



ACADEMIC FORUM CONFERENCE 2019

COPENHAGEN

HARMONISATION OF INSOLVENCY AND RESTRUCTURING LAWS IN THE EU



JCOERE- Judicial Co-Operation in the European Union: Insolvency and Rescue

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The Core Research Question

- Based on existing experience with restructuring (eg IRELAND) obstacles to court co-operation will arise from substantive rules which are particular to preventive restructuring.
- In addition some of these problems pertain to existing procedural obstacles which will be exacerbated in the preventive restructuring context.



The Irish Examinership process...Companies (Amendment) Act 1990, now Part 10 Companies Act 2014.

- Modelled on Chapter 11 of US Bankruptcy Code
- Contains all of the features included in the PRD 2019/1023 and with a 'robust' approach to rescue.
- STAY
- INTRA and CROSS CLASS CRAMDOWN
- PROTECTION for NEW FINANCING
- APPROVAL of COMPROMISE
- Some examples from 30 YEARS of CASE LAW





Appointing and examiner and imposing the stay...the threshold question

Re Vantive Holdings Ltd. [2009] IEHC 384 and [2009] IESC 68
Re Kitty Hall Ltd and Ors and the Companies Acts [2017] IECA 247

- Conditions are that the company is 'unable to pay its debts' or 'likely to be unable to pay its debts.'
- No order for winding up.
- No receiver appointed for more than 3 days.
- There is a 'reasonable prospect of the survival of the company' or companies (group).



Cram down: Secured Creditors (including with rights in rem).

Re Holidayair [1994] 1 I.R. 416

- Secured creditor with right to appoint a receiver (usually considered a right in rem).
- Receiver appointed by AIB and was removed on appointment by court of an Examiner.
- During examinership interim financing given priority.
- Rescue successful.



Approval of compromise or settlement- formality of court approval.

Re McInerney Homes Ltd. [2011] IESC 31 O'Donnell J.

Re SIAC Construction Ltd. [2014] IESC 25

- Under Irish law the court will approve a scheme where it satisfies the consent requirements and where the court is satisfied that the scheme is not 'unfairly prejudicial to any creditor or class of them'.
- McInerney the final scheme not approved on the basis of 'unfair prejudice'.
- SIAC – Scheme approved. What does the 'unfair prejudice' test entail?
- APR or RPR- What does this mean considered against the reality of court approval?



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Cross Class Cram down

Re Kitty Hall Ltd and Ors and the Companies Acts [2017] IECA 247

Court to Court co-operation, practitioner to court co-operation – what difference
Do these obligations make?

www.ucc.ie/en/jcoere/research and click on the Judicial Wing Case Study

Lynch, Marshall and O'Ferrall: Corporate Insolvency and Rescue (Butterworths, 1996)

Lynch Fannon and Murphy: Corporate Insolvency and Rescue (Bloomsbury 2012)

O'Donnell and Nicholas Examinerships (2017)



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The Preventive Restructuring Directive 2019/1023 and other member states.

- Questionnaire addressing what we consider to be substantively important rules in the context of court to court co-operation.
- And addressing what we consider to be procedurally important rules in relation to the same question.
- www.ucc.ie/en/jcoere/research and click on link JCOERE Questionnaire (Jurisdictions)



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JCOERE Invitation

- Any ideas or suggestions? Join our network!
- Thank you.



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