A&L Goodbody

RESTRUCTURING & INSOLVENCY

Ireland transposes the EU Preventive Restructuring Directive: *Modifications to Irish law will be of interest to both Irish and international practitioners*

On 27 July 2022, the European Union (Preventive Restructuring) Regulations 2022 (S.I. 380/2022) (the **Regulations**) amended the Irish Companies Act 2014 (the **Act**) by transposing certain requirements of Directive (EU) 2019/1023 of the European Parliament and of the Council of 20 June 2019 (the **Directive**) not already provided for in Irish law.

This has resulted in a number of modifications to the examinership regime and, for the first time, a codification of directors' duties when companies are in the 'zone of insolvency'.

5 MIN READ

The changes to the Examinership regime include:

- the introduction of the "*best-interest-of-creditors*" test which must be considered in the Independent Expert's report and satisfied before the court can confirm proposals for a scheme of arrangement
- a requirement in cases involving cross-border elements that the examiner must have sufficient experience and expertise, and
- a carve-out to the usual moratorium on creditor action afforded to companies in examinership in respect of certain employee claims.

Broadly speaking, many of the amendments to the Act codify how examinership law has already been interpreted by the courts and practitioners in practice but there are some changes of particular interest which we address below.

1. Voting: Confirmation requirements for Examiner's proposals altered

Previously the court could not confirm any proposals unless at least one impaired class of creditors (i.e. creditors receiving less than the full value of their claim under the proposals) had voted in favour. Now the court must confirm that a majority in number and value of impaired creditors have accepted the proposals in accordance with section 540 of the Act. In another far-reaching change, only creditors who would be 'in the money' in a liquidation are now permitted to vote or be counted in the adoption of any proposals.

Where any proposals have not been accepted in accordance with section 540, the court may, with the examiner's agreement, confirm the proposals if they have been accepted by:

i. a majority of the voting classes of impaired creditors, provided that at least one of those classes is a class of secured creditors or is senior to the class of ordinary unsecured creditors (e.g. preferential creditors), or

ii. where (i) above cannot be satisfied, where at least one class of impaired creditors votes to approve the proposals, being a class which would otherwise receive a payment upon a valuation of the company as a going concern or if the company was liquidated.

It remains to be seen how in practice examiners will address these requirements in their scheme proposals. However, there is a risk that the new requirement for voting creditors to be 'in the money' may reduce some of the flexibility that examiners have had in both collating creditor classes and in securing the approval required to seek court sanction for their proposals.

2. Contracts: Restrictions on Ipso Facto clauses introduced

One historic limitation of examinership had been the inability to compel counterparties to continue to trade during the process where creditors were able rely on 'Ipso Facto clauses' triggered by the appointment of the examiner. Section 520A of the Act now precludes creditors from invoking these types of clauses in an examinership and brings examinership more closely into line with the practice adopted both under US Chapter 11 and the UK's administration process where these clauses are unenforceable.

An 'Ipso Facto' clause is a provision in a contract allowing a contracting party to modify or terminate the contract on the occurrence of an event which puts performance by the counterparty at risk. These clauses are often contained in contracts for the supply of goods and services which the Directive recognised can have a negative impact on a company's business and its chances for a successful rescue, in particular, where the contracts involve essential supplies (e.g. utilities).

Irrespective of any contractual clause to the contrary, the Act now precludes a creditor from terminating, accelerating, modifying or withholding the performance of 'executory contracts' (contracts where parties still have ongoing obligations to perform at the presentation of the examinership petition) to the detriment of the company solely by virtue of the presentation of a petition; the appointment of an examiner/interim examiner; or a company being placed under the protection of the court.

Creditors are also precluded from terminating, accelerating, modifying or withholding the performance of 'essential executory contracts' (executory contracts necessary for the continuation of the day-to-day operations including contracts for supply) solely by virtue of the company being unable to pay its debts as prescribed.

It is unclear how these provisions will interplay with liabilities incurred prior to the presentation of a petition and whether it will still be necessary for the Independent Expert or the company to take account of those liabilities in the cash projections and recommendations to the court on payment of pre-petition liabilities. It also remains to be seen in practice how these provisions will impact the position of lenders that have undrawn lending commitments to debtor companies in examinership.

3. Directors: statutory duties to creditors codified

The Regulations have introduced a new statutory duty on directors when a company is in the zone of insolvency. In particular, directors will have to **have regard to the interests of creditors** where a director believes, or has reasonable cause to believe, that a company is, or is likely to be, unable to pay its debts, or becomes aware of its insolvency.

Previously the Irish courts recognised a number of instances where the directors of a company in the zone of insolvency have a duty to have regard to the interests of creditors. However, there had been no Irish authority to confirm whether this duty is owed directly to creditors or is simply one of the duties that the director owes to the company on insolvency. The new statutory duty is owed to the company alone and will be enforceable in the same way as other fiduciary duties owed by a director to the company. In practice, this should mean that creditors will not have a direct right of action against a director for a breach.

It also ensures that Irish law is now more closely aligned than it previously was with the UK where there is a statutory duty owed by directors to the company to promote the success of the company for the benefit of its members, and where the English Courts have established that the duty to have regard to the interests of creditors when a company is in the zone of insolvency is a duty is owed to the company alone, and not to its creditors.

Conclusion

Whilst it remains to be seen how examiners and the courts will apply the provisions introduced by the Regulation, it is clear that examinership will remain an extremely efficient restructuring tool which will continue to facilitate domestic restructurings but also complex cross-border restructurings, whether as a lead process as was the case with Norwegian Air Shuttle or as an ancillary process as was the case with both the Weatherford International plc and Mallinckrodt Pharmaceuticals. Once the modified regime has been worked through in practice it should provide an enhanced restructuring framework harmonised with the EU's aspirations and expectations and bring the process more into line with the practices adopted in both US Chapter 11 and UK administration.

A&L Goodbody

For further information contact a member of the A&L Goodbody Restructuring and Insolvency team.

Key contacts

David Baxter
Partner
+353 1 649 2514
dbaxter@algoodbody.com

Mark Traynor
Partner
+353 1 649 2261
mtraynor@algoodbody.com

Marsha Coghlan
Partner
+353 1 649 2116
mcoghlan@algoodbody.com

Brian O'Malley
Partner
+353 1 649 2466
bomalley@algoodbody.com

Stephen Ahern
Senior Associate
+353 1 649 2310
sahern@algoodbody.com

Thomas Ryan
Senior Associate
+353 1 649 2268
tpryan@algoodbody.com