

UK judges tweak insolvency practice direction in face of lockdown

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Electronic administrator appointments, urgent hearings by Skype and looser rules on statutory declarations under oath – UK insolvency judges have issued a temporary practice direction to help them deal with the new normal during the coronavirus lockdown.

Drafted by three experienced insolvency judges, **Mr Justice Zacaroli**, **Mr Justice Snowden** and **Chief Insolvency and Companies Court Judge Briggs**, as well as financial list judge **Mr Justice Marcus Smith**, the **temporary Insolvency Practice Direction (IPD)** came into force on 6 April to provide “workable solutions for court users” during the pandemic.

Its aim is to avoid parties attending the courts while social distancing measures are in place and they are potentially faced with fewer staff members and resources.

The new direction applies to all insolvency proceedings in the Business and Property Courts and will function as a supplement to the existing Insolvency Practice Direction until 1 October 2020, unless otherwise amended or revoked. It may, however, be subject to variations in courts outside of London as directed by local lead judges.

Among other things, the temporary IPD includes sections on the electronic filing of notices of intention to appoint administrators, as well as notices of appointment. It states how and when these will be treated as delivered, and, with respect to the former, when the 10-day notice moratorium period kicks in.

It also clarifies that notices of appointment by a company or its directors filed outside normal court business hours will be treated as filed at 10am on the next day the court is open, and states that qualifying floating-charge holders will still be unable to appoint administrators outside of normal court opening times as at paragraph 14 Schedule B1 of the existing Insolvency Practice Direction.

The new temporary IPD also provides for certain non-urgent applications, petitions and claim forms that were listed for hearing before 21 April to be adjourned. It explains how to communicate the need for an urgent hearing to court clerks, and stipulates how urgent hearings will be carried out remotely via Skype for Business.

Adjourned bankruptcy and winding-up cases will be re-listed in line with a temporary listing procedure through Skype or British Telecom's MeetMe, according to the temporary IPD.

Finally, the new direction acknowledges that, where someone was expected to make a statutory declaration under oath but can no longer do it in person, it could be deemed to constitute a formal defect or irregularity. The temporary IPD says the court has the power to declare that a scenario like this one will not invalidate the insolvency proceedings, so long as no substantial injustice has been caused.

It also states that where someone makes a statutory declaration to a person authorised to administer the oath by videolink – and the authorised individual attests it happened – that will not in itself be regarded as having the potential to cause substantial injustice.

South Square barrister **Mark Philips QC** describes the temporary IPD as “very good” – but he cautions it would be wrong to characterise hearings involving video conferencing as something new in the context of international insolvency cases. “I cross-examined one witness for over two weeks via video link in circumstances where the witness could not come to court,” he says, noting that taking witness evidence this way has been around for years.

“The only real difference now is that the judge, as well as the advocates and witnesses, will be in different locations. When you don't have the judge, the advocates and the witnesses, it is true that we lose something of our oral tradition, but speed and efficiency will sometimes result so it may be a sensible price,” he adds.

“The biggest problem with taking evidence via video link is making sure that the witness isn’t being prompted by someone off-camera.”

While the process does have its issues, ultimately, video hearings and email service are just a reflection of the present day, Philips notes.

Canadian arbitrator and former British Virgin Islands Commercial Court Justice **Barry Leon**, a member of 33 Bedford Row Chambers, says it is not yet clear whether or how the courts will address “the reality” that it is usually neither feasible nor efficient for judges or counsel to be managing the technology for virtual proceedings, while simultaneously hearing or presenting them.

“They will often be distracted – or worse – if they need to manage technology and try to resolve any technical issues, when their job should be to focus on the proceeding. They should not have the frustrations of trying to pivot from focusing on the case to dealing with a technology problem, and then back to focusing on the case,” he tells GRR.

Leon says his experience of helping to launch the virtual proceedings services at Arbitration Place, an arbitral chambers and hearings centre in Canada, showed it is best to use “a professional and independent provider of specialist virtual proceedings technology” whenever possible. It is unclear whether the UK courts are in a position to do that at present, he says, but it might be something to think about now. “It is not expensive through an external provider,” he adds.

“Such a service will provide a ‘virtual proceeding specialist’ who is familiar and comfortable with the technology and also is familiar and comfortable with the legal side of the virtual proceeding,” he explains. That specialist usually provides tech support to participants both before and during the virtual proceedings, including training and even potentially a rehearsal, he adds.

Other barristers simply praised the new temporary IPD for keeping the sector functioning: In a **memo** on Trinity Chambers’ website, **Chris Hegarty** said it “brings the insolvency provisions forward a long way and is a pragmatic toolkit to keep urgent insolvency work moving”.

Hegarty added that it will work well for “cooperative litigators” while uncooperative parties can expect “robust case management”.