Restructuring & Insolvency 2021

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LEXOLOGY
Getting The Deal Through

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Published by
Law Business Research Ltd
Meridian House, 34-35 Farringdon Street
London, EC4A 4HL, UK

First published 2008
Fourteenth edition
ISBN 978-1-83862-397-5

Printed and distributed by
Encompass Print Solutions
Tel: 0844 2480 112

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2021

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Freshfields Bruckhaus Deringer

Lexology Getting The Deal Through is delighted to publish the 14th edition of *Restructuring & Insolvency*, which is available in print and online at www.lexology.com/gtdt.

Lexology Getting The Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique Lexology Getting The Deal Through format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes new chapters on Ireland and Taiwan.

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Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Lexology Getting The Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editors, Catherine Balmond and Katharina Crinson of Freshfields Bruckhaus Deringer, for their assistance with this volume.

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London
November 2020

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This article was first published in November 2020
For further information please contact editorial@gettingthedealthrough.com

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Ireland

Jamie Ensor and Peter Bredin
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GENERAL

Legislation

1 What main legislation is applicable to insolvencies and reorganisations?

The main legislation governing corporate insolvencies and reorganisations in Ireland is the Companies Act 2014, as amended (the Companies Act). The Companies Act is supplemented by principles of common law. For cross-border insolvencies within the EU member states other than Denmark, Ireland has adopted European Insolvency Regulation (Regulation (EC) No. 1346/2000) as recast by Regulation 2015/848 of the European Parliament and of the Council of 20 May 2015 (the EU Insolvency Regulation). For procedural requirements before the courts, the rules of court relating to the particular insolvency or reorganisation process will apply.

Excluded entities and excluded assets

2 What entities are excluded from customary insolvency or reorganisation proceedings and what legislation applies to them? What assets are excluded or exempt from claims of creditors?

The insolvency regime prescribed by the Companies Act applies to: Irish registered companies; entities to which the EU Insolvency Regulation applies and whose centre of main interests or establishment is in Ireland; foreign-registered companies with sufficient connection to Ireland; and certain types of investment vehicles such as Irish Collective Asset-management Vehicles. The High Court may also dissolve partnerships under the Companies Act. The insolvency regime has been tailored in certain sectors such as insurance, banking, credit institutions and investment services. Specific provisions relating to the insolvency of businesses in these sectors are contained in the Companies Act, related EU regulations and in sectoral specific regulatory regimes. The objective of these modified sectoral regimes is primarily to prevent insolvencies because of the systemic or societal impact that could result.

Specific regimes

The Central Bank of Ireland (the CBI) can request the court to appoint an administrator under the Insurance (No.2) Act 1983 when an insurer has failed to maintain its regulatory solvency margin or cannot meet claims. The administrator will assume management of a company to attempt to place the insurer on a sound commercial and financial footing. Administration is not available as a remedy for individual creditors, but is available to the CBI even where another remedy or cause of action is available. In two instances, being the insolvency of PMPA in 1982 and Quinn Insurance in 2010, a levy had to be put on all insurance premiums to cover the cost of the shortfall following the administration of these insolvent insurers.

In the case of financially distressed credit institutions and banks, the regime for an effective and orderly wind down is governed by 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. Under the Investor Compensation Act 1998 there is a compensation scheme for qualifying investors for losses arising from the insolvency of certain financial services firms.

Ireland had adopted Alternative A of Article XI of the Aircraft Protocol of the Cape Town Convention on International Interests in Mobile Equipment. The regime creates an aircraft-specific international framework for the formation, registration (through an international registry), protection and enforcement of certain international interests in airframes, aircraft engines and helicopters.

Entities in regulated sectors, particularly regulated financial institutions and insurance providers, are regulated by the CBI. Special provisions exist for the involving of the CBI where there is an insolvency of entities in these regulated sectors.

Excluded assets

Assets in which the debtor company has a legal or beneficial interest will be available for realisation and distribution by the insolvency practitioner for the benefit of creditors. Assets that are the subject of a valid trust or retention of title claim are not deemed assets of the company available for distribution. Assets that are subject to fixed security are generally disposed of by the security holder outside of the insolvency process.

Public enterprises

3 What procedures are followed in the insolvency of a government-owned enterprise? What remedies do creditors of insolvent public enterprises have?

An insolvent government-owned enterprise will be subject to the same insolvency process under the Companies Act as any other enterprise the subject of the same form of insolvency process. Specific modified insolvencies regimes would also apply to government-owned enterprises as any other enterprise in that sector. Insolvencies in certain sectors will entitle government departments or agencies to be on notice of insolvency proceedings and a right to participate in those proceedings. Creditors of insolvent public enterprises have the same remedies as creditors of any other enterprise being wound up under the same insolvency process.

Protection for large financial institutions

4 Has your country enacted legislation to deal with the financial difficulties of institutions that are considered 'too big to fail'?

Following the financial crisis that began in 2008, Ireland had to take a number of emergency measures to stabilise its banking sector. Under the National Asset Management Agency (NAMA) Act 2009, distressed

assets of Irish banks and building societies were transferred to NAMA and then recapitalised by NAMA, funded ultimately through public funds in the main. The Irish Bank Resolution Corporation Act 2013 was enacted to prevent the collapse of Irish Bank Resolution Corporation Limited (IBRC), formerly Anglo Irish Bank, with the appointment of special liquidators to wind down IBRC.

Courts and appeals

5 What courts are involved? What are the rights of appeal from court orders? Does an appellant have an automatic right of appeal or must it obtain permission? Is there a requirement to post security to proceed with an appeal?

The High Court is the court of original jurisdiction in dealing with matters of company insolvency and reorganisation. Examinership is the most common form of statutory corporate restructure in Ireland. In an attempt to make examinership more accessible and cost-efficient for small to medium-sized enterprises, examinerships in respect of a 'small company' (as defined) should be brought before the Circuit Court, the court below the High Court.

Generally, there is an automatic right of appeal. Appeals from the High Court are heard by the Court of Appeal. A decision of the Court of Appeal can, in most cases, be appealed to the Supreme Court, Ireland's highest court. There is no automatic requirement to post security to proceed with an appeal. A respondent to an appeal can bring an application for an order for security for costs against an appellant who is looking to pursue an appeal.

TYPES OF LIQUIDATION AND REORGANISATION PROCESSES

Voluntary liquidations

6 What are the requirements for a debtor commencing a voluntary liquidation case and what are the effects?

A company can place itself into liquidation on a voluntary basis in one of two ways, depending on whether the directors have formed the view that the debtor company is solvent or insolvent.

Members' voluntary liquidation

Where the company debtor is solvent, the directors commence the process by making a declaration of solvency. This declares that the directors have a reasonable belief that the company is solvent and will be able to pay its debts in full within 12 months from the commencement of the liquidation. The declaration must be accompanied by a report of a person qualified to be the company's auditor who opines that the declaration of the directors is not unreasonable. The company is placed into members' voluntary liquidation and the nominated liquidator appointed by special majority resolution (at least 75 per cent) of the shareholders.

Creditors' voluntary liquidation

Where the directors have formed the view that, by reason of its debts, a debtor company is insolvent and cannot continue its business, it should be wound up by way of a creditors' voluntary liquidation. The directors call a meeting of the shareholders and the creditors giving the appropriate minimum notice period. At the shareholders' meeting, the shareholders resolve by simple majority (more than 50 per cent) that the company be wound up and nominate a liquidator. At the meeting of creditors, which is generally held immediately after the meeting where the shareholder resolution is passed, the creditors have the option to appoint an alternative liquidator if the majority of creditors by value of debt vote to appoint a creditor nominee.

The effects

Upon the passing of the shareholders' resolution to appoint the liquidator, the directors' powers cease unless the shareholders sanction certain powers to remain with the directors for a specific purpose. No action or proceedings may be brought or continued against the company without leave of the court.

Voluntary reorganisations

7 What are the requirements for a debtor commencing a voluntary reorganisation and what are the effects?

There are two statutory reorganisation processes in Ireland: examinership (Part 10 of the Companies Act) and schemes of arrangement (Part 9 of the Companies Act).

Examinership (Part 10 of the Companies Act)

Examinership is a hybrid of aspects of the corporate rescue systems in the US and also England and Wales. Influences from both regimes are evident, albeit that examinership is more inspired by Chapter 11 in the US than administration in the UK. Examinership is a process whereby an insolvent company that meets certain criteria can petition the court for protection from its creditors to see if a restructuring plan can be put together by the examiner. The petition to the court for entry into the process is, in most cases, accompanied by an independent expert's report (IER), which opines that the debtor company has a reasonable prospect of survival as a going concern, subject to certain conditions. Where an IER is included with the petition, the company benefits from an automatic and extensive immunity from its creditors. A receiver who has not been appointed for more than three days prior to the date of the filing of the petition can be ordered to cease to act.

Management stays in day-to-day control of the debtor company. The examiner is obliged to examine the financial situation of the company and endeavour to put together a reorganisation plan that will be acceptable to the creditors and shareholders, and ultimately also to the court. At least one class of creditor whose claims are being impaired by the examiner's proposals must vote in favour (50 per cent plus one in number representing over 50 per cent value) to allow the reorganisation plan to go forward for confirmation by the court. The examiner has up to 100 days from the date of the filing of the petition to report to the court that he or she has put together a reorganisation plan that has received the statutory minimum threshold of creditor approval. The 100 days has been temporarily extended to 150 days as part of a range of covid-19 emergency measures currently in place until 31 December 2021 (which may be extended). Where an examiner's proposals, which invariably provide for a write-down of creditor debt, are confirmed by the court, the proposals are binding on all creditors regardless of whether they have voted for or against the examiner's reorganisation plan.

Schemes of arrangement (Part 9 of the Companies Act)

A scheme of arrangement is similar to a scheme of arrangement in England and Wales. It is a debtor-company/director-led restructuring process. The appointment of an outside insolvency practitioner is not required. There is also no requirement that the company necessarily be insolvent.

Once the restructuring plan has been put together, the directors can convene meetings of shareholders and creditors. In order for the scheme of arrangement to be able to go forward for court approval, it must be approved by a majority in number and 75 per cent in value of the creditors or shareholders present. There is no automatic protection from creditors. An application can be made to court for a stay on proceedings or refrain new proceedings issuing. Arguably, that application to court cannot prevent a receiver being appointed by a secured creditor, for example.

Where the requisite votes in favour of the scheme of arrangement have been received, the scheme can go forward for court sanction. The court will look to be satisfied that the scheme of arrangement meets a number of criteria. Of primary focus is that the majority who voted for the reorganisation plan are acting bona fide and are not coercing the minority to promote interests adverse to the minority. Where sanctioned by the court, the scheme of arrangement will be binding on all shareholders and creditors.

Successful reorganisations

8 How are creditors classified for purposes of a reorganisation plan and how is the plan approved? Can a reorganisation plan release non-debtor parties from liability and, if so, in what circumstances?

There are no express directives regarding the classification of creditors for the purposes of examinership or schemes of arrangement. Creditor classes will be constituted having regard to the various creditor profiles and often by reference to how creditors would be classified in the order of priority on distribution on insolvency under the Companies Act. Creditor classifications will generally include secured, preferential, unsecured, contingent and unknown. An objectively justifiable and equitable methodology should be adopted. The Irish courts have adopted with approval the test in England and Wales, that classes of creditors are to be limited to 'those persons whose rights are not so dissimilar as to make it impossible for them to consult together with a view to a common interest'. In the case of examinership, the courts have held that failure by the examiner to correctly constitute the classes within the examiner's proposals could lead to a court refusing to confirm the examiner's reorganisation plan.

Examinership

In order for an examiner to put his reorganisation plan forward for court confirmation, at least one class of creditor whose interests are being impaired by the examiner's reorganisation plan must have voted in favour. A vote in favour at a meeting of a class of creditor is carried if a majority in number holding a majority in value vote in favour of the examiner's reorganisation plan. 'Impaired' means a class of creditors who are not getting paid back all of their debt in the reorganisation plan.

Schemes of arrangement

To be in a position to go forward for court sanction, the scheme of arrangement must be approved by over 50 per cent in number representing at least 75 per cent in value of the creditors or class of creditors or shareholders present and voting in person or by proxy in favour of the scheme of arrangement.

Non-debtor party release

In certain circumstances, non-debtor parties can be released. In examinership, an examiner's reorganisation plan will not automatically release a third-party guarantor of the debtor company's liabilities. However, to be entitled to enforce the guarantee after the protection period has ended, the creditor must notify the guarantor prior to the examiner convening the statutory meetings to vote on the examiner's reorganisation plan and transfer to the guarantor the creditor voting rights at those convened meetings. Failure to notify the guarantor will result in the guarantor being, in effect, released from the guarantee where the examiner's reorganisation plan is confirmed by the court.

Involuntary liquidations

9 What are the requirements for creditors placing a debtor into involuntary liquidation and what are the effects? Once the proceeding is opened, are there material differences to proceedings opened voluntarily?

A creditor may place a debtor into involuntary liquidation where the creditor petitions the court for a winding-up order against the debtor company. Where the creditor is successful, the liquidation will be conducted by a liquidator under the supervision of the High Court.

If a creditor who is owed more than €10,000, or two or more creditors in aggregate are owed €20,000, serves on a debtor a 21-day statutory demand and that demand is not met, then there is a presumption that the debtor company is insolvent. These minimum debt amounts have been temporarily increased to €50,000 with respect to one or more in aggregate creditors as part of the covid-19 emergency measures. Service of a statutory demand that is unmet in this way does not require that a creditor has obtained judgment (court-confirmed debt owing) against the debtor prior to filing its petition. The debtor company may still dispute the debt or rebut the presumption of insolvency. The High Court has jurisdiction to appoint a liquidator if it is satisfied that the debtor is insolvent. There are also other grounds upon which the court may place a company into liquidation. A successful petitioning creditor does not gain any priority or advantage above other creditors that rank ahead or pari passu by virtue of it bringing the petition.

Since the coming into force of the Companies Act on 1 June 2015, the processes by which a liquidator conducts voluntary or involuntary liquidations are much more closely aligned. The main material difference between an involuntary and a voluntary liquidation in Ireland now is how the respective processes are commenced, with an involuntary liquidation requiring an application to court to commence the process.

Involuntary reorganisations

10 What are the requirements for creditors commencing an involuntary reorganisation and what are the effects? Once the proceeding is opened, are there any material differences to proceedings opened voluntarily?

Although not commonly seen, a creditor may petition the court to have a debtor company placed into examinership. In the case of a scheme of arrangement under Part 9 of the Companies Act, a creditor can also bring an application to have the court order that the scheme meetings of creditors and shareholders are convened if the directors do not exercise those powers.

Once opened, there are no material differences to proceedings commenced by the debtor company or another third-party petitioner. There may be certain practical considerations that would make it somewhat more difficult to conclude a successful examinership or scheme of arrangement where there is non-cooperation of the directors of the debtor company, such as getting possession of the most up-to-date financial and other important information that is required to complete any reorganisation.

Expedited reorganisations

11 Do procedures exist for expedited reorganisations (eg, 'prepackaged' reorganisations)?

While there are no statutory procedures for expediting reorganisations, there have been a number of high-profile examples of reorganisations that have benefited from a significant degree of pre-negotiation prior to the commencement of the reorganisation process. This is especially the case in examinership, where the time allowed to an examiner to put

together a reorganisation plan is relatively short, particularly where the reorganisation in complex. Because the examiner is an independent court-appointed officer, he or she is also obliged to consider all reasonable investment and restructuring proposals into the company. The courts will, however, generally be amenable to expedited hearings that facilitate the early consummation of a reorganisation plan, subject to all interested parties having been given proper notice and time to consider the reorganisation proposals.

Unsuccessful reorganisations

12 | How is a proposed reorganisation defeated and what is the effect of a reorganisation plan not being approved? What if the debtor fails to perform a plan?

Examinership

An examiner's proposed reorganisation plan can be defeated if at least one class of creditors whose interests or claims would be impaired by implementation or the reorganisation plan has not accepted the plan. At the final confirmation hearing before the court, the reorganisation can also be defeated if the court is not satisfied that the reorganisation plan is fair and equitable in relation to any class of shareholders or impaired creditors that has not accepted the plan, or if the court finds that the reorganisation plan is unfairly prejudicial to the interests of any interested party. If an examinership is defeated, the debtor should be placed into insolvent liquidation without delay.

Schemes of arrangement

A scheme of arrangement can be defeated if the requisite number and value of creditors or shareholders do not vote for the scheme. At the final confirmation hearing before the court, the reorganisation can be defeated if the court is satisfied that the majority who voted for the scheme are not acting bona fide and are coercing the minority to promote interests adverse to the minority. If a scheme of arrangement is defeated, the debtor may be placed into liquidation if it is insolvent. If the debtor is not insolvent, a revised reorganisation plan that looks to address the court concerned can be considered.

Because both reorganisation processes are confirmed and become binding on all parties by way of court order, failure to perform the reorganisation plan could be a breach of an order of the High Court by the debtor. In the case of examinership, if the debtor is unable to make the dividend payments to creditors provided for in the examiner's reorganisation plan, the debtor is insolvent once more and should be placed into liquidation.

Corporate procedures

13 | Are there corporate procedures for the dissolution of a corporation? How do such processes contrast with bankruptcy proceedings?

If a company never traded or has ceased to trade and has no assets or liabilities that exceed €150 and it is not a party to ongoing or pending litigation, it can request the Irish Companies Registration Office (CRO) to strike the company off the Register of Companies, with the effect that the company is then dissolved.

The voluntary strike-off procedure contrasts with insolvency proceedings in that the appointment of a liquidator is not required. The application to strike the company off the Register of Companies has a number of constituent requirements that must be complied with. Once the application is received, the CRO will make arrangements for the publication of a notice in the CRO Gazette. The application for strike-off may be objected to within 90 days of the date of the notice being published in the CRO Gazette, and the objection must be that one or more of the strike-off conditions have not been met. If no objection has been received or sustained, the CRO has discretion and may strike the company off the Register of Companies and have it dissolved.

Conclusion of case

14 | How are liquidation and reorganisation cases formally concluded?

In voluntary liquidations, once the liquidation has concluded, the liquidator calls a meeting of creditors and shareholders to lay before them an account of the process. The liquidator then files a final statement of accounts and the return of the final meeting with the CRO. The company is deemed to be formally dissolved three months after the liquidator's final return is registered.

In the case of involuntary liquidations (ie, liquidations commenced by court order), the process is now the same as with voluntary liquidations, unless the court has ordered that the liquidator make an application to court prior to the dissolution of the debtor company once the liquidation has been concluded.

An examinership or scheme of arrangement is concluded on the date that the last condition or obligation of the court-sanctioned reorganisation plan has been complied with or discharged.

INSOLVENCY TESTS AND FILING REQUIREMENTS

Conditions for insolvency

15 | What is the test to determine if a debtor is insolvent?

The Companies Act sets out the four circumstances where a company is deemed to be insolvent. Each of the four circumstances are stand-alone. The test most commonly referenced or applied is whether a debtor is in a position to pay its debts as they fall due. In making that assessment the Irish courts can take account of a debtor company's solvency on a balance sheet or a cash-flow basis. The courts have not favoured either the balance sheet or cash-flow test or adopted a position as to the appropriateness of one test over another or the application of an amalgam of them. The courts have preferred to take a global view of a company's finances using both tests to determine if a company has reached the point of no return.

Mandatory filing

16 | Must companies commence insolvency proceedings in particular circumstances?

There is no express duty on directors to commence insolvency proceedings at any particular time. Where the directors have (or should have) formed the view that the company is insolvent and has no reasonable prospect of returning to solvency, then they should take steps to commence an insolvency process without delay and preserve assets for the benefit of creditors. To do otherwise could expose the directors to an action for reckless trading. The directors could also be the subject of an application for restriction from acting as directors of companies that do not have minimal capitalisation thresholds or even disqualification from acting as directors in other companies.

DIRECTORS AND OFFICERS

Directors' liability – failure to commence proceedings and trading while insolvent

17 If proceedings are not commenced, what liability can result for directors and officers? What are the consequences for directors and officers if a company carries on business while insolvent?

Directors and officers who trade while insolvent can be the subject of an action for reckless or fraudulent trading. In respect of both actions, directors or officers may be made personally liable for the debts of an insolvent company. Fraudulent trading is also a criminal offence.

The directors may also be subject to a restriction or disqualification order. A restriction order prevents a director from being appointed or acting in any way, whether directly or indirectly, as a director or from being concerned or taking part in the promotion or formation of an Irish company unless the company meets certain minimal capitalisation thresholds. A disqualification order is an order by the court precluding a director from being appointed or acting in any way, whether directly or indirectly, as a director for such period as the court determines. In practice, the making of disqualification orders is not that common and is usually reserved for situations involving criminal activity or other serious misbehaviour such as fraud.

Directors' liability – other sources of liability

18 Apart from failure to file for proceedings, are corporate officers and directors personally liable for their corporation's obligations? Are they liable for corporate pre-insolvency or pre-reorganisation actions? Can they be subject to sanctions for other reasons?

In general, the company's directors or offices will not be personally liable for the obligations of their corporations, including corporate pre-insolvency or pre-organisation actions. There are circumstances in which directors and officers can be held to be personally liable to contribute to the company's assets. The court can order the officers either to restore the assets or part of the assets to the company, or make a payment of compensation that the court thinks appropriate in the circumstances. Misfeasance is a summary procedure for obtaining redress against officers who have wronged a company. It does not create a new category of liability, but provides for an express method of imposing liability on a director who has misapplied or retained property of a company or has been guilty of misfeasance, or other breach of duty or trust in relation to a company.

Criminal sanctions can also attach to directors for breaches of company law, including in cases of, for example, fraud, fraudulent trading and not keeping proper records or accounts.

Directors' liability – defences

19 What defences are available to directors and officers in the context of an insolvency or reorganisation?

When assessing whether to impose liability on directors, the Irish courts have shown that they have some appreciation for entrepreneurial risk. In relation to reckless trading, it is not enough that the directors believed that a debt could have been repaid by the company; this will only be a defence if that belief was held honestly and that it was also held reasonably. The court may also take into account other factors, including the directors' position and experience and the degree to which the directors were aware of the company's financial distress. The statute of limitations may also be a defence.

With regard to an action for misfeasance, the courts have held that dishonesty or mala fides are not a necessary condition for liability. However, misfeasance does not encompass mere negligence; it is something that amounts to gross negligence. It has been found that shareholder approval of the wrongdoing can be a defence.

Shift in directors' duties

20 Do the duties that directors owe to the corporation shift to the creditors when an insolvency or reorganisation proceeding is likely? When?

Directors' duties to the corporation shift from when the corporation is financially healthy, to being in questionable solvency to when its prospects are terminal. In times of financial uncertainty, the directors continue to owe their duties to the company but must take the interests of creditors into account. The directors must be constantly vigilant as to the interests of creditors and, for example, not subordinate the creditors' interests to their own or to shareholders' interests. Failure to do so is a breach of their fiduciary duty to the corporation rather than necessarily to the creditors. Where the outlook is terminal, the directors should, as a minimum, take advice on what would be the appropriate reorganisation or insolvency process. In those circumstances, it has been held the directors can be deemed to hold the assets of the corporation in trust for the benefit of the corporation's creditors to be preserved and delivered to the liquidator upon his or her appointment.

Directors' powers after proceedings commence

21 What powers can directors and officers exercise after liquidation or reorganisation proceedings are commenced by, or against, their corporation?

When a liquidation process has commenced, the directors' powers cease and the liquidator assumes the powers of the directors. In an involuntary or creditors' voluntary (ie, insolvent) liquidation, the directors' powers can continue if approved by the creditors or the committee of inspection and with the approval of the liquidator. In a members' voluntary (i.e., solvent) liquidation, the shareholders can approve the continuance of directors' powers. In the case of the continuance of any directors' powers once a liquidator has been appointed, a decision of the liquidator takes precedence.

In an examinership, the directors 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 necessary, and usually only where there has been a suggestion of some sort of wrongdoing on the part of the directors. During a scheme of arrangement process, the directors remain in control of the company and generally direct the process.

MATTERS ARISING IN A LIQUIDATION OR REORGANISATION

Stays of proceedings and moratoria

22 What prohibitions against the continuation of legal proceedings or the enforcement of claims by creditors apply in liquidations and reorganisations? In what circumstances may creditors obtain relief from such prohibitions?

Liquidation

When a company is placed into liquidation, whether on a voluntary or involuntary basis, no action or proceeding may be started or proceeded with against the company without the court's permission. This does not apply, however, with respect to certain employment law claims. In general, the courts will refuse permission to bring an action against a company in liquidation if the proposed action raises issues that could be dealt with more conveniently and less expensively in the liquidation

proceeding itself. There are a number of circumstances in which the court will allow actions to proceed against a company in liquidation. These include, for example, where a secured creditor is looking to enforce its security, or where there are claims for specific performance of a contract to sell land.

Reorganisation

Under the examinership process, there is an automatic stay on new proceedings issuing against the company or its assets during the protected period, unless the court directs otherwise. For proceedings already issued, the examiner may apply to court to have them stayed. In order for a creditor to have this prohibition lifted, it has to convince the court that the detriment to the creditor in not being allowed bring the proceedings outweighs the potential impact on the company surviving as a going concern and successfully exiting the examinership process. There is no automatic stay with regard to a scheme of arrangement. During the process, the company can bring an application to court for a stay on proceedings or refrain new proceedings from being issued.

Doing business

23 When can the debtor carry on business during a liquidation or reorganisation? Is any special treatment given to creditors who supply goods or services after the filing? What are the roles of the creditors and the court in supervising the debtor's business activities?

Liquidation

Liquidation is a terminal process, so typically a company will not carry on business once it enters into any form of liquidation. Having said that, liquidators have the statutory power to continue and carry on the business of a company. This power of liquidators is generally only in contemplation of an orderly winding up of the company, as opposed to the carrying on and trading the business in the medium term. Expenses of the liquidation have priority in the liquidation and rank ahead of preferential claims. Expenses of this nature include a variety of debts incurred when carrying on the business for the purpose of winding it up, such as rent on a property that the liquidator is using or salaries of employees who are being temporarily retained. The conduct of the liquidator in the exercise of this power to continue to trade would be included as part of the overall duties of the liquidator in discharging his or her function as liquidator. Accordingly, there is limited requirement for a role of creditors or the court to supervise business activities. In an involuntary (ie, commenced by court order) liquidation, a liquidator is an officer of the court.

Reorganisation

In both statutory reorganisation processes, the debtor company will continue to carry on its business throughout the process. In the case of examinership, the examiner, as an independent officer of the court, will be in ongoing communication with the directors as to how the business is trading during the protection period. Any misgivings the examiner has about the operation of the debtor business during the protection period would be included in the examiner's intermittent reports to the court.

Post-filing credit

24 May a debtor in a liquidation or reorganisation obtain secured or unsecured loans or credit? What priority is or can be given to such loans or credit?

A liquidator has the statutory power to 'obtain credit, whether on the security of the property of the company or otherwise'. The priority given will depend on whether the debtor, acting by the liquidator, grants security over its assets for such credit. Any new security granted will be taken subject to any prior security that may be in place over the same assets. Additional finance advanced on this basis may be deemed an expense in the liquidation and is afforded priority to other creditors, although this may be subject to challenge by other unsecured creditors.

Where an examiner is of the view that the debtor company's survival as a going concern would otherwise be materially prejudiced, an examiner may certify liabilities or credit. The effect of certifying the credit is that the liability must be paid in priority. This form of credit advanced during the examinership process cannot be crammed down, as only pre-examinership liabilities can be included to be written down as part of the reorganisation plan of the examiner. However, no specific protection exists under Irish law for any new finance provided to a company by way of rescue funding, as is the case in other jurisdictions.

Sale of assets

25 In reorganisations and liquidations, what provisions apply to the sale of specific assets out of the ordinary course of business and to the sale of the entire business of the debtor? Does the purchaser acquire the assets 'free and clear' of claims or do some liabilities pass with the assets?

In liquidations, the debtor company's property may be sold by the liquidator free and clear of claims if the assets are beneficially owned by the company and not subject of any fixed-charge security. Assets subject to fixed-charge security may be sold by the charge-holder outside of the liquidation. Where fixed-charge assets are sold by the liquidator, the consent of the charge-holder will be required to release the security upon sale. In practice, the liquidator will often account the purchase price of the secured asset to the secured creditor to allow the secured asset to be transferred free from any claim.

In the case of examinership, an examiner can apply to court to have the authority to deal or dispose of unencumbered assets. An examiner can also apply to the court for the power to dispose of secured assets if doing so 'would be likely to facilitate the survival of the whole or any part of the company as a going concern'. In practice, the examiner's reorganisation plan would have to give a dividend to the secured creditor that is at least as much as the value of the secured asset. If not, the secured creditor would have a legitimate claim to object to the reorganisation plan on the basis that the secured creditor is being unfairly prejudiced by the examiner's reorganisation plan.

Negotiating sale of assets

26 Does your system allow for 'stalking horse' bids in sale procedures and does your system permit credit bidding in sales?

In Ireland there is no specific piece of legislation that either encourages or prohibits the use of 'stalking horse' bids in sale procedures. A liquidator will be focused on ensuring that he or she has discharged his or her duty of care to the creditors to obtain the best price for the assets. An examiner will be focused on getting the best investment proposal into the company.

Credit bidding in sales is not a commonly seen feature in Ireland. While not prohibited, there is no specific legislation on this point. It will generally be a matter for the insolvency practitioner, as opposed to the court, to agree a sales structure that offers the best return for creditors. In approving such an arrangement, the court is likely to weigh the certainty of the insolvency estate receiving value for the assets in an amount agreed with the secured creditor immediately as against the concern that a lender is exploiting its position to take delivery of the goods, shares or other property at below market value. Where the creditor is a mere assignee of the debt from the original lender, that concern could be heightened.

Rejection and disclaimer of contracts

27 Can a debtor undergoing a liquidation or reorganisation reject or disclaim an unfavourable contract? Are there contracts that may not be rejected? What procedure is followed to reject a contract and what is the effect of rejection on the other party? What happens if a debtor breaches the contract after the insolvency case is opened?

Liquidation

A liquidator has the power to apply to the High Court within 12 months of the commencement of liquidation to disclaim an onerous contract. Any loss suffered by the counterparty will be an unsecured claim in the liquidation.

Reorganisation

In examinership, the debtor company, but not the examiner, may bring an application to repudiate an onerous contract in place before the examiner's appointment. The court will have regard to whether, if not repudiated, the contract would be likely to prejudice the survival of the company or the whole or any part of its undertaking as a going concern. This can include an application to repudiate an 'onerous' lease of real estate, but a court cannot confirm an examiner's restructuring plan that looks to unilaterally impose reduced rent on a landlord under an existing lease, whether during or out the other side of the examinership process, unless the landlord agrees in writing. A debtor company has no formal right to reject or disclaim an unfavourable contract in a scheme of arrangement process.

Intellectual property assets

28 May an IP licensor or owner terminate the debtor's right to use the IP when a liquidation or reorganisation is opened? To what extent may IP rights granted under an agreement with the debtor continue to be used?

There is no automatic right of an IP licensor or owner to terminate the debtor's right to use IP assets when a liquidation or reorganisation is opened. The termination rights will be governed by the terms of the IP agreement itself. If the debtor, acting through the relevant insolvency practitioner, wishes to continue the agreement, then, assuming it has not been validly terminated by the IP owner, the debtor must also be in a position to comply with its obligations under the IP agreement.

Personal data

29 Where personal information or customer data collected by a company in liquidation or reorganisation is valuable, are there any restrictions in your country on the use of that information or its transfer to a purchaser?

Data protection law in Ireland is governed by the General Data Protection Regulation (EU) 2016/679, the Data Protection Act 2018 and the European Communities (Electronic Communications Networks and Services) (Privacy and Electronic Communications) Regulations 2011 (together, the GDPR). Whether an insolvency practitioner acts as an agent of the debtor company or not, under the GDPR, an insolvency practitioner will be a data controller if the insolvency practitioner is a person that determines the purpose and means of the processing of personal data. If the insolvency practitioner or his or her firm process personal data, the insolvency practitioner or his or her firm will assume the obligations of a data processor. Personal data that is a valuable asset may be sold for the benefit of creditors. The processing and transfer of that personal data must be in compliance with the GDPR. Typically, any sale agreement disposing of personal data will provide that the sale of the data is for a permitted purpose, and that the purchaser will comply with all GDPR obligations upon transfer and send an agreed form of fair processing notice stating that the purchaser is the new controller of the data as well as the purpose of using this data. It would also be common for the sale agreement to include an indemnity from the purchaser to the liquidator in respect of any claim made by any third-party data subject against the liquidator or debtor company arising out of or in connection with a breach of the GDPR by the buyer.

Arbitration processes

30 How frequently is arbitration used in liquidation or reorganisation proceedings? Are there certain types of disputes that may not be arbitrated? Can disputes that arise after the liquidation or reorganisation case is opened be arbitrated with the consent of the parties?

Once a debtor is in liquidation, no action or proceedings may be brought against the company except by leave of the court. Similar provisions apply in respect of reorganisation proceedings. The Irish courts have given a reasonably broad interpretation of what constitutes an action or proceedings. In circumstances where a counterparty would be referring a matter to arbitration for the purposes of obtaining a binding arbitral award against the debtor, arbitration would be deemed to be an action or proceedings that are the subject of the statutory stay in insolvency or insolvency reorganisation proceedings. This would be in line with the approach that has been adopted in England and Wales. When the courts do become involved in the arbitral process, the process is streamlined, with all arbitration matters being dealt with by a designated arbitration judge in the High Court from whose decision there is no appeal. Such a referral would constitute proceedings to which the statutory stay applies. For this reason, arbitration is not a common feature of liquidation or reorganisation proceedings in Ireland. Disputes that arise after the liquidation or reorganisation case is opened could be referred to arbitration if there is an arbitration clause in the applicable agreement and with the consent of the parties and also leave of the court. The Arbitration Act 2010 applies to all arbitrations, both domestic and international, with the exception of arbitrations relating to terms and conditions of employment, arbitrations under the Industrial Relations Act 1964 and arbitrations under the Property Values (Arbitration and Appeals) Act 1960.

CREDITOR REMEDIES

Creditors' enforcement

31 Are there processes by which some or all of the assets of a business may be seized outside of court proceedings? How are these processes carried out?

A receiver may be appointed by a creditor who holds a fixed charge or mortgage over an asset. The appointment of a receiver, or receiver and manager, in Ireland is a reasonably straightforward process. The appointment can be effected by way of a deed or instrument of appointment between the secured creditor and receiver at any time after the enforcement powers have become enforceable under the terms of the secured creditor's security and at law. The secured creditor may also sell the asset, selling as mortgagee or chargee in possession.

Unsecured credit

32 What remedies are available to unsecured creditors? Are the processes difficult or time-consuming? Are pre-judgment attachments available?

Where an unsecured creditor obtains judgment against a debtor in the first instance, it gives the unsecured creditor more remedy options. Where judgment has been obtained, an unsecured creditor can make an

application to court for the appointment of a receiver by way of equitable execution. Where a court finds it just and convenient to do so, it can order the appointment of an equitable receiver over the assets held or income to be received by the debtor to pay down the debts owing to the unsecured creditor via the equitable receiver. This remedy is not available to a creditor where other remedies are available to that creditor over the same assets such as enforcement of existing security. An unsecured creditor can also register its judgment as a judgment mortgage over real estate. This will entitle the secured creditor, as judgment mortgagee, to the proceeds of sale after all prior encumbrances on the property have been discharged. Under common law, the sheriff of the relevant county can seize the debtor's goods and have them sold with payment of the proceeds to the judgment creditor less the expenses of execution.

Where an unsecured creditor has not obtained judgment, it can still bring an application for injunctive relief to prevent the assets of the debtor being dissipated. Typically, this would involve an application for a Mareva (freeze assets) or Anton Pillar (seize evidence) injunction. Where unsecured creditors have rights of set-off or a valid retention of title claim, the effect will be to improve their position considerably as against the position of other unsecured creditors.

An unsecured creditor can also send a 21-day statutory demand to a debtor company. If that statutory demand is not met, then there is a presumption that the debtor company is insolvent, which can precipitate a petition to the High Court to have the debtor company put into court (involuntary) liquidation.

CREDITOR INVOLVEMENT AND PROVING CLAIMS

Creditor participation

33 During the liquidation or reorganisation, what notices are given to creditors? What meetings are held and how are they called? What information regarding the administration of the estate, its assets and the claims against it is available to creditors or creditors' committees? What are the liquidator's reporting obligations?

Liquidation

In an application to put a debtor company into involuntary (court) liquidation, typically the debtor's main creditors, such as, for example, the debtor's bank and the Irish tax authority, are put on notice of the hearing of the petition. The hearing of the petition will also be advertised. In a creditors' voluntary liquidation, the process is commenced by the convening of a creditors' meeting. At least 10 days' prior notice of the creditors' meeting must be given to creditors.

Where a liquidation continues for more than 12 months, the liquidator must summon creditors' meetings at the yearly anniversary of its commencement and furnish an account of the liquidator's conduct in that year. When the liquidation is completed, the liquidator must convene a final meeting and provide a final account and address any questions on the final account. Liquidators may also summon a creditors' meeting at any time to obtain sanction, where the liquidator deems it appropriate or necessary. The liquidator also has similar interval filing requirements with the CRO with regard to receipts and payments in the liquidation during the previous year.

Reorganisation

As with involuntary (court) liquidations, in examinership it would also be the norm that the debtor's main creditors are put on notice of the hearing of the examinership petition. Once the examinership process has begun, at least three days' advance notice of the meetings to be convened by the examiner to vote on his or her reorganisation plan must be given to creditors. The notices must also include copies of the examiner's reorganisation plan and an explanatory memorandum. Typically, the court will make directions as to what creditors and other parties should be put on notice of the court hearing as to whether to confirm the examiner's reorganisation plan.

If the debtor company has received the required level of approval from creditors and shareholders to allow the scheme of arrangement to go forward for court sanction, there are strict advertising requirements of the date and time of the court sanction hearing that must be adhered to by the debtor company.

Creditor representation

34 What committees can be formed (or representative counsel appointed) and what powers or responsibilities do they have? How are they selected and appointed? May they retain advisers and how are their expenses funded?

The representative committee of creditors in an insolvent liquidation is called the committee of inspection. Committees of inspection are not mandatory but can be helpful to a liquidator if there are a lot of creditors. The committee of inspection must comprise no more than eight members, with no more than five members representing the creditors. The committee can meet whenever it chooses. They must meet when convened by the liquidator. A primary function of the committee is to agree the liquidator's fees and sanction payment. Committee of inspection members are not allowed make a profit from the liquidation.

Enforcement of estate's rights

35 If the liquidator has no assets to pursue a claim, may the creditors pursue the estate's remedies? If so, to whom do the fruits of the remedies belong? Can they be assigned to a third party?

There are a number of causes of action that may be brought by either a creditor or the liquidator. They include claims for reckless trading, fraudulent trading, fraudulent disposition and misfeasance. There will be situations, however, where a creditor doesn't want to pursue a claim directly nor are they willing to fund the liquidator to prosecute a claim. Creditors funding the liquidator to pursue claims will not, as a general rule, entitle the creditor to a return of that funding in priority to any other unsecured claims. There may be certain limited situations, however, where creditor finance for such a purpose could be deemed an expense in the liquidation and is afforded priority accordingly.

An agreement to assign a claimant's right to bring a claim or pursue a cause of action is not generally permissible as a breach of the rule against champerty. The common law rules against champerty and maintenance still apply in Ireland for the time being as contravening public policy. In the case of insolvency, if the debtor company has a claim or cause of action that is, in effect, as asset of the debtor company, the liquidator is entitled to sell or assign that claim to a third party as part of his or her asset disposal powers.

Claims

36 How is a creditor's claim submitted and what are the time limits? How are claims disallowed and how does a creditor appeal? Can claims for contingent or unliquidated amounts be recognised? Are there provisions on the transfer of claims and must transfers be disclosed? How are the amounts of such claims determined?

Creditors' claims are submitted by sending particulars of the debt to the applicable insolvency practitioner by way of a 'proof of debt'. The rules regarding submission of proofs in corporate liquidations are found in the Bankruptcy Act 1988, First Schedule. A creditor may make a claim in respect of the debt it is owed, provided that the debt or obligation arises

prior to the date on which the company went into liquidation or examinership. The liquidator adjudicates on the admission of claims and then the value that a claim is admitted for. Claims for contingent amounts can be recognised. Claims for unliquidated claims can also be recognised, albeit that an application to court or other appropriate forum (eg, arbitration) may be required to determine the amount of the claim. A creditor may appeal to the court if their debt is rejected by the liquidator or examiner. There are no specific provisions dealing with the purchase of creditor claims against a debtor company in Ireland and, accordingly, there are no prescribed forms for notifying the liquidator of the sale or trade.

Set-off and netting

37 To what extent may creditors exercise rights of set-off or netting in a liquidation or in a reorganisation? Can creditors be deprived of the right of set-off either temporarily or permanently?

Liquidation

Where a company is in liquidation, there are statutory set-off rules on insolvency that can apply where there are mutual credits and debits between the debtor company in liquidation and a creditor. The obligations must be mutual, should exist in the same right, must ultimately sound in money and have been incurred prior to the commencement of the liquidation process. Whether insolvency set-off is a peremptory rule in insolvency that cannot ever be contracted out of or waived is a question that has not been determined conclusively in Ireland in the same way as it has been in other common law jurisdictions. Contractual set-off should also be enforceable against a liquidator. Netting provisions in financial contracts that are covered by the Netting of Financial Contracts Act 1995 and European Communities (Financial Collateral Arrangements) Regulations 2010 (eg, swaps, futures, options and contracts for differences) will be upheld, notwithstanding the insolvency of a counterparty to those financial contracts.

Reorganisation

Going into examinership is not a bar to the debtor company's creditors exercising any netting rights or rights of set-off they may possess.

Modifying creditors' rights

38 May the court change the rank (priority) of a creditor's claim? If so, what are the grounds for doing so and how frequently does this occur?

If there is a dispute as to the ranking or priority of a creditor's claim, the court has the ultimate jurisdiction to determine any competing claims. If the ranking of a creditor's claim is not in dispute, the court will not change the priority of creditors' claims save in exceptional circumstances. The types of dispute with regard to the ranking of creditor claims can be very varied. One example is that in the *Belgard Motors* case (*In Re JD Brian Ltd* (No 1) [2012]), the Supreme Court held that if, on the facts of a case, a floating charge as created had nonetheless crystallised in advance of a company going into liquidation, that floating charge as created becomes a fixed charge and ranks in the order of priority of a fixed charge accordingly; in other words, ahead of all other unsecured creditors, including preferential creditors.

Priority claims

39 Apart from employee-related claims, what are the major privileged and priority claims in liquidations and reorganisations? Which have priority over secured creditors?

The order of priority of claims in an insolvent liquidation can be a complicated area. As a general rule, priority claims are:

- payments in respect of certain social welfare payments (often referred to as 'super-preferential' claims);
- the court-sanctioned remuneration, costs and expenses of an examiner if the examinership fails;
- secured creditors;
- expenses certified by an examiner;
- liquidation costs and expenses;
- preferential claims of employees and to the Irish tax authority (certain rates and taxes, wages and salaries);
- holders of a floating charge that didn't crystallise prior to the date of liquidation;
- unsecured creditors;
- subordinated creditors; and finally
- shareholders.

Within each class of claimant, the pari passu applies so that if realisations are insufficient to pay any class of creditors in full, they are paid in equal proportion to their debts. Assets that are the subject of a valid trust or retention of title clause will not be deemed to be assets of the debtor company to be available for realisation and distribution. Creditors may enter into inter-lender or subordination agreements, whereby they agree as a matter of contract inter-se that their claims rank differently within their respective classes than if the pari passu rule was applied.

Employment-related liabilities

40 What employee claims arise where employees' contracts are terminated during a restructuring or liquidation? What are the procedures for termination? (Are employee claims as a whole increased where large numbers of employees' contracts are terminated or where the business ceases operations?)

Liquidation

Employee claims that arise in liquidations can be numerous. The contract of employment should deal with termination rights upon the commencement of a liquidation process. If not, the commencement of an involuntary (court) liquidation will have the effect of terminating employment contracts. A creditors' voluntary liquidation does not result in an automatic termination of employment contracts; however, it often involves redundancies soon afterwards as it is unusual for the debtor company to continue trading for any extended period of time.

Certain employee claims are a category of preferential creditor that are entitled to be paid out of the liquidation assets before the general body of creditors. Claims of employees will rank in accordance with the order of priorities on insolvency. If the debtor company does not have sufficient realisations to pay those claims in full, then certain of those claims, limited to a prescribed level, will be paid from the redundancy or insolvency payments scheme, which is funded by the Social Insurance Fund. In those circumstances, claims of the employees will be subrogated to the applicable government minister on behalf of the Social Insurance Fund for the amount that the employee claims were funded. Claims covered include arrears of pay, holiday pay, statutory notice entitlements and certain other entitlements.

Where a certain minimum number of redundancies are being made in any 30-day period in liquidation proceedings, certain of the collective redundancy legislation requirements will still apply to a liquidator. The fact that collective redundancy legislation can apply in liquidations does not operate to increase employee claims per se, unless the employees negotiate better terms than their statutory entitlements. Whether they do or not will be on a case-by-case basis and is not particularly prevalent. Legislative provisions relating to the protection of employees' terms and conditions upon transfer of business under TUPE (European Communities (Protection of Employees on Transfer of Undertakings) Regulations 2003) are exempted in most insolvency proceedings.

Reorganisation

Examinership will not automatically terminate employment contracts. Claims by employees arising as of the date of the debtor company entering into the examinership process, including prospective or contingent claims, can be crammed down in the examiner's reorganisation plans.

Pension claims

41 What remedies exist for pension-related claims against employers in insolvency or reorganisation proceedings and what priorities attach to such claims?

All unpaid pension contributions, whether employee or employer contributions, are categorised as preferential debts and will rank ahead of floating charge holders in the event of a debtor company's insolvency. There is no financial ceiling on the level of those preferential pension claims. The structure of most pension schemes, with some exceptions, operates to insulate the monies in pension schemes from the insolvency of an employer. As regards deficiencies in a pension fund itself, under EC Directive 2008/94 the Irish government is required to ensure that sufficient measures are in place to protect the interests of employees where there is a deficit in their pension fund. The courts have held that employees have a claim in damages against the state where that directive was not properly and effectively transposed. In reality, however, employees whose pension scheme is insolvent will rarely recover all their pension entitlements.

Environmental problems and liabilities

42 Where there are environmental problems, who is responsible for controlling the environmental problem and for remediating the damage caused? Are any of these liabilities imposed on the insolvency administrator personally, secured or unsecured creditors, the debtor's officers and directors, or on third parties?

A company's environmental liabilities continue even where the company is in an insolvency process. A monetary claim against the company in liquidation or examinership for breaches of environmental legislation would rank as an unsecured claim in the liquidation or examinership. The majority of environmental legislation specifically provides for the ability to hold directors or any other officers liable in respect of criminal breaches. While there are no analogous provisions in respect of directors' liability for civil claims, the concept of the 'polluter pays' principle and the obligations imposed on operators and 'holders of waste' has led to directors being held liable for remediation and clean-up works in the context of a civil claim. The appointment of a liquidator or examiner would not insulate directors from such claims if they were pursued within time. A liquidator or examiner will ordinarily not incur any liability personally in respect of environmental legislation for breaches arising prior to their appointment. That said, there is always a residual risk for insolvency practitioners because the release of contaminants is usually a slow process that can continue after the insolvency practitioner has been appointed. Also, the Irish environmental regulatory authorities' powers allow the prosecuting of the party who happens to be the person in control of the property or the occupier at the time, which can be the insolvency practitioner. In the liquidation of Irish Ispat Limited, formerly Irish Steel, court proceedings were brought against the liquidator seeking orders directing the cleaning up of hazardous waste on the site. Ultimately, the High Court granted the liquidator leave to disclaim the integrated pollution control licence granted to the company by the Environmental Protection Agency, and the corresponding clean-up obligation, on the basis that the integrated pollution control licence was 'onerous property' of the company (*Minister for Environment v Irish Ispat Limited* [2005] 2 IR 333).

Liabilities that survive insolvency or reorganisation proceedings

43 Do any liabilities of a debtor survive an insolvency or a reorganisation?

Liquidation

Where there are contracts that a debtor in an insolvency process chooses to perform, then liabilities that arise under those contracts will typically survive.

Reorganisation

In examinership or schemes of arrangement, it will be the terms of the reorganisation plans that set out whether any liabilities will survive. Typically, liabilities arising before the commencement of the reorganisation process would not continue once the reorganisations plans have been confirmed by the court and implemented. In examinership, an examiner's restructuring plan cannot unilaterally impose reduced rent on a landlord under an existing lease, unless the landlord agrees in writing.

Distributions

44 How and when are distributions made to creditors in liquidations and reorganisations?

Liquidation

A liquidator has discretion in exercising professional judgment as to when distributions are made. Typically, a liquidator will only make distributions to creditors once he or she has adjudicated on all creditor claims and is satisfied that sufficient assets have been realised to start making distributions.

Reorganisation

In an examinership, if the examiner's reorganisation plan is confirmed by the court, the court will set a date for when the plan is to become effective. Distributions will be made to creditors in respect of their entitlements under that reorganisation plan on that date, or as soon as practicable thereafter, as provided for in the reorganisation plan. In the case of schemes of arrangement, the timing of any distribution will be set out in the scheme of arrangement.

SECURITY

Secured lending and credit (immovables)

45 What principal types of security are taken on immovable (real) property?

The most common forms of security over immovable property are legal mortgages and fixed charges. A mortgage operates to transfer title to the property subject to a right of retransfer once the liabilities for which the mortgage is held security has been discharged. A mortgage must be in writing, executed as a deed and is subject to registration requirements. Under a fixed charge, there is no transfer of beneficial or legal title, the charge operates as a contractual or statutory entitlement to the proceeds of an asset in discharge of obligations that it secures. A fixed charge is created over an ascertainable asset over which the charge-holder will have a degree of control, such as requiring charge-holder consent before the asset can be sold. The same registration requirements apply to fixed charges as to mortgages in order to perfect the security they create. There was a distinction between the types of security that could be taken over real estate depending on whether the real estate title was registered (fixed charge) or unregistered (mortgage) in nature. Since the enactment of the Land and Conveyancing Law Reform Act 2009, that distinction has been dispensed with.

An equitable interest in immovable property can be secured by an equitable mortgage. An equitable mortgage can arise in a number of ways, including by way of advances in the expectation or agreement of a legal mortgage that does not get created or the deposit of title documents to an asset.

Registration and perfection of security requirements can vary depending on the assets class, such as with respect to real estate, cash or money, intellectual property, financial instruments, agricultural stock, aircraft and ships.

Secured lending and credit (movables)

46 What principal types of security are taken on movable (personal) property?

The most widely used form of security over movable property is a fixed (to the extent possible) and floating charge. A floating charge operates to secure assets that fluctuate in quantity or value. When a debtor company has granted a floating charge over its assets, it can continue to use and deal with the assets in the ordinary course of business until the charge crystallises or 'fixes' over the assets. The terms of the floating charge should prescribe when and how the floating charge crystallises.

Pledges and liens are forms of possessory security that entitle the creditor to possession only of the asset until the obligations for which the asset are held are discharged.

A right of set-off against a debtor is the functional equivalent of possessory security. While strictly not security arrangements, retention of title operates in a very similar way. Under a valid retention of title arrangement, an asset is delivered to the buyer/transferee, but title to the asset does not transfer until the asset has been paid for. Valid retention of title claims will take the assets outside of the insolvent estate as not being owned by the insolvent debtor.

CLAWBACK AND RELATED-PARTY TRANSACTIONS

Transactions that may be annulled

47 What transactions can be annulled or set aside in liquidations and reorganisations and what are the grounds? Who can attack such transactions?

Liquidations

Transactions can be annulled or set aside in liquidations in a number of circumstances. Transactions that took place within specified look-back periods, and at a time when the debtor was insolvent, are particularly susceptible to successful challenge.

Where a transaction in favour of a creditor occurs within six months (or within two years, if in favour of a 'connected person') before the commencement of an insolvent liquidation and made with the dominant intention of preferring that creditor, then that transfer can be reversed as being an unfair preference. Where the transfer is to a connected person, there is presumption of the intention and for the connected person to prove to the contrary. The unfairly preferred creditor can be ordered to return what was transferred to the liquidator.

A liquidator, receiver, examiner, creditor or contributory of a company can apply to court for the return of assets or compensation, where it is established that the transfer of assets had the effect of the perpetration of a fraud on the company, its creditors or its members. The courts have set a high standard of proof for fraudulent trading, and successful prosecutions are relatively rare.

If a floating charge was created less than 12 months (or two years where given to a connected person) before the commencement of the liquidation, it will be invalid unless it can be shown that the company was solvent immediately after the creation of the floating charge. An exception is made for money paid to the company at the time when the floating charge was granted.

All floating charges and most mortgages and fixed charges (depending on the asset being secured) granted by a company must be registered in the Companies Registration Office (CRO) within 21 days of their creation. Failure to do so will result in the security being void as against a liquidator and the assets otherwise the subject of the security become available to be realised in the liquidation. Registration is now a two-stage process. Priority under the two-stage procedure is determined by the time and date of the filing of the first form in the CRO.

Equitable subordination

48 Are there any restrictions on claims by related parties or non-arm's length creditors (including shareholders) against corporations in insolvency or reorganisation proceedings?

There are no specific equitable subordination rules in Ireland that provide a regime for courts to lower the priority of admitted creditor claims because of that creditor's wrongful actions per se. Creditors that have wronged the debtor company can be subject to claims for compensation or restitution. Related parties or non-arm's-length creditors will, in the same way as other creditors, rank in accordance with their adjudicated and admitted claims, whether that be as a secured, preferential or unsecured creditor.

There are also no specific restrictions on claims by related creditors against the debtor. Subject to no claims subsisting against related parties or non-arm's-length creditors as being prohibited, transfers to connected persons within prescribed look-back periods, related or non-arm's length creditors are entitled to have their claims adjudicated on their merits as with any other creditors.

GROUPS OF COMPANIES

Groups of companies

49 In which circumstances can a parent or affiliated corporation be responsible for the liabilities of subsidiaries or affiliates?

In general, parent or affiliated corporations will not be responsible for the liabilities of their subsidiaries or affiliates. Where there is a shortfall of available assets in the liquidation, the liquidator of the related company that's in liquidation can apply to court for a contribution order. The court, if it is satisfied that it is just and equitable to do so, may order the company not in liquidation to pay to the liquidator an amount equivalent to the whole or part of all or any of the debts of the company in liquidation. A contribution order will not be made unless the court is satisfied that the circumstances that gave rise to the liquidation of the company are attributable to the actions or omissions of the related company. As a general rule, it will not be just and equitable to make an order unless the creditors have dealt with the insolvent company on the reasonable assumption that it trades as part of a group with the related company or companies.

Combining parent and subsidiary proceedings

50 In proceedings involving a corporate group, are the proceedings by the parent and its subsidiaries combined for administrative purposes? May the assets and liabilities of the companies be pooled for distribution purposes?

Only in limited circumstances will insolvency proceedings of group companies being combined. Where two or more related companies are in liquidation and the court is satisfied that it is just and equitable to do so, both companies may be wound up together as if they were one company. A pooling order of this kind does not affect the rights of any secured creditor of any companies that are subject to it.

INTERNATIONAL CASES

Recognition of foreign judgments

51 Are foreign judgments or orders recognised, and in what circumstances? Is your country a signatory to a treaty on international insolvency or on the recognition of foreign judgments?

Brussels I Regulation as Recast was implemented into Irish law by the European Union (Civil and Commercial Judgments) Regulations 2015 (SI 6/2015). Accordingly, Ireland automatically recognises EU judgments to which Brussels I Recast applies without the need for an application before the Irish courts. Ireland is also a signatory to the Lugano Convention, which applies similar mutual recognition of judgment principles as Brussels I Recast to European Free Trade Association (EFTA) member states. With regard to the recognition or judgments of countries outside the EU and EFTA, common law recognition principles apply.

The EU Insolvency Regulation has also been implemented into Irish law. This regulation affects all collective insolvency proceedings and certain restructuring proceedings that relate to a company whose centre of main interests is within the EU (excluding Denmark). The EU Insolvency Regulation provides for automatic recognition in Ireland of insolvency proceedings and determinations to which the EU Insolvency Regulation applies.

UNCITRAL Model Law

52 Has the UNCITRAL Model Law on Cross-Border Insolvency been adopted or is it under consideration in your country?

The UNCITRAL Model Law on cross-border insolvency proceedings has not been adopted in Ireland at this time. The Company Law Review Group, in its report to the Minister for Business, Enterprise and Innovation in November 2018, recommended that the UNCITRAL Model Law on cross-border insolvency proceedings should be adopted as it would provide companies and creditors to which the EU Insolvency Regulation does not apply, including potentially the UK post-Brexit, with more certainty and predictability with respect to cross-border insolvencies. The recommendation has not been progressed significantly by the Irish government to date.

Foreign creditors

53 How are foreign creditors dealt with in liquidations and reorganisations?

There is no distinguishing process for foreign creditors with respect to the participation or rights in liquidations and reorganisations in Ireland. A foreign creditor is entitled to file its claim in the same manner as a domestic creditor and will be subject to the same proofs and adjudication as to the admission of their claims. Debts arising in a foreign currency must be converted into euros as at the date of the commencement of the liquidation.

Cross-border transfers of assets under administration

54 May assets be transferred from an administration in your country to an administration of the same company or another group company in another country?

The EU Insolvency Regulation has specific provisions for cross-border insolvencies within the EU (excluding Denmark), including where the main proceedings have opened in one EU member state or where secondary proceedings may have opened in another EU member state where assets are located. For cross-border insolvencies that do not come within the ambit of the EU Insolvency Regulation, a liquidator in Ireland will be reluctant to transfer assets to an insolvency practitioner in another country unless the Irish liquidator has determined that the assets were not in fact assets of the Irish debtor company. The respective liquidators (administrators) may, however, come to an agreement as to how the proceeds of the realisation of assets once sold may be transferred cross-border to give effect to an appropriate or equitable distribution have regard to the circumstances of the particular cross-border insolvency.

COMI

55 What test is used in your jurisdiction to determine the COMI (centre of main interests) of a debtor company or group of companies? Is there a test for, or any experience with, determining the COMI of a corporate group of companies in your jurisdiction?

As provided for in the recitals to the EU Insolvency Regulation and applied by the Irish courts with guidance from the European Court of Justice, there is a rebuttable presumption that a company's COMI is in the EU member state where its registered office is located. Determining where the COMI is, therefore, a question of fact and degree.

With regard to corporate group insolvencies in Ireland, the foremost case where COMI between group companies was considered was in the *Re Eurofood IFSC Limited* [2004] case. This concerned the Italian Parmalat group of companies, which had an Irish-registered subsidiary. The European Court of Justice found that, although the ultimate control of the Irish subsidiary was in Italy, that fact in itself did not displace the presumption that the subsidiary's COMI was in Ireland in circumstances where the Irish subsidiary carried on its business in Ireland.

Cross-border cooperation

56 Does your country's system provide for recognition of foreign insolvency proceedings and for cooperation between domestic and foreign courts and domestic and foreign insolvency administrators in cross-border insolvencies and restructurings? Have courts in your country refused to recognise foreign proceedings or to cooperate with foreign courts and, if so, on what grounds?

The EU Insolvency Regulation provides for the automatic recognition and cooperation of insolvency proceedings in other EU member states, excluding Denmark. For insolvency proceedings initiated outside the ambit of the EU Insolvency Regulation, applications can be made to court for an order recognising the proceedings under Irish common law principles. The Irish courts have affirmed their inherent jurisdiction to recognise orders of foreign non-EU courts for liquidations of companies and the appointment of liquidators. The Irish courts have also held that they have inherent jurisdiction to assist foreign courts in liquidation proceedings when the request is for a legitimate purpose and other criteria are met.

In the case of *Re Flightlease (Ireland) Limited* [2012], the Supreme Court refused to enforce an order made in insolvency proceedings in Switzerland against an Irish subsidiary of Swissair. The court held that the nature of the Swiss proceedings were such that it could not make the orders against the Irish company in circumstances where the Irish company had not submitted to the jurisdiction of the Swiss courts in the Swiss proceedings.

Cross-border insolvency protocols and joint court hearings

57 In cross-border cases, have the courts in your country entered into cross-border insolvency protocols or other arrangements to coordinate proceedings with courts in other countries? Have courts in your country communicated or held joint hearings with courts in other countries in cross-border cases? If so, with which other countries?

The EU Insolvency Regulation contains the protocols and coordination arrangements for the applicable EU member states. In the aircraft sector, Ireland has adopted 'Alternative A' of the Aircraft Protocol to the Cape Town Convention on International Interests in Mobile Equipment, which contains specific insolvency remedies and protocols that take precedence with respect to aircraft assets for qualifying aircraft leasing and security arrangements. Joint hearings between the Irish courts and courts in other countries have not been a common feature of the Irish insolvency or reorganisation landscape as yet.

Winding-up of foreign companies

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

Under the EU Insolvency Recast Regulation, Irish courts have the power to order the winding up of a company whose COMI is located in Ireland, regardless of whether that company was incorporated in another EU member state. The Irish courts also have the jurisdiction to order the winding up of foreign registered companies as 'unregistered companies' on grounds of insolvency where it is just and equitable to do so and provided that the company has been carrying on business in Ireland and has ceased to carry on that business. The Irish courts have discretion to make such an order and have exercised this discretion sparingly. Orders 'made for or in the course of winding up' of a company incorporated outside of Ireland by the courts of a country recognised by a ministerial order under that section may be enforced by the High Court. There are no operative ministerial orders currently; however, post-Brexit this may be re-invoked as regards the recognition of winding-up orders in the UK. There is no automatic recognition of US bankruptcy proceedings in Ireland.

UPDATE AND TRENDS

Trends and reforms

59 Are there any emerging trends or hot topics in the law of insolvency and restructuring? Is there any new or pending legislation affecting domestic bankruptcy procedures, international bankruptcy cooperation or recognition of foreign judgments and orders?

Directive (EU) 2019/1023 of the European Parliament and of the Council of 20 June 2019, amending Directive (EU) 2017/1132 (the Pre-Insolvency Directive), is due to be transposed into Irish law by 17 July 2021. The Pre-Insolvency Directive contains measures that will provide for a preventative restructuring framework and a structure for facilitating and negotiating on preventative restructuring plans across EU member states. It proposes a number of features similar to those that currently already apply in Ireland under the examinership process. Ireland is currently in the consultative process as to the adoption of those parts of the Pre-Insolvency Directive that member states can make a choice on.

In terms of hot-topics, Ireland will feel the effects of Brexit most acutely when the UK leaves the EU on 31 December 2020. As things stand, there is a real prospect that companies in the UK may no longer be subject to the EU Insolvency Regulation once the UK has exited.

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As Ireland's closest single trading partner, both geographically and economically, there will be an acute focus on re-establishing and regularising cross-border insolvency provisions with the UK as a priority if the EU Insolvency Regulations no longer apply to the UK.

Coronavirus

60 What emergency legislation, relief programmes and other initiatives specific to your practice area has your state implemented to address the pandemic? Have any existing government programmes, laws or regulations been amended to address these concerns?

The emergency legislation that Ireland has enacted arising from or to address the pandemic in an insolvency or reorganisation context has been reasonably limited, particularly when viewed against, for example, the temporary suspension of certain insolvency rules seen in the likes of Germany and the UK. Effective from 21 August 2020, Ireland has enacted emergency legislation that makes changes to certain aspects of the Irish insolvency and reorganisation regime during the emergency period, which is to end on 31 December 2020 but can be extended by the Irish government. Those temporary changes include extending the examinership process from 100 to 150 days; increasing the debt threshold for the commencement of an involuntary liquidation from an individual debt of €10,000 or aggregate debts of €20,000 to €50,000; and a number of provisions to facilitate the virtual holding of creditors' meetings. Legislation has also been enacted that gives residential tenants additional protections against having their tenancies terminated or their rent increased in circumstances where tenants have made a declaration that they are unable to pay their rent because of covid-19. This currently applies until 10 January 2021. With regard to the potential for directors' liability for trading during times of questionable solvency arising from the pandemic, although there have been no specific legislative changes in that area, the Office of the Director of Corporate Enforcement, which is Ireland's corporate governance regulatory body, has given some helpful guidance to directors that should offer some degree of comfort. Ireland has also introduced measures that restrict the rights of employees to invoke redundancy in certain circumstances. These measures had been extended at the time of writing to apply until 30 November 2020.

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ISBN 978-1-83862-397-5