

Implementing the Directive- The Irish Examinership Process

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



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JCOERE Findings –OCT 2019

- A significant variation amongst member states in the existing status quo regarding rescue.
- A significant difference in policy and theoretical understandings of rescue and the rescue imperative.
- Surveying judges and practitioners- barriers to co-operation are reflective of these two issues: lack of harmonisation and lack of knowledge of other procedures.

Implementing the Directive: 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. (Except workers Art 13)
- STAY
- INTRA and CROSS CLASS CRAMDOWN
- PROTECTION for NEW FINANCING
- APPROVAL of COMPROMISE
- **Some examples from 30 YEARS of CASE LAW. The importance of the High Court, Court of Appeal and Supreme Court in interpreting the legal framework.**
- <http://www.irishstatutebook.ie/eli/2014/act/38/enacted/en/html?q=Companies+Act>

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

- *Re Vantive Holdings Ltd. [2009] IEHC 384 and [2009] IESC 68.*
- <http://www.courts.ie/Judgments.nsf/0/51A907AEB784657B8025764F00448D97>
- *Re Kitty Hall Ltd and Ors and the Companies Acts [2017] IECA 247*
- <http://www.courts.ie/Judgments.nsf/0/07C4EE5F31D3A168802581B1002F7119>

Conditions in the legislation are

- 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 Holidair* [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'.

[The criteria used in deciding questions of unfair prejudice may have to be codified in new legislation].

McInerney the final scheme not approved on the basis of 'unfair prejudice'.

SIAC – Scheme approved. What does the 'unfair prejudice' test entail?



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Judicial Co-Operation
European Economic Recovery

- <http://www.courts.ie/Judgments.nsf/0/E5D707ACF2DB58B4802578D50030F43E>
- <http://www.courts.ie/Judgments.nsf/0/DF8BC6B1D25D25A580257CB40051C0D2>

Cross Class Cram down

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

- The figures on Examinership post financial crisis:
- 2007-2016 420 companies under examinership and 56% stay rescued.
- Important to recognise that rescue not for every company. As with comparable jurisdictions, insolvency usually results in a liquidation. www.cro.ie
- 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)
- Lynch Fannon and Murphy: Corporate Insolvency and Rescue (3rd Edition forthcoming 2020)



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