



INSOLVENCY
PROCEEDINGS PRACTICE
DIRECTION 2018:
ALL YOU NEED TO
KNOW

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Introduction

The Insolvency Proceedings Practice Direction (“PD”) came into force on 25 April 2018. Rumour had it that the PD would not be brought into effect (or had been revoked) following the identification of a number of errors. It is now confirmed that the PD will remain in force subject to future amendment.

The former 2014 Practice Direction suffered from being seriously out of kilter with the Insolvency Rules 2016 and various changes to the CPR. The 2018 PD took some time in formulation because of its reliance on other Practice Directions which were also under construction, notably the CPR Practice Direction 51O and the CPR Business and Property Courts Direction.

The 2018 PD replaces its 2014 predecessor for all current and future insolvency proceedings. Tidying up provisions apart, one major area of reform is the distribution of business with expanded jurisdiction for the Insolvency and Companies Court (ICC) judges (formerly Bankruptcy Registrars) who can now hear administration order applications and injunction applications (apart from committals for contempt, freezing and search order and CPR r.25.1(1)(g) ancillary orders which must go to a High Court judge). District judges in county courts with insolvency jurisdiction can hear unopposed winding up or bankruptcy petitions (“local business”) but other insolvency applications are required to be transferred to be heard by a district judge in the relevant district registry or an ICC judge in the Royal Courts of Justice. The power of court officials is also expanded by paras 10.1 to 13.1.

One major thread through the change in the rules is towards modernising decision-making processes and the use of modern technology. Likewise, the PD seeks to put this into effect.

The 2018 Practice Direction

1. For those unfamiliar with insolvency litigation, the PD is not just a procedural afterthought; default may result in costs sanctions.
2. The PD completely replaces earlier practice directions. There is no transitional period, it is here now and insolvency practice is now dictated by its provisions.
3. The announcement of the PD by the Court Service stated as follows:

“Lord Chancellor David Gauke MP has signed the new Insolvency Proceedings Practice Direction, the Courts and Tribunals Judiciary has announced. The new practice direction updates the previous one by making reference to the Insolvency Rules 2016, taking account of recently decided cases and changes in the CPR (in particular with regards to the Business and Property Courts practice direction specifying new arrangements for the distribution of insolvency business across the different levels of the judiciary, and clarifying the routes of appeal in insolvency cases. This new practice direction came into force on 25 April 2018 and shall replace all previous Practice Directions, Practice Statements and Practice Notes relating to insolvency proceedings.”

4. The following are of note, having carried over from the old PD:
 - (i) Validation Orders. Very useful and detailed guidance on the information required to be provided in an application to validate a transaction when a winding up petition is extant. Something that commercial litigation solicitors with no experience of insolvency might face. The consequences of getting this wrong are drastic. The large payment of wages or transfer of assets might be rendered impossible or later found

to be void. The starting point should always be to go back to the wording of the PD para 12.8

- (ii) Administration Extensions A clear statement as to when an application for extension of administrations is required to be made, i.e. 4 weeks before the date the office is due to expire. It is often said that the practice in London is 6 weeks. The new PD makes clear that the applicable period is 4 weeks, even though the opportunity was there to change that: PD para 8.3;
- (iii) Statutory Demand Debt Based on a Judgment or Order Will Not be Set Aside/Adjourned: PD para 11.4.4:

11.4.4 Where the debt claimed in the statutory demand is based on a judgment, order, liability order, costs certificate, tax assessment or decision of a tribunal, the Court will not at this stage inquire into the validity of the debt nor, as a general rule, will it adjourn the application to await the result of an application to set aside the judgment, order, decision, costs certificate or any appeal.

5. What has changed? The following are somewhat prosaic in nature but warrant mention:

- (i) New terminology – such as ICC judge (insolvency and companies court judge) replaces registrar;
- (ii) Makes appropriate cross references to the 2016 rules and the Business and Property Courts PD;
- (iii) **Distribution of Business: PD para 3.** More applications being opened up to be heard by DJs. In particular note:

3.5 The following applications relating to insolvent companies or insolvent individuals may be listed before a District Judge Sitting in a District Registry only with the consent of the Supervising Judge for the

circuit in which the District Judge is sitting, or with the consent of the Supervising Judge's nominee:

(1) applications pursuant to the Court's inherent jurisdiction (e.g. to restrain the presentation or advertisement of a winding up petition);

(2) interim applications and applications for directions or case management after any proceedings have been referred or adjourned to a High Court Judge.

- (iv) Useful hyperlinks to insolvency forms e.g. at **PD paras 4.1, 9.1**;
- (v) Deletion of old para 5 on evidence (witness statements as opposed to affidavits being the default form of written evidence) – dealt with in rules (IR r12.28);
- (vi) **Service: PD para 5.** Provisions on service at para 5 have been simplified by reference to schedule 4 of the 2016 rules – in essence CPR part 6 applies unless schedule 4 to 2016 rules provides otherwise. Useful clarification that a statutory demand is not a court document and so falls outside the schedule 4/part 6 provisions (IR r 10.2 deals with service of the statutory demand);
- (vii) **Drawing up of orders: PD para 6.** In line with Chancery Guide/ Business and Property Court practice – this is to be done by the parties, no longer by the Court;
- (viii) **Urgency – PD para 7** – no longer a set form in the PD, you simply are required to justify with reasons;
- (ix) **Administrations – PD para 8**, reference to Electronic Working Pilot 510;
- (x) **Winding up petitions – PD para 9.3**, reference to the Electronic Practice Direction and arrangements for payment of the deposit where winding up petition issued electronically. Similarly, for bankruptcy petitions at **12.41**:

“A petition filed electronically without payment of the deposit will be marked “private” and will not be available for inspection until the deposit has been paid. The date of presentation of the petition will accord with the date on which the deposit has been paid. If the official receiver’s deposit is not paid within 7 calendar days after filing the petition, the petition will not be accepted, in accordance with paragraph 5.3 of the Electronic Practice Direction 510 -The Electronic Working Pilot Scheme”;

- (xi) **Winding up petitions – PD para 9.8.3:** reminder to advertise dismissal
- (xii) **Rescission of a Winding Up Order – PD para 9.10.1:** worth noting the slight change from “should normally” be made within 5 business days to must be made within 5 business days.;
- (xiii) **Statutory demands: PD para 11.** Substituted service provisions have been removed but cross reference to para 12.7 of the PD which now prescribes steps that will suffice where personal service of the petition is not practicable;
- (xiv) **Setting Aside Statutory demands: PD para 11.4/11.4.5.** Reference to “genuine triable issue” test in relation to cross claims has been taken out, simple reference now to the resolution of the issue in line with IR 10.5

10.5(5):

(5) The court may grant the application if—

(a) the debtor appears to have a counterclaim, set-off or cross demand which equals or exceeds the amount of the debt specified in the statutory demand;

(b) the debt is disputed on grounds which appear to the court to be substantial;

(c) it appears that the creditor holds some security in relation to the debt claimed by the demand, and either rule 10.1(9) is not complied with in relation to it, or the court is satisfied that the value of the security equals or exceeds the full amount of the debt; or

(d) the court is satisfied, on other grounds, that the demand ought to be set aside.

- (xv) **Appeals: PD para 17.** Far more detail on the destination of appeals from particular judges, both first and second appeals. This should be your first port of call for any insolvency appeal followed by schedule 10 of the insolvency rules and CPR part 52;
- (xvi) **Remuneration provisions (PD para 21)** are largely the same, although there are some changes e.g. para 21.7(c) which states that any fees estimate or details of anticipated expenses should be provided to the court on a remuneration application;
- (xvii) **New section on unfair prejudice petitions (PD para 22)**, reflecting PD to CPR 49 where guidance was given that a contributory should not in an unfair prejudice petition ask for winding up petition as a matter of course. This paragraph provides guidance on details which must be included in contributories' petitions.

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