In Practice

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Accidental repeal of coronavirus restrictions on winding up petitions

KEY POINTS

- On 29 September 2021, the restrictions on winding up companies were amended by SI 2021/1029. The intention is that a new regime applies from 1 October 2021, with the existing regime remaining for petitions presented before then.
- However, SI 2021/1029 inadvertently repeals the existing regime entirely, effective from 29 September 2021.
- Petitions presented on 29 and 30 September 2021 will thus be subject to no restrictions at all.
- Petitions presented before 29 September 2021 and not yet heard may now be subject to no restrictions, even if the petitions were previously improperly presented.

The extraordinary circumstances of the SARS-CoV-2 pandemic gave birth to a raft of emergency legislation – primary and secondary. One criticism that has been levelled at the government is that the speed with which such measures have been implemented has prevented their effective scrutiny. Generally, the criticism has been that this has led to a democratic deficit. However, the speed with which the latest amendment to the Corporate Insolvency and Governance Act 2020 was enacted has inadvertently removed some of the protections intended for companies experiencing difficulties during the pandemic.

CIGA 2020

The Corporate Insolvency and Governance Act 2020 ('CIGA 2020') was made on 25 June 2020. Schedule 10 of CIGA as originally enacted set out various restrictions on the presentation of winding up petitions. Of note in respect of registered companies (and similar provisions apply for unregistered companies):

(a) Para 1 prohibited the presentation of a winding up petition on the ground that a statutory demand had been served during the *'relevant period'*.

(b) Para 2 restricted a creditor's right to present a winding up petition during the *'relevant period'* on certain other grounds, requiring as a precondition:

> *'that the creditor has reasonable grounds for believing that –*
> (a) *coronavirus has not had a financial effect on the company, or*
> (b) *the facts by reference to which the relevant ground applies would have arisen even if coronavirus had not had a financial effect on the company.'*

(c) Para 5 provides that the court may wind up a company following the presentation of certain petitions during the *'relevant period' 'only if the court is satisfied that the facts by reference to which that ground applies would have arisen even if coronavirus had not had a financial effect on the company.'*

The *'relevant period'* was from 27 April (or 1 March for the purpose of para 1) to 30 September 2020, as CIGA was originally enacted: paras 1(4) & 21(1). Since then, the end date of the relevant period has been extended by various statutory instruments (SI 2020/1031, SI 2020/1483, SI 2021/375 and SI 2021/718), the most recent of which extended the end date of the relevant period to 30 September 2021.

LATEST AMENDMENT TO CIGA

At time of writing, Corporate Insolvency and Governance Act 2020 (Coronavirus) (Amendment of Schedule 10) Regulations 2021 (SI 2021/1029) is the most recent amendment to CIGA. It was made on 8 September 2021 and came into force on 29 September 2021.

This latest statutory instrument makes far more wide-ranging amendments to the protections afforded by Schedule 10 of CIGA 2020 as originally enacted (the 'Old Schedule 10'). SI 2021/1029 s 2 reads: *'For Schedule 10 to the Corporate Insolvency and Governance Act 2020 substitute--'*. A replacement Schedule 10 (the 'New Schedule 10'), with a different regime to that originally enacted in CIGA 2020, is then set forth.

New Schedule 10 will require conditions A to D (as defined) to be met before a creditor can present a winding up petition during the *'relevant period'*. New Schedule 10 will therefore continue to restrict the pre-CIGA rights of creditors to present winding up petitions, but does not limit the court's power to make winding up orders (ie no new equivalent of para 5 of Old Schedule 10 is enacted). The New Schedule 10 *'relevant period'* is defined in para 4(1) as being from 1 October 2021 to 31 March 2022.

The objective of the draftsperson is clear. Petitions presented during the relevant period up to 30 September 2021, will be subject to the restrictions in Old Schedule 10 to protect companies from winding up in certain circumstances. Petitions presented after that period, in the new relevant period 1 October 2021 to 31 March 2022, will be subject to the restrictions in New Schedule 10. Petitions presented after the new relevant period will not be under any CIGA restrictions; the position will be restored to the pre-CIGA position.

That is undoubtedly the intention behind SI 2021/1029. However, the question here posed is whether the statutory instrument inadvertently has a dramatically different effect.

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INADVERTENT EFFECT

SI 2021/1029 substitutes the entirety of Old Schedule 10 with New Schedule 10. As a matter of statutory interpretation, an amendment or substitution formally takes effect as the repeal of the existing enactment followed by the insertion of its replacement.

SI 2021/1029 came into force on 29 September 2021. As such, on and from that date, Old Schedule 10 is repealed and a new regime is inserted in its place.

This raises two questions:

- First, what (if any) restrictions on the presentation of winding up petitions are there on 29 and 30 September 2021 (ie after SI 2021/1029 repeals Old Schedule 10 but before the start of the '*relevant period*' for the restrictions introduced by SI 2021/1029)?
- Second, what (if any) effect does SI 2021/1029 have on winding up petitions presented before 29 September 2021 (ie during the period that Old Schedule 10 was enacted and in force) where those petitions have not yet been heard?

PETITIONS PRESENTED ON 29 AND 30 SEPTEMBER 2021

Strikingly, it appears that there will be no restrictions (under either Old Schedule 10 or New Schedule 10) on winding up petitions presented on 29 or 30 September 2021.

On 28 September 2021, Old Schedule 10 will be in force, restricting creditors' rights to present winding up petitions and the court's power to make winding up orders. Overnight, Old Schedule 10 will be deleted from the statute books and New Schedule 10 put in place. However, New Schedule 10 will only restrict the right to present winding up petitions from 1 October 2021. A creditor presenting a petition on 29 or 30 September 2021 will, it follows, not be under any CIGA 2020 Schedule 10 restriction at all.

It is hard to see how this – obviously unintended – consequence is not the natural result of SI 2021/1029 being drafted in the way that it is. The anomalous result follows from SI 2021/1029 repealing the Old Schedule 10 protections before the New Schedule 10 protections are effective. Had the start of the '*relevant period*' under New Schedule 10 matched the date on which SI 2021/1029 is due to come into force, this issue would have been avoided.

29 and 30 September 2021 are a Wednesday and Thursday respectively. It seems inherently likely that at least one winding up petition will be presented in this window. It remains to be seen whether a creditor will seek to capitalise on the apparent gap in the CIGA restrictions.

PETITIONS PRESENTED BEFORE 29 SEPTEMBER 2021

Prior to SI 2021/1029 being enacted, winding up petitions were subject to the restrictions in paras 1, 2 and 5 of Old Schedule 10. Paras 1 and 2 provided that a creditor may not present a winding up petition in certain circumstances, and para 5 provided that that the court could not make a winding up order in certain circumstances. Old Schedule 10 will shortly be repealed by SI 2021/1029. What happens in respect of statutory demands served or petitions presented during the Old Schedule 10 '*relevant period*' where the hearing of the relevant winding up petition has not yet taken place?

There is no express savings provision in SI 2021/1029. This is unusual, and best practice would have been to include an express savings provision – or even to enact New Schedule 10 as an additional Schedule 10A, leaving Old Schedule 10 in situ to lapse with the passage of time.

Implied saving of Old Schedule 10

For the restrictions in Old Schedule 10 to continue to have effect from 29 September 2021, a debtor company will need to show that the general savings provision in Interpretation Act 1978 s 16 is engaged. Section 16 provides as follows:

> *'(1) Without prejudice to section 15, where an Act repeals an enactment, the repeal does not, unless the contrary intention appears,—*
>
> (a) *revive anything not in force or existing at the time at which the repeal takes effect;*
> (b) *affect the previous operation of the enactment repealed or anything duly done or suffered under that enactment;*
> (c) *affect any right, privilege, obligation or liability acquired, accrued or incurred under that enactment;*
> (d) *affect any penalty, forfeiture or punishment incurred in respect of any offence committed against that enactment;*
> (e) *affect any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation, liability, penalty, forfeiture or punishment;*
>
> *and any such investigation, legal proceeding or remedy may be instituted, continued or enforced, and any such penalty, forfeiture or punishment may be imposed, as if the repealing Act had not been passed.'*

Sub-sections (a) and (d) do not have any bearing on the present situation.

Sub-section (c) suffers from the dual complication that there must be a '*right, privilege, obligation or liability*' and that the relevant right, etc must have '*accrued*' (or been '*incurred*'). Old Schedule 10 does not give a debtor company any form of statutory right or defence. It merely restricts an otherwise-existing right of the creditor to present a petition (or power of the court to make a winding up order). By conventional use of language, a restriction on A's right is neither a right or privilege granted to B nor an obligation or liability on A. Old Schedule 10 does not even grant a right to a debtor company if a creditor does incorrectly present a petition. The company in such circumstances may be awarded its costs of resisting the petition, but there is no entitlement to costs; an order for costs remains within the discretion of the judge hearing the petition.

There is a theoretical possibility that presentation of a petition in breach of Old Schedule 10 could constitute a tort of abuse of process or of maliciously commencing insolvency proceedings. If so, the debtor company would have a right to claim damages (though not a *right* to have the petition dismissed). However, this would require somewhat extreme facts and will

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not apply in the vast majority of cases with which we are here concerned.

If sub-s (c) is of no assistance, then the same goes for sub-s (e). Sub-section (e) is a savings provision in respect of extant legal proceedings, but those proceedings must be '*in respect of*' a right, etc as identified in sub-ss (c) or (d). In the absence of any such right, etc, sub-s (e) is not engaged.

That only leaves sub-s (b). The present case is not one of saving the effect of '*anything duly done or suffered under that enactment*'; it is the opposite. The very nature of a debtor company's complaint in this case is that the previous act (eg presenting a winding up petition) was *not* duly done.

The debtor company would thus be required to argue that, by sub-s (b), SI 2021/1029 does not '*affect the previous operation*' of Old Schedule 10. That language in sub-s (b) is ostensibly very broad and does not appear to have been subject to material consideration in the authorities. It seems likely that this provision ensures that any effects that the repealed enactment has already had are not reversed by the enactment's repeal; this is consistent with the balance of sub-s (b) (concerning '*anything duly done*'). Thus, the question is whether Old Schedule 10 has already had an effect on a winding up petition which has been presented, but not heard, during the Old Schedule 10 relevant period.

What effect has Old Schedule 10 already had?

Take the example of a petition presented on 1 June 2021 by a creditor who did not at that time satisfy the precondition under para 2 of Old Schedule 10, but where that petition is not heard until 1 October 2021:

The debtor company could argue that, by the '*previous operation*' of Old Schedule 10, the petitioner was not entitled to present that petition at the time. Accordingly, the petitioner's petition should not now be permitted to be heard. Therefore, by means of the saving provision, the extant petition falls to be dismissed as falling foul of Old Schedule 10.

The petitioner's response to this would be that Old Schedule 10 does not say that the petition is ineffective if presented in breach of para 2. Old Schedule 10 simply says that a creditor may not present a petition unless the creditor has certain reasonable beliefs. Old Schedule 10 is silent as to the consequence of the petition being presented in circumstances where it ought not to have been. It is reasonable to assume that a court would, under Old Schedule 10, be very likely to refuse the petition and order the petitioner to pay costs. However, such orders are a matter for the court's discretion and cannot be said to follow as of right. Therefore, if the petition has yet to be heard, the '*previous operation*' of Old Schedule 10 has not had any effect on the petition and the Interpretation Act 1978 is not engaged.

Although plainly not what the draftsperson of SI 2021/1029 intended, the author is of the view that the petitioner's argument is strictly correct and that the Interpretation Act 1978 is not engaged. The judge hearing the petition could, of course, exercise their discretion to dismiss the petition on the basis that it was improperly presented at the time of presentation. That would be an arguably novel exercise of a judge's discretion under Insolvency Act 1986 s 125, typically only exercised in accordance with established and well-defined principles. An improperly presented petition could be characterised as an abuse of process, though that label would not be particularly apt if the petitioner genuinely – but mistakenly – believed that it satisfied the para 2 precondition under Old Schedule 10.

CONCLUSION

CIGA and its various amending instruments are only some of several hundred pieces of legislation enacted in the past 18 months in response to the coronavirus pandemic. It would be a Herculean task to ensure that they are all models of perfection, and most errors (when they are made) are of no real consequence. For example, footnote (b) to SI 2021/1029 purports to identify the instruments which amended Old Schedule 10 but omits the most recent extension to Old Schedule 10 in SI 2021/718.

However, SI 2021/1029 involves a much more serious error. It seems that SI 2021/1029 has lifted the protections in Old Schedule 10 with effect from 29 September 2021. This will apply to petitions presented on 29 and 30 September 2021, and probably also petitions previously presented but not yet heard.

It is therefore highly desirable that a further statutory instrument is enacted which revives the effect of Old Schedule 10 for petitions presented before 1 October 2021. Unless this is done, it is likely that the issues discussed herein will need to be addressed by the court – adding significant complication, expense and uncertainty to insolvency proceedings in the interim. ■

POST SCRIPT

While this article was being prepared for publication, Corporate Insolvency and Governance Act 2020 (Coronavirus) (Amendment of Schedule 10) (No.2) Regulations 2021 (SI 2021/1091) was made on 27 September. The purpose of SI 2021/1091, according to its Explanatory Note, is to revoke and replace SI 2021/1029 'which contained an error'. The nature of the error is not identified. The revocation was effective on 28 September, so before SI 2021/1029 came into force.

SI 2021/1091 provides for Old Schedule 10 to be substituted for New Schedule 10, which is identical between SI 2021/1029 and SI 2021/1091. The only change in SI 2021/1091 is that the substitution comes into force on 1 October 2021 (reg 1(3)) not 29 September. SI 2021/1091 therefore corrects one of the errors identified above, where petitions presented on 29 and 30 September 2021 would be subject to no restrictions at all. However, such petitions will still be subject to the wider problem identified in respect of petitions presented before 29 September 2021. Thus, a petition presented on 30 September 2021 may be improperly presented under Old Schedule 10 as considered on that date; however, by the time that the petition is heard, Old Schedule 10 will have been repealed – and without the debtor company having the benefit of any savings provisions, for the reasons explained in this article.