear fashion, the changes coming in from April 2017.

Much like a river in flood, the evolution of insolvency law in this country flows inextricably onwards, bearing us ever closer to the commencement of the new Insolvency Rules 2016 on 6 April 2017.

Working in conjunction with the amendments to the Insolvency Act 1986 made by the Deregulation Act 2015 and the Small Business Enterprise and Employment Act 2015, the new rules have a threefold goal: to consolidate the various 26 amending statutory instruments adopted since the original commencement of the 1986 rules, to update and simplify the language to be more accessible, and to modernise the rules to take account of changes in communication technology and procedure introduced by the above mentioned acts.

At first glance it might appear that such alterations to the rules would bring sweeping changes to the practice of insolvency law in this country, a prospect that terrifies certain members of my chambers who recently published a practical guide to insolvency proceedings. However, the reality is that little of substance has changed in the world of insolvency law and procedure, which not only means that many of us don't have to relearn the subject from scratch, but also that barristers who have authored practical guides might breathe a sigh of relief as their publications remain relevant.

For the purposes of this article I propose to focus on the area of modification, which represents a significant change from the previous rules: the rules against physical creditors' meetings, the new voting procedures and the deemed consent procedure.

Creditors meetings, voting and old rules

Traditionally, and with only a few exceptions, decisions needing the approval of creditors were required to be reached at a physical meeting. I do not propose to dwell on these old systems as they are well known to anyone reading this article, but I merely note that in the era predating electronic communication and virtual spaces such physical meetings made sense as they allowed equal communication and debate between creditors and the office-holder. However, most of those reading this article will be well aware that recent practice has seen creditors' meetings become expensive propositions that often result only in small

to non-existent attendances, or 'meetings' conducted at an office-holder's desk where a preponderance of proxy votes render the original purpose of a physical meeting largely moot.

The new rules

Into such a world is born change in the form of s122 (company insolvency) and ss123 (individual insolvency) of the Small Business Enterprise and Employment Act 2015, which made amendments to the Insolvency Act 1986 by introducing ss246ZE–246ZG and 379ZA–379ZC, both of which come into force on 6 April 2017. To save readers the trouble of finding and interpreting these sections I shall briefly summarise their effect: the new default position for decision making is that no physical meeting of creditors/contributories is to be called where previously a physical meeting and decision was required, and that the office-holder must first use any 'qualifying decision making procedure' or the deemed consent procedure rather than a physical meeting. It must be stressed that an office-holder *must not* summon a physical meeting unless specific conditions allowing/requiring such a meeting are met. Rather, under a 'rule of 10', a meeting may only be called where 10 per cent of the total value of the creditors/contributories, 10 per cent of the total number of creditors/contributories or 10 total creditors/contributories make written requests for a physical meeting. In that case a physical meeting *must* be summoned by the office-holder.

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Qualifying decision making procedures

The new rules stipulate that where a decision must be reached by the above procedure, and pursuant to one of the procedures under rule 15.3, the office-holder may seek a decision by sending notice pursuant to rule 15.8, which includes among other information a description of the issue to be determined, the means of reaching said decision and a date/deadline for any decision. It is crucial to note that a decision date must be included in such a notice, and that no decision is reached under new rule 15.9 unless at least one valid vote is received by the decision date. These decisions might be reached via means such as correspondence, electronic voting, a virtual meeting, or via an elastic clause, which allows for any other procedure that permits all creditors to participate equally. Under new rules 15.4 and 15.5, where electronic voting or virtual meetings are sought for decisions, the office-holder must give proper notice of the requisite information about how to electronically access any such meeting or voting system, ie telephone numbers, login details or passwords, etc.

Deemed consent procedure

While the above options for decision procedures still require the active consent of at least one of the creditors/contributories, there is also an alternative in the deemed consent procedure, which is intended to streamline office-holder decisions to an even finer extent. Found in s246ZF and s379ZB IA 1986 and rule 15.7, the procedure is as follows: in almost all decisions (with the exception of those mentioned later in this section), which would require a vote of creditors/contributories via the above mentioned means the office-holder might send a rule 15.8 notice specifying that the deemed consent procedure is being followed, and giving directions for how to object to the decision. As opposed to the normal decision procedure above, the issue will be deemed to have been accepted as if it were voted through in the qualifying decision making procedure unless the requisite number of creditors/ contributories object.

In the deemed consent procedure the creditors/contributories may object to the decision following an abbreviated 'rule of 10' procedure: if 10 per cent of the value of creditors/contributories object to the notice of deemed consent then the creditors/contributories will be considered not to have made the decision. In the event that the deemed consent notice is rejected, the office-holder may bring the issue forward for a second consideration via the qualifying decision making procedure, employing one of the methods under Rule 15.3. It naturally flows from the rules that only after a second rejection by the 'rule of 10', under the qualifying decision making procedure, that a physical meeting may be called for a third and final consideration of the issue.

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For obvious reasons involving conflict of interests the deemed consent procedure is *not* available for decisions regarding office-holder remuneration, nor is it available for CVA and (presumably) IVA proposals where the standard voting procedure described above must be followed after a physical meeting of the members of a company under new rule 2.25.

Conclusion

The intended effect of the changes to decision making procedures under the new rules is to allow for a streamlined procedure whereby office-holders can make decisions quickly, and without the expenses currently incurred through physical meetings. Office-holders will have to be aware of the technical aspects of the notice provisions in rule 15.7 to ensure that creditors are supplied with the full and correct information necessary. The embrace of electronic voting procedures and the deemed consent procedure will hopefully ease the burden on office-holders, and allow for an increase in creditor involvement in decision making procedures.

ANDREW BROWN
is a barrister, Radcliffe Chambers.

Out with the old systems, in with the new rules?

Caroline Sumner welcomes the new insolvency rules, but asks whether it will really be so easy for insolvency practices to adapt.

The Insolvency (England and Wales) Rules 2016 (the rules) should be welcomed by the insolvency profession. Having been talked about for a number of years they finally come into force on 6 April 2017 and we can now implement the changes and get on with our work instead of worrying what they will contain. While they do represent the most significant change to insolvency legislation to affect the profession for 30 years, as Andrew Brown has identified on page 12, they do not introduce sweeping changes to the practice of insolvency law in the UK. So what do they change for the insolvency profession and how will this affect IPs in practice? There are three main aims that the legislators have, outlined below.

To consolidate existing rules and amendments

They have been largely successful in this regard and the new rules are simpler, easier to read and contain modernised, gender-neutral language. The grouping together of common procedures across all types of insolvency processes into the common parts has removed much of the repetition from the old rules and has also removed some of the annoying niggles caused by discrepancies in approach across the different procedures.

To effect the changes introduced by the Small Business Enterprise and Employment Act 2015 and the Deregulation Act 2015

These changes have been much written about and will by now be familiar to IPs – such as the removal of physical meetings and the removal of the requirement for a creditor with a small debt to formally prove in order to receive a dividend. While these changes sound simple and the rules are easier to read, the devil is in the detail.

In order to take full advantage of the different decision procedures available the IP is required to have access to modern technologies. It is by no means certain that these technologies to enable virtual meetings and electronic voting are readily available at the present time. In addition, the costs associated with installing the necessary software may mean that the smaller IP practice is unable to take full advantage of the different options available.

Many of the new decision procedures rely on having fast, reliable internet access, which simply doesn't exist in many rural spots outside of the major cities. The rules do recognise some of the challenges to be faced and introduce the concept of the 'excluded creditor', but the reality is that in practice this will add to the burden of IPs when seeking to ensure that a decision sought has been validly obtained. How does an IP ensure that only those entitled to vote actually do so? How are votes made electronically going to be kept confidential

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and secure? How will IPs demonstrate to their regulator that the decision procedure used has been appropriately monitored and evidenced? Getting to grips with the different decision procedures, the varying notice periods, the additional information to be provided to creditors, understanding the restrictions on using deemed consent in certain circumstances and the ability of creditors to object to the procedure decided on and request an alternative will all take time for IPs and their staff to get used to.

To encourage more modern means of communication

The new rules recognise that email is a fast, efficient and effective way of communicating, and that many creditors really do not want to receive endless hardcopy reports and correspondence from IPs, particularly where there is little »