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Ireland

RESTRUCTURING & INSOLVENCY

Contributor

William Fry

WILLIAM FRY

Alice O'Connor

Senior Associate, Restructuring & Insolvency / Litigation and Investigations | alice.oconnor@williamfry.com

Barbara Galvin

Consultant, Restructuring & Insolvency / Litigation and Investigations | barbara.galvin@williamfry.com

Ruairi Rynn

Partner, Restructuring & Insolvency / Litigation and Investigations | ruairi.rynn@williamfry.com

Simona Mulligan

Senior Associate, Restructuring & Insolvency / Litigation and Investigations | simona.mulligan@williamfry.com

This country-specific Q&A provides an overview of restructuring & insolvency laws and regulations applicable in Ireland.

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IRELAND
RESTRUCTURING & INSOLVENCY

1. What forms of security can be granted over immovable and movable property? What formalities are required and what is the impact if such formalities are not complied with?

The most common forms of security over immovable property are mortgages and fixed charges. A mortgage involves the transfer of the beneficial or legal interest in the asset to the creditor subject to the debtor's right to have the asset transferred back to them when the loan has been paid (the equity of redemption). A charge is an agreement between a debtor and creditor that an asset will be available to discharge indebtedness.

A charge can be fixed (security attaching to a specific asset) or floating (security floats over the asset until the occurrence of certain events causing it to crystallise and become fixed). A floating charge is the most common form of security over movable property in Ireland.

The formalities required to perfect security depend on the type of security, nature of the asset and the entity creating the security. Security documents are typically executed as deeds. Where security is created over real estate, it should be registered with the Property Registration Authority in order to attain priority. Further, the Companies Act 2014 (the "**2014 Act**") requires that security created by an Irish company must be registered with the Companies Registration Office within 21 days, failing which the security will be void against a liquidator or creditor of the company.

2. What practical issues do secured creditors face in enforcing their security package (e.g. timing issues, requirement for court involvement) in out-of-court and/or insolvency proceedings?

The principal method of enforcing security is the appointment of a receiver over the relevant secured asset(s). This is an out-of-court process effected by way of deed or instrument in writing, which can typically be done in a matter of days. Court intervention is not required unless a secured asset is the residential home of the debtor. A creditor may also in certain circumstances exercise a power of sale under a security document or statutory entitlement.

The most common impediments to enforcement arise where the charge holder fails to comply with the loan or security documentation when taking enforcement steps.

Restrictions on enforcement also arise where a company has been placed under court protection (in the case of examinership) or a moratorium has been ordered by the court in the context of SCARP.

3. What restructuring and rescue procedures are available in the jurisdiction, what are the entry requirements and how is a restructuring plan approved and implemented? Does management continue to operate the business and / or is the debtor subject to supervision? What roles do the court and other stakeholders play?

The principal restructuring and rescue procedures are examinership, scheme of arrangement and SCARP. The debtor remains in possession during each of the processes, with management continuing to operate the business:

Examinership: a court-sanctioned and supervised restructuring and rescue process during which a court-appointed examiner will formulate a scheme/restructuring plan to be voted upon by creditors and members and approved by the court. If the application to appoint an examiner is successful, there will be an automatic moratorium on creditor action and litigation (save for certain employment claims) for the period of examinership (up to 100 days).

The petition to appoint an examiner may be brought by the company, its directors, creditors or members (holding sufficient voting shares). Before appointing the examiner, the court must be satisfied that the company is, or is likely to be, unable to pay its debts, that it is not in the course of being wound up and that there is a reasonable prospect of its survival (to be supported by an independent expert's report). The examiner's key role is to prepare a restructuring plan for the survival of the company which is put to creditors, members and the court for sanction.

A majority in number and value of impaired creditors must accept the examiner's restructuring plan before it is put to the court for confirmation. Further, the proposals must have the approval of a class of creditors which would receive a payment in a liquidation of the company ("in the money" creditors). The court must be satisfied that the plan is not unfairly prejudicial to any interested party. Once sanctioned by the court, the scheme is binding on all shareholders and creditors.

Scheme of Arrangement: a court-sanctioned statutory procedure under Part 9 of the 2014 Act which allows a company to negotiate either the rearrangement of its capital structure with its members or its obligations and liabilities to its creditors. A scheme may be proposed by the directors or a liquidator of the company. No automatic stay or moratorium on creditor action applies but may be sought from the court.

75% in value representing a majority in number of the creditors present and voting must vote in favour of the scheme before it is put to the court for approval. Once sanctioned by the court, the scheme is binding on all shareholders and creditors.

The Small Company Administrative Rescue Process (SCARP): a process available for small and micro companies facing insolvency. It is a process led by the company and its directors with court intervention only where necessary. No automatic stay or moratorium on creditor action applies but may be sought from the court.

The directors engage a process advisor whose initial role is to opine as to the company's prospects of survival if SCARP is undertaken. Once appointed, the process advisor's role is to formulate a rescue plan and call creditor and member meetings within 42 days.

60% of one impaired class of creditor must vote in favour of the rescue plan. No court involvement is required if there are no objections from creditors within a 21-day cooling off period. If an objection is raised, then an application to court is required to approve the plan.

4. Can a debtor in restructuring proceedings obtain new financing and are any special priorities afforded to such financing (if available)?

A debtor can obtain new financing in any of the above restructuring processes.

In the case of examinership, an examiner has the power to borrow monies on behalf of the company with the prior sanction of the court and may certify any such borrowings as 'expenses' of the examinership under the 2014 Act, giving the lender a certain priority over other creditors. (See answer no.11 below).

5. Can a restructuring proceeding release claims against non-debtor parties (e.g. guarantees granted by parent entities, claims against directors of the debtor), and, if so, in what circumstances?

The Irish High Court has jurisdiction to confirm Part 9 schemes of arrangement that provide for the release of third-party liabilities, where there is sufficient nexus between the debt being restructured and the third-party liability.

Third-party releases are unusual in examinership. The general rule is that the liability of third parties is not affected under an examiner's scheme. However, this prohibition shall not apply if the guarantor is itself a company to which an examiner has been appointed. So, the 2014 Act does not prohibit a scheme of arrangement in one company effecting releases of claims against a related company, provided that the related company is also in examinership. Similar provisions apply under SCARP.

6. How do creditors organize themselves in these proceedings? Are advisory fees covered by the debtor and to what extent?

Typically, in Ireland, creditors do not formally organise into groups unless they are already part of a creditor grouping. However, it is not restricted and there have been cases of, for example, groups of landlords acting together upon the strategic restructurings of insolvent tenants.

There is no basis in Irish law for debtors to cover costs involved in such creditors' groupings. The general principle is that 'costs follow the event', and the Irish courts have awarded costs of an unsuccessful examinership petition to opposing creditors. In the case of a winding up by the court, section 617 of the 2014 Act provides that the costs of petitioner(s) are payable out of the property of the company in liquidation and have priority to other claims (subject to any order of the court to the contrary). A group of creditors acting together as petitioners can also recover their costs pursuant to section 617.

7. What is the test for insolvency? Is there any obligation on directors or officers of the debtor to open insolvency proceedings upon the debtor becoming distressed or insolvent? Are there any consequences for failure to do so?

A company is deemed to be insolvent if it is cash flow or balance sheet insolvent and/or has a debt of €50,000+ which goes unpaid (following a formal demand) for 21 days.

Under section 224A of the 2014 Act, where the director of a company believes, or has reasonable cause to believe, that the company is, or is likely to be, unable to pay its debts, s/he must have regard to the:

1. creditors' interests;
2. need to take steps to avoid insolvency, and
3. need to avoid deliberate or grossly negligent conduct that threatens the viability of the business of the company.

A director who fails to act in accordance with their duties faces a possible finding of reckless or fraudulent trading and personal liability to contribute towards the debtor's debts (including to account to the company for any gain which they made from a breach of duty and/or indemnifying the company for any loss or damage arising from that breach). A director could also be subject to an application for restriction or disqualification from acting as a director of a company in the future.

8. What insolvency proceedings are available in the jurisdiction? Does management continue to operate the business and / or is the debtor subject to supervision? What roles do the court and other stakeholders play? How long does the process usually take to complete?

The principal form of insolvency proceeding is liquidation which is either commenced by the company (via a creditors' voluntary liquidation) or a court-ordered liquidation.

The directors of the insolvent company do not continue to operate the business once it is in liquidation.

In a court-ordered liquidation, an application is made to the court to place the insolvent company into liquidation. Following the winding up order, the courts generally have little involvement but a liquidator may apply to the court for directions, to make an application to have directors of the company restricted or disqualified and/or to make 'asset-swelling' applications.

Creditors will engage with the liquidator to prove their claim in the winding up. Creditors may also establish a committee of inspection to oversee the liquidator's activities.

9. What form of stay or moratorium applies in insolvency proceedings against the continuation of legal proceedings or the enforcement of creditors' claims? Does that stay or moratorium have extraterritorial effect? In what circumstances may creditors benefit from any exceptions to such stay or moratorium?

See answer no.3 above in relation to moratoria in examinership (automatic stay), SCARP and Part 9 schemes (stay may be sought from court).

Save for certain employment claims, no action may be continued or commenced against a company in liquidation except with the court's permission.

EU Member States that have adopted the EU Insolvency Recast Regulation (2015/848) (the **EIR**) will recognise Irish insolvency proceedings and related moratoria where the main insolvency proceedings are governed by Irish law (this will apply where the company's COMI is Ireland).

Recognition of a liquidation or other insolvency proceedings outside the EU or outside of countries which have adopted EIR will depend on applicable local law e.g. section 436 of the UK Insolvency Act or the implementation of the UNCITRAL Model Law on Cross-Border Insolvency.

10. How do the creditors, and more generally any affected parties, proceed in such proceedings? What are the requirements and forms governing the

adoption of any reorgnisation plan (if any)?

Reorganisation plans are principally relevant to examinerships, SCARP and schemes of arrangement. See answer no.3 above for details around voting thresholds.

Examinership: the examiner will call meetings of classes of creditors and members to consider and vote upon proposals for a compromise or scheme of arrangement. A creditor who objects to the proposals may vote against them at the relevant meeting and may also be heard at the court sanction hearing.

SCARP: the process advisor has 42 days to put together a plan and call creditor and member meetings to vote on its terms. Certain creditors (principally the Revenue Commissioners) may object to the inclusion of their debt in the rescue plan. If no objection to a rescue plan is made within 21 days or its passing, it becomes binding without further action. If a creditor objects to the plan, they may file an objection and the matter will be determined by the court.

Scheme of arrangement: The directors, a liquidator or the court will convene meetings of creditors and members to consider and vote upon the scheme. A creditor who objects to the scheme may vote against it at the scheme meetings and may be heard at the court sanction hearing.

The 2014 Act contains an additional mechanism available to companies that are in, or about to be in, liquidation whereby an arrangement between that company and its creditors shall be binding once sanctioned by special resolution of the company and three fourths in number and value of creditors.

11. How do creditors and other stakeholders rank on an insolvency of a debtor? Do any stakeholders enjoy particular priority (e.g. employees, pension liabilities, DIP financing)? Could the claims of any class of creditor be subordinated (e.g. recognition of subordination agreement)?

Typically, ranking of claims in an insolvent liquidation is as follows: (i) super-preferential claims of certain statutorily defined employee contributions that have been deducted from employees' remuneration but which have not been paid over to Revenue, (ii) an examiner's remuneration, costs and expenses, (iii) fixed charge claims, (iv) certified expenses of an examiner (potentially including new borrowings during the examinership), (v) a liquidator's costs and expenses, (vi) preferential claims (under section 621(2) of the 2012 Act and under section 12(1) of the Unfair Dismissals Acts 1977 to 2015); (vii) floating charge claims and (viii) unsecured creditors ranking pari passu amongst themselves.

There are no specific statutory provisions concerning the subordination of creditors or subordinated claims. However, creditors are free to enter, and the courts will recognise, subordination agreements.

12. Can a debtor's pre-insolvency transactions be challenged? If so, by whom, when and on what grounds? What is the effect of a successful challenge and how are the rights of third parties impacted?

Under Irish law, it is possible for certain pre-insolvency transactions to be challenged, including:

- **unfair preference**: a transaction in favour of a creditor taking place within 6 months of the commencement of a winding up (or within 2 years if in favour of a connected person), can be deemed invalid by the courts;
- **floating charge**: if a floating charge has been created within 12 months of the commencement of a winding up, it may be deemed invalid unless it can be shown that immediately after its creation, the company was solvent; and
- **fraudulent transfers**: a liquidator or creditor of a company can apply to the court for compensation or the return of assets where they can establish that a transfer of assets had the effect of perpetrating a fraud on the company, its creditors or members.

The courts generally have a wide discretion as to the orders which may be made in reversing transactions and/or restoring a debtor company to its pre-transaction position. There are recognised protections for bona fide third parties who transact for value and without notice of the circumstances behind the transaction.

13. How existing contracts are treated in restructuring and insolvency processes? Are the parties obliged to continue to perform their obligations? Will termination, retention of title and set-off provisions in

these contracts remain enforceable? Is there any ability for either party to disclaim the contract?

Generally, such provisions will remain enforceable, save in the case of certain termination entitlements in an examinership. In the case of examinership, section 520A of the 2014 Act (introduced under the European Union (Preventive Restructuring) Regulations 2022 (the "**2022 Regulations**")) restricts reliance upon "ipso facto clauses" such that counterparties may not withhold performance of, terminate, accelerate or modify executory contracts (ones where parties still have ongoing obligations to perform at the presentation of the examinership petition) to the detriment of the company solely because of the appointment of, or petition for the appointment of, an examiner. Counterparties to "essential executory contracts" (executory contracts which are necessary for the continuation of the day-to-day operations of the company) may not take the steps referred to above for the duration of the examinership, solely because the company is deemed unable to pay its debts.

An examiner may repudiate certain contracts with the approval of the court. Further, a liquidator may disclaim onerous property – including leases – with the approval of the High Court.

14. What conditions apply to the sale of assets / the entire business in a restructuring or insolvency process? Does the purchaser acquire the assets "free and clear" of claims and liabilities? Can security be released without creditor consent? Is credit bidding permitted? Are pre-packaged sales possible?

Liquidation: assets of the company may be sold "free and clear" unless they are subject to fixed charge security. If the assets are subject to a fixed charge, the chargeholder may sell them outside of the liquidation otherwise the liquidator may sell them with the consent of the chargeholder. Where there are floating charges, it will need to be ascertained whether the floating charge crystallised and fixed on the relevant assets before sale.

Examinership: Although uncommon, it is technically possible for the examiner to sell assets "free and clear" if they can satisfy the High Court that the sale would facilitate the survival of the company as a going concern. The secured creditor will need to receive the value of the secured asset as part of the restructuring plan or they will have grounds to object to the plan on the grounds that it is unfairly prejudicial.

Credit bidding is technically permitted, but there is no clear guidance or regulation. It will be a matter for the relevant insolvency practitioner to ensure that they comply with their duties in completing a sale through a credit bid and that they are satisfied that the best price reasonably achievable is attained.

Pre-packaged sales are permissible and are mostly used in receiverships or provisional liquidations as part of wider group restructurings.

15. What duties and liabilities should directors and officers be mindful of when managing a distressed debtor? What are the consequences of breach of duty? Is there any scope for other parties (e.g. director, partner, shareholder, lender) to incur liability for the debts of an insolvent debtor and if so can they be covered by insurances?

The duties of directors in Ireland arise from common law and are codified in the 2014 Act, amended by the 2022 Regulations. Directors of companies which are unable or are likely to be unable to pay their debts are statutorily obliged to have regard to the interests of creditors.

Under Irish law, a director is defined as "*any person occupying the position of a director by whatever name called*". De facto, shadow, nominee, executive and non-executive directors all owe certain duties to the company and can incur liability in the context of a debtor's insolvency.

A director of an insolvent company can be held personally liable for a company's debts if found guilty of reckless and/or fraudulent trading with potential exposure on conviction to a maximum fine of €500,000 and/or ten years imprisonment.

For insolvent liquidations, a director who fails to satisfy the court that they have acted honestly and responsibly in relation to the affairs of the company may be restricted for up to five years from being appointed or acting in any way as a director or secretary of a company or from being involved in the formation or promotion of a company.

A director may also face a disqualification order which prevents them from acting as a director or other officer or being in any way concerned or taking part in the promotion, formation or management of any company for a specified period.

Directors' and officers' insurance may cover against certain financial risks.

16. Do restructuring or insolvency proceedings have the effect of releasing directors and other stakeholders from liability for previous actions and decisions? In which context could the liability of the directors be sought?

There is no automatic release from liability for previous actions for directors and stakeholders in the context of restructuring or insolvency proceedings. A release clause may be negotiated and agreed during restructuring or insolvency. Directors' and officers' insurance may be important in terms of providing cover for a company and its management, protecting them from claims arising from their decisions and actions.

17. Will a local court recognise foreign restructuring or insolvency proceedings over a local debtor? What is the process and test for achieving such recognition? Does recognition depend on the COMI of the debtor and/or the governing law of the debt to be compromised? Has the UNCITRAL Model Law on Cross Border Insolvency or the UNCITRAL Model Law on Recognition and Enforcement of Insolvency-Related Judgments been adopted or is it under consideration in your country?

EIR provides for the automatic recognition and enforcement of foreign collective insolvency proceedings. It applies to companies whose COMI is in an EU Member State (except Denmark).

Under EIR, the Irish courts will automatically recognise foreign restructuring or insolvency main proceedings commenced in another Member State. Further, if a debtor has a place of operation in a Member State other than the one in which their COMI is located, EIR permits that Member State to open secondary proceedings – to run in parallel with main proceedings – related to the assets located in that Member State. Again, such secondary proceedings will be automatically recognised by the Irish courts under EIR.

Where the foreign restructuring or insolvency proceeding fall outside EIR, the Irish courts will apply common law principles in recognising such proceedings.

In a 2018 Report, the Company Law Review Group (**CLRG**) recommended that the Model Law on Cross Border Insolvency be adopted into Irish law. It has not yet been adopted. The UNCITRAL Model Law on Recognition and Enforcement of Insolvency-Related Judgments has not been adopted into Irish law.

18. For EU countries only: Have there been any challenges to the recognition of English proceedings in your jurisdiction following the Brexit implementation date? If yes, please provide details.

No. In the event of such challenges, the Irish courts will rely upon their inherent common law jurisdiction to recognise equivalent corporate restructuring and insolvency proceedings originating in England.

19. Can debtors incorporated elsewhere enter into restructuring or insolvency proceedings in the jurisdiction? What are the eligibility requirements? Are there any restrictions? Which country does your jurisdiction have the most cross-border problems with?

Under EIR, if a debtor's COMI or establishment is located in Ireland, insolvency or restructuring proceedings may be opened in Ireland.

The Irish courts also have jurisdiction under Part 22 of the 2014 Act to wind up foreign companies which are incorporated in and have as their COMI a country which is not subject to the provisions of EIR, where that company has "sufficient connection" with Ireland. This will typically (but not always) consist of having assets or operations in the jurisdiction.

Companies which satisfy the "sufficient connection" test so that they may be wound up under Part 22 of the 2014 Act, may also be subject to the provisions of Part 9 for the presentation of a scheme of arrangement with creditors or be treated as "related companies" for the purposes of examinership (extending court protection to them, provided other relevant tests are met). See Quinn J in *Re Arctic Aviation Assets DAC*, endorsing and adopting the "sufficient connection" test in the English decisions in *Re Drax Holdings Limited* and *Re Rodenstock*.

Ireland has no particular difficulties with any single jurisdiction in terms of recognition or enforcement of proceedings. Recognition is automatic under EIR for the relevant EU Member States. Recognition with other key jurisdictions (UK, US) can be achieved based on common law approaches.

20. How are groups of companies treated on the restructuring or insolvency of one or more members of that group? Is there scope for cooperation between office holders? For EU countries only: Have there been any changes in the consideration granted to groups of companies following the transposition of Directive 2019/1023?

Restructuring and insolvency processes tend to be specific to each debtor entity as a matter of law but may be run collectively by the appointment of the same insolvency practitioner to a number of entities.

Examinerships are typically commenced and run collectively (i.e. a single examinership relating to all relevant group companies including, where applicable and appropriate, foreign related companies) (see Quinn J in *Arctic Aviation Assets DAC*).

The 2014 Act provides for pooling of assets of related companies in a winding up.

In restructuring or insolvency process of Irish companies there will usually be cooperation between office holders, if different. Under EIR provision is made for coordination and cooperation between insolvency practitioners in different member state jurisdictions, in respect of groups of companies and single debtor insolvency proceedings taking place in more than one member state.

21. Is your country considering adoption of the UNCITRAL Model Law on Enterprise Group Insolvency?

There has been no publicised discussion on Ireland's adoption of the UNCITRAL Model Law on Enterprise Group Insolvency.

22. Are there any proposed or upcoming changes to the restructuring / insolvency regime in your country?

There have been significant changes to the restructuring and insolvency regime in Irish law in the recent past, including the introduction of SCARP and the 2022 Regulations.

The CLRG's current work programme (2020 – 2024) includes a review of examinership law in the context of applying the optional articles of Directive 2019/1023 into Irish law. Changes may be proposed on foot of that review. The EU's proposed Directive on harmonising certain aspects of substantive law on insolvency proceedings (COM (2022) 702), is making its way through the EU's ordinary legislative procedure. The proposed Directive is currently being reviewed by the CLRG.

23. Is your jurisdiction debtor or creditor friendly and was it always the case?

Ireland is a well-established jurisdiction which is well-balanced as between debtors' and creditors' interests. Creditor-friendly tools exist whereby secured creditors can avail of examinership, enforce secured assets in an efficient way, effect pre-packs and place a company in liquidation. Similarly, the examinership process can be viewed as a debtor-friendly tool, given the moratorium and low creditor approval thresholds.

24. Do sociopolitical factors give additional influence to certain stakeholders in restructurings or insolvencies in the jurisdiction (e.g. pressure around employees or pensions)? What role does the State play in relation to a distressed business (e.g. availability of state support)?

In general, the State does not play a significant role in relation to distressed businesses, save for where the business is viewed as systemically important requiring State intervention e.g. Anglo Irish Bank merger with Irish Nationwide Building Society to form IBRC; introduction of the IBRC Act 2013 to provide for the special liquidation of IBRC. The State also funds redundancy payments to employees where an employer is unable to pay.

Stakeholders' interests are governed by the priority of payments waterfall under the 2014 Act, with no group typically having a greater influence beyond their ranking in the priority waterfall (albeit trade unions have been prominent in some recent high street retailer insolvencies).

25. What are the greatest barriers to efficient and effective restructurings and insolvencies in the jurisdiction? Are there any proposals for reform to counter any

such barriers?

There are no significant barriers to efficient and effective restructurings and insolvencies in Ireland. This is particularly so since the introduction of SCARP. However, the costs involved in the restructuring and insolvency processes may remain material for some debtors.

Contributors

Alice O'Connor
Senior Associate, Restructuring & Insolvency / Litigation and Investigations
alice.oconnor@williamfry.com

Barbara Galvin
Consultant, Restructuring & Insolvency / Litigation and Investigations
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