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The Legal 500 Country Comparative Guides

Ireland

RESTRUCTURING & INSOLVENCY

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

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IRELAND
RESTRUCTURING & INSOLVENCY

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

There are a number of different types of security available in Ireland which may be taken over immovable and movable property:

Immovable: The most common forms of security over immovable property are legal mortgages and fixed charges. When creating a mortgage, the title to the property will be transferred to the creditor subject to a right of retransfer once the liabilities attached to the mortgage have been discharged. A fixed charge differs from a mortgage as it does not involve the transfer of legal title. Instead, it operates as a contractual or statutory entitlement to the proceeds of an asset once certain obligations are discharged. A fixed charge can only be created over an ascertainable asset and the charge-holder will continue to have some degree of control over the asset, for example their consent would be required in order to sell the asset. Pledges and liens may also be used as forms of possessory security. They entitle the creditor to possession of the asset until the debtor discharges the stated obligations.

Movable: A floating charge is the most common form of security used over movable property in Ireland. Fixed charges may also be used if the moveable asset is ascertainable. Floating charges are used to secure assets that can fluctuate in quantity or value. Debtors can continue to use the assets in the normal course of business until the charge “crystallises” over the assets.

Formalities: Security documents in Ireland are generally executed as deeds in order to give certainty to the documents. Where the security is created over real estate then it should be registered with the Property Registration Authority of Ireland (“PRAI”) in order to guarantee priority and to grant the security holder certain statutory entitlements under Irish land law. All floating charges, and most fixed charges and mortgages, created by Irish companies must be registered in the Companies Registration Office (“CRO”) within 21 days of creation. Failure to do so will result in the security becoming void against any liquidator or creditor.

2. What practical issues do secured creditors face in enforcing their security (e.g. timing issues, requirement for court involvement)?

The practical issues faced by secured creditors depend largely on the type and terms of the security being enforced.

Security Enforcement: A secured creditor’s most commonly exercised enforcement option is the appointment of a receiver if they hold a fixed charge or mortgage over an asset. This is a relatively straightforward process and can be affected by way of a deed or instrument of appointment between the secured creditor and the receiver. This does not require court involvement. Typically a receiver can be appointed within a matter of days if there is sufficient notice given. The receiver’s role is to take control and realise the secured assets to apply those realisations towards the repayment of the secured debt. A creditor may also exercise its power of sale under the security document or statutory entitlement. This also allows the creditor to sell the secured asset, without needing to apply to court, and use the proceeds to settle the secured liabilities. In selling secured assets there is an obligation to get the best price reasonably obtainable at the time of sale in the circumstances.

Enforcement Moratoria: A practical issue that can be faced by secured creditors is where a statutory moratorium may be imposed if the debtor has entered into a statutory restructuring process that affords debtors protection against creditor action for a period of time. A debtor is granted an automatic moratorium from all creditors if it successfully enters into examinership

under Irish law (see also Question 8). A debtor company may also apply to court for a moratorium on court proceedings issuing against the debtor for the purposes of trying to put together a scheme of arrangement under Chapter 1 of Part 9 (a "schemes of arrangement") of the Irish Companies Act 2014 (as amended) (the "Companies Act 2014"). Finally, sector specific insolvency or restructuring regimes may also provide for limited moratoria that will impact on security enforcement in certain circumstances. For example, Ireland has adopted Alternative A of Article XI of the Aircraft Protocol of the Cape Town Convention on International Interests in Mobile Equipment with respect to security enforcement over aircraft objects.

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

There are four stand-alone circumstances set out in the Companies Act 2014 whereby a company will be deemed to be insolvent. The most commonly applied test is whether the debtor company is in a position to pay its debts as they fall due, commonly referred to as the "cash-flow" test. The courts can take in to account the company's solvency on a balance sheet or cash flow basis. The Irish 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 Irish courts have generally taken a global view of the company's finances using both tests in order to ascertain whether a company has reached the point of no return.

There is no express statutory duty on directors or officers to open insolvency processes per se. However, directors should take steps towards starting the appropriate procedures once they have formed the view as to whether the debtor is either distressed but suitable for restructure or insolvent and has no reasonable prospect of returning to solvency. If the directors have reached that decision that it is the latter, then they should act so as to preserve as much of the assets as possible for the creditors to be handed over to a liquidator upon his/her appointment.

If a director fails to act appropriately, they may be found to have traded recklessly or fraudulently and could be made personally liable to contribute towards the debtor's debts. A director could also be subject to an application for restriction, or possibly disqualification, from acting as a director of a company in the future.

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

Insolvency Procedures: The principal insolvency procedures in Ireland are a receivership, creditors' voluntary liquidation or a compulsory/court liquidation. Statutory restructuring processes are also open to insolvent companies.

- Receivership: As referred to in Question 2, receivership is a creditor enforcement power typically exercised if a debtor is insolvent and cannot meet its repayment obligations to a creditor. The receiver realises the secured assets to pay down or pay off the secured debt.
- Creditors' Voluntary Liquidation: This form of liquidation occurs when the directors of a debtor form the opinion that the company is insolvent and cannot continue because of its liabilities. The directors call a meeting of the shareholders and then of the company's creditors. At the shareholders' meeting the shareholders must resolve by simple majority (>50%) that the debtor shall be wound up and nominate a liquidator. The creditors' meeting is usually held directly after the meeting of shareholders. At that meeting the creditors have the option to appoint an alternative liquidator than the debtor's nominee
- Compulsory Liquidation: This occurs when the insolvent company is wound up by the High Court. A liquidator is appointed once the court finds that the company is insolvent and it is just and equitable to do so. Once the process is initiated there is no longer any material procedural differences between a creditors' voluntary liquidation and a compulsory or court ordered liquidation.
- Examinership is a statutory restructuring process for insolvent companies. Schemes of arrangement can also be used to restructure insolvent (as well as solvent) companies. Examinership and schemes of arrangement are discussed further in Question 8.
- Special sectoral regimes can apply, for example to financially distressed insurance providers, credit institutions banks and in the aviation sector.

Management: After the liquidator is appointed, the directors no longer continue to operate the business. In examinership and schemes of arrangement, the directors stay in control of the company.

Role of Court: In a compulsory liquidation, the court will be involved in determining whether the company is to be placed into liquidation. Thereafter the courts generally have little involvement in either type of liquidations. However, a liquidator or creditor can apply to the High Court to determine any question arising from the winding up. Examinership is commenced by way of a court petition and there will be a number of applications to court throughout the process. A scheme of arrangement requires at least one application to court to have the court confirm the scheme.

Duration: The timeframe for the completion of liquidations depends on the size of the company and the complexity of the liquidation itself. Some may be completed within a year to eighteen months, others may take several years if they involve a complex liquidation of a large debtor. Examinerships in the normal course (i.e. without any COVID-19 related extensions) typically take about 120 days from start to finish, but can take longer.

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

General ranking: The order of priority of claims is established through a combination of legislation, contract law and common law. As a general rule, stakeholders rank in the following order of priority; (i) super preferential claims (payments in respect of certain unremitted social welfare payments), (ii) court sanctioned remuneration, costs and expenses of an examiner if the examinership fails, (iii) secured creditors, (iv) expenses certified by an examiner in an examinership, (v) liquidation costs and expenses, (vi) preferential claims of employees and the Irish Revenue Commissioners, (vii) holders of a floating charge that didn't crystallise before the date of liquidation, (viii) unsecured creditors, (ix) subordinated creditors and finally, in the case of a solvent liquidation, 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.

Preferential Creditors: As above, certain limited claims of employees and the Irish Revenue Commissions have priority status ranking above the claims of holders of floating charges and the unsecured creditors.

Subordination: Creditors may enter into subordination agreements where they agree to have their claims ranked differently than if the pari passu rule was applied. There are no specific equitable subordination rules in Ireland that provide, for example, a regime for the courts to lower the priority of admitted creditor claims because of that creditor's wrongful actions.

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

Certain pre-insolvency transactions are vulnerable to being challenged or impugned under Irish law.

Vulnerable transactions: Transactions that are open to challenge include transactions at an undervalue, unfair preferences, avoidance of floating charges, transactions defrauding creditors and dispositions after the commencement of a winding up.

Look-back period: Where look-back periods apply, they range from two years prior to the commencement of insolvency proceedings where the transaction was with a connected party (including directors, shadow directors, and associated persons and companies) to six months for all other parties. An important factor to be assessed when considering a number of circumstances where transactions could be impugnable is whether the debtor was insolvent at the time the transaction was made.

Effect of Challenge on Third-Party rights: The Irish courts generally have a wide discretion to make any order they think fit in reversing transactions or restoring the debtor company to its previous position. There are protections for third parties who transact bona fide for value and without notice of the circumstances.

7. What form of stay or moratorium applies in insolvency proceedings against the continuation of legal proceedings or the enforcement of creditors' claims? Does that stay or moratorium have extraterritorial effect? In what

circumstances may creditors benefit from any exceptions to such stay or moratorium?

Liquidations: Once a company is placed into liquidation, whether it be on a voluntary or compulsory basis, no legal proceedings may be started or proceeded with unless with the permission of the court.

Examinership: There is an automatic stay on all creditor enforcement action and on the issuing of legal proceedings against the debtor. For legal proceedings already commenced, the examiner may apply to the court to have them stayed.

Schemes of arrangement: There is no automatic stay. However, during the process the company can bring an application to court for a stay on court proceedings or refrain new proceedings from being issued. Not all creditor enforcement, such as the appointment of a receiver, can be stayed.

Extraterritorial Effect: A moratorium under Irish law does not purport to have extraterritorial effect. EU member states that have adopted the EU Insolvency Recast Regulation (2015/848) (the "Recast Regulation") will recognise Irish insolvency proceedings, as well as any related moratoria, where the main insolvency proceedings are governed by Irish law. Main insolvency proceedings are commenced in Ireland if the centre of main interests ("COMI") is in Ireland. This pertains notwithstanding that there is no automatic recognition of the standalone moratorium under the Recast Regulation. Following the UK's departure from the EU, Irish insolvency proceedings and related moratoria should be recognised by the English Court, if requested to do so, pursuant to section 426 of the (UK) Insolvency Act 1986 and/or under UK common law and comity principals.

Moratoria Exceptions: In liquidations secured creditors may bring proceedings so that they can enforce their security. Claims for specific performance of a contract to sell land may also be heard. There is also no stay for certain employment law claims. In examinership a creditor with proceedings already issued may be able to get past any stay application by an examiner, if they are able to prove that the detriment they will suffer as a result of not being able to bring the proceedings before the courts outweighs the potential impact on the debtor's survival.

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

As outlined in earlier questions, there are two statutory reorganisation or rescue processes available in Ireland: examinership and schemes of arrangement.

Examinership: Examinership provides protection to financially distressed companies from its creditors in order to implement a restructuring plan which is put together by an examiner. A petition must be made to the court by the insolvent company which should be accompanied by an independent expert's report stating that, while the company is currently in financial distress, there is a reasonable prospect of its survival as a going concern if certain conditions are met. The examiner will put together a restructuring plan to be voted on by the creditors and shareholders. At least one class of creditors whose claims are impaired (i.e. not getting repaid all their debt under the examiner's proposals) must vote in favour of the plan. The voting threshold is a majority by value of debt within each class who vote. The examiner would usually have 100 days to put together their plan, however due to COVID-19, that timeframe has been temporarily extended to 150 days.

Schemes of Arrangement: Irish schemes of arrangement are similar to those found in England and Wales. It is a process typically led by the distressed company itself. It does not require an independent insolvency practitioner and the company does not need to be insolvent. In order to be put in front of the courts for approval, a majority in number representing at least 75% in value within each class of the creditors and shareholders present must have voted in favour of the scheme. The court must satisfy itself that those who voted were acting bona fide and that there was not coercion of the minority by the majority who voted against or for the scheme, as applicable. Once sanctioned by the court, the scheme is binding on all shareholders and creditors.

Management supervision: In both processes the debtor company continues to carry on business. In examinership, management will continue to run the company on a day-to-day basis and in most cases management will work closely with an examiner to appraise the examiner of how the debtor's trading is going. Schemes of arrangement are almost always director/management led.

Role of Court: Both examinership and schemes of arrangement are statutory processes, which require court hearings, including court sanction. More court

involvement is required in examinership.

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

There is no specific protection or priority under Irish law for any new finance provided to a company by way of rescue funding in the same way as, for example, the DIP financing regime in the US.

A company in examinership may obtain new financing. Where an examiner is of the view that the debtor 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 gets paid in priority. This form of credit advanced during the examinership process cannot be crammed down, as only pre-examinership petition liabilities can be included to be written down as part of the restructuring plan of the examiner.

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

Non-debtor parties can be released from claims in a restructuring proceeding in certain circumstances.

Examinership: While an examiner's restructuring plan will not automatically release a third-party guarantor, in order to be able to enforce the guarantee after the protection period has ended, a creditor with the benefit of the guarantee of the debtor's principal debt must notify the guarantor prior to the examiner convening the statutory meetings to vote on the restructuring plan and transfer to the guarantor the creditor's voting rights for those convened meetings. If the creditor fails to do so it will result in the guarantor being, in effect, released from the guarantee if the restructuring plan is confirmed by the court.

Schemes of arrangement: The Irish courts have sanctioned schemes of arrangement which operate to release the debtor scheme company as guarantor, subsidiaries of the scheme whose primary obligations were guaranteed by the scheme company and also release third parties who had guaranteed certain scheme company liabilities.

11. Is it common for creditor committees to be formed in restructuring proceedings and what powers or responsibilities do they have? Are they permitted to retain advisers and, if so, how are they funded?

Unlike in liquidations where there is a statutory basis for convening creditor committees, called committees of inspection, there is no equivalent in the Irish statutory restructuring regimes (i.e. examinership or schemes of arrangement). In complex Irish restructurings, particularly where there is a cross-jurisdictional and specifically a US element, ad hoc creditor committees can be a feature. Where that is the case, the ad hoc committee will usually engage legal and financial advisers. Typically those costs will be paid by the debtor as part of the restructuring process.

12. How are existing contracts treated in restructuring and insolvency processes? Are the parties obliged to continue to perform their obligations? Will termination, retention of title and set-off provisions in these contracts remain enforceable? Is there any ability for either party to disclaim the contract?

In liquidations, the property of the debtor may be sold by the liquidator free and clear of claims and liabilities if the assets are beneficially owned by the company and not subject to any fixed charge security. If the assets are subject to a fixed charge, then the charge-holder is free to sell the secured assets outside of the liquidation. If the liquidator wants to sell the fixed charge assets, the liquidator will be required to obtain the consent of the security-holder before selling. In practice, the liquidator will generally account the purchase price of the secured asset to the charge-holder and then transfer the asset so that it is free from any claim.

In examinership, an examiner may apply to the court for authority to dispose of assets which are free from any claims. The examiner may also apply to court to dispose of secured assets if the examiner can satisfy the court that the sale would facilitate the survival of the company as a going concern. In practice the examiner's restructuring plan would have to give a dividend to the secured creditor of at least the value of the secured asset, otherwise the secured creditor would have grounds to object to the examiner's restructuring plan as being unfairly prejudicial.

While credit bidding is not expressly prohibited in Ireland, it is rarely seen and there is no specific

legislation in place relating to it. It will be a matter for the insolvency practitioner to agree a sales structure that offers the best return for creditors.

Pre-package sales are possible in Ireland and can be used to minimise the costs and disruption often associated with restructurings.

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

Under Irish law the term 'officer' means a director or secretary of a company. The fiduciary duties owed are primarily by directors (including shadow or de facto directors) of the distressed debtor company. Directors owe their fiduciary duties to the company itself. That said, once it is clear that the debtor company is no longer financially healthy, the directors must take the interests of creditors into account while continuing to owe their duties to the company. A failure to do so will be seen as a breach of their fiduciary duties to the company. Once the outlook is terminal for the company, the directors should take advice on what winding up process would be most appropriate.

Directors who trade the debtor company while insolvent can be the subject of an action for reckless or fraudulent trading. In respect of both actions, directors 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.

As a general rule, third parties will not be held personally liable for the obligations of an insolvent debtor company. There are, however, circumstances where directors can be held personally liable for the debts owed by the company and ordered to contribute towards the company's assets by way of restoring assets to the company or making a payment of compensation if, for example, they have engaged in fraudulent or reckless trading or there was a failure to keep proper books of account where this failure has contributed to the debtor's insolvency. Parent or affiliated companies will not ordinarily be responsible for the liabilities of their subsidiaries or affiliates. However, where there is a shortfall of available assets in the liquidation, the liquidator of the related company that is in liquidation can apply to court for a contribution order. 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. 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.

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

Restructuring or insolvency proceedings do no automatically release directors or other stakeholders from liability. Most of the circumstances referred to in Question 14, whereby directors can be held personally liable for the debts owed by the debtor or subject to criminal sanction, apply to a director if in office at the time of the offending action. Only directors who were a director of a company within the 12 months prior to the debtor being placed into liquidation can be the subject of a restriction order. There is no equivalent limitation period for disqualification orders.

Directors or other stakeholders can also look to negotiate a release of liability contractually with a liquidator or within a restructuring process.

15. Do restructuring or insolvency proceedings have the effect of releasing directors and other stakeholders from liability for previous actions and decisions?

Under the Recast Regulation all collective insolvency proceedings, and some restructuring proceedings and determinations, relating to a debtor company with its

COMI in the EU, excluding Denmark, will be automatically recognised in Ireland. With respect to the recognition of concurrent foreign restructuring or insolvency proceedings falling outside the ambit of the Recast Regulation, including, for example, the US or the UK now that the UK has left the EU, applications can be made to the Irish courts for an order in aid of the foreign insolvency practitioner or recognising the foreign proceedings under Irish common law principles.

Recognition Test: As provided for in the recitals to the Recast Regulation and applied by the Irish courts with guidance from the European Court of Justice, there is a rebuttable presumption that a local debtor's COMI is in the EU member state where its registered office is located. For foreign restructuring or insolvency proceedings not covered by the Recast Regulation, 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.

The UNCITRAL Model Law on Cross Border Insolvency has not yet been adopted in Ireland. The Company Law Review Group recommended in November 2018 that it should be, but this recommendation is still be consideredand has not been implemented by the Irish government to date.

16. Will a local court recognise concurrent foreign restructuring or insolvency proceedings over a local debtor? What is the process and test for achieving such recognition? Has the UNCITRAL Model Law on Cross Border Insolvency or the UNCITRAL Model Law on Recognition and Enforcement of Insolvency-Related Judgments been adopted or is it under consideration in your country?

Under the Recast Regulation all collective insolvency proceedings, and some restructuring proceedings and determinations, relating to a debtor company with its COMI in the EU, excluding Denmark, will be automatically recognised in Ireland. With respect to the recognition of concurrent foreign restructuring or insolvency proceedings falling outside the ambit of the Recast Regulation, including, for example, the US or the UK now that the UK has left the EU, applications can be made to the Irish courts for an order in aid of the foreign insolvency practitioner or recognising the foreign proceedings under Irish common law principles.

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17. Can debtors incorporated elsewhere enter into restructuring or insolvency proceedings in the jurisdiction?

Under the Recast Regulation, Irish courts have the power to order the winding up of a company whose COMI is in Ireland, regardless of whether that company is incorporated in another EU member state.

If the company is incorporated outside of the EU, then the Irish courts still retain discretion to have the debtor enter into restructuring or insolvency proceedings where the foreign company has a sufficient connection to Ireland. For example, where a debtor company has assets in Ireland or where financing arrangements are governed by Irish law.

18. How are groups of companies treated on the restructuring or insolvency of one of more members of that group? Is there scope for cooperation between office holders?

Insolvency: As a general rule, each company in a corporate group should be treated as a stand-alone entity with respect to any insolvency proceedings. However, in limited circumstances the proceedings of a group of related companies in liquidation may be combined. To do so, the courts must be satisfied that it is just and equitable to do so. This will result in the

companies being wound up as if they were one company and will not affect the rights of any secured creditor of the companies. In addition, a parent or affiliated company will not be responsible for the liabilities of its subsidiaries or affiliates. Nonethless, if there is a shortfall in assets during the liquidation of a related company, the liquidator may apply to the courts for a contribution order from the parent/affiliate that is not in liquidation. This order can be granted by the courts if they are satisfied that it is just and equitable to do so and the circumstances which gave rise to the debtor's liquidation can be attributed to the actions of the related company.

Restructuring: In examinership a related company to the debtor company may also be joined in the process if the court is satisfied that to do so is necessary for the reasonable prospect of survival as a going concern of the debtor company and the related company meets the same test. The definition of related company in this context is reasonably broad in scope.

Co-operation: In the majority of cases where a group of Irish companies are treated within the same restructuring or insolvency process it will be the same insolvency practitioner or practitioners that are appointed. If that is not the case, then there would be co-operation albeit on a voluntary basis arising out of necessity. For cross-border insolvencies or restructurings to which the Recast Regulation applies, there is specific legislative provision to try to facilitate and promote co-ordination between insolvency or restructuring officeholders.

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

The UNCITRAL Model Law on Enterprise Group Insolvency has also not been adopted in Ireland. As referred to in Question 14, 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 in Ireland. As far as we are aware, no such recommendation has taken place in relation to the UNCITRAL Model Law on Enterprise Group Insolvency at this time.

20. Did your country make any changes to its restructuring or insolvency laws in response to the Covid-19 pandemic? If so, what changes were made, what is their effect and are they temporary or permanent?

Ireland's response to the Covid-19 pandemic has been reasonably limited in relation to restructuring and insolvency law when compared to the response of other countries, such as Germany or the UK. However, the Companies (Miscellaneous Provisions) (Covid-19) Act 2020 was enacted into law on 30 July 2020. Under this legislation there were some amendments made to the Companies Act, including; (i) an increase of the minimum single and aggregated amounts of a statutory demand to €50,000, (ii) a number of provisions facilitating the holding of virtual creditors' meetings for creditors' voluntary liquidations, schemes of arrangements and examinerships, and (iii) an extension to the period of protection during examinership from 100 days to 150 days.

The legislation currently has force of law until 9 June 2021 and so is temporary in nature, however the timeframe may be extended further by Ministerial order if it is found that these protections are required for a further period of time.

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

The Irish government is currently in the process of debating legislation to enact a new statutory rescue process for small-to-medium sized companies which is to have a number of elements of examinership but with less court involvement. These companies would have to satisfy two of the following three criteria: have an annual turnover of €12 million or less; have a balance sheet of €6 million or less; or have 50 or less employees. The rescue process, as currently proposed, involves recourse to the courts only where there are disputes or a need to guard against abuse of process. The proposal is that the requirement for the company to have a reasonable prospect of survival, as applies in the case of examinership, will also apply to this process. The government has stated that it is their goal to implement the legislation before the summer recess.

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.

22. Is it a debtor or creditor friendly jurisdiction?

Ireland has a reasonably well balanced insolvency and restructuring regime, which can be efficiently and effectively utilised by both debtors and creditors.

With the availability of examinership as a statutory restructuring process for debtor companies that are suitable candidates, Ireland can be considered a debtor-friendly jurisdiction as it has an internationally recognised debt-or-in-possession rescue process which has led the way in the EU for 30 years in providing a process which is reasonably accessible in terms of the entry criteria into the process. Examinership also allows, for example, for cross-class cram down of creditors. The success of examinership has led to many overseas companies using Ireland as the jurisdiction in which to implement their restructuring.

However, as Ireland is a common law jurisdiction it abides by the principles of contractual interpretation and so provides comfort and certainty for creditors that their contractual entitlements, whether security or otherwise, will be upheld if court proceedings are required. For the most part, creditors are also able to enforce their security in Ireland without having to make applications to court. The Irish courts are also continuing to enhance their reputation as being a forum of choice for complex international insolvencies and restructurings.

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

There are some sociopolitical factors which will impact on certain stakeholders, specifically; employee related liabilities and pension claims and environmental liabilities. With that said, in the main Ireland does not have a level of sociopolitical factors impacting restructurings that stakeholders may be subjected to in other jurisdictions.

Employees: Certain employees' claims are a category of preferential creditor and so will be paid out before those holding floating charges over the assets of the insolvent company as well as unsecured creditors.

Pensions: All unpaid pension contributions are categorised as preferential debts and will rank ahead of floating charge holders and unsecured creditors during a liquidation process. There is no upper limit to the amount that these pension claims can total.

Environment: A successful monetary claim by an Irish environmental regulatory authority against an insolvent company who has breached environmental legislation will rank as an unsecured claim. Ordinarily a liquidator would not incur any personal liability in respect of an environmental breach, however as the Irish environmental regulatory authority's powers allow them to prosecute the person in control of the property, this cannot be said with absolute certainty.

State Support: In a situation where a distressed business has deficiencies in their pension fund, the Irish government is required by EC Directive 2008/94 to ensure that sufficient measures are in place to protect the interests of employees. If the directive is not properly and effectively transposed, then the employees are entitled to a claim in damages against the State. However, in practicality, employees will rarely recover all of their pension entitlements in situations where their pension scheme is insolvent.

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

While examinership provides an effective means for a company to restructure, its costs can be prohibitive for small and medium sized companies. As a result the Irish government is currently preparing legislation to allow for a new rescue process for companies of that size. This is discussed in Question 21.

In light of Brexit there is now no overarching framework governing insolvency between the UK and the EU as the UK is no longer a party to the Recast Regulation. This has resulted in Irish insolvency proceedings no longer being automatically recognised in the UK and vice versa. As both Ireland and UK have strong economic ties to each other, this is, and will continue to be, a serious issue for insolvency practitioners.

As referred to in Question 16, the Irish government is

considering adopting the UNCITRAL Model Law on cross border insolvency which should provide some assistance in the recognition of insolvency proceedings from outside of the EU. Until then UK insolvency practitioners will have to apply to the Irish High Court and rely on the common law comity rules for their insolvency proceedings to be recognised. As this is done on a case-by-case basis, it will result in uncertainty in the area in the short-to-medium term.

Finally, the lack of third-party litigation funding in Ireland is a barrier to insolvency practitioners and other stakeholders being able to take proceedings within restructurings and insolvencies to uphold legitimate rights and interests. A report launched by Ireland's most senior judge, Chief Justice Frank Clarke, in 2020 has found that representative actions for consumers and litigation funding are both "essential mechanisms of access to justice" and are necessary for Ireland. For obvious reasons, the lack of third-party litigation funding can disproportionately impact the efficient and effective implementation and upholding of rights in restructurings and insolvencies scenarios because of the shortfall of available assets to fund what can be costly litigation.

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