The Restructuring Review

Twelfth Edition

Editor
Christopher Mallon

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THE RESTRUCTURING REVIEW

TWELFTH EDITION

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PREFACE

I am very pleased to present this twelfth edition of *The Restructuring Review*. As with the previous editions, our intention is to help general counsel, private practice lawyers and the public sector understand the conditions prevailing in the global restructuring market in 2019, and to highlight some of the more significant legal and commercial developments and trends that have been evident in recent years, and that are expected to be significant in the future.

In what appears to be a growing trend, the global economic situation, particularly for European and other Western countries, continues to be uncertain. Despite the modest strengthening of global GDP in recent years, unresolved trade tensions between the United States and China continue to unsettle markets and European countries remain in the grip of an ongoing impasse over Brexit.

According to figures published by the International Monetary Fund (IMF), global GDP growth is expected to fall from 3.6 per cent in 2018 to 3.3 per cent in 2019, with growth in the European Union falling from 2.1 per cent to 1.6 per cent over the same period. Political instability in the European Union shows no signs of abating, and remains highly visible in movements such as the '*gilet jaunes*' in France or success of populist political parties in the European Parliament elections held in May 2019. The extent of national public debt and non-performing loans in the eurozone also continue to present a major challenge to eurozone economies and the legacy of the 2008 crash is still readily apparent in countries such as Italy and Greece. Although the European Central Bank (ECB) made good on its promise to end quantitative easing by the end of 2018, interest rates in the eurozone remain at record lows and the impending departure of Mario Draghi as ECB president leaves something of a question mark over the future trajectory of European monetary policy.

More broadly, the tensions surrounding the Middle East and Russia show no indication of being resolved, and differences in global attitudes to climate change are beginning to reveal a new, and potentially very significant, source of contention between the world's major powers.

With the ever-increasing significance of the Chinese and other Asian economies on the world stage, it is also notable that the seemingly endless trend of high-paced growth appears to be slowing, with IMF figures predicting a fall in Chinese growth from 6.6 per cent in 2018 to 6.3 per cent in 2019, and a continued decline in subsequent years. Effects are bound to be felt on the global stage as the world adapts to the slowdown.

While, of course, unforeseen circumstances have a tendency to derail even the most cautious of predictions, uncertainty and financial stress are usually good indicators that a turn in the economic cycle is approaching. As such, the twelfth edition of this work continues to be relevant and important, in particular, as a result of the increasingly cross-border nature of many corporate restructurings.

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As ever, I would like to extend my gratitude to the contributors from some of the world's leading law firms who have given such valuable support and cooperation in the preparation of this work, and to our publishers, without whom this work would not have been possible.

Christopher Mallon
Retired partner of Skadden, Arps, Slate, Meagher & Flom (UK) LLP
London
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Chapter 12

IRELAND

Barry Cahir[1]

I OVERVIEW OF RESTRUCTURING AND INSOLVENCY ACTIVITY

Positive market conditions and improved sentiment towards Ireland have given rise to a strong recovery for the Irish economy.

One of the key indicators of the continued renaissance in the Irish economy has been the performance of the domestic banking sector. While domestic institutions, the Exchequer and indeed debtors still suffer the overhang of overtrading, in aggregate the banking sector returned to profitability in 2014 for the first time since 2008 and continues to thrive. This has led to a rise in lending, further supporting the economic recovery.

Ireland continued to experience strong growth in 2019. Gross domestic product (GDP) grew by 6.7 per cent in 2018 compared with 2017. The Spring 2019 European Economic Forecast estimates that Ireland will experience a 3.8 per cent growth in 2019. Underlying economic activity is expected to remain robust, driven by investment in construction and positive labour market developments. The government deficit is projected to turn into a surplus, but risks to the fiscal outlook remain due to the uncertainty from external factors such as Brexit, as well possible changes in internal taxation and trade.[2]

The impact of Brexit on the Irish economy remains uncertain. The Central Bank of Ireland's 2018 Q2 quarterly review notes the main issue facing the Irish economy is Brexit and, in particular, the possibility of a disorderly Brexit.

Moody's, the credit rating firm, raised its outlook for Irish banks to 'positive' in 2018 as the quality of loans improves with a growing economy. The ratings agency expects that the impact of Brexit on the Irish market is likely to be 'contained'.[3]

There were 767 corporate insolvencies recorded in 2018, a drop of 107 (12 per cent) from the previous year, and below the peak of 2012 when a total of 1,684 insolvencies were recorded.[4] The breakdown of these insolvencies remains relatively unchanged, with creditors' voluntary liquidations accounting for 70 per cent of the total number (539), receiverships comprising 28 per cent, court-ordered liquidations 8 per cent and examinerships only 3 per cent. This trend is likely to continue during 2019.

1 Barry Cahir is a partner at Beauchamps. The author wishes to thank Denise O'Shaughnessy.
2 https://ec.europa.eu/info/sites/info/files/economy finance/ecfin_forecast_spring_070519_ie_en.pdf.
3 https://www.irishtimes.com/business/financial-services/moody-s-positive-on-irish-banks-as-it-sees-impact-on-them-from-brexit-contained-1.3656944.
4 https://www.rte.ie/news/business/2019/0510/1048665.

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The level of examinerships continues to remain notably low. While legislative changes in 2014 were promoted on the basis of reducing costs, the substantive requirements for entering examinership were not simplified. Therefore, accessing the process is still challenging for smaller companies.

The impact and remit of the Insolvency Service of Ireland (ISI) has continued to grow since its establishment in 2013. The ISI is an independent statutory body established to restore insolvent persons to solvency. In Q4 2018 the ISI received 753 new applications. The number of debtors securing personal insolvency arrangements continues to grow steadily and has increased by 41 per cent compared to Q4 2017.[5]

II GENERAL INTRODUCTION TO THE RESTRUCTURING AND INSOLVENCY LEGAL FRAMEWORK

Corporate restructuring and insolvency processes in Ireland are governed by a blend of statute, law and common law, the most important statute being the Companies Act 2014 (the Companies Act).

Ireland has two forms of schemes of arrangement under the Companies Act, the examinership scheme and the Companies Act scheme.

i The examinership scheme

Examinership legislation was enacted in 1990 and is modelled in large part on US Chapter 11 proceedings. As such, it provides companies (large or small) that are temporarily unable to pay debts as they fall due the opportunity to explore options to ensure their survival.

On filing a court petition, the company is protected from its creditors by an automatic moratorium for a period of up to 100 days.

An independent officer called the examiner is appointed and charged with examining the state of the company's affairs with a view to compiling a restructuring plan for the company's future viability (the examinership scheme).

The court may appoint an examiner to a related company if it would 'facilitate the survival of the company, or of the related company, or both'.[6] There are a number of provisos around this section but the definition of 'related company' is extensive.

There is a heavy focus on saving jobs and the court requires an independent expert's report to the effect that there is a reasonable prospect of survival of the company (or a part of the company) as a going concern.

The directors of the company will generally remain in control of and responsible for the day-to-day running of the business.

An examinership scheme is often achieved through new investment in the company, a write down of debt, forced surrender or termination of property leases and or reformulated debt repayments. There are very few, if any, restrictions on the nature of the proposals that the examiner may formulate to achieve this.

5 http://www.isi.gov.ie/en/ISI/2018%20Q4%20ISI%20Statistics%20Report.pdf/Files/2018%20Q4%20ISI%20Statistics%20Report.pdf.

6 Section 517(2) Companies Act 2014.

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Many well-known retailers[7] have used examinership to disclaim or repudiate onerous leases. The residual lease obligations can then be crammed down as part of the examinership scheme. Landlords facing disclaimer or repudiation may negotiate reduced lease obligations or dispute the terms on offer.

Once the examiner has formulated a scheme, the creditors are invited to consider it. Creditors with similar economic and legal interests will be classed together for these meetings.

Voting to accept the scheme is by majority in number representing a majority in value of the claims represented at each class meeting. This is a significantly lower threshold than is required for comparable schemes in other jurisdictions.

It is a statutory requirement that at least one class of impaired creditors has accepted the scheme proposals before the court can confirm it. The court will also consider whether the scheme proposals are fair and equitable to the creditors. Once approved by the court the scheme will take effect.

The examinership scheme is enforceable throughout the EU by virtue of being scheduled in the European Insolvency Regulation (EIR)[8] and EIR Recast.[9]

Eircom Limited[10] is a good example of the effective use of examinership in a cross-border restructuring of large financial obligations. The Eircom group of companies owed €4.08 billion to financial creditors. Of that amount, €2.659 billion was fully secured first lien debt. The second lien debt amounted to €350 million. It was also secured but subordinated to the first lien debt. A further €350 million was owed to holders of floating rate notes (FRNs) secured on shares in ERC Ireland Holdings Limited. A further €699 million was owed to holders of payment in kind notes. In addition, there were significant trade and other debts.

Due to pre-filing negotiations, the examinership scheme writing €1.4 billion off the total debt was confirmed by the court within 54 days of the filing. It is reported[11] that the senior lenders took a 15 per cent write down on their debt, the second tier received 10 per cent of the value of their debt and the last two layers were crammed down entirely. The senior lenders became the new owners of the business. There was no objection to the scheme.

ii The Companies Act Scheme

The Companies Act Scheme has been reasonably well used, although more often of late for corporate reorganisations, mergers and de-mergers than for insolvent restructurings.

The essential features of the Companies Act Scheme may be summarised as follows:

a a compromise or arrangement is proposed between a company and its creditors or any class of them;

b directors may convene meetings of creditors without court order;

c the court may order a moratorium for such period as it sees fit;

d creditor approval requires a majority in number representing three-quarters in value (of each class); and

e court sanction hearing at which process and form, and a 'fair and equitable' or 'reasonable man' test is applied.

7 Examples include Bestseller Retail Ireland Limited (Vero Moda, Jack and Jones), Debenhams & B&Q.

8 Annex A and Annex C of Council Regulation (EC) No. 1346/2000.

9 Annex A and Annex B of Regulation (EU)2015/848 of the European Parliament and of the Council.

10 [2012] IEHC 107.

11 *Financial Times*, 11 June 2012.

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In the Matter of Colonia Re Insurance (Ireland) Limited[12] Mr Justice Kelly approved a Companies Act scheme to shorten the time frame involved in quantifying and paying insurance run-off liabilities. The court cited with approval Mr Justice Neuberger in *Re Osiris Insurance Limited*[13], Buckley on the Companies Acts[14] and Lord Justice Lindley in *Re English, Scottish and Australian Chartered Bank*.[15]

In the *Matter of Depfa Bank Plc*,[16] Mr Justice Kelly approved a Companies Act scheme whereby Hypo Real Estate Holdings AG acquired all of the issued share capital in Depfa Bank PLC for a consideration paid partly in cash and partly in shares in Hypo Real Estate Holdings AG.

In a recent judgment, the Irish High Court sanctioned a Companies Act Scheme that aimed to restructure a company's reinsurance obligations and its outstanding indebtedness to enable the residual value in the company to be distributed to the scheme noteholders despite a US creditor's objection.[17]

The company, Ballantyne Re PLc is an Irish registered PLc formed as a special purpose vehicle for the purpose of entering into a reinsurance agreement and (the company). The company applied to the High Court of Ireland to sanction a proposed scheme of arrangement between it and its creditors (the scheme). The sole objecting creditor, ESM Fund I LP, (ESM) a limited partnership formed in the United States opposed the company's application. ESM contended the scheme was deficient in terms of the information it provided and the impression it created. It further claimed that the Irish court had no jurisdiction to sanction a scheme that provides for third-party releases and that its sanctioning would frustrate existing litigation that ESM had initiated in the United States.

The parties accepted that a special majority of creditors voted in favour of the scheme as required by the Act and that adequate notice of the passing of the resolutions in favour of the scheme was established.[18] The High Court endorsed *Re Osiris Insurance Limited* (cited above) and ultimately held that the scheme was reasonable, fair and equitable to all creditors viewed from the perspective of an honest, intelligent and experienced person of business who is familiar with the scheme.

The Irish Court had jurisdiction as the company is registered in Ireland, its directors are Irish and all board meeting were held in Ireland.

In terms of EU recognition and enforceability of the Companies Act scheme, the court relied on evidence of compliance with European law requirements, an opinion from German lawyers and consent from the EU Commission.

iii Receivership

Receivership is, in essence, the enforcement of security by the lender on default of loan or security covenants by the borrower. The most common form of receivership is an appointment by the holder of security created by a mortgage, charge or debenture.

12 [2005] IEHC 115.
13 [1999] 1 B.C.L. 182.
14 Buckley on the Companies Acts (1981 edition) 473-474.
15 [1893] 3 Ch. 385 at page 409.
16 [2007] IEHC 463.
17 *Re Ballantyne RE Plc & the Companies Act 2014* [2019] IEHC 407.
18 Section 432(2)(a) of the Companies Act outlines the special majority requirements. Notification requirements are stipulated in Section 253(2)(b) of the Companies Act.

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While the remedy of appointing a receiver is not truly a collective insolvency procedure, being a procedure of enforcement of rights under a charge, it is a procedure that may be used in many cases to achieve a sale on a going concern basis of a company's entire assets and undertaking.

Unlike other processes, however, the appointment of a receiver does not, of itself, affect the legal status of the company. Rather, the appointment of the receiver affects the status of the charged assets.

Most debentures contain specified fixed charges and a floating charge on all the assets and undertakings of the borrower company. Debentures typically provide for enforcement in the event of default by the appointment of a receiver with full power to take possession of and manage all of the secured assets and the power of sale of the assets. The powers and duties of a receiver are governed by the terms of the debenture itself and are supplemented by Part 8 of the Companies Act, which includes the following powers:

a to enter into possession and take control of the property of the company;
b to lease, let, hire, grant options over or dispose of such property;
c to carry on the business of the company; and
d to execute documents, bring proceedings and use the seal of the company (a new power) to engage or discharge employees, and to appoint professionals and agents.

The Companies Act does not attempt to delimit the duties of receivers but does codify in Section 439 the obligation, in selling property of the company, to exercise all reasonable care to obtain the best price reasonably obtainable for the property as at the time of sale.

Liquidation

Liquidation is the ultimate collective insolvency procedure, being a winding up of a company leading to its dissolution. A liquidator assumes full power and authority over the company, realises the assets and applies the proceeds in accordance with the rules set down by the Companies Acts, the Rules of the Superior Courts and a substantial body of case law.

There are two means by which an insolvent company may be wound up or liquidated: creditors' voluntary liquidation or compulsory liquidation.

Creditors' voluntary liquidation

The vast majority of liquidations are creditors' voluntary liquidations. These are commenced by ordinary resolution of the shareholders, prompted by a recommendation from the board of directors of a company to the effect that, by reason of its liabilities, the company should cease trading.

A meeting of all creditors of the company is convened on at least 10 days written notice. If creditors representing a majority in value of those attending and voting at the meeting resolve to appoint a different person as liquidator to the person nominated by the shareholders, then the person so approved by the creditors shall be the liquidator.

Generally speaking, on the appointment of a liquidator the powers of the directors will cease and the liquidator effectively displaces the directors.

Functions of liquidator

The principle function of the liquidator is to realise all of the assets of the company and then distribute the proceeds of the sale of the assets broadly in accordance with the following priorities:

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a the discharge of the costs, fees and expenses of the winding up;
b payment to secured and preferential creditors;
c payment to unsecured creditors; and
d payment of a distribution to members if there is a surplus available after (a), (b) and (c) above.

The liquidator conducts the liquidation independently of all parties and reports on the conduct of the liquidation to meetings of the members and creditors.

Compulsory liquidation

Compulsory liquidations are commenced on the basis of the jurisdiction of the High Court to order the winding up of a company and appoint a liquidator.

The process commences with a petition to court. The parties who may petition the court for an order for the appointment of a liquidator include creditors, members or the company itself.

Section 569 of the Companies Act 2014 provides for a number of circumstances in which the court may order a winding up, including where the company is unable to pay its debts as they fall due.

Provisional liquidator

After a petition to have a company wound up is presented, and before making the order for the winding up of a company, the court may order the appointment of a provisional liquidator under Section 573 of the Companies Act. The primary purpose of the appointment of a provisional liquidator is the preservation of assets pending the winding-up order based on a concern or requirement that the value, assets and business of the company are immediately preserved in the interest of creditors.

The provisional liquidator will represent all of the creditors of the company and must act in all of their interests. The compelling grounds to appoint a provisional liquidator must be clearly set out by the petitioner in the grounding affidavit to the winding-up petition.

The powers of a provisional liquidator are limited but can be expanded by the court. For example, a provisional liquidator's power to carry on the business of the company will generally only be to do so insofar as is necessary to facilitate a beneficial winding up of the company.

Directors' duties and responsibilities where a company is in financial difficulties

If a company becomes unable to pay its debts as they fall due, or if there is a prospect (whether based on the cash-flow test or the balance sheet test) that creditors will not be paid in full the duties owed to the shareholders become secondary to an overriding duty to act in the best interests of the creditors, including contingent or prospective creditors.

Failure by the directors to act in the best interests of creditors at such a point may result in personal liability for all or some of the debts of the company.

In cases where a company is unable to pay its debts as they fall due (i.e., it fails the cash-flow test) it is difficult to justify continued trading unless the directors believe on reasonable grounds that the company can survive and that all debts will be paid.

The critical point is that the duty to act in good faith and to exercise the utmost care, skill and diligence, is a duty that in those circumstances is owed to the creditors.

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Potential sanctions

The Companies Act sets out the sanctions of restriction and disqualification of directors and the circumstances in which a court may impose personal liability on directors of a company.

Restriction

In every insolvent liquidation, the liquidator must bring an application for a restriction order before the High Court unless the liquidator is relieved from doing so by the Office of the Director of Corporate Enforcement (ODCE).[19]

This obligation applies to every person who has been a director in the 12 months prior to the commencement of the winding up (including shadow directors).

The ODCE makes its decision based on a comprehensive report of the liquidator that must be made within six months of his or her appointment.

The burden is on the directors to prove that they have acted honestly and responsibly in relation to the affairs of the company and that they have cooperated with the liquidator.

The effect of a restriction order is that such a person may not act as a director or be concerned in any way in the management of another company for a period of up to five years unless that new company meets defined capital requirements.

Disqualification

Section 842 of the Companies Act provides for the disqualification of persons from acting as directors, officers or otherwise being concerned in the management of the company for a period of five years, or for such periods as the court may order.

A disqualification order is more absolute than a restriction order, but such an order will only be made where culpable wrongdoing on the part of the director has been established.

The grounds for making a disqualification order include where the person has been guilty of any fraud in relation to a company or guilty of conduct rendering such a person unfit to be concerned in the management of a company.

Restriction and disqualification undertakings

Where the ODCE believes that a person may properly be subject to a restriction or disqualification application they will be invited to elect to give an undertaking to be subject to a restriction declaration or a disqualification order for the purposes of the legislation.

Requests for undertakings can only be given by the ODCE, and not by the appointed liquidator or receiver.

Reckless trading

Section 610 of the 2014 Act imposes personal liability for all the debts of a company on any person who, while an officer of the company, has been knowingly party to the conduct of any business of the company in a reckless manner.

There are a number of instances of conduct that are deemed to constitute reckless trading, including where the director in question ought to have known that his or her actions or those of the company would cause loss to the creditors of the company or to any of them.

19 Section 819 of the Companies Act.

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Fraudulent trading

Section 722 of the Companies Act imposes criminal and civil liability on a person who is knowingly party to the carrying on of the business of the company with intent to defraud creditors of the company.

Floating charges

A floating charge created within 12 months before the commencement of the winding up is invalid unless it is proven that the company was solvent immediately after the creation of the charge. This provision in Section 577 of the Companies Act does not apply in respect of money actually advanced or paid, or the actual price or value of goods or services sold or supplied to the company at the time of, or subsequent to the creation of the floating charge, and is consideration for the charge.

Where the chargee is a party connected to the company, the period of 12 months for testing the floating charge is extended to two years.

Contribution by a related company

The High Court may order a related company to contribute to the whole or part of the debts of a company being wound up if satisfied in accordance with Section 599 of the Companies Act that such an order is just and equitable.

In making such an order, the court must have regard to (1) the extent to which the related company took part in the management of the company being wound up; (2) the conduct of the related company towards the creditors of the company being wound up; and (3) the effects that such an order would be likely to have on the creditors of the related company.

Pooling assets of related companies and effective consolidation orders

The grounds for a pooling order under Section 600 of the Companies Act are based on (1) the extent of involvement by one company in the management of the other (2) the conduct of each company towards the creditor of the others (3) the extent to which the circumstances giving rise to the winding up of the companies are attributable to the conduct of each other and (4) the extent to which the businesses of the companies have been intermingled.

Where a court makes a pooling order, it must respect the rights of secured creditors (both fixed and floating charge holders) in each company separately. Otherwise, the claims of unsecured creditors rank equally in the consolidated entity.

Unfair preference

Any disposal or other action by an insolvent company in favour of a creditor made with a view to giving that creditor a preference over other creditors is invalid as an unfair preference. Section 604 of the Companies Act, applies if a winding up commences within a period of six months from the date of the disposal or other action in favour of a creditor. Where the transaction is in favour of a party connected to the company, the six-month scrutiny period is extended to two years and there is a statutory presumption of intent to prefer.

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Assets improperly transferred (Section 608)

A court may, under Section 608 of the Companies Act, order restitution against a disponee where the effect of a disposal of the property of a company is to perpetrate a fraud on the company, its creditors or members. The test is whether the transaction has the effect of depriving the company or its creditors of assets that would otherwise have been available to it.

III RECENT LEGAL DEVELOPMENTS

i Personal Insolvency Amendment Act 2015 (the 2015 Act)

The 2015 Act amended the Personal Insolvency Act 2012 and enabled the Court to confirm a personal insolvency arrangement (PIA) that had been rejected by majority vote of the secured lender.

The Act provides that a personal insolvency arrangement could be used to write down secured debt up to €3 million. A debtor is eligible for a PIA if he or she fulfilled certain criteria and had aggregate secured debts of up to €3 million. The limit of €3 million may be waived where all creditors agree.

PIAs in Q1 2019 increased by 16 per cent in comparison with Q1 2018[20] and bankruptcy adjudications decreased in the same period by 31 per cent. There is a consistent trend of bankruptcies declining, wherein 526 were filed in 2016 and 397 were filed in 2018.[21]

IV SIGNIFICANT TRANSACTIONS, KEY DEVELOPMENTS AND MOST ACTIVE INDUSTRIES

While the number of examinerships have been quite low, companies in the construction, energy and retail sector have been the most prominent candidates.

Sammon Contracting Ireland Limited, a leading Irish building contractor that employed 216 people was contracted to build a significant number of public and educational facilities by an entity that included Carillion, the UK contractor. However, Carillion were experiencing immense financial difficulties and had debts that exceeded £1.5 billion. Sammon was severely impacted by the collapse of Carillion and was pushed into examinership.[22] The examinership was unsuccessful in that the examiner was unable to formulate an examinership scheme and the company went into liquidation.[23]

Naval Energies, a French company and leader in the marine renewables energy sector ceased to support its investments in tidal turbines in 2018 with the result that its Irish subsidiary OpenHydro went into liquidation. The company founders and minority shareholders of OpenHydro lodged an examinership petition that was rejected by the High

20 http://www.isi.gov.ie/en/ISI/2019%20Q1%20ISI%20Statistics%20Report.pdf/Files/2019%20Q1%20ISI%20Statistics%20Report.pdf.

21 ISI Quarterly Statics Report available at http://www.isi.gov.ie/en/isi/pages/media_&_statistics.

22 *In the matter of Sammon Contracting Ireland Limited* and *in the matter of the Companies Act 2014* (2018/137 COS).

23 https://www.irishtimes.com/business/construction/carillion-collapse-pushes-sammon-intoexaminership-1.3451777 .

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Court as there was no chance of the company securing fresh investment and therefore it had no reasonable chance of survival.[24] The liquidation application to wind up the company was made by Naval Energies which was the largest shareholder and creditor of OpenHydro.

Dennis Moriarty (The Kerries) Limited is a significant supplier of engineering and grounds work services to the wind farm sector. It successfully secured new investment and completed a restructuring through examinership despite the challenges its faced in the sector.[25]

Retail featured prominently, including in the case of Bradleys Pharmacy Group, which was successfully restructured through Examinership with the saving of a significant number of jobs.

Well-known Irish optician chain MacNally Opticians is at the time of writing under the protection of the court in examinership.

V INTERNATIONAL

i EIR applies

Liquidations and examinership are enforceable throughout the European Union by virtue of being scheduled in the EIR[26] and now in the EIR Recast.[27]

Chapter 15 of the Companies Act contains specific provisions to facilitate the operation of the Insolvency Regulation in Ireland, including provisions governing the publication of the opening of insolvency proceedings, court confirmation of the appointment of a liquidator in a voluntary liquidation, and provision for the translation of claims of creditors into the Irish or English language, as required by the liquidator in individual cases.

ii EU 'Second Chance' Directive

As of 15 May 2019, the EU Directive on Preventive Restructuring Frameworks[28] has been adopted. The Directive is based on and closely resembles examinership.

Ireland and all applicable EU Member States will now be required to transpose the Directive's provisions into the legal system within two years.

The stated aim of the Directive is to provide increased access to preventive restructuring frameworks at an early stage for viable enterprises in financial difficulties.

iii UNCITRAL Model Law on Cross-Border Insolvency

The Company Law Review Group (CLRG) is a statutory body established to advise the Irish Minister for Enterprise, Trade and Employment (the Minister) on the reform and modernisation of Irish company law.

The CLRG recently published a detailed report[29] recommending that the UNCITRAL Model Law on Cross-Border Insolvency be adopted.

24 https://www.independent.ie/business/irish/insolvent-energy-firms-in-liquidation-37158484.html.

25 *In the matter of Denis Moriarty The Kerries Limited and Moriarty Civil Engineering Limited* and *in the Matter of the Companies Act 2014* (2018/13 COS).

26 Annex A and Annex C of Council Regulation (EC) No. 1346/2000.

27 Annex A and Annex B of Regulation (EU)2015/848 of the European Parliament and of the Council

28 (EU) 2017/1132.

29 http://www.clrg.org/Publications/.

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With an eye on supporting further foreign direct investment and on Brexit, the adoption of the Model Law in Ireland would provide greater certainty and predictability to companies to which the EU Regulation does not apply, and their creditors, as to how cross-border insolvencies are treated in Ireland.

VI FUTURE DEVELOPMENTS

The insolvency market continues to be dominated by the enforcement of security by alternative lenders who have acquired loan portfolios, predominantly from state-sponsored banks and 'bad banks'.

While the range of lenders available to businesses has expanded, the ratio of non-performing loans on the books of domestic banks still make for a challenging environment. That is especially so for smaller businesses who cannot easily source borrowings for cash-flow purposes.

It was recently reported[30] that the state's chief economist, John McCarthy, has described the economy as 'being on a knife edge, poised between "overheating" and a major Brexit-related downturn'.

In any event, recent improvements to company law generally coupled with recent and anticipated changes to insolvency law in particular should mean that businesses seeking timely advice will be well placed to restructure a business before it deteriorates to the point of no return.

30 https://www.irishtimes.com/business/economy-on-knife-edge-taxing-funds-and-dublin-airport-expansion-halted-1.3925140.

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Appendix 1

ABOUT THE AUTHORS

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Barry heads the market-leading insolvency and corporate recovery team at Beauchamps in Dublin, where he advises a wide range of clients on contentious and non-contentious restructuring, insolvency and corporate recovery issues.

Barry is a Fellow of INSOL International and a member of the council for INSOL Europe, where he is also part of the Brexit group.

In addition, Barry stands appointed by the Irish Minister for Business, Enterprise and Innovation as a member of the statutory Company Law Review Group (CLRG) where he represents the Irish Society of Insolvency Practitioners. He chairs the CLRG's corporate insolvency committee, which has recently published a report recommending the adoption of the UNCITRAL Model Law on Cross-Border Insolvency.

Barry is a past chairman of the Irish Society of Insolvency Practitioners and an active member of the UK Insolvency Lawyers' Association.

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