The Legal 500 & The In-House Lawyer
Comparative Legal Guide
Ireland: Restructuring & Insolvency (3rd edition)

This country-specific Q&A provides an overview to restructuring and insolvency laws and regulations that may occur in Ireland.

This Q&A is part of the global guide to Restructuring & Insolvency (3rd edition). For a full list of jurisdictional Q&As visit http://www.inhouselawyer.co.uk/practice-areas/restructuring-and-insolvency-3rd-edition/

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1. **What forms of security can be granted over immovable and movable property? What formalities are required and what is the impact if such formalities are not complied with?**

The most common forms of security granted over property in Ireland are summarised below:

- **Fixed Charge**: this is a charge created by an obligor in favour of a creditor over a specifically identifiable asset to secure compliance with a debt or obligation owing by that obligor.
- **Mortgage**: this involves the transfer of an obligor's legal or equitable title to a property to

a creditor or mortgagee to secure a debt or other obligation of the obligor, but subject to the obligor’s right to the return of the legal title once the secured obligation has been satisfied or the relevant debt has been redeemed (known as the “equitable right of redemption”).

- **Floating charge**: this is an equitable charge created over all or specific categories of assets of a company only which converts or “crystallises” into a quasi-fixed charge either automatically or on notice of the occurrence of a specified event of default - a floating charge is usually granted over trading assets which change in quantity and value from time to time, such as stock, cash or receivables.
- **Pledge**: this arises where the debtor delivers possession of goods to a creditor pending satisfaction of the debtor’s obligations – a creditor will usually have the power to sell the pledged assets where an event of default occurs.
- **Lien**: a lien arises where a creditor has a lawful right to retain possession of an asset owned by another until the creditor has been paid in full by that person for services rendered – possession is critical to the existence of a lien and once possession is relinquished so is the lien.
- **Security assignment**: this arises where a debtor assigns its rights under a contract to a creditor as security for a debt or obligation owing to that creditor – the assignment can be equitable (i.e. not on notice to the contractual counterparty) or legal in which case the assignment is perfected and notice is given to the counterparty.

Security over certain types of property must be filed with the Companies Registration Office in Ireland (the “**CRO**”) within 21 days of its creation. Failure to do so renders the charge void against any creditor or liquidator of the company. Where charges of the same nature are created over the same asset in favour of multiple creditors, priority is given to the creditor who files the notice first in time.

In the case of registered land, security interests must be registered with the Land Registry in Ireland. A floating charge over registered land is not registrable until after the charge has crystallised. Where security is provided in respect of unregistered land a notice must be registered in the Registry of Deeds. These registration give notice to third party purchasers that the property is secured in favour of a creditor.

2. **What practical issues do secured creditors face in enforcing their security (e.g. timing issues, requirement for court involvement)?**

The extent of the rights and powers of a secured creditor arising on enforcement will depend on the terms of the agreement creating the security and, to a lesser extent, applicable statute, and therefore can vary considerably. However, in most instances it is not necessary for a secured creditor to initiate legal proceedings (i.e., go to Court) before enforcement provided that it is clear that an event of default has occurred under the terms of the security instrument which entitles the secured creditor to take immediate enforcement action.

Most successful challenges to enforcement action arise due to one or more deficiency in the procedure followed by the secured creditor (such as notice of default not having been properly delivered, insufficient time having been given for payment and / or a failure to execute the instrument of appointment in accordance with the terms of the security and finance documents).

Therefore, in order to reduce the risk of a challenge by the obligor, a secured creditor that wishes to enforce should take care to ensure that the enforcement steps required by the security and finance documents are followed precisely.

3. **What is the test for insolvency? Is there any obligation on directors or officers of the debtor to open insolvency procedures upon the debtor becoming distressed or insolvent? Are there any consequences for failure to do so?**

A company will be deemed insolvent where it is unable to pay its debts. The

Companies Act 2014 provides that a company shall be deemed to be unable to pay its debts where (a) a debt of the requisite size has been demanded and the company has failed to make payment within 21 days, or (b) it is proved to the satisfaction of the Court that the company is unable to pay its debts, taking into account the actual as well as contingent and prospective liabilities of the company.

The directors are not obliged to commence insolvency proceedings in respect of an insolvent company and the directors of a company do not have *locus standi* to present a petition for the winding up, or commence a voluntary liquidation. However, they have the standing, but not the obligation, to present a petition for the appointment of an examiner to a company that is insolvent or at risk of insolvency.

Where the directors of a company are aware (or ought to be aware) that there is no reasonable prospect of the company avoiding an insolvent liquidation, they have a duty to take steps to minimise any loss to the company's creditors i.e. to preserve, or at least not dissipate, the company’s assets. Depending on the circumstances, the directors may decide to cease trading or to recommend to the shareholders that the company be wound up by means of a voluntary liquidation. Alternatively, if the company’s business has a reasonable prospect of survival, the directors may decide to file a petition with the Court for the appointment of an examiner which will impose a moratorium on creditor action for a period to enable the examiner to formulate a scheme of arrangement that would facilitate a restructuring of the company’s debts.

Where it is reasonable to continue to trade, for example where efforts are continuing to secure investment or financing that would allow the business to survive, the directors will not necessarily be required to cease trading, particularly where to do so would cause material value destruction, which is contrary to the interests of creditors. Nevertheless, a director of a potentially insolvent company must be careful to avoid a scenario where the company continues to trade, and to incur liabilities to creditors, unless he or she has an honest and reasonable belief that those liabilities would be discharged. In those circumstances there is a risk that the directors will be found to have engaged in reckless trading, and could be fixed with personal liability for losses suffered by creditors. There is also a risk that a liquidator would subsequently apply to the Court for an order restricting the directors from acting in that capacity for companies that do not satisfy certain minimum capital requirements, and in cases of serious misconduct the Court may disqualify the directors from holding office in any company for a period of up to five years.

4. **What insolvency procedures are available in the jurisdiction? Does management continue to operate the business and / or is the debtor subject to supervision? What roles do the court and other stakeholders play? How long does the process usually take to complete?**

There are two forms of formal corporate insolvency proceedings available under the laws of Ireland – liquidation and examinership.

Liquidation

There are three forms of liquidation:

- **members' voluntary liquidation** – a solvent winding up commenced by shareholder resolution, however, if it becomes apparent to the liquidator in the course of the winding up that the company is insolvent, he must convert the liquidation into a creditor's voluntary liquidation;
- **creditors' voluntary liquidation** - an insolvent winding-up commenced by ordinary shareholder resolution where the members have formed the view that the company cannot, by reason of its liabilities, continue to trade – the process is generally initiated by the directors recommending to the members that the company be wound up due to insolvency; and
- **compulsory liquidation** – a winding up commenced by Order of the High Court on foot

of a petition presented by a creditor, a contributory or by the company itself (having been authorised to do so by its members) – this can be a solvent or an insolvent liquidation but is most commonly initiated by a creditor that has not been paid a debt that is lawfully due.

Save in very limited circumstances, the directors of the company cease to have any powers to deal with the assets of the company, or to have any role in the affairs of the company, with effect from the appointment of the liquidator. If the liquidator decides to continue to trade post-liquidation, he can engage management as employees where this is for the benefit of the winding-up, but that is the liquidator’s decision and the board of directors is nonetheless defunct.

The Court does not have any oversight role with respect to the day to day conduct of a liquidation of a company, including a compulsory liquidation commenced by Court Order. However, a liquidator or any creditor may at any time apply to Court for directions as to the conduct of any liquidation (whether voluntary or compulsory), or for Orders directing parties, such as directors, to co-operate with or provide information to the liquidator concerning the assets or affairs of the company.

In a compulsory liquidation or a creditors voluntary liquidation a committee of inspection may be formed, comprising up to five nominees from the creditors and three nominees of the members, which will exercise day to day oversight with regard to taking of certain actions by the liquidator, including with respect to the commencement of legal proceedings, engaging in a trade post-liquidation, the payment of any class of creditors in full and the settlement or compromise of creditors’ claims. The liquidator's fees are also agreed with the committee of inspection. Finally, the liquidator is obliged to have regard to any directions given by the creditors, contributories or by the committee of inspection with respect to the administration and distribution of the property of the company.

There is no time limit for the completion of compulsory or a creditors’ voluntary liquidation, and it is not unusual for the winding up to take a number of years to complete, depending on the complexity of the affairs of the company concerned.

Examinership

Examinership is a court protection procedure available to a company that is insolvent, or likely to be insolvent, and which can demonstrate that, provided that its debts are restructured and/or it can attract new investment, it has an undertaking that is capable of surviving as a going concern.

In order to avail of the Court's protection for the company, a petition must be filed and presented to the Court by either the company itself, its directors, any shareholder holding more than 10% of the equity, or any creditor. The company will have protection from its creditors (including secured creditors) for a period of up to 100 days whilst the examiner (invariably an insolvency professional) attempts to seek fresh investment for the company and to formulate a scheme of arrangement that has the support of at least 50% plus one in value and number of at least one class of impaired creditor.

A scheme of arrangement will usually provide for (a) the investment of funds from an investor to fund payments to impaired creditors as well as the costs of the examiner, (b) the writing down of creditors' claims, and (c) the transfer of the shareholdings to the investor(s). The Court will not approve a scheme of arrangement unless it is satisfied that it is not unfairly prejudicial to any creditor (which is generally taken to mean that a creditor cannot receive less under the proposed scheme than it would have received in a receivership or liquidation).

The management / board of directors of a company in examinership will remain in place during the period of the moratorium unless the examiner applies to Court for an Order to transfer those powers to him or her.

Generally, creditors with a material sum owing by the company will, if they wish, be a notice party to any motions issued or hearings convened during the period of the examinership. The examiner may also convene a committee of inspection to act as a forum for creditors to voice their views on the conduct of the proceedings.

Receivership

Receivership is not, strictly speaking, a form of formal insolvency proceeding because a receiver is generally appointed by a secured creditor by the exercise of a contractual right to do so, rather than pursuant to any court proceedings. The directors of the company will cease to have any role with respect to assets over which a receiver has been appointed, and if the receiver is also appointed as manager, the receiver can then also assume responsibility for the carrying on of the business of the obligor to the exclusion of the directors.

5. **How do creditors and other stakeholders rank on an insolvency of a debtor? Do any stakeholders enjoy particular priority (e.g. employees, pension liabilities)? Could the claims of any class of creditor be subordinated (e.g. equitable subordination)?**

   In an Irish corporate insolvency, proceeds are generally distributed in the following order:

   - if the receiver/liquidator is appointed to a company that has been in examinership, the fees, costs and expenses of the examiner will rank prior to all other claims, including those of a fixed charge holder;
   - the costs and expenses of the receiver/liquidator, including with respect to all taxes, including capital gains tax ("**CGT**"), arising on the sale of the fixed charge assets, rank ahead of the fixed charge holders;
   - the fixed charge holders are entitled to the net proceeds of the sale of the fixed charge assets (after the costs and expenses of the receiver) up to the value of the secured debt -

any surplus debt can be claimed by the charge holder as an unsecured creditor;

- if the receiver/liquidator is appointed to a company that has been in examinership, any liabilities of the company that have been certified by the examiner as having been necessarily incurred to enable the formulation of a Scheme of Arrangement with respect to the company will rank ahead of all creditors other than fixed charge holders;
- certain social insurance deductions collected by the company from employees in respect of employees (known as "*super-preferential creditors*") are considered to be held on trust for the Irish Revenue Commissioners;
- the costs and expenses of the receiver/liquidator, including with respect to all taxes, including CGT, arising on the sale of the floating charge assets, rank ahead of preferential creditors and the floating charge holder; and
- certain claims of statutorily preferred creditors will rank ahead of and be paid in priority to the floating charge holder, including (a) employees' salaries and unpaid holiday entitlements, (b) unpaid taxes and employers' social insurance contributions, (c) pensions contributions and (d) commercial rates rank ahead of and paid in priority to the floating charge holder.

All claims in one category receive full payment before the balance is distributed to the creditors in the next category. When proceeds are insufficient to meet the claims of one category in full, payments for that category are distributed on a *pro rata* basis.

In a receivership, where there are secured creditors that have prior ranking security over some or all of the assets over which the receiver has been appointed, the receiver must apply the proceeds in accordance with the ranking of the debt, notwithstanding that he or she may have been appointed by a junior-ranking secured creditor.

Whilst creditors, including shareholders, may contractually agree to subordinate their debt claims to those of other creditors or classes of creditors, and such contracts will be enforced by the Irish Courts, Irish law does not have a concept of "equitable subordination" that would be imposed on any class of creditor, including a shareholder that is also a creditor.

6. **Can a debtor's pre-insolvency transactions be challenged? If so, by whom, when and on what grounds? What is the effect of a successful challenge and how are the rights of third parties impacted?**

Unfair preference

The Companies Act 2014 provides that any conveyance, mortgage, delivery of goods, payment, execution or other act relating to property made or done by or against an insolvent company within 6 months of the commencement of its winding up (or two years in the case of a connected person) with a view to preferring that creditor over others, shall be deemed to be an unfair preference and accordingly, the transfer is void and the property must be returned to the company. Where the transaction involved a connected person, there is a rebuttable presumption in law that the intention was to unfairly prefer that connected party.

Where a person acting with *bona fides* has acquired an interest in the assets of the company for value, that person's rights are not affected by a determination that the transaction concerned was an unfair preference.

Improperly transferred assets

Under the Companies Act 2014, if it can be shown to the satisfaction of the High Court that company property was disposed of (which would include by way of transfer, charge, security assignment or mortgage) and the effect of such disposal was to "perpetrate a fraud" on the company, its creditors or members, the High Court may, if it deems it just and equitable, order any person who appears to have "use control or possession" of such property or the proceeds of the sale or development thereof, to deliver it or pay a sum in respect of it to the liquidator on such terms as the High Court sees fit.

There is no requirement to prove fraud – it must merely be proven that the effect of the disposition was to perpetrate a fraud. It is not necessary for the company to be insolvent at the time of the disposition, although the application can only be made in respect of a company that is being wound up. In addition, there is no time limit specified under the section, therefore, theoretically at least, any transaction could be challenged.

The Court, in making any order with regard to property that has been improperly transferred, must have regard to the rights of person who have *bona fide* and for value acquired an interest in the property concerned.

Breach of fiduciary duty to preserve the assets of the Company

Where a company is insolvent, that company ceases to be the beneficial owner of its assets and the directors no longer have the power to dispose of the assets. The Irish Supreme Court has held that in such a situation, the directors owe a duty to the creditors to preserve the assets to enable them to be applied in discharge of the company's liabilities. Where directors of an insolvent company are aware or ought to be aware of its insolvency, they hold the assets of that company in trust for the benefit of the company's creditors.

The rights of a person that *bona fide* and for value acquires an interest in the property of a company that is insolvent, and who is not on notice of that insolvency, will not be affected by the lack of capacity of the directors.

7. **What form of stay or moratorium applies in insolvency proceedings against the continuation of legal proceedings or the**

enforcement of creditors' claims? Does that stay or moratorium have extraterritorial effect? In what circumstances may creditors benefit from any exceptions to such stay or moratorium?

Examinership

The automatic stay on creditor action commences on the filing of the papers in the court office on an ex-parte basis. The statutory moratorium can last for up to a maximum of 100 days by which time the examiner must have formulated his proposals for a scheme of arrangement. The moratorium is ineffective in relation to rights in rem by way of security in assets located outside of Ireland. Prohibited creditor action includes the appointment of a receiver, enforcement of security, repossession of goods on lease, hire purchase or supplied on retention of title (without the consent of the examiner), liquidation etc. No proceedings may be instigated against the company except b leave of the Court and the Court may, on the application of the examiner, make any order as it believes proper in relation to existing proceedings including an order to stay those proceedings.

Scheme of arrangement

Before a scheme of arrangement is proposed, an application can be made to the Court by the company itself, its directors, any creditor or member or, the liquidator appointed to the company (if applicable) for a moratorium on enforcement to stay all proceedings and restrain further proceedings against the company or its property for such period as the Court deems fit (as opposed to the maximum 100 day period applicable to examinership).

Liquidation

Compulsory liquidation: No proceedings or other creditor action can be commenced or continued against a company in compulsory liquidation without leave of the Court. Where a winding up petition has been presented to the Court, but the Order for winding up has yet to be made, the company or any creditor or contributory can apply to the Court to stay any proceedings until the winding-up petition has been determined.

Voluntary liquidations: No stay automatically arises when a company is placed into voluntary liquidation. Notwithstanding, the liquidator, any creditor or contributory of the company may apply to the Court for a stay on enforcement. On any such application, the Court will have regard as to whether the claim can be dealt with in the course of the liquidation and will apply certain factors to ensure that one creditor does not obtain an advantage over the other creditors.

Receivership

No restrictions apply to a company in receivership save that the relevant assets over which the receiver is appointed will fall outside of the pool of assets available to satisfy claims of the company's other creditors.

8. **What restructuring and rescue procedures are available in the jurisdiction, what are the entry requirements and how is a restructuring plan approved and implemented? Does management continue to operate the business and / or is the debtor subject to supervision? What roles do the court and other stakeholders play?**

Examinership

Examinership is a court protection procedure available to a company that is insolvent but which has a business that is capable of surviving as a going concern. The procedure for instigating an examinership is described in detail at Section 4 above.

The Examiner has a maximum of 100 days from the date of his interim appointment to report to the Court that he has formulated a Scheme of Arrangement that has the support of at least 50% plus one in value and number of at least one class of impaired creditor. A Scheme of Arrangement will usually provide for (a) the investment of funds from an investor to fund payments to impaired creditors, (b) the discharge of the Examiner’s fees, and (c) the transfer of the shareholdings to the investor(s). The Court will not approve a Scheme of Arrangement unless it is satisfied that it is not unfairly prejudicial to any creditor (which generally means that a creditor cannot receive less in cash terms than it would in a receivership or liquidation). The Court will often have particular regard to the potential for jobs to be saved when considering whether or not to approve a Scheme of Arrangement. A Scheme of Arrangement that has been approved by the Court will be binding on all creditors, including secured creditors, regardless of whether they have voted in favour of the Scheme of Arrangement.

The examinership process is overseen by the High Court. An examiner is an officer of the Court and owes his duties to the Court. The directors’ powers survive the appointment of an examiner and as such they remain responsible for the day-to-day management of the company. The company continues to trade during the period of examinership.

In an examinership, the shareholders retain their shares in the company and their powers are technically unaffected, however, because of the insolvency of the company, the shares are effectively worthless and no action can be brought against the company, including a minority oppression claim, during the period of the examinership without the Court's permission. The scheme of arrangement can, and often will, provide for the compulsory transfer of all issued shares to the investor without any shareholder consent.

Scheme of Arrangement

A scheme of arrangement can be invoked where a solvent or insolvent company proposes to enter into an arrangement with its creditors or its members by way of reconstruction (by a reduction in share capital, amalgamation of any two or more companies or otherwise). A scheme of arrangement can be proposed by the directors, or the liquidator of a company. An application is made to court for a moratorium which restricts creditors from taking enforcement action against the company, which allows the directors to restructure the company without threat of creditor action. The company can continue to trade during the moratorium.

Meetings of the company’s members and creditors are held at which the proposal are put and, where passed by a majority in value of creditors (or members), an application is made to the High Court to sanction the compromise or arrangement. The Court will sanction the scheme where it believes it to be reasonable and offers the company’s creditors a larger return than that which they would have received in a liquidation. The scheme of arrangement will be legally binding once approved by the Court.

The process does not affect the management or operations of the company, or the shareholders of the company save to the extent that the Court has, at its discretion, granted a stay of any proceedings against the company.

In contrast to an examinership, the business of the company does not need to be viable and a scheme may be used to wind up the company's affairs to achieve a greater return for its creditors.

9. Can a debtor in restructuring proceedings obtain new financing

and are any special priorities afforded to such financing (if available)?

Examinership

In an examinership the company can obtain financing where required to ensure the survival of the company during the period of examinership. That financing will be certified by the examiner as having been necessarily incurred to ensure the survival of the business. If the examinership does not succeed and the company is liquidated, the certified debt will rank after the claims of fixed charge holders and the costs of the examinership but ahead of all other claims, including preferential creditors, floating charge holders and unsecured creditors.

Liquidation

A liquidator can raise financing where necessary to fund the activities of the liquidation, and such financing if appropriately incurred will generally rank as a cost and expense of the liquidation and therefore ahead of all other claims.

Receivership

Subject to the terms of the security document pursuant to which he was appointed, a receiver can raise financing to fund the activities of the receivership, and such financing will generally rank as a cost and expense of the receivership and therefore will be paid from the proceeds of the sale of the secured assets ahead of all other claims including those of the secured creditor.

10. Can a restructuring proceeding release claims against non-

debtor parties (e.g. guarantees granted by parent entities, claims against directors of the debtor), and, if so, in what circumstances?

Examinership

Where an Examiner is appointed to a company, the beneficiary of a guarantee in respect of the obligations of that company is prohibited from taking steps to enforce the guarantee during the period of court protection. However, the beneficiary of the guarantee will be able to enforce post-examinership provided that he offers to transfer to the guarantor the right to attend and vote in his place at the creditors' meetings with respect to the Scheme of Arrangement. This offer must be made in strict compliance with certain time limits (not less than 14 days before the meeting if more than 14 days' notice is given or within 48 hours of receipt of the notice of the meeting where less than 14 days' notice is given). If the beneficiary does not make the offer to the guarantor or does not make it within the statutory time-limits, the beneficiary cannot enforce the guarantee post-examinership.

If the scheme is approved and the guarantor has discharged the debt, any payment to which the creditor would have been entitled to under the Scheme of Arrangement becomes payable to the guarantor. Should the Scheme of Arrangement not take effect, the beneficiary may apply to the court seeking leave to commence proceedings against the guarantor.
It is not currently clear whether a guarantee in respect of the non-payment obligations of a company in examinership can be enforced following post-completion examinership.

It is important to note that:

- the liability of the guarantor can be written down along with the liability of the company where the terms of the guarantee so provide; and
- if the guarantor is itself a company in examination, including a related company, its

liability under the guarantee can be written down under any Scheme of Arrangement proposed with respect to the guarantor.

11. Is it common for creditor committees to be formed in restructuring proceedings and what powers or responsibilities to they have? Are they permitted to retain advisers and, if so, how are they funded?

Examinership

The examiner may also convene a committee of inspection to act as a forum for creditors to voice their views on the conduct of the proceedings. Committee members are entitled to be independently advised and their out of pocket expenses will be discharged from as costs of the examinership.

Liquidation

A committee of inspection is a group of people who represent the interests of creditors in a creditors 'voluntary winding up or a compulsory winding up. Its main role is to oversee the activities of the liquidator and protect the rights of creditors. The committee can be comprised of up to 5 creditors and 3 members provided that there are no more than 8 members and no less than 2. The core duties of the committee are to approve the liquidator's fees and expenses, call meeting to discuss concerns about the liquidation, approve payments to certain creditors or agree a compromise with creditors and decide whether or not the powers of the company's directors should continue during the course of the liquidation. Members of the committee of inspection are not paid for their work but are entitled to expenses necessarily incurred, as costs of the liquidation.

Receiverships

The Companies Act does not provide for the formation of creditor committees in a receivership.

12. How are existing contracts treated in restructuring and insolvency processes? Are the parties obliged to continue to perform their obligations? Will termination, retention of title and set-off provisions in these contracts remain enforceable? Is there any ability for either party to disclaim the contract?

Examinership

A contract will not be automatically terminated by the examinership of a company. However, in general a counterparty is not prevented from exercising a right to terminate in accordance with the terms of the contract. Notwithstanding that, a landlord will generally not be entitled to terminate the lease of a premises occupied by the company in examinership provided that the company is able to discharge the rental obligation for the period of the moratorium.

Parties with rights of set off continue to be able to exercise those rights during the period of the examinership. Parties that have retained title to goods supplied to a company in examinership are not permitted to repossess those goods whilst the moratorium is in place. However, the company is not able to dispose of goods without the approval of the Court and where such approval is given the Court will generally direct that the proceeds of the sale of the ROT assets is applied against the monies owing to the ROT creditor.

A company in examinership can, with Court sanction, repudiate any contract where some element of performance (other than payment) remains to be rendered by both the company and the contracting party and where proposals for a scheme of arrangement are being put forward. Where a contract is repudiated, the damage caused to the counterparty will be assessed and constitute an unsecured claim under any scheme of arrangement.

Liquidation

Unless otherwise expressly provided, existing contracts will not automatically terminate upon the appointment of a liquidator to a company. Termination, retention of title and set-off provisions will remain enforceable notwithstanding the liquidation of the company.

A liquidator may, within two months of the winding-up of the company, apply to the High Court to disclaim certain onerous or unprofitable contracts of the company. Unconditional contracts for the sale of property cannot be disclaimed, and where a liquidator refuses to complete such a contract, an order for specific performance can be sought.

Receivership

Unless otherwise expressly provided, existing contracts will not automatically terminate upon the appointment of a receiver to a company. Termination, retention of title and set-off provisions will remain enforceable notwithstanding the appointment of a receiver to the company. It has been held in case law that a receiver may disregard the contractual obligations of the company where he can prove that there would be no benefit to the company or the secured creditor in fulfilling the contractual obligations.

A receiver cannot repudiate contracts however, as agent of the company, a receiver may refuse to perform contracts whereby the only recourse available to the contracting party is to sue an insolvent company for breach of contract whereupon he would rank as an unsecured creditor only in respect of any award made in its favour.

13. What conditions apply to the sale of assets / the entire business in a restructuring or insolvency process? Does the purchaser acquire the assets “free and clear” of claims and liabilities? Can security be released without creditor consent? Is credit bidding permitted? Are pre-packaged sales possible?

Examinership

A scheme of arrangement in an examinership does not involve the sale of the assets and business of the company. Rather, the balance sheet of the company is rendered solvent through the cramming down and discharge of pre-petition liabilities. The pre-petition equity is also typically transferred, free from encumbrances, to the investor in the scheme.

It is commonplace for a scheme of arrangement to provide for the cramming down and discharge of secured claims (to the value of the security), whereupon the security will be released. A scheme of arrangement can provide for the cramming down of secured claims and the release of security without the consent of the secured creditor(s) provided that (a) the majority of at least one class of impaired creditor has voted in favour of the scheme and (b) the scheme is not unfairly prejudicial to the secured creditor.

There is nothing under Irish law to suggest that a secured creditor cannot put forward an investment proposal to fund a scheme of arrangement with a view to acquiring an equity position in the company, and such a proposal could involve some element of credit bidding, including a debt for equity swap, although payments to other classes of impaired creditors under scheme of arrangement will need to be cash funded.

Liquidation

A liquidator is required to obtain the best price reasonably obtainable for the assets of the company. Where the liquidator has decided to continue to trade the business post-liquidation, he can also sell the business as a going concern. However, the liquidator will invariably exclude all warranties and personal liability in the sale contract.

Where assets are secured in favour of a creditor a liquidator will not be able to sell free and clear of that security unless the secured creditor agrees to release its security, save where the proceeds will be sufficient to discharge the entirety of the secured obligation.

A liquidator may permit a credit bid by a creditor provided that other creditors are not prejudiced and all *pro rata* payments due to other creditors are paid in cash.

Receivership

The receiver has a statutory to obtain the best price reasonably obtainable for the secured assets over which he or she has been appointed. Where the receiver has also been appointed as a manager he or she can also carry on the trade and sell the business as a going concern. However, the receiver will invariably exclude all warranties and personal liability in the sale contract.

Save where the proceeds exceed the entirety of the secured liabilities, the receiver cannot compel the secured creditor to release its security on the sale of the assets.

There is nothing under Irish law to prevent a secured creditor from credit bidding to acquire the secured assets from a receiver that it has appointed (although usually the asset is acquired by an affiliate rather than in the secured creditor’s own name) provided that other creditors are not prejudiced and any payments that the receiver is obliged to pay to preferential creditors are cash funded.

Pre-pack sales (usually implemented through a receivership) are not prohibited under Irish law. The insolvency practitioner must take precautions to ensure that he obtains best price reasonably obtainable at the time of sale (usually by reference to a market valuation) and that no creditor is prejudiced as a result of a swift sale.

14. **What duties and liabilities should directors and officers be mindful of when managing a distressed debtor? What are the consequences of breach of duty? Is there any scope for other parties (e.g. director, partner, shareholder, lender) to incur liability for the debts of an insolvent debtor?**

The duties of the directors of an insolvent, or potentially insolvent, company are primarily owed to the company's creditors. Where the directors are aware of the insolvency they are deemed to hold the assets on trust for the creditors of the company and are obliged to preserve the assets for the benefit of the creditors.

A director of an insolvent company that acts in breach of his or her fiduciary duties to the creditors can be sued for damages, and a purchaser with knowledge of the insolvency that attempts to acquire assets at an undervalue can be required to return or compensate the company and its creditors.

Reckless trading

Directors that are found by the Court to have knowingly engaged in reckless trading (i.e. allowing a company to incur liabilities that the director knows the company cannot or is unlikely to be able to discharge) can become personally liable for the debts of the company, in whole or in part, and without limitation in amount. A director is deemed to have acted knowingly where he or she (a) ought to have known that their actions or those of the company would cause loss to creditors or (b) allowed a company to contract a debt without honestly believing on reasonable grounds that the company would be able to discharge that debt.

The Court may relieve an officer of personal liability for the debts of the company where it is satisfied that the officer acted honestly and responsibly in relation to the conduct of the affairs of the company.

Fraudulent trading

Directors can be found guilty of fraudulent trading if, in the course of an examinership or the winding up of a company, it is proven that the director was knowingly a party to the carrying on of any business of the company with intent to defraud creditors of the company or creditors of any other person or for any fraudulent purpose. A person found guilty of fraudulent trading may be exposed to criminal liability as well as personal liability for all or any part of the debts or other liabilities of the company.

Duty to keep adequate accounting records

Directors are responsible for the company’s due administration, including keeping proper accounting records, minutes of meetings and filing information at the Companies Registration Office.

Where a company is wound up, and was unable to pay all of its debts, and it is shown that the failure to keep adequate accounting records contributed to this, or resulted in substantial uncertainty concerning its assets and liabilities, or substantially impeded its orderly winding-up, the company and every director or other officer in default shall be guilty of a criminal offence and moreover a court may declare that any such director or other officer in default shall be personally liable for all or any part of the liabilities of the company.

Restriction and Disqualification orders

A liquidator of an insolvent company is obliged to make an application to the Court for an Order restricting the directors from acting as directors of another company for a period of up to five years, unless the liquidator directed otherwise by the Director of Corporate Enforcement (the "**ODCE**"). A defence to such an order exists where the director can demonstrate that he or she acted honestly and reasonably in the conduct of the affairs of the company. In addition the directors must demonstrate that they have when requested to do by the liquidator, cooperated as far as could reasonably be expected in relation to the conduct of the winding up. A restricted director can only act be appointed or act in any way, whether directly or indirectly, as a director or secretary or be concerned or take part in the promotion or formation of any company where the company has a paid up share capital of €500,000 in the case of a PLC or €100,000 in the case of a private company.

An application can also be brought by a wide range of parties including shareholders, directors, employees, receivers, liquidators, examiners and creditors, for a disqualification order in respect of a director who has been guilty of fraud, a breach of his duties, reckless or fraudulent trading or conduct which makes him unfit to be concerned in the management of a company. A disqualification order will prevent the offender from acting as an auditor, director, receiver, liquidator or examiner or other officer of a company for a period of five years, or such other period as the court may order.

Disqualification and restriction orders can be obtained against any person who is a director of a company on the date of, or within 12 months of, the commencement of the winding up.

Directors' liability

As explained in more detail in our response to Question 11 above, a director of an insolvent can become personally liable for personally liable (without limitation of liability) for all or any part of the debts or other liabilities of the company where he or she is found to have (a) knowingly engaged in reckless trading (b) engaged in fraudulent trading or (c) failed to ensure that the company keeps adequate records.

Where a party (including a lender, parent entity or other party) is found to be a shadow director of an insolvent company (i.e. a person in accordance with whose instructions the company was accustomed to act), then it could also be treated as a director and become personally liable in the circumstances outlined above.

Related companies

Liquidators, creditors and contributories of a company that is being wound up have the power to apply to court to have related companies contribute to the debts and liabilities of the company which is being wound up by means of a contribution order. In any such application the Court will have regard to (a) the extent to which the related company took part in the management of the company being wound up, (b) the conduct of the related company towards the creditors of the company being wound up and (c) the effect that such order would be likely to have on the creditors of the related company.

Parent companies

Shareholders of an unlimited liability company that is being wound up on an insolvent basis are liable, without limit, to make a contribution of an amount equal to the deficit on its balance sheet after its assets have been realised.

15. **Do restructuring or insolvency proceedings have the effect of releasing directors and other stakeholders from liability for previous actions and decisions?**

Irish law does not provide for any such release of liability.

16. **Will a local court recognise concurrent foreign restructuring or insolvency proceedings over a local debtor? What is the process and test for achieving such recognition? Has the UNCITRAL Model Law on Cross Border Insolvency or the UNCITRAL Model Law on Recognition and Enforcement of Insolvency-Related Judgments been adopted or is it under consideration in your country?**

Regulation (EU) 2015/848 (the "*Recast Insolvency Regulation*") is applied in Ireland and provides that where a company has its centre of main interests (COMI) in an EU Member State (except Denmark) the courts of that member state have control of the insolvency process even if the company carries out business elsewhere.

Secondary proceedings or territorial proceedings can be opened concurrently in another EU jurisdiction (except Denmark) in which the company has an establishment (e.g. carries out business and /or has company assets located in that jurisdiction). Territorial proceedings are, in effect, secondary proceedings which are commenced prior to the opening of main insolvency proceedings and may be opened once the requirements of Article 3(2)of the Recast Insolvency Regulation are met. When main insolvency proceedings are opened, territorial insolvency proceedings usually become secondary insolvency proceedings. The effects of secondary insolvency proceedings or territorial insolvency proceedings opened in that other Member State are restricted to the assets of the debtor situated in the territory of such other Member State.

Irrespective of whether the insolvency proceedings are main, secondary or territorial insolvency proceedings, such proceedings will, subject to certain exceptions, be governed by the local insolvency law of the court that has assumed jurisdiction over the insolvency proceedings of the debtor. The courts of all Member States (other than Denmark) must recognise the judgment of the court commencing the main proceedings, which will be given the same effect in the other Member States provided no secondary proceedings or territorial proceedings have been commenced there.

The insolvency practitioner appointed by a court in the Member State which has jurisdiction to commence main proceedings may exercise the powers conferred on it by the laws of that Member State in another Member State (other than Denmark) (such as to remove assets of the debtor from that other Member State). These powers are subject to certain limitations (e.g. the powers are available provided that no insolvency proceedings have been commenced in that other Member State nor any preservation measure to the contrary has been taken there further to a request to commence secondary proceedings in that other Member State where the debtor has assets).

The Recast Insolvency Regulation does not apply in the context of receiverships or schemes of arrangement. In addition, insolvency processes outside the EU are not covered by the Regulation. As such, recognition of these insolvency processes is determined on a case-by-case basis in accordance with conflict-of-law rules. Ireland is not a signatory to the UNCITRAL Model Law and therefore US Chapter 11 bankruptcy proceedings are not automatically recognised.

There are no current plans to adopt the UNCITRAL Model Law in this jurisdiction.

17. Can debtors incorporated elsewhere enter into restructuring or insolvency proceedings in the jurisdiction?

Examinership

Examinership is available in principle to any company having its centre of main interests in Ireland, including non-Irish incorporated companies.

Liquidation

Under the Insolvency Regulations, the Irish High Court has jurisdiction to wind up a company that is incorporated under the laws of another EU jurisdiction where that company has its centre of main interests (or COMI) in Ireland. The Irish High Court also has jurisdiction to open secondary proceedings in respect of a company that is incorporated under the laws of another EU jurisdiction where main insolvency proceedings have been opened in another EU member state provided that the relevant company has an establishment in Ireland.

The Irish High Court also has jurisdiction to wind-up companies that are registered in jurisdictions outside the EU where (a) there is a substantive connection with Ireland, (b) there is a reasonable possibility, if a winding-up order is made, of such order benefitting those applying and (c) the Court has jurisdiction over one or more persons that are interested in the distribution of assets of the company.

Receivership

A receiver can be appointed to assets held by a foreign-incorporated company in Ireland, provided that the terms of the relevant document allow for this.

18. How are groups of companies treated on the restructuring or insolvency of one or more members of that group? Is there scope for cooperation between office holders?

Examinership

In an examinership, the Court can appoint the Examiner to a related company or related companies at the same time or thereafter (provided any related company also has its COMI in Ireland), where it is satisfied that:

- the making of the order in respect of a related company would be likely to facilitate the survival of the insolvent company as a going concern; and
- there is also a reasonable prospect that the related company and the whole or any part of its undertaking is capable of surviving as a going concern.

Liquidation

Related Irish companies are generally not wound up as a group. However, where two or more related companies are being wound up the liquidators, creditors and / or contributors of those companies can apply to court for a pooling order whereupon the assets of the related companies are pooled and the companies are wound up together as if they were one company. The court must have regard to the following (a) the extent to which any of the companies took part in the management of the other companies, (b) the conduct of the related company towards the creditors of the other companies (c) the extent to which the circumstances that gave rise to the winding up of any of the companies is attributable to the acts or omissions of any of the other companies and (d) the extent to which the business of the companies have been intermingled.

Cross-border group insolvency in EU

The Recast EU Insolvency Regulation (Regulation (EU) 2015/848) introduces a framework for group insolvencies. It provides for voluntary co-ordination between office holders in order to achieve a greater chance of rescuing the entire group. Where utilised, insolvency practitioners from different jurisdictions will co-ordinate a restructuring plan and seek a stay on enforcement mechanisms. The duty to co-ordinate shall exist to the extent that it is not incompatible with local procedural rules and does not give rise to any conflict of interest. The framework envisages one court co-ordinating the group coordination plan with one insolvency practitioner acting as group co-ordinator. Insolvency practitioners in member states can refuse to participate in the group coordination proceedings and therefore, the coordination plan will only be effective where it is consensual.

19. Is it a debtor or creditor friendly jurisdiction?

We believe that Ireland should generally be regarded as a creditor friendly jurisdiction but one in which the legitimate interests and rights of borrowers and other obligors are also protected.

20. Do sociopolitical factors give additional influence to certain stakeholders in restructurings or insolvencies in the jurisdiction (e.g. pressure around employees or pensions)? What role does the state play in relation to a distressed business (e.g. availability of state support)?

In an examinership, the Court will have particular regard for the potential to save jobs when considering whether or not to approve (a) a petition for examinership or (b) a scheme of arrangement.

There is no availability of state support for insolvent companies, however statutory redundancy is available to employees whose jobs are terminated due to the insolvency of their employer via the Social Insurance Fund.

Irish law also provides a certain level of preferential treatment for certain specific classes of creditor in the event of a corporate insolvency – please see our response to Question 5 for further details.

21. What are the greatest barriers to efficient and effective restructurings and insolvencies in the jurisdiction? Are there any proposals for reform to counter any such barriers?

In our view, broadly speaking, Irish law provides for effective and efficient restructuring solutions for most corporate insolvency scenarios. We find, however, that a key issue that often arises, and which can act as a barrier to an efficient process, is the availability of DIP financing. There is a lack of a structured and formal DIP financing arrangement applicable equally to all forms of insolvency proceedings. Currently Irish company law only allows for partial priority status for DIP finance in an examinership, and this can make it more difficult to raise the necessary cashflow funding during the period of the moratorium. We are not aware of any proposals to reform this aspect of Irish insolvency law.