

ARTHUR COX

**Examinership:
Part 10 of the Companies Bill**

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Part 10 - Examinership

- Consists of 5 Chapters,
- Contain 51 sections of law.
- Largely restates existing examinership law

Chapter 1 - application of Part 10

Chapter 1 contains 1 section (s 509):

- Definitions relevant to Part 10.
- Part 10 specifically subject to the Insolvency Regulations.
- Independent Accountant now to be "*Independent Expert*"

Chapter 2 – Appointment of Examiner

Chapter 2 (ss 510 – 524) sets out the following matters:

- Circumstances in which a court can appoint an examiner (s 510);
- Who can petition the court for the appointment of an examiner (s 511);
- Provisions relating to the independent expert's report, what is to be included in it and the powers of the court where the report is not available (ss 512-515);
- Creditors' right to be heard and the availability of the expert's report (ss 516-517);
- Ability of the Court to appoint an examiner to related companies –
Note: the extension of the definition of company to include any body which is liable to be wound up under the Companies Acts has been removed (s 518);

Chapter 2 – Appointment of Examiner (Continued)

- Duty to act in honest good faith (s 519);
- Qualification of examiners: To act as an examiner a person must be qualified to act as the company's liquidator (s 520)
- The statutory moratorium on creditor action is contained in Section 521 and effectively prohibits creditor action against the company during the protection period without the consent of the examiner;
- No pre petition debts may be discharged by a company under the protection of the Court (s 522);

Chapter 2 – Appointment of Examiner (Continued)

- Receivers or provisional liquidators appointed to the company may be asked to stand aside following the appointment of an examiner (s 523);
- Disapplication of requirement that receivers deal with preferential creditors in certain circumstances (s 524);

Chapter 3 – Powers of Examiner

- This chapter contains 21 Sections dealing with the powers of the examiner and the provisions relating to the bringing forward and approval of a Scheme of Arrangement;
- The examiner has the power to convene and attend board and general meetings of the company, to halt, prevent or rectify the effects of actions to the detriment of the company and apply to the Court to determine any question arising in the course of his or her office (s 525);
- The power to avoid negative pledge clauses is contained in s 526;
- Duty of officers to produce to examiner books and records of the company (s 527)

Chapter 3 – Powers of Examiner (Continued)

- No party is entitled to maintain a lien over any company documents as against the examiner (s 528);
- The examiner can apply to Court to have the directors' executive powers transferred to him/her in certain circumstances (s 529);
- The examiner can afford certain expenses priority where otherwise the survival of the company would be seriously prejudiced (s 530);
- The examiner has the power to sell assets subject to a fixed or floating charge (s 531);

Chapter 3 – Powers of Examiner (Continued)

- Section 532 sets out the obligations for advertisement and notification of the examiner's appointment and includes an obligation that websites and emails sent by or on behalf of the company must contain a statement that the company is "*in examination under Part 10 of the Companies Act*"
- Section 533 sets out the provisions for resignation and a filling of vacancy etc in respect of examiners;
- Section 534 provides for hearings in relation to irregularities in relation to the company's affairs and the conduct of those hearings;

Chapter 3 – Powers of Examiner (Continued)

- Section 535 reproduces the examiner's obligation to report to the Court on the conduct of his meetings with members and creditors in relation to the Scheme of Affairs;
- Section 536 provides for the circumstances in which the examiner cannot bring forward an acceptable Scheme of Arrangement;
- Section 537 sets out the requirements for the contents of the examiner's report under Section 535;
- Section 538 reiterates the company's ability to repudiate contracts in certain circumstances;

Chapter 3 – Powers of Examiner (Continued)

- Section 539 provides for the appointment of a creditor's committee;
- Section 540 provides for the requirements for the contents of the Scheme of Arrangement;
- Section 541 sets out the requirements for the meetings of creditors and voting requirements;
- Section 542 provides for the hearing of the examiner's proposals for a Scheme of Arrangement and the ability for creditors to object;

Chapter 3 – Powers of Examiner (Continued)

- Section 543 provides for the coming into effect of the Scheme of Arrangement and any changes that are required to the company's Memorandum and Articles of Association amongst other things;
- Section 544 provides for further mechanisms by which creditors whose claims are impaired may object to the confirmation by the Court of the proposals;
- Section 545 repeats the provisions in relation to the permitted future effects of a Scheme of Arrangements on leasehold interests.

Chapter 4 – liability of third parties for debts of a company in examination

This chapter sets out that the general rule is that the liability of the third party is not affected by the scheme of Arrangement (*ss 546–549, 552*);

Section 550 provides what a creditor must do to be able to enforce the guarantee after the scheme of arrangement

Section 551 provides for subrogation to a creditor's rights under the scheme of arrangement

Chapter 5 – conclusion of examinership

Chapter 5 contains 7 sections dealing with various matters including:

- The conclusion of the examination and discharge of the examiner (s 553)
- Revocation of the approval of the scheme of arrangement (s 554)
- Examiner's costs and expenses and their priority (s 555)

Chapter 5 – conclusion of examinership

- Requirement to publish certain orders made in the course of an examination (s 556)
- Hearings in camera (s 557)
- Power to return to the company assets improperly transferred (s 558)
- Reporting of misconduct by examiners to the ODCE (s 559)

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