

2009-2019

THE INAUGURAL YANIL CONFERENCE AT 10 YEARS



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Preventive Restructuring - Is Ireland a leader in the EU?

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INTRODUCTION

- Irish Examinership Process
- Preventive Restructuring Directive (2019)
- 3 Key Areas:
 - The Stay
 - Cram-Down
 - Decreased Court Formality

IRISH EXAMINERSHIP

- Introduced in 1990
- Modelled on Chapter 11 of Title XI of the US Bankruptcy Code
- Key Features
 - Court Protection
 - Cram-Down
 - Protection of New Finance
 - Displacement of Receiver

Displacement of the Receiver

- If the petition for the appointment is presented within 3 days of the receiver being appointed, then the examinership process takes precedence
- *Re Belohn & Merrow Ltd* [2013] IEHC 157
 - Friday: Receiver appointed
 - Sunday: Interim Examiner appointed
Stay granted in the absence of the examiner's report

PREVENTATIVE RESTRUCTURING DIRECTIVE

- Committee on Legal Affairs (2011)
- Commission Communication: ‘A New Approach to Business Failure’ (2012)
- Commission Recommendation: ‘A New Approach to Business Failure’ (2014)
- Evaluation of the Commission Recommendation (2015)
- Proposed Directive (2016)
- Directive (EU) 2019/1023 – “The Preventive Restructuring Directive” (2019)

EXAMINERSHIP: THE STAY

- Referred to as “Court Protection”
- Triggered by receipt of the petition for Examinership
- Initial Duration: 70 days
- Extension: Up to 30 days for the Examiner to complete the report
- Further Extension: Until the Court has time to consider the report
- End (Prior to the Appointment of the Examiner):
 - Court refuses the petition
 - If the petition is withdrawn
- End (After the Appointment of the Examiner):
 - Court is not satisfied that the Examiner will be able to present a report with an extension
 - Court refuses to confirm the restructuring proposals

PRD: THE STAY

- Article 6
- Initial Duration: Up to 4 month (Article 6(6))
- Extension: Up to 12 months in total (Article 6(8))
- Refusal (Article 6(1))
- Lifting (Article 6(9))
 - The stay no longer supports the negotiation process
 - At the request of the debtor or insolvency practitioner
 - Unfair prejudice*
 - Insolvency of a creditor*

* Where so provided by national law

EXAMINERSHIP: CRAM-DOWN

- Section 541(7) of the Companies Act 2014
- Proposals confirmed by the Court are binding on ALL affected (classes of) creditors
- Confirmation Criteria
 - One class of affected creditors must vote in favour
 - Fair and equitable to dissenting classes of creditors
 - No unfair prejudice

PRD: CRAM-DOWN

- Article 11
- A restructuring plan may be made binding upon dissenting voting classes where certain conditions are met;
 - Compliance with Articles 10(2) & (3)
 - Approval by either (i) a majority of the voting classes, where at least one is a secured creditor class or failing that, (ii) one of the voting classes*
 - No unfair prejudice*
 - No payment in excess of the claim of an individual creditor

* Subject to derogation

PRD: CRAM-DOWN

- Derogations
 - Member States may increase the minimum number of classes of affected parties or, where so provided under national law, impaired parties, required to approve the plan as laid down in point (b)(ii) of the first subparagraph.
 - By way of derogation from point (c) of paragraph 1, Member States may provide that the claims of affected creditors in a dissenting voting class are satisfied in full by the same or equivalent means where a more junior class is to receive any payment or keep any interest under the restructuring plan.

PRD: DECREASED FORMALITY

- Article 4(6)
- Member States may put in place provisions limiting the involvement of a judicial or administrative authority in a preventive restructuring framework to where it is necessary and proportionate while ensuring that rights of any affected parties and relevant stakeholders are safeguarded.
- Change from “shall” to “may”

EXAMINERSHIP: COURT FORMALITY

- Considerable court involvement
 - The petition to appoint an examiner must be lodged with the relevant court
 - All restructuring plans are subject to court approval
 - Extensions in the stay are subject to court application, etc.
- Benefit of Increased Flexibility
 - Examinership may become more accessible to SMEs
 - Increase efficiency of the process
- Disadvantage of Increased Flexibility
 - May open the process to abuse

JCOERE Project

- JCOERE: Judicial Co-Operation supporting Economic Recovery in Europe
- This project is funded by the EU Commission Project 800807- DG JUST- JUST-JCOO-AG-2017
- Identify obstacles to judicial co-operation presented by existing domestic restructuring frameworks and the Preventative Restructuring Directive.



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JCOERE Project

Website

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