Ireland Examinership Becoming Critical In Int'l Insolvency

By Sam Saarsteiner · *Listen to article*

Law360 (June 29, 2022, 5:45 PM EDT) -- U.S. companies and their attorneys should be aware of a unique avenue of restructuring in Ireland — examinership — as its importance has been highlighted by a series of recent international restructurings that culminated in examinership petitions to the Irish courts.

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Examinership is a court-based process, introduced by the Companies (Amendment) Act of 1990.[1] The legislation was unusual in that it is now broadly understood to have been drafted, negotiated and enacted on an emergency basis by the Irish parliament, the Oireachtas, in an attempt to save a company which was structurally important to the survival of the Irish beef market.

The origins are inconsequential to the reality that the law remained on the books, has evolved over time and is now a critical piece of the corporate insolvency landscape in Ireland and indeed internationally, as this article will explore.

Why Is This Relevant to Me?

Post-Brexit, Ireland is now the only English-speaking common law jurisdiction in Europe. It is swiftly becoming the jurisdiction of choice for companies seeking to expand into Europe.

Knowing how to tackle an insolvency of your Irish company — be it a holding or subsidiary company — and when to proactively explore such a restructuring option is nothing more than prudent corporate planning. To say that such an examination is an

essential element of choice of jurisdiction is no great exaggeration.

Ireland has implemented the Recast Insolvency Regulation, meaning that insolvency proceedings in all European Union member states — bar Denmark — are recognized in Ireland.

Recognition in Ireland of U.S. insolvency proceedings is not straightforward.

However, the Mallinckrodt PLC and Weatherford International LLC bankruptcy cases are recent examples demonstrating the Irish courts' willingness to recognize U.S. Chapter 11 orders when necessary, much in the way that the U.S. Bankruptcy Court for the Eastern District of Virginia recognized an Irish scheme of arrangement under Chapter 15 of the U.S. Bankruptcy Code in the Nordic Aviation Capital Designated Activity Company case in April.

The more prevalent use of Ireland's commercial court to fast-track urgent applications through the Irish courts has generated widespread acclaim and is a boon to Irish efforts to attract foreign companies to use Ireland as a corporate base.[2][3][4]

Gaining an understanding of the key aspects of the options available in Ireland is an important step for any lawyer advising a U.S. company on their intended domicile in Europe.

How It Works

Examinership works by a court making an order placing the petitioning company under protection. In real terms, this means that no petitions can be brought to wind up the company, nor can any court proceedings be brought against the company be progressed or security enforced.

The company can keep trading — albeit often on a cash on delivery basis, depending on industry — while its affairs are examined, third-party interest is gauged and ultimately, a scheme of arrangement is drafted and proposed to creditors.

The petition to the court must show that the company is insolvent or likely to become insolvent imminently, and has a reasonable prospect of survival of all or part of the company as a going concern.

These proofs are evidenced by an independent accountant's report which is put before the court alongside other affidavit evidence setting out the history of the company, why it is now facing difficulties and, in broad terms, what avenues exist for it to successfully exit examinership.

Unlike administration in the U.K., the objective is that the company survives as a going concern, rather than having its assets sold off to satisfy creditors.

If the court agrees, then an independent person, usually the company's nominee, is appointed to examine the company, investigate certain matters and pull together a draft scheme of arrangement if possible.

This typically involves further cash investment by management and/or third parties, write-downs of debt, sale of assets, splitting of company divisions and/or taking on new debt. Unsecured creditors typically suffer a write-down above 90%.

Fixed charge holders generally require at least the value of their security to be paid if they are losing that security, and the revenue commissioners — tax authorities — will typically look for a substantial dividend if not the entirety of their debt. Even at that, they will normally adopt a neutral approach if this is achieved.

Creditor meetings are split between various classes such as secured, unsecured, preferential (local rates, employees), super preferential (revenue commissioners), management and others.

To satisfy the required proofs, a scheme of arrangement must be approved by at least one class of creditors. This is a noticeably low bar, after which the court's discretion is engaged in determining whether to approve the scheme.

A key comparator is the outcome for creditors and employees from the examinership versus a liquidation.

The timescale for the whole process is intentionally tight at 35 days. This can be extended up to 100 days, but by then a scheme of arrangement must be presented to the court.

If the scheme is approved then, as of the effective date of the order, the company's balance sheet is effectively rewritten subject to the planned investment agreements

completing. Shareholdings can be revised by the same court order, with debts written down, management removed and/or replaced, and other ancillary matters attended to.

Recent Case Law

This writer recently acted for two lender special purpose vehicles, or SPVs, funded by investors from Asia, who were due approximately €10 million ($10.4 million) from a property development company. Rather than exercise their rights under their secured charges, the SPVs opted instead to run a creditor examinership petition.

Although very rare and fraught with difficulties arising from an information deficit, in this instance the petition resulted in the SPVs ultimately succeeding with an examinership being ordered.

The SPVs were eventually selected as the preferred bidders for the scheme of arrangement, which was duly ordered, and so the SPVs took control of the debtor company, resulting in a better outcome for the SPVs and their investors.

This case also involved several novel aspects, including the first time where there were competing examinership petitions — as the company itself also petitioned — and joint examiners being appointed, in an Irish corporate first.

The Mallinckrodt examinership will also be of interest to Law360 readers.[5] Mallinckrodt is a drugmaker run in the U.S. but with its holding structure based in Dublin, Ireland.

The company filed for bankruptcy in the U.S. Bankruptcy Court for the District of Delaware with $5.3 billion in long-term debt arising from lawsuits relating to its marketing of opioids.

A settlement date was reached in that bankruptcy on Feb. 3, which involved a complex reorganization plan which was approved by the Delaware bankruptcy court. The approval was conditional upon the holding company entering and successfully exiting examinership in Dublin.

This was the second largest examinership case in Irish corporate history. That an interaction between Chapter 11 in the U.S. and examinership in Ireland was so integral to the overall restructuring of Mallinckrodt is of note and demonstrates the importance of having a transatlantic awareness of corporate insolvency regimes in both jurisdictions.

Regard might also be had to the successful 2019 examinership of Weatherford, an Irish parent company of the U.S.-based Weatherford Group with 24,500 employees and $8.35 billion in debt to restructure.[6] This was contemporaneous with a Chapter 11 bankruptcy in the U.S. Bankruptcy Court for the Southern District of Texas and a similar process in Bermuda.

In In re: Ballantyne Re PLC, an Irish reinsurance SPV petitioned for a scheme of arrangement — as a standalone process, possible with 75% approval of each creditor class, by value — to restructure $1.65 billion of debt. The scheme was sanctioned and thereafter recognized in the U.S. Bankruptcy Court for the Southern District of New York under Chapter 15 of the Bankruptcy Code.

In a case which demonstrated the capacity and pace of the Irish courts when dealing with such matters, from petition to completion of the process, took weeks, not months.

Ireland has emerged as an international base for successful corporate reorganizations of this nature and the examinership route has played a significant part in that success.

Typically, the Irish registered entity is a linchpin in the corporate structure and having an understanding of how that piece of the puzzle will be dealt with in restructuring an international group is a sine qua non for the architects of such plans.

What Do the Statistics Say?

Although not officially tracked, anecdotal evidence and soundings from insolvency practitioners would indicate that examinership is used in approximately 2% of corporate insolvencies, with approximately 22% in the U.S.

When the success rate of 70% to 80% — and long-term success rate certainly in the majority — is considered, examinership is an underutilized device in Ireland.

Costs can often be a considerable factor for small to medium-sized enterprises, however this is less likely to be a consideration for larger international operations.[7]

Key Takeaways

Who should consider examinership and/or schemes of arrangement?

- Companies operating in Ireland facing financial difficulties, looking to avoid liquidation and/or looking to restructure;
- Companies registered in Ireland but which are a part of an international group where there is a broader restructuring sought; and
- Professional advisers to either of the above.

What are the advantages of the Irish regime?

- Avoids liquidation;
- Protection from creditors;
- Jurisdictional equivalence and familiarity;
- Debt write-downs;
- Disclaimer or renegotiation of burdensome property leases;
- Continuation of trade under same control;
- Recognition of judgments;
- English-speaking;
- Ability to conduct business with U.S. and European companies; and
- Base of operations for the majority of top tech, pharma and biotech.

Conclusion

As the world faces spiraling prices, interest rate increases, a Russian invasion and cessation of state supports for businesses during the pandemic, insolvency practitioners are expecting a deluge of new activity in this area.

While not a panacea, examinership in Ireland is alive and well and is well poised to provide solutions — for the right companies. Key to its deployment is corporate and financial preparation and early appointment of experienced professionals both in terms of legal advisers and the independent accountant.

A holistic view of an international company's locations is critical for any successful

restructuring or insolvency action. Ireland presents significant jurisdictional advantages and gaining an understanding of that dynamic at an early stage will reap rewards down the line.

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[1] https://www.irishstatutebook.ie/eli/1990/act/27/enacted/en/html

[2] https://iclg.com/cdr/expert-views/the-irish-commercial-court:-an-inside-view

[3] https://www.irishtimes.com/news/crime-and-law/commercial-court-routinely-adjudicates-on-international-disputes-1.4517863