ALLEN & OVERY

September 2017

Restructuring Across Borders

Ireland: corporate restructuring and insolvency procedures

Contents

Introduction

The principal restructuring and insolvency regimes for companies under Irish law are:

- liquidation or winding up, the three different types under Irish law are:
  - compulsory liquidation by the court
  - creditors' voluntary liquidation by (with confirmation by the court)
  - members' voluntary liquidation
- company examinership
- receivership

Liquidation

Liquidation (or winding-up) is the formal procedure for dissolution of insolvent companies under Irish law. It involves the appointment of a liquidator whose function is to take control of all the property vested in the company, to realise the assets and to pay the creditors, if possible. In fulfilling these obligations, the liquidator is subject to a varying degree of supervision by the court, creditors, shareholders and the Director of Corporate Enforcement depending on the type of liquidation. At the end of the process of liquidation, the company is dissolved.

There are three different types of liquidation under Irish law, each is summarised below.

Compulsory liquidation by the court

This type of liquidation can only be commenced by order of the court. The application is made by way of a petition to the High Court. Where a liquidator is appointed, section 589(1) of the Companies Act 2014 provides that the date of commencement of the liquidation is the date of the presentation of the petition.

Once appointed, the liquidator becomes an officer of the court and works under its supervision. The court may direct that the liquidation continues using the rules relating to a creditors' voluntary liquidation (see below) but applications may still be brought to the court by either the committee of inspection or the liquidator.

Creditors' voluntary liquidation

This form of liquidation commences with the passing of a resolution of the shareholders of the company that the company be wound up. This resolution places the company in liquidation. At the same time the members also pass a resolution appointing a liquidator and at this time the directors' powers cease. A meeting of the creditors must be held on the same day or the day after the resolution is passed and the liquidator has limited powers pending the completion of this meeting. At the meeting the directors must produce a statement of affairs of the company and afford the creditors the opportunity to ask questions of the chairman, who must be a director, based on it. The creditors may confirm the liquidator nominated by the company or seek to have their own nominee appointed (where this happens a vote is taken and the resolution is deemed passed when a majority in value of the debt voted votes in favour of the resolution). A committee of inspection made up of creditors and shareholders of the company may also be appointed. In a creditors' voluntary liquidation, the liquidator is ultimately answerable to the creditors, and is not considered an officer of the court.

Members' voluntary liquidation

To avail itself of this procedure the company must be solvent. A members' voluntary liquidation can be distinguished from a creditors' voluntary liquidation by the fact that, in a members' voluntary liquidation, the directors must complete a Declaration of Solvency to the effect that the company will be able to pay its debts in full within a period not exceeding 12 months from the commencement of liquidation. In a members' voluntary liquidation, the liquidator is answerable to the members of the company.

Company examinership

Examinership is a court-based insolvency procedure introduced by the Companies (Amendment) Act 1990 to facilitate the rescue of insolvent and nearly insolvent companies. It is similar in some ways to the U.S. Chapter 11 procedure. Examinerships are now governed by Part 10 of the Companies Act 2014.

Examinership entitles a company to a period of up to 100 days when its creditors are prevented from exercising certain rights, including enforcing their right of security. This is called "the protection of the court".

The procedure commences with the presentation to the High Court of a petition. On hearing the petition, the court may only appoint an examiner where it is satisfied that:

- the company is or is likely to become insolvent; and
- there is a reasonable prospect of the survival of the company and the whole or any part of its undertaking as a going concern.

The examiner's task is to bring forward proposals for a scheme of arrangement. The scheme of arrangement usually involves a combination of new investment, a write-down of creditors' claims and payment of a dividend to creditors over a period of months or years. Pursuant to section 542 of the Companies Act 2014 the court has the power to authorise capital reduction as part of a scheme of arrangement. The company continues to trade during the protection period and the directors continue to run the company. If a scheme of arrangement is not successfully implemented, the protection of the court is withdrawn and liquidation or receivership inevitably follows.

Receivership

As receivership is merely a method of enforcing a security, it is not a collective insolvency and therefore is not an "insolvency proceeding".

In general terms a receiver is appointed by a secured creditor pursuant to a debenture or charge to realise the assets secured by the debenture or charge where the company has defaulted on the repayments of the loan secured.

A receiver can be appointed only over assets which have been charged. The appointment of the receiver does not change the status of the company and although the directors cease to control the charged assets, their normal powers and duties continue in respect of the other assets and liabilities of the company.

A receivership is a temporary condition affecting a company which, unlike liquidation, does not necessarily lead to the company's dissolution. After a receiver has been discharged, the directors resume their normal functions in relation to all of the company's affairs, unless a liquidator has been appointed in the interim. In fact, many receiverships do result in the liquidation and dissolution of the company.

It is important to note that if a receiver is appointed pursuant to a floating charge as distinct from a fixed charge, the receiver must first pay in full those creditors whose claims would be accorded priority by statute in a winding up, ie the preferential creditors.

Where the receiver has been appointed for less than three days and a petition for examinership is presented, the court may make various orders in relation to the receiver, including an order directing that he ceases to act during the examinership period. However, where a receiver has been appointed to a company for a period of more than three days, this prevents the presentation of an examinership petition.

The powers of a receiver have been placed for the first time on a statutory footing. Section 437 of the Companies Act 2014 provides that the receiver shall have power to do all things necessary for attainment of objectives of his appointment over the assets of a company, including the power to:

- enter into possession and take control of property;
- lease, let, hire or dispose of property;
- borrow money on security of property;
- insure property;
- repair, renew or enlarge property;
- carry on any business of the company;
- appoint a lawyer, accountant or other professional to advise receiver;
- engage or discharge employees of the company; and
- make or defend an application for the winding up of the company.

This list of powers is non-exhaustive and additional powers and duties may be created in the debenture, or subject to a limiting provision of an order of court. Similarly, the debenture may limit the statutory powers.

The High Court also has an inherent equitable jurisdiction to appoint a receiver upon an application being made. The High Court also has jurisdiction to appoint a receiver in the context of granting an interlocutory injunction where the court deems it just or appropriate to do so.

European Insolvency Regulation

The EU Regulation on Insolvency Proceedings 2015 (Regulation (EU) 2015/848) (the **Recast Regulation**) applies to all proceedings opened on or after 26 June 2017. Its predecessor, the EC Regulation on Insolvency Proceedings 2000 (Regulation (EC) 1346/2000) (the **Original Regulation**) continues to apply to all proceedings opened before 26 June 2017. One of the key changes in the Recast Regulation is that it brings into scope certain pre-insolvency "rescue" proceedings and these are now listed alongside the traditional insolvency procedures in Annex A to the Recast Regulation. The Recast Regulation retains the split between main and secondary/territorial proceedings but secondary proceedings are no longer restricted to a separate list of winding up proceedings - secondary proceedings can now be any of those listed in Annex A. By contrast, the Original Regulation listed main proceedings in Annex A and secondary proceedings (which were confined to terminal proceedings) in Annex B.

Of the above restructuring and insolvency regimes, compulsory winding up by the court, creditors' voluntary liquidation (with confirmation of the court) and company examinership were available as main proceedings under the Original Regulation.

Compulsory liquidation by the court and creditors' voluntary winding up (with confirmation of the court) were available as secondary proceedings under the Original Regulation.

Under the Recast Regulation, compulsory winding up by the court, creditors' voluntary liquidation (with confirmation of the court) and company examinership are listed in Annex A.

Further information

For further information on Irish restructuring and insolvency procedures we would refer you to the Sweet & Maxwell book "European Cross Border Insolvency" edited by Allen & Overy. To purchase a copy of this book, please visit sweetandmaxwell.co.uk.

This fact sheet has been prepared with the assistance of Arthur Cox.

Allen & Overy has launched an online service for clients focusing on debt restructurings and insolvency issues. Developed by Allen & Overy's market-leading Restructuring group, "Restructuring Across Borders" is an easy-to-use website that provides information and guidance on all key practical aspects of restructuring and insolvency in Europe and the U.S.

To request access for your organisation, please contact your usual Allen & Overy contact, or email rab@allenovery.com.

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