



Unbending the Insolvency Rules 2016 – part 2

Christina Fitzgerald, Tania Clench and Andrew Brown provide a review of deemed consent and CVL procedure.

In the spring edition we looked at one of the primary changes to the decision-making procedure introduced by the new Insolvency Rules 2016. Unsurprisingly, the nature of these changes has created a certain amount of confusion among practitioners. The two chief examples are:

- 1) the application of the amended 'single 10 rule' in the deemed consent procedure as opposed to the 'triple 10 rule' for requesting physical meetings, and
- 2) the use of the deemed consent procedure within the CVL context.

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various decision-making procedures is likely to be in need of an updated map to guide him through the various twists and turns of the legislation.

To that end we have produced three flowcharts to assist in understanding the course an office-holder should chart, and we have included below some practical advice to avoid some of the stranger tides of insolvency decision-making procedures.

Single 10 in deemed consent procedure (diagram 1)

There has been some confusion among practitioners regarding which 'rules of 10s' threshold must be applied in the deemed consent procedure. We sought to clarify this in our previous article, but some confusion remains due to conflicting »

information given by some speakers and secondary literature. To assist office-holders in understanding the deemed consent procedure we offer the example of diagram 1 as a flowchart of decisions to be taken, and further offer the below commentary to clarify the issues.

The 2016 rules do not explicitly state the applicable threshold of objection for the deemed consent procedure and instead directs office-holders to consult s246ZF of the Insolvency Act 1986.

Rule 15.7(3) refers to objections from the ‘appropriate number of relevant creditors.’ S246ZF(6) IA 1986 defines ‘the appropriate number’ as **10 per cent in value** of the creditors or contributories. It must be stressed that this is **10 per cent in value**, and not ‘10 in number’ or ‘10 per cent in number of the creditors’ as found in the qualifying decision-making procedure. These three different thresholds have been mixed-up by some commentators, which has caused some

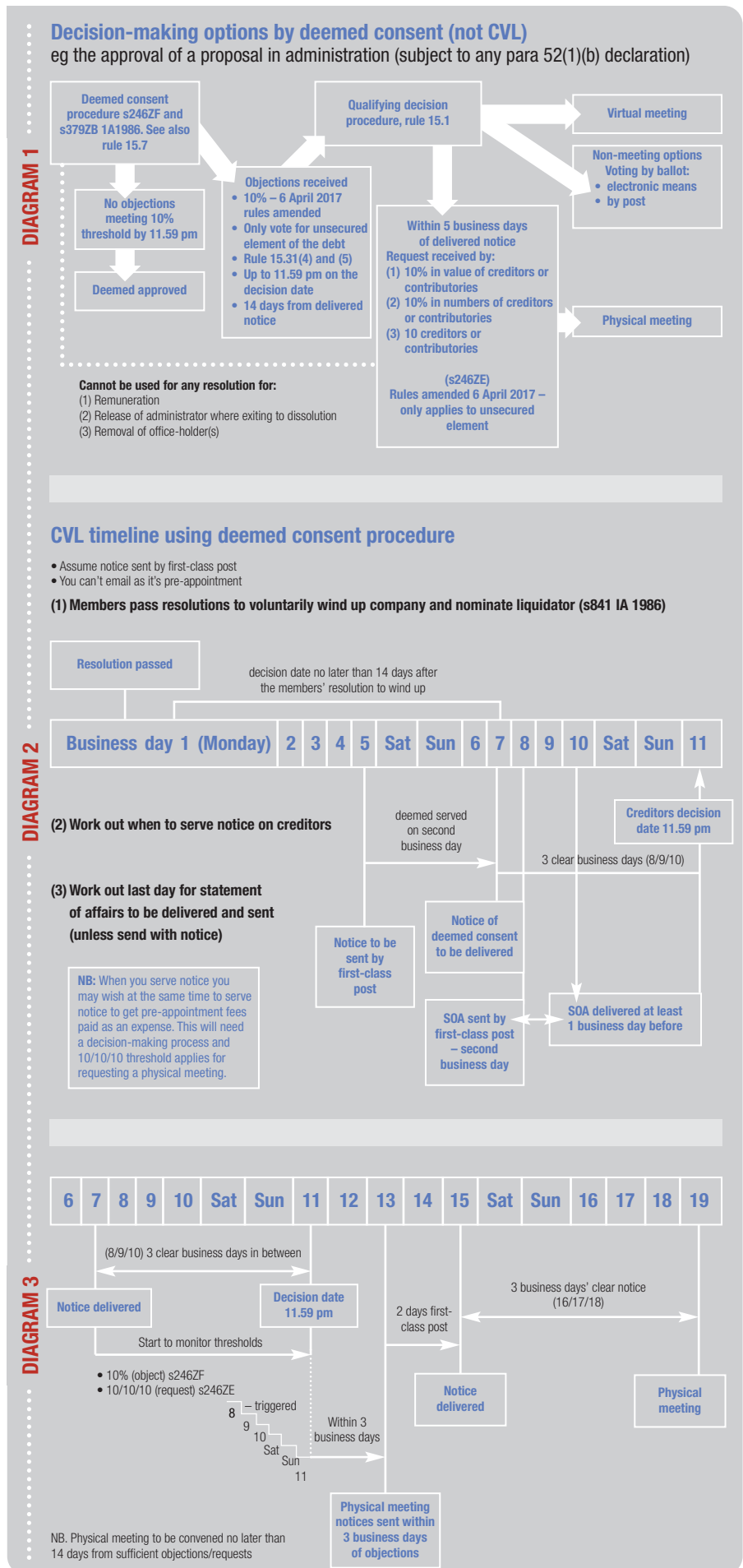
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confusion and disarray. For example, at the time of writing, in the 2017 edition of *Sealy & Milman: Annotated Guide to the Insolvency Legislation*, the general note to ss246ZE–246ZG erroneously states the threshold as being ‘generally 10 per cent or 10 in number’. This ambiguous and incorrect statement should be disregarded, and office-holders should take note of the **10 per cent in value** threshold as being the ‘single 10 rule’ for objections in the deemed consent procedure.

Under the ‘single 10 rule’ it is important to understand how the ‘value of creditors’ is calculated, which can be found in rule 15.31. It is important to note that under 15.31(4) secured creditors have no voting rights, and under 15.31(5) partially secured creditors only have voting rights equivalent to the value of their unsecured debt.

The deadline for objections under the deemed consent procedure is 11.59 pm on the decision date. Guidance on the minimum number of days of notice between delivery of the notice of deemed consent procedure and the deadline for objections can be found in rule 15.11.

Regarding ‘notices of the deemed consent procedure’ we query whether it is



necessary to send a standardised 'notice of objection' form for creditors to fill in and return. Rule 15.7(2)(a) requires no such prepared blank notice, and the possibility exists that a prepared form might encourage creditors to object where they otherwise would not. We encourage office-holders to use first-class post for delivery of any notes of the deemed consent procedure (or under the qualifying decision-making procedure) as this will ensure consistency in time calculations for deadlines.

Triple 10 in deemed consent procedure

One final point to consider is when the 'triple 10 rule' will apply to the deemed consent procedure. As noted above, the 'single 10 rule' of **10 per cent in value** is the only applicable rule for objections in the deemed consent procedure, but creditors can still demand a physical meeting. Under s246ZE(3) IA 1986, if the 'minimum number of creditors' request a physical meeting it must be held. The 'minimum number' is defined at s246(7) IA 1986 as: 10 per cent in value of

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creditors; 10 per cent in number of creditors; or 10 creditors. It is important to note that this is specifically for notices to request a physical meeting. If 10 creditors merely object to a deemed consent procedure, but do not constitute 10 per cent of the value of creditors, then consent will be deemed to exist, and no physical meeting will be called as the 10 creditors merely objected and didn't request a physical meeting. Notices demanding a physical meeting must be received within five business days of delivery of the notice of deemed consent procedure.

The deemed consent procedure in the context of a CVL (diagrams 2 & 3)

The deemed consent procedure has further application under rule 6.14 for the nomination of a liquidator by company directors entering into a CVL. Rule 6.14(2) allows company directors to seek a decision of the creditors regarding the nomination of a liquidator by either:

- 1) the deemed consent procedure, or
- 2) a virtual meeting.

Until IT systems for virtual meetings are proven reliable, we advise the use of the deemed consent procedure and service of any notices by first-class post. To assist office-holders we have prepared two further flowcharts opposite to assist in understanding the procedure for deemed consent under rule 6.14.

Hybrid 10s

As with the standard deemed consent procedure (discussed above), company directors must monitor both the single 10 rule and the triple 10 rule. Under 6.14(3) directors must send notices to creditors for the nomination of a liquidator and state a decision date not earlier than three business days after deemed delivery of the notice (deemed service is always two business days from posting), and no more than 14 total days after the resolution to wind-up the company. If before 11.59 pm on the decision date **10 per cent in value** (the single 10 rule) of the creditors object to the nomination of the liquidator, then the company directors *must* call a physical meeting under rule 15.6 for determination of the issue. The directors must send out notices under 15.6(3) convening a physical meeting. The physical meeting must not be heard earlier than three business days after deemed service of a notice under rule 15.6, and not more than 14 total days after the single 10 rule is triggered. This is a sort of hybridisation of the single 10 rule and the effect of the triple 10 rule.

The triple 10 rule also applies to rule 6.14 under subsection (6). However, unlike the normal triple 10 rule, which only allows requests for a physical meeting to be filed within five days of deemed service of any notice, rule 6.14(6)(a) notes that the triple 10 rule can be achieved at any point between deemed service and the decision date. So, for instance, if the company directors set a decision date at seven business days after deemed service of the notice, the triple 10 rule could be triggered

at any point up to that decision date. In practice we expect most directors to set a decision date at three business days, so this peculiarity is unlikely to arise often.

Practical points under rule 6.14

On a practical level, we would advise office-holders to meet with directors early to focus on completing the statement of affairs as soon as practicable, and to deliver the statement of affairs well in advance of the decision date rather than effecting delivery one business day before the decision date, this being the last possible date under rule 6.14(7).

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Finally, under rule 6.19 the company directors must, at the same time as sending a notice under rule 6.14, also send notice to creditors inviting them to decide whether they wish to form a creditors' liquidation committee, and further to solicit any nominations for the committee. Under rule 17.2 such a committee is to assist the office-holder in the discharge of their duties.

Conclusion

Despite the noble intentions behind the new rules to simplify insolvency procedures, the interplay of the deemed consent procedure with the qualifying decision-making procedure can be confusing. The variety of 'rules of 10s', the various deadlines and the required information to be included in notices can complicate what otherwise was meant to be a streamlined procedure. We hope the flowcharts accompanying this article are of assistance to the reader and reduce some of the confusion surrounding the rule changes. □



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