The Insolvency Rules 2016 – improved outcome for creditors or debtors' charter?

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The Insolvency Rules 2016 ("IR 2016") are due to come into force in England and Wales on 6 April 2017. Its purpose is to modernise and streamline the insolvency process in England and Wales in order to reduce the costs and potentially increase returns to creditors. IR 2016 incorporates the changes to insolvency law and practice brought about by the Deregulation Act 2015 and the Small Business, Enterprise and Employment Act 2015.

This article highlights the principal areas of change and their practical implications.

Background

IR 2016 will apply to all liquidations, creditors' voluntary arrangements, bankruptcies, debt relief orders, and individual insolvency arrangements etc whether they commence before or after 6 April 2017, save in relation to some minor transitional provisions. IR 2016 will sit alongside the Insolvency Act 1986 and it will repeal the Insolvency Rules 1986 ("IR 1986") in their entirety, together with their 28 subsequent amendments.

IR 2016 has a more logical structure than IR 1986; uses modern and gender-neutral language (e.g., changing "Chairman" to "Chair"); and provides more flexibility for insolvency practitioners in managing the decision-making processes. It is a relief for many that the rules surrounding insolvency procedures have now been collated in one source.

Key changes include:

- *Abolition of statutory forms for use in insolvency proceedings* - instead IR 2016 sets out prescribed content that should be included in documents and notices but inevitably prescribed forms will be created and become widely available for use.
- *Consolidation of IR 1986 provisions relevant to all formal insolvency processes to reduce undue repetition* - this includes those relating to distributions, decision-making, creditors' committees, office-holder remuneration, and disclaimers. However, there are still exceptions, e.g., various rules dealing with creditors' claims and distributions are stated to apply only to administration and winding up, because the corresponding provision in bankruptcy proceedings is contained within the Insolvency Act 1986.
- *Physical creditors' meetings discouraged* - in contrast to IR 1986, under the new regime, an office-holder (i.e., the administrator or liquidator) can no longer call a physical meeting of creditors unless requested to do so by a minimum number of creditors. Final meetings of creditors in liquidations and bankruptcies are also no longer required. This should achieve a reduction in the cost and time implications of administering insolvent companies for creditors in terms of room hire and charges for the insolvency practitioner's time to attend.
- *Creditors' meetings* - deemed consent - as an alternative to deemed consent, the following procedures may be adopted: correspondence; e-voting; virtual meetings and any other decision-making procedure that enables all creditors who are entitled to participate in the decision-making to participate equally. The new deemed consent procedure should also help to speed up decision-making.
- *Changes to office-holder reports and communications* - creditors will be allowed to opt out of communications sent by the insolvency office-holder, but are able to opt back in at any time. Again, this is a cost-saving measure. However, this will necessitate office-holders maintaining a record of those creditors that have opted in and those that have opted out. Even when a creditor has opted out, some documents must be delivered to all creditors in any event (e.g., changes of office-holder contact details, and notices of distributions).
- *Encouragement of email communications* - IR 1986 was the product of a different technical era and only permitted office-holders to communicate with creditors by email where the creditor has given written consent. IR 2016 allows e-communication by the office-holder with creditors, which is generally cheaper and speedier than traditional post.
- *Improvements to use of websites* - in addition, office-holders can now give notice to creditors that future notices will be published on a website without further notification to creditors or permission from the court. This is subject to certain exceptions, e.g., documents requiring personal delivery.
- *Deemed proof of low value debts (less than £1,000)* - an office-holder may, with a view to limiting the costs of inquiry into that debt and without requiring a formal claim from creditors, decide to treat that debt as proved for the purpose of payment of a dividend.
- *Automatic appointment of official receiver as first trustee immediately upon the making of a bankruptcy order* -

instead of becoming receiver and manager of bankrupt's estate pending appointment of a trustee. This will mean that there is no longer any delay between the making of the bankruptcy order and the automatic vesting of property in a trustee.

Conclusion

Whilst it is recognised by insolvency practitioners that the changes to the legislative framework were overdue it remains to be seen whether IR 2016, which is largely deregulatory, will in fact increase the efficiency of the insolvency process and result in an improved outcome for creditors. Or will it transpire that the new procedures can be exploited by experienced professionals and become a charter for debtors?

The changes required by insolvency practitioners to bring their businesses in line with IR 2016 are significant. Issues will undoubtedly arise in the coming months in relation to confidentiality and security in the use of virtual meetings, e-voting and e-communications, for instance insolvency practitioners will need to ensure that e-votes are cast by the people entitled and that login details have not fallen into the wrong hands. They will also need to ensure that any online broadcast of a virtual meeting is kept secure and confidential.

However, inevitably there will be concern that the discouragement of physical creditors meetings and the impact on creditors' engagement. Much can be gained from a discussion amongst creditors about the conduct of the company and its directors. The collation of such material can assist an insolvency practitioner in his/her decision on the progression of a case and improve the outcome for the creditors.

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