IS THIS A WIND-UP?

Winding-up petitions presented on or after 1 October 2021 and the new Schedule 10 to the Corporate Insolvency & Governance Act 2020

Out with the old (Schedule 10) and in with the new (Schedule 10)

1. Practitioners will by now no doubt be familiar with the temporary (but less temporary than was first anticipated) provisions relating to winding-up petitions that have been with us from the early days of the pandemic.

2. Those provisions were found within the original enactment of Schedule 10 of the Corporate Insolvency and Governance Act 2020 (CIGA 2020) ("**Old Schedule 10**"), but will not be discussed here. They came to an end after 30 September 2021 and the only petitions which are still governed by them will be ones issued prior to 1 October 2021 of which there will be now be relatively few.

3. This handout[1] discusses "**New Schedule 10**", i.e. the provisions brought in by way of wholesale amendment to Schedule 10 of CIGA 2020[2]. New Schedule 10 applies to any winding-up petitions presented on or after 1 October 2021 on the ground that the

[1] Which accompanies a talk presented at the remote Kings Insolvency Seminar on 11 November 2021
[2] Brought in by the Corporate Insolvency and Governance Act 2020 (Coronavirus) (Amendment of Schedule 10) (No.2) Regulations 2021

company is unable to pay its debts and so captures the most common form of creditor's winding up petitions.

Key reflections

4. Before delving into the intricacies of the schedule the following overarching takeaways arise:

   (1) New Schedule 10 brings the procedure for winding up petitions far closer to the pre-pandemic position than was the position under Old Schedule 10;

   (2) Nevertheless there are hurdles that have been placed in a creditor's path which will (at the least) lengthen the process and may in many instances complicate it;

   (3) Debtors looking to forestall a winding up order will have ample scope to do so, especially at the first hearing of a petition. Those acting for creditors should be alive to this and anticipate potential challenges;

   (4) New Schedule 10 is designed to create a tapering effect and is currently scheduled to end in March 2022. Whether it is extended is, as ever, anyone's guess, but perhaps in line with the previous restrictions it will probably largely track the pandemic. For example, if the economy has continued to operate unrestricted to March 2022 it perhaps seems less likely it will be extended. The Explanatory Memorandum expressly recognises that the provisions are a "…*significant intervention into the normal working of insolvency law*…", which at least appears to recognise the ongoing hurdles creditors have faced and face. On the other hand, predicting the decisions of a Government in this area would continue to be a fool's errand.

New Schedule 10 - getting into the weeds

5. Overall the scheme of New Schedule 10 is far more user friendly than Old Schedule 10 and it can be relatively quickly read and digested, for which as ever there is no real substitute.[3]

6. The four hurdles that must be cleared (each of Conditions A, B, C and D) are as follows, the phrases in brackets are the author's nomenclature:

Condition A (the gateway hurdle)

[3] Available here - https://www.legislation.gov.uk/uksi/2021/1091/made/data.pdf

7. The debt must be liquidated and have fallen due.

8. The debt cannot be an "*excluded debt*", which broadly means commercial rent arrears (or other sums due under a "*relevant business tenancy*" (so defined) which is "*unpaid by reason of a financial effect of coronavirus.*"

9. If you are in any doubt as to whether your debt is an "excluded debt", the best advice is to consult the language of New Schedule 10. As to whether the debt is "unpaid by reason of a financial effect of coronavirus", it is likely that this test will continue to engage in some form the so-called 'coronavirus test' from Old Schedule 10.[4] In all likelihood there will be vanishingly few "excluded debts" still outstanding which would surmount the evidential hurdle created by the coronavirus test.

Condition B (the procedural hurdle)

10. This requires a creditor to deliver formal written notice to the debtor company that "*must*" comply with various formalities (for example providing details of the debt) and crucially must state that:

> "*…if no proposal to the creditor's satisfaction is made within the period of 21 days beginning with the date on which the notice is delivered, the creditor intends to present a petition to the court for the winding-up of the company.*"

11. The notice must be delivered to the debtor company's registered office, or if that is not known or is not practicable to the company secretary, a director or manager.

Condition C (the payment proposals hurdle)

12. This is the shortest condition but will likely create the most interest and source of contention and legal argument. It states:

> "*Condition C is that at end of the period of 21 days beginning with the day on which condition B was met the company has not made a proposal for the payment of the debt that is to the creditor's satisfaction.*"

[4] A convenient summary of the relatively few reported authorities considering this test can be found in *A v B* [2021] EWHC 2289 (Ch)

13. On the face of it the phrase "creditor's satisfaction" without any qualification appears to give the creditor ultimate discretion as to whether proposals are to its satisfaction (and so whether it is entitled to present a winding up petition).

14. However, it is suggested that it is very unlikely that the court will construe the provision in this way. Doing so would give the creditor an unfettered ability to merely assert their dissatisfaction with a proposal (no matter how irrational that dissatisfaction appeared) and press on with issuing a petition. That cannot have been the intention of Parliament (in the usual interpretative sense, as New Schedule 10 was brought in by way of Statutory Instrument).

15. Far more likely is that the court would in the course of argument be taken to authorities which concern the offer of reasonable security in the context of bankruptcy petitions, and considerations of whether the refusal of those offers by creditors is reasonable. Although there is no express language in New Schedule 10 to this effect, applying similar considerations by analogy would appear to be a sensible outcome, perhaps on the basis that the courts have in the past limited contractual discretion by holding that contracts can contain implied terms that decision makers will not act unreasonably or irrationally.[5] As a reminder of the key principles:[6]

    (1) Any offer should be concrete and capable of acceptance;

    (2) Any offer should be a present offer, not the possibility of a future offer;

    (3) The court will consider whether a creditor's refusal represents a course of action outside what a reasonable creditor might take;

    (4) Any refusal should be as the result of proper consideration;

    (5) Creditors are entitled to have regard to their own interests, do not need to speculate or take on more risk nor are they required to be patient or generous.[7]

16. Offers of security in respect of bankruptcy debts are not strictly the same as offers of direct payment of a petition debt and so the test will not necessarily be exactly equivalent. It will also be interesting (a dreaded word for commercial certainty) to see whether or not the courts have any regard to the background circumstances (i.e. the difficulties created by a global pandemic) when considering the actions of a hypothetical reasonable creditor. It is respectfully suggested that they should not, but it may be a factor which is at least considered in decisions at the margins.

[5] *Braganza v BP Shipping Ltd* [2015] UKSC 17
[6] As stated in *HMRC v Garwood* [2012] BPIR 575 and recently confirmed by the Court of Appeal in *Hughes and another v Howell* [2021] EWCA Civ 1431
[7] *Ross v Revenue and Customs Commissioners* [2010] EWHC 13 (Ch)

17. In reality, it is expected that if the creditor can convincingly explain why the proposals are not in their commercial interests the court will be unlikely to go too far behind that reasoning.

Condition D (the debt threshold hurdle)

18. This imposes a minimum debt threshold of £10,000, although creditors can band together to present a petition if their aggregate debts exceed £10,000.

19. Creditor aggregation may create complexities if (say) Creditors X and Y are each owed £5,000, join forces to threaten a petition and comply with Condition B by requesting payment proposals from Debtor Z. If a proposal is made to Creditor X which is to its satisfaction but not to Creditor Y, Creditor Y cannot then present a petition. Divide and conquer could be a canny strategy. The situation may be more manageable for group or connected companies.

Are there any ways of circumventing the Conditions?

20. Yes, creditors can apply to the court to disapply Condition B or C or shorten the 21 day notice period from Condition C.

21. However it is expected that the circumstances in which such an application will be successful will be relatively unusual, for example where there is a risk of asset dissipation or a need to put the company into liquidation as soon as possible.

Other matters (modification of the Insolvency Rules)

22. Petitions must now also[8] contain a statement that (paragraph 2 of New Schedule 10):

    (1) Conditions A – D are met; and

    (2) That either:

        i. No proposals for repayment have been made; or

        ii. If they have been made, why they are not to the creditor's satisfaction.

[8] I.e. on top of the usual requirements as to the contents of petitions in Rule 7.5(1) of the Insolvency (England and Wales) Rules 2016

23. The word "why" is emphasised simply to stress that it would not enough to simply state that the proposals are not to the creditor's satisfaction, the petition itself must at least outline the reasons for that statement. If the reasoning could be tied back to the statement of principles which may be applied by analogy from *HMRC v Garwood* (see paragraph 15 above), all the better

Practical tips for the future

24. Once again faced with a new test it will be a wait and see exercise to see how the courts approach petitions under New Schedule 10. However whilst we will all be learning together, it is still worth going back to basics and ensuring that (for example) if a petition is issued all of the usual formalities have been complied with so that the first hearing goes smoothly and does not trip up on an avoidable defect.

25. The reality is that debtors will have more potential lines of challenge to resist a winding up order at a first hearing, and creditors should be alive to those and be realistic about what directions may be needed. In cases where payment proposals have been made but are not to the court's satisfaction it is currently not known what the practice of the courts will be as to whether the reasonableness of the creditor's rejection of the proposals will be considered at the first hearing, as to do so will likely require a greater allocation of time to each petition in what may be very crowded lists. There will be plain and obvious cases, but others will be more marginal the court may be persuaded of the necessity to give the matter consideration at a longer hearing. A concise, well-drafted statement by the creditor setting out their reasoning for refusing the proposals may make all the difference.

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