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OUR GUIDE TO DECISION PROCEDURES AND CREDITORS' MEETINGS

On 6 April 2017 the world of insolvency was altered significantly by the implementation of the Insolvency Rules (England and Wales) 2016 ("the Rules"). Whilst the aim of the new Rules was primarily to streamline and simplify legislation that had been continually amended since 1986, in our opinion the commendable intentions haven't necessarily come about.

In relation to seeking approval or a "decision" from creditors, the Rules have tried to give insolvency practitioners the opportunity to take advantage of new technology (well, new since 1986). In doing so they have prevented insolvency practitioners from voluntarily using one of the most important elements of the old Liquidation or Administration processes: the creditors' meeting.

Creditors' meetings in olden times

Since the late 1800s creditors' meetings were a feature of most insolvency procedures. However, those in power deemed that the dwindling attendances at meetings by creditors meant that they should be abolished.

It is true that many meetings have only been attended "by proxy": being the completion of a voting form directing the Chair of the meeting to vote in a certain way. This is, in our view, not necessarily a bad thing.

The Small Business, Enterprise and Employment Act 2015[1] introduced two new sections to the Insolvency Act 1986: the helpfully titled Sections 246ZE and 379ZA, which abolished physical meetings as the default decision making mechanism in all insolvencies.

Meetings are now, therefore, the exception rather than the rule and the old "Section 98" meeting which used to start a voluntary insolvent liquidation is no more. Many mourn its passing.

Supporters of the reform argue that new technology, including video conferencing, makes such physical meetings redundant. They believe that this will save time and money for creditors. Those critical of the new regime believe that it will reduce creditor involvement even further; removing their ability to question directors and to meet to share information between themselves in order to form an accurate picture of a business's last months of trading.

Qualifying decision procedures

Replacing creditors' meetings, we now have qualifying decision procedures. The Rules introduced the following procedures for collective decisions to be obtained by insolvency practitioners:

- Electronic voting, which envisages a system that "enables a person to vote without the need to attend at a particular location";
- Virtual meetings, meaning meetings "where persons who are not invited to be physically present together may participate in the meeting communicating directly with all the other participants in the meeting and voting (either directly or via a proxy holder)";
- Correspondence; and
- Any other decision making procedure that allows creditors to participate equally.

You will note, as explained above, that a physical meeting is not in the list of options.

Notices in respect of the relevant qualifying decision procedure must contain full details of how to access the system, deadlines for voting and passwords. Electronic voting systems are not allowed to let individual creditors know how other creditors have voted.

Virtual meetings can be suspended or adjourned by the Chair in the same way that a physical meeting could.

Bizarrely, if a creditor attempts to attend the location of where a virtual meeting is being conducted from, they are to be prevented from entering the room and must dial in from outside. This legal requirement takes some explaining to the unfortunate creditor who has unwittingly travelled and who, understandably, wants to be allowed in.

[1] Sections 122 and 123.

The "Rule of 10"

The amended Insolvency Act 1986[2] allows for physical meetings to be convened when, within five business days of the notice of the qualifying decision procedure, sufficient creditors request one. The thresholds for creditors are:

- 10% of creditors, by value;
- 10% of creditors, by number; and
- 10 creditors.

There are certain exceptions beyond the scope of this Guide that we would be happy to discuss.

Deemed consent

One further procedure to be considered is that of deemed consent. When deemed consent is sought by an insolvency practitioner, they must send a notice specifying what it is that they are seeking approval for, stating that the deemed consent procedure is being followed and giving instructions as to what creditors can do to object. If no objections are received then at 11.59pm on the specified day the approval will be deemed consented to as if it had been voted upon.

Dissenting creditors, who pass one or more of the thresholds above, can request a physical meeting to vote on the matter.

Because deemed consent is not a qualifying decision procedure it cannot be used in all situations. For example, the agreement of an insolvency practitioner's fees or the approval of a Voluntary Arrangement requires a positive vote and cannot be deemed to be consented to in the absence of creditor involvement.

Issues we are facing

1. When seeking a decision by correspondence, if a creditor casts a vote it cannot be changed even where, after further consideration or clarification, they decide they would like to vote differently before the deadline set for counting votes. Practically, as we regularly see creditors who vote to reject a resolution through a failure to understand the implications of their vote, this deters us from using this procedure where an issue is anything other than clear cut.
2. Virtual and, in particular, telephone meetings are like herding cats. The control of a room full of creditors, that allowed for everyone to express an opinion whilst seeking the answers to their burning questions, used to be an art form that experienced insolvency practitioners honed over the years. Now, the use of a virtual meeting means that, if there are more than one or two creditors on the line, it can become either something of a free-for-all with creditors talking over each other or a series of monologues from individual creditors.
3. Directors can experience a poor connection just at the moment that they are being asked a difficult question. Whilst we are sure that this is coincidental, it does frustrate creditors and often results in a loss of momentum even if / when the director is able to re-join the meeting.

Our conclusion

Change in our profession is constant. Having attended meetings for many years on behalf of creditors and, in many cases, enhanced dividend prospects or come away with information that was useful to the instructing creditor, we have had to adapt.

We have now chaired many hours of virtual meetings and believe that we have learned, through practised use of the mute button, to strike the balance between allowing creditors the chance to actively participate in our meetings, whilst avoiding those who like the sound of their own voice from drowning out others.

Preparation for virtual meetings is key and when the internet is at our fingertips, we can often fact check as we go along.

If you would like specific guidance for you or your company or you are a creditor who would like us to attend a virtual meeting on your behalf, talk to Sadlers today.

[2] Amended by Sections 246ZE(9) and 379ZA(9).