LEXOLOGY®

Navigator

Restructuring & Insolvency

in Ireland

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Legal framework

Legislation

What is the primary legislation governing insolvency and restructuring proceedings in your jurisdiction?

Insolvency and restructuring proceedings in Ireland are primarily governed by:

- the Companies Act 2014 (as amended);
- the Bankruptcy Act 1988 (as amended); and
- the Personal Insolvency Act 2012 (as amended).

These are supplemented by principles of common law.

The EU Regulation on Insolvency Proceedings (2015/848/EU) also applies in cross-border cases when a debtor has its centre of main interests in an EU member state.

Regulatory climate

On an international spectrum, is your jurisdiction more creditor or debtor friendly?

Ireland is generally regarded as having a creditor-friendly and flexible corporate recovery and insolvency framework. However, the courts are nevertheless cognisant of balancing the need for certainty – in terms of creditors having effective enforcement rights – with the requirement for the rights of debtors to be protected, particularly when dealing with vulnerable debtors.

Sector-specific regimes

Do any special regimes apply to corporate insolvencies in specific sectors (eg, insurance, pension funds)?

Modified insolvency regimes apply in certain sectors. For example, the Insurance (No 2) Act 1983 provides for the appointment of an administrator to non-life insurance insolvent companies at the request of the Central Bank in certain circumstances, with a view to ensuring the survival of the company and compliance with regulatory requirements.

Ireland took a series of exceptional steps to contain the crisis in the banking sector that emerged in 2008. Its strategy included transferring non-performing eligible assets to a government-backed entity called the National Asset Management Agency (NAMA) and providing capital and liquidity to weakened and distressed banks and building societies. NAMA has extensive powers under the NAMA Act 2009, in line with broader public interest concerns.

The European Communities (Reorganisation and Winding Up of Credit Institutions) Regulations 2011 (SI 48/2011) and the Central Bank and Credit Institutions (Resolution) Act 2011 apply to the winding up of credit institutions and banks and aim to provide an effective and expeditious regime for dealing with failing credit institutions.

The Irish Bank Resolution Corporation Act 2013 was enacted in February 2013 and provided for the immediate liquidation of Irish Bank Corporation Limited (formerly Anglo Irish Bank Corporation Limited) by way of 'special liquidation'. As the special liquidators were appointed by the minister for finance, they are obliged to comply with instructions given by the minister and act in the interests of the Irish taxpayer; this puts them in a somewhat different position than other liquidators, who are answerable primarily to the creditors of the company.

Ireland is an internationally recognised centre of excellence in aviation finance and recently gave effect to the Alternative A insolvency remedy of the Aircraft Protocol to the Cape Town Convention on International Interests in Mobile Equipment, the primary purpose of which is to provide a protective regime for aircraft financiers and creditors in insolvency proceedings (ie, similar to the US Chapter 11 procedure).

Reform

Are any reforms to the legal framework envisaged?

The government recently approved the drafting of the Courts and Land and Conveyancing Law Reform Bill 2018, with a view to giving mortgagees additional protections when dealing with family homes.

Director and parent company liability

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Liability

Under what circumstances can a director or parent company be held liable for a company's insolvency?

Pursuant to the Companies Act 2014, when a company is being wound up, directors (including shadow and de facto directors) can be held personally liable for the debts of the company, where the court is satisfied that they have engaged in any of the following activities:

- fraudulent or reckless trading;
- failure to keep proper books of account, if such failure has contributed to the company's inability to pay all its debts or impeded the orderly winding up of the company; or
- unfair preference within six months of commencement of the winding up.

Subject to rare exceptions, a parent company or shareholder will not be held liable for the debts of a company.

Defences

What defences are available to a liable director or parent company?

The following defences are available to directors who face personal liability for the debts of a company.

Fraudulent or reckless trading
The director must be able to demonstrate that they acted honestly and responsibly in relation to the conduct of the affairs of the company, in order to relieve them from personal liability either wholly or in part. There is a considerable amount of precedent, in terms of what constitutes honest and responsible behaviour in the context of defending applications to have directors restricted.

Failure to keep proper books of account
The director must satisfy the court that they took all reasonable steps to secure compliance with their obligations under the Companies Act or that they had reasonable grounds for believing – and did believe – that a competent and reliable person had been formally and appropriately allocated the responsibility of ensuring that the company's obligations were being fulfilled.

Unfair preference
A defence to an allegation of making an unfair preference is to establish that the alleged act was not carried out with the dominant intention of giving one creditor preference over the other creditors.

Due diligence

What due diligence should be conducted to limit liability?

If the directors decide to continue to trade while the company is insolvent, there is clearly a serious risk of personal liability should the company ultimately go into liquidation. There are steps that can be taken to improve a director's chances of being able to rely on the 'honestly and responsibly' defence. As soon as a director is aware that there is no reasonable prospect of avoiding insolvent liquidation, or fears that that is the case, they should raise the problem with the rest of the board with a view to their taking independent professional advice. Further credit should almost certainly not be incurred pending such advice and directors must take every step to minimise the potential loss to creditors.

Position of creditors

Forms of security

What are the main forms of security over moveable and immoveable property and how are they given legal effect?

The most common forms of security are mortgages and fixed or floating charges.

A mortgage is a form of fixed security by way of a transfer of title to an asset subject to a right of re-transfer (ie, the 'equity of redemption'). A mortgage must be in writing and executed as a deed, and is subject to certain registration requirements.

A fixed charge is also a form of fixed security and involves no transfer of legal or beneficial title, but is an encumbrance on an asset. A fixed charge is created over an ascertainable asset, over which the lender will have a degree of control (eg, the right to consent before the asset is sold).

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A floating charge is an encumbrance over an asset or group of assets that are subject to change in quantity and value. When businesses use floating charges, it does not affect their ability to use the underlying assets as normal.

All floating charges and most mortgages and fixed charges (depending on the asset being secured) must be registered with the registrar of companies within 21 days of their creation (by way of Form C1), failing which they will be void. It is optional to also file a notice of intention to create a charge (Form C1A), followed within 21 days by a confirmation of creation of that charge (Form C1B). Priority under the two-stage procedure is determined by the time and date of the filing of Form C1A. Priority under the one-stage procedure is determined by the date and time of filing of the Form C1.

Ranking of creditors

How are creditors' claims ranked in insolvency proceedings?

The underlying principle regarding distribution in the liquidation of a company is that the property of a company should be applied pari passu in satisfaction of its liabilities. This allows for all creditors to be treated equally, particularly those within the same class. If the realised assets of a company are insufficient to pay any class of creditors in full, they are paid in equal proportion to their debts.

The combination of legislation, contract law and common law establishes a hierarchy of claims. The following order of priority is therefore a general guide only:

- super-preferential claims (eg, certain employees' social insurance contributions);
- the remuneration, costs and expenses of an examiner, which have been sanctioned by the court;
- fixed charge holders (a fixed charge holder is entitled to realise its security outside of a winding up of the company);
- expenses certified by an examiner;
- liquidation costs and expenses;
- preferential debts (eg, certain rates and taxes, wages and salaries);
- holders of any charge created as a floating charge;
- unsecured debts; and
- deferred debts of members.

When proceeds are insufficient to meet the claims of one category in full, payments for that category are pro-rated.

Can this ranking be amended in any way?

The order of priority of claims payment in a winding up is complex, due to the many exceptions – both statutory and otherwise – that exist in relation to the basic pari passu principle. For example, assets that are held in trust and moneys that must be offset will be unavailable for distribution. Assets which are the subject of a valid retention of title clause will also be unavailable for distribution. Creditors may enter into inter-lender and subordinated loan agreements, pursuant to which they agree that debts that would otherwise rank pari passu may be subordinated to one another.

Foreign creditors

What is the status of foreign creditors in filing claims?

There is no distinct process for foreign creditors in relation to filing claims. A foreign creditor may file its claim in the same manner as a domestic creditor.

Unsecured creditors

Are any special remedies available to unsecured creditors?

In certain circumstances, unsecured creditors may be able to avail of remedies, such as a valid retention of title clause or a right of set off, in order to gain some priority over other creditors.

Debt recovery

By what legal means can creditors recover unpaid debts (other than through insolvency proceedings)?

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Creditors may apply for a summary judgment in court and then seek to enforce the judgment in a variety of ways, depending on the circumstances of the debtor.

Secured creditors can often appoint a receiver for the purpose of realising secured assets outside of an insolvency process. A receiver's role is to take control of and realise the secured assets in order to apply the proceeds towards the repayment of debt owed to the debenture holder.

Is trade credit insurance commonly purchased in your jurisdiction?

While there are a wide range of insurance companies offering trade credit insurance in this jurisdiction, it is not as commonly purchased in Ireland as it is in other jurisdictions (eg, the United Kingdom).

Liquidation procedures

Eligibility

What are the eligibility criteria for initiating liquidation procedures? Are any entities explicitly barred from initiating such procedures?

Liquidation procedures can be initiated by both solvent and insolvent companies, and are usually initiated by the company itself or its shareholders, or – for an insolvent company – its creditors. A creditor must be owed a sum exceeding €10,000.

Procedures

What are the primary procedures used to liquidate an insolvent company in your jurisdiction and what are the key features and requirements of each? Are there any structural or regulatory differences between voluntary liquidation and compulsory liquidation?

An insolvent company can be wound up by the High Court (ie, a compulsory liquidation) or by way of a shareholders' resolution followed by a creditors' meeting (ie, a creditors' voluntary liquidation). The general criterion required to liquidate an insolvent company is that the company is unable to pay its debts. This usually entails an assessment of whether:

- the company is unable to pay its debts as they fall due (ie, the 'cash-flow test'); or
- the value of the company's assets is less than its liabilities, taking into account its contingent and prospective liabilities (ie, the 'balance sheet test').

The key difference between a compulsory liquidation and a creditors' voluntary liquidation is how the process is initiated. The court's supervisory role in compulsory liquidations was largely done away with by the Companies Act 2014.

How are liquidation procedures formally approved?

In the case of a compulsory liquidation, it is the court that has jurisdiction to appoint a liquidator if it is satisfied that the company is unable to pay its debts or that it is just and equitable to do so.

In case of a creditors' voluntary liquidation, the company's directors usually initiate the process. A shareholders' meeting and creditors' meeting are called respectively. The shareholders resolve that the company is insolvent and a liquidator is appointed. A statement of affairs is compiled and presented by the directors at the creditors' meeting, including the list of creditors and the amounts owed. Creditors at this point have the option to nominate an alternative liquidator.

To place a solvent company into liquidation, the directors of the company must make a formal declaration of solvency to the effect that the company will be able to pay its debts in full within 12 months from the commencement of the liquidation. They must obtain a report of the auditors confirming that the declaration of the directors is not unreasonable. The shareholders then pass a special resolution to place the company into members' voluntary liquidation and appoint the liquidator.

What effects do liquidation procedures have on existing contracts?

The effect of a liquidation of one of the parties to a contract is determined by its terms, and certain contracts expressly provide how it will affect the contract. In some instances, the commencement of a winding up may

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constitute a breach of contract or frustrate a contract. In others, it may result in the automatic or optional termination of the contract.

A liquidator has the power to apply to the High Court within 12 months after the commencement of liquidation to disclaim an onerous contract. The counterparty to a contract can compel the liquidator to decide whether to disclaim by applying to them in writing; following this, the liquidator has 28 days to decide whether to do so.

If a counterparty suffers loss as a result of a disclaimer or breach of contract, it may claim for the loss in the winding up (although this is usually an unsecured claim).

What is the typical timeframe for completion of liquidation procedures?

The timeframe for the completion of a winding up depends on the size of the company and its trading patterns. A relatively straightforward liquidation can be completed in under a year; however, it is common for larger and more complex liquidation procedures to take significantly longer.

Role of liquidator

How is the liquidator appointed and what is the extent of his or her powers and responsibilities?

Depending on the nature of the liquidation, a liquidator can be appointed by the High Court or by the members of a company and this can be at the instigation of the company itself, its members or its creditors.

Once a liquidator is appointed, their main responsibility is to take possession of and realise the assets of the company and to distribute the proceeds of the realisation among the creditors in accordance with the rules on priority. The statutory powers of a liquidator are set out in the Companies Act 2014, which also regulates the exercise of a liquidator's powers.

Court involvement

What is the extent of the court's involvement in liquidation procedures?

In a compulsory liquidation, an application to court is required to commence the process. The extent of the court's involvement in terms of its supervisory role in the liquidation process was significantly reduced by the Companies Act and there is usually no need to involve the court in either a compulsory or creditors' voluntary liquidation. However, a liquidator and any creditor of a company has jurisdiction to apply to the High Court to determine any question arising in relation to a winding up.

It is unusual for a court to have any involvement in a members' voluntary liquidation, as the liquidator reports directly to the shareholders of the company.

Creditor involvement

What is the extent of creditors' involvement in liquidation procedures and what actions are they prohibited from taking against the insolvent company in the course of the proceedings?

A committee of inspection can be established. This must comprise not more than eight members, with a majority representing the creditors of the company. Its role includes overseeing the liquidator and granting or withholding approval of particular proposals from the liquidator.

A stay is imposed on the commencement or continuation of legal proceedings against a company that is in liquidation, unless there is permission from the court to pursue such proceedings.

The rights of secured creditors are largely unaffected by any liquidation process. They remain free to enforce their security, including appointing a receiver.

Director and shareholder involvement

What is the extent of directors' and shareholders' involvement in liquidation procedures?

Once a company is in liquidation, the directors' powers cease and the liquidator assumes the management of the company. However, directors' powers can continue if approved by the committee of inspection (or the creditors, in the absence of a committee of inspection).

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In a members' voluntary liquidation, the shareholders can approve the continuance of directors' powers in a general meeting and the liquidator is answerable to and reports to the shareholders.

Restructuring procedures

Eligibility

What are the eligibility criteria for initiating restructuring procedures? Are any entities explicitly barred from initiating such procedures?

Examinership
A company must be or be unlikely to be able to pay its debts, , in order to avail of the examinership process.

Statutory scheme of arrangement
Although the statutory scheme of arrangement is not necessarily an insolvency process, its flexibility allows it to be used to restructure debt. However, the scheme is more commonly used in Ireland to give effect to a reorganisation of shareholdings of large corporations and it has tended to be the tool of choice for effecting the large-scale corporate inversion transactions that have been in vogue in recent times with US/Irish pharmaceutical companies.

Pre-pack receivership
There are no special entry requirements for a 'pre-pack' receivership over any other receivership.

Procedures

What are the primary formal restructuring procedures available in your jurisdiction and what are the key features and requirements of each?

The main rescue process for companies in Ireland is known as 'examinership'. Examinership is a court-supervised process available to insolvent companies, which international corporations will recognise as similar in many respects to the US Chapter 11 procedure and, to a lesser extent, UK administration. Where a company is or is unlikely to be able to pay its debts , a petition may be brought before the court to place the company under the protection of the court for a period of up to 100 days so as to enable an insolvency practitioner (ie, the examiner) to put in place a scheme of arrangement with a view to securing the survival of the company, convene class meetings and bring the scheme before the court for approval. The key requirement of the examinership process is that the company has a reasonable prospect of survival.

Like in the United Kingdom, it is also possible for companies in Ireland to avail of a statutory 'scheme of arrangement', which can be used to implement a variety of arrangements between the company and its creditors or members. While schemes of arrangement can be used to implement even the most complex of debt restructurings, they are not used as often as the examinership process, not least because in an examinership there is a lower voting threshold.

It is also possible to restructure companies by way of a 'pre-pack' receivership, in which case the sale of a distressed company's business can be negotiated before it enters into receivership and executed shortly after the receiver is appointed. The aim is to minimise disruption and cost, and one advantage is that out-of-the-money junior creditors can be left behind in the insolvent company.

How are restructuring plans formally approved?

In an examinership, the support of more than 50% (in value and number) of any one impaired class of creditors is enough for that plan to be put before the court for approval. The plan is then binding on all creditors and shareholders and typically results in shareholder equity being diluted or eliminated entirely. A scheme which is unfairly prejudicial to any class of creditors or one which purports to avoid tax will not be approved.

If the examiner forms the view during the examinership that appropriate proposals cannot be formulated, they must immediately inform the court. This will result in the process coming to an end and the appointment of a liquidator.

In a scheme of arrangement, the support of more than 75% of value and majority in number of each class of creditors or members (ie, creditors or members with common interests are classed together) is required.

In the case of a pre-pack receivership, the support of the secured creditors is usually necessary to allow the receiver to deal with the secured assets. Other key stakeholder support would include management and any significant contractual counterparties. However, unsecured creditors are not usually consulted in advance.

What effects do restructuring procedures have on existing contracts?

Although many contracts provide that a restructuring process activates a right of termination, neither of the restructuring processes operate in themselves to terminate contracts into which a company has entered. However,

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where a company is in examinership, its creditors may not exercise certain rights against the company in respect of pre-petition debts during the protection period. In a pre-pack receivership, it may be necessary to novate certain contracts with the receiver's consent.

Pursuant to the Companies Act 2014, a company under the protection of the court may repudiate any contract under which some element of performance other than payment remains to be rendered by both parties, provided that the repudiation is approved by the court. Any person who suffers loss as a result of the repudiation becomes an unsecured creditor and the court will assess the value of the loss incurred. In recent years, this provision has frequently been availed of by tenant companies to repudiate onerous leases.

What is the typical timeframe for completion of restructuring procedures?

The timeframe generally depends on the complexity of the restructuring and the support it has from the stakeholders in the company.

In an examinership, the maximum period in which a company may be under the protection of the court is 100 days.

In a statutory scheme of arrangement, once a scheme proposal document has been finalised and circulated, it would not be unrealistic for the court process to be completed within eight to 10 weeks.

A pre-pack receivership can be completed as soon as the receiver has been appointed – unless it involves the sale of the asset to a connected party, in which case 14 days' notice must be given to creditors.

Court involvement

What is the extent of the court's involvement in restructuring procedures?

An examinership requires court approval to enter into the process, but also to confirm the scheme of arrangement proposed by the examiner and approved by the creditors before it can become binding. The court may also deal with any interim issues that arise.

For a statutory scheme of arrangement, court approval is no longer required to convene scheme meetings of members and creditors, where such proposed meetings are convened by directors. However, court involvement will be required where directors do not convene the scheme meeting. At the first hearing the court decides whether to grant permission for meetings of creditors to be convened. If the scheme is then approved by the scheme creditors, the court will consider in a second hearing whether to approve the scheme.

A pre-pack receivership does not require court involvement.

Creditor involvement

What is the extent of creditors' involvement in restructuring procedures and what actions are they prohibited from taking against the company in the course of the proceedings?

An examinership can be commenced by way of a creditor's petition, although this is relatively unusual. It is usually the company itself or its shareholders that commence the process. Once an examiner is appointed, creditors are restricted from taking any enforcement action or proceedings against a company in examinership without leave of the court.

In a scheme of arrangement, although it is possible for creditors to make a scheme proposal, in practice it is usually proposed by the company itself. The company will negotiate with any scheme creditors in order to obtain their support for approving the terms of the scheme. Before the scheme proposal is made, an application can be made to the court for a moratorium preventing creditors from taking action against the company or its property.

A pre-pack receivership requires the support of secured creditors in advance and is usually driven by the secured creditors, although directors must be comfortable with the terms of the proposal.

Under what conditions may dissenting creditors be crammed down?

In an examinership, a court-approved scheme is binding on all creditors of the company, including dissenting creditors, as long as the examiner satisfies the court that the scheme is fair and equitable to all classes of creditors and not 'unfairly prejudicial' to any creditor and the court confirms the proposals. If the writedown under an examiner's scheme leaves each creditor in no worse a position than they would have been in a receivership or liquidation (using the current realisable value of the assets), then it would not usually be deemed unfairly prejudicial. This distinction can lead to valuation battles at the confirmation hearing, with potential cross-examination of expert witnesses.

In a statutory scheme of arrangement, once a majority in number representing 75% in value of each class of

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schemed creditors vote in favour of the scheme, and it is approved by the court, that scheme becomes binding on all schemed creditors. It is open to a creditor to challenge the scheme on grounds of fairness.

A pre-pack receivership can be used to cram down junior creditors by leaving them behind in an insolvent company and transferring the secured assets or business to a new company.

Director and shareholder involvement

What is the extent of directors' and shareholders' involvement in restructuring procedures?

In an examinership, the directors usually remain in control of a company during the protection period. This is subject to the court's discretion, on application, to direct the examiner to assume some or all of the functions of the directors for the period of examinership. In practice this is rarely done, and usually only where there has been a suggestion of some sort of wrongdoing on the part of the directors.

In a statutory scheme of arrangement, the directors remain in control of the company throughout the process. The directors and shareholders are usually instrumental in putting together the scheme and running the process.

A pre-pack receivership is usually driven by the secured creditors, although it is important to ensure that directors are comfortable with the terms of the proposal.

Informal work-outs

Are informal work-outs available for distressed companies in your jurisdiction? If so, what are the advantages and disadvantages in comparison to formal proceedings?

Informal work-outs can be (and often are) implemented by agreement between the company and its creditors and must be entirely consensual.

One major disadvantage is that a company cannot avail of court protection in respect of creditor enforcement action during this period; for example, a petition to wind the company up may be issued. While certain (often secured) creditors may be willing to provide standstill agreements during a period of negotiation, the company will be vulnerable to actions by other creditors, including the Revenue Commissioners.

If the vast majority of creditors are in favour of the proposal, but a certain minority of creditors are non-responsive or unable to vote, then a statutory scheme of arrangement can often be used to implement the terms of the proposal, binding all schemed creditors. The possibility of resorting to a formal procedure will normally be enough to encourage agreement.

Where a company perceives a significant threat of liquidation or receivership, examinership may be a more viable option.

The main advantage of an informal process is that it is usually more cost effective.

Transaction avoidance

Setting aside transactions

What rules and procedures govern the setting aside of an insolvent company's transactions? Who can challenge eligible transactions?

Generally, it is the liquidator and any creditors that may seek to set aside eligible transactions. Such powers arise:

- where the transaction occurred within specified periods before the company entered into liquidation (ie, between six months and two years, depending on the type of transaction); and
- where the company was insolvent at the time it entered into the transaction in question.

The following three types of transactions are particularly vulnerable in this regard.

Unfair preference
This is a transaction in favour of a creditor taking place less than six months before the commencement of a winding up (or within two years, if in favour of a connected person) and made with the dominant intention of putting the other party in a better position than they would have been had the company gone into liquidation.

Avoidance of a floating charge
If a floating charge was created less than 12 months before the commencement of the winding up, it will be invalid unless it can be shown that the company was solvent immediately after the creation of the charge. However, it will

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not be invalid in terms of money or goods or services actually provided as consideration for the charge.

Fraudulent transfers
A liquidator or creditor of a company can apply to the High Court for the return of assets or compensation, provided that they can establish that the transfer of the assets in question had the effect of the perpetration of a fraud on the company, its creditors or its members. However, transactions which constitute unfair preferences are excluded.

Operating during insolvency

Criteria

Under what circumstances can a company continue to conduct business during an insolvency procedure?

A company in examinership will continue to conduct its business throughout the process. In a liquidation, however, leave of the court or the committee of inspection must be sought. Leave will generally be granted if it can be demonstrated that continuing to conduct business during a liquidation will increase the realisable value of the assets.

Depending on the breadth of the security on foot of which the receiver was appointed, a receiver can continue to trade a business before selling it. However, the receiver will be personally liable on post-appointment contracts entered into, unless such liability is excluded by the terms of the contract. A receiver is entitled, in respect of that liability, to an indemnity out of the assets of the company.

Stakeholder and court involvement

To what extent are relevant stakeholders (eg, creditors, directors, shareholders) and the courts involved in any business conducted during an insolvency procedure?

When a company is in examinership, the directors are still responsible for its day-to-day running. There is provision for the court to grant the examiner executive functions for the company, although this is quite uncommon in practice. Creditors and suppliers may refuse to contract with a company in examinership unless their debts are paid upfront. The examiner can certify certain liabilities incurred during the examinership period, in which case they will be treated as expenses of the examiner and thereby afforded priority if the company should go into liquidation. These are liabilities without which, in the opinion of the examiner, the survival of the company as a going concern during the protection period would be seriously prejudiced. Creditors will also get to vote at creditors' meetings to approve the scheme of arrangement proposed by the examiner.

When a company is granted leave to continue trading during the liquidation process, the liquidator may decide to retain a director to assist with the business being conducted. Apart from in these circumstances, directors will have limited involvement beyond an expectation to cooperate with the liquidator. The liquidator must prepare a report for the director of corporate enforcement regarding the directors of the company, including a recommendation as to whether an application should be brought to restrict or disqualify any of them.

A committee of inspection may be appointed; this is made up of representatives of the creditor body and can hold the liquidator to account in relation to the sale of assets, the fees charged and other such matters.

Creditors may apply to the court for directions on any issue arising in a liquidation.

Shareholders generally have little say once an insolvency process is underway.

Financing

Can an insolvent company obtain further credit or take out additional secured loans during an insolvency procedure?

A liquidator may borrow money and provide assets of the company as security. Additional finance is deemed an expense in the liquidation and is afforded priority to other creditors.

A company in examinership is permitted to obtain further credit. This can be secured on the property of the company or – if certified by the examiner – will be afforded priority if the company should go into liquidation. Any money advanced during the examinership cannot be crammed down, as only pre-examinership liabilities can be schemed. However, no specific protection exists under Irish law for any new finance provided to a company by way of rescue funding.

Receivers are permitted to borrow money on the security of property of the company.

Employees

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Effect of insolvency on employees

How does a company's insolvency affect employees and the company's legal obligations to employees?

The effect of a company's insolvency in relation to employees may be dealt with in contracts of employment. If there are no such provisions, the effect will depend on the nature of the insolvency process.

The appointment of an examiner or receiver does not immediately terminate the employment relationship. The appointment of a liquidator may lead to termination, but not in all circumstances.

If a receiver chooses to terminate employment, any claims by employees which accrued prior to their appointment may have preferential status in the receivership.

In an examinership, the company will continue to trade. Pre-existing claims by employees, including prospective or contingent claims, can be crammed down in the examiner's proposals.

A court order for the winding up of a company usually constitutes a notice of dismissal of the company's employees, to commence on the date of the order. However, if the liquidator retains employees on the same terms and conditions as the original contract, the effect of the court order can be waived so that the original contract is deemed to continue. A liquidator may require certain contracts of employment to continue for a limited period or may decide to operate and sell the business as a going concern.

By contrast, a creditors' voluntary liquidation does not result in automatic termination of employment contracts. However, it often involves fairly prompt redundancies, as it is unusual for the company to continue trading.

The government-funded Insolvency Payments Scheme permits eligible employees to claim for arrears in:

- pay;
- holiday pay;
- pay in lieu of statutory notice entitlements; and
- certain other employment-related entitlements.

The Redundancy Payments Scheme – which is separate from the Insolvency Payments Scheme, although both are funded by the Social Insurance Fund – applies where an employer cannot pay the statutory lump sum redundancy payments.

Where a transfer of the business is effected or proposed, the employees and the employer's liabilities to employees may transfer by statute to the purchaser (subject to certain exemptions for insolvency proceedings).

Cross-border insolvency

Recognition of foreign proceedings

Under what circumstances will the courts in your jurisdiction recognise the validity of foreign insolvency proceedings?

The EU Insolvency Recast Regulation (2015/848) applies to all collective insolvency proceedings and some restructuring proceedings relating to a company with its centre of main interests in the European Union. The EU Insolvency Recast Regulation provides for automatic recognition in Ireland of proceedings to which the regulation applies.

Ireland has not adopted the United Nations Commission on International Trade Law (UNCITRAL) Model Law on cross-border insolvency proceedings and domestic legislation does not contain a mechanism for the recognition of restructuring or insolvency processes. For companies that do not have their centre of main interests in the European Union, the foreign insolvency officeholder can apply to the High Court for an order recognising the proceedings under common law.

Winding up foreign companies

What is the extent of the courts' powers to order the winding up of foreign companies doing business in your jurisdiction?

Pursuant to the EU Insolvency Recast Regulation, where a company's centre of main interests is located in Ireland, winding up and examinership proceedings may be commenced in Ireland regardless of whether that company was incorporated in Ireland.

A foreign company incorporated in a country that is not subject to the provisions of the EU Insolvency Recast

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Regulation can be wound up in Ireland in certain circumstances, where it has sufficient connection with Ireland. However, the courts' discretion to make such an order is exercised sparingly.

Centre of main interests

How is the centre of main interests determined in your jurisdiction?

The procedural framework for determining jurisdiction for opening insolvency proceedings has been improved by the EU Insolvency Recast Regulation. The updated provisions on centre of main interest implement the existing case law of the European Court of Justice in an attempt to prevent abusive forum shopping.

Prior to opening insolvency proceedings, courts must actively examine whether the debtor's centre of main interest is actually located within the jurisdiction. In so doing, special consideration is afforded to creditors and to their perception of where the debtor conducts the administration of its business. There is no look-back period, but the presumption that the centre of main interest is at the registered office of the legal entity does not apply if the debtor has relocated its corporate seat within the three months before the insolvency petition.

Cross-border cooperation

What is the general approach of the courts in your jurisdiction to cooperating with foreign courts in managing cross-border insolvencies?

Irish courts are generally cooperative with and provide assistance to foreign courts in terms of managing concurrent proceedings pursuant to their obligations under the EU Insolvency Recast Regulation.

Ireland is not a signatory to the UNCITRAL Model Law on cross-border insolvency. Where the EU Insolvency Recast Regulation is not applicable, a foreign insolvency officeholder may apply for relief in Ireland on the basis of common law principles developed by the courts. Recent Irish cases have demonstrated that the comity of the courts will prevail and the Irish courts have held that, pursuant to the common law in Ireland, the court has an inherent jurisdiction to recognise (as opposed to enforce) orders of foreign courts (in the sense of non-EU courts) for the winding up of companies and the appointment of liquidators.

Law stated date

Correct as of

Please state the date of which the law stated here is accurate.

18 June 2018.