A&L Goodbody

A user's guide to cross border restructurings

The COVID-19 global crisis has brought cross border insolvencies into focus as companies consider the challenges that may arise where assets are situated across a number of jurisdictions and where an insolvency event may occur.

Drawing on our experience of cross border restructurings, and the issues that should be considered, we look at the key issues to consider when assessing if you should implement a restructuring where an Irish company is involved and which restructuring tool to avail of.

The Irish corporate restructuring processes

The two principal Irish corporate restructuring processes are examinership and a scheme of arrangement.

Examinership is a process where a company in financial difficulties is placed under the protection of the Court and an examiner is appointed to draw up proposals for the restructuring of the company within a 100 day period. It is similar to Chapter 11 of the US Bankruptcy Code.

A **scheme of arrangement** is a statutory procedure whereby claims against a company can be compromised and arrangements made by the company with its creditors or shareholders. Irish schemes of arrangement are nearly identical to English schemes of arrangement and the relevant English case law will be persuasive before the Irish courts. Schemes of arrangement have been the most popular restructuring tool in the EU in the last decade.

The other principal restructuring tool availed of is **receivership** which is a way of enforcing security whereby a secured lender appoints a receiver over secured assets. This is typically the restructuring tool of choice when implementing a pre-pack asset disposal in a distressed scenario.

Liquidation is also availed of which results in the final dissolution of a company and is similar to Chapter 7 of the US Bankruptcy Code.

Are foreign insolvency proceedings recognised under Irish law?

The answer to this question largely depends on where the foreign proceeding began and whether the proceeding has commenced in the EU or not. For example, Ireland has not adopted the United Nations Commission on International Trade Law (UNCITRAL) model law on cross border insolvency. Equally, there is no automatic recognition of US bankruptcy processes under Irish law. Outside of the EU (as detailed below) there is therefore no automatic recognition of foreign insolvency proceedings.

As an EU member state, Ireland has implemented the Recast Insolvency Regulation (EU) 2015/848 on insolvency proceedings (**Recast Regulation**). The Recast Regulation is applicable in all EU member states apart from Denmark and also determines the recognised insolvency proceedings for each member state. In Ireland, most insolvency proceedings are recognised apart from receiverships. The purpose of the Recast Regulation is to provide procedural rules to determine the proper jurisdiction for a debtor's insolvency proceedings and the applicable law to be used in those proceedings in order to avoid conflict of law issues.

The Recast Regulation also requires mandatory recognition of relevant insolvency proceedings in other EU member states which can offer particular comfort to local directors of companies in an EU group restructuring. The Recast Regulation pivots around the concept of a 'centre of main interests' (COMI) and provides that the jurisdiction where the company's COMI is located is the jurisdiction where the company's main insolvency proceedings should be opened. It is that jurisdiction's local laws that should also govern the conduct of the main proceedings once they are opened.

There have been very few pan-European group restructurings with an Irish aspect so more commonly the group restructurings involving Irish entities have tended to be US focused and involve US bankruptcy filings. In many cases, the decision to pursue a US bankruptcy filing is influenced by the fact the underlying finance documents contain US choice of law clauses.

Group restructurings: key Irish law issues

Director duties

Under Irish law, directors of a company generally owe a duty of care to the company but for companies that are in the zone of insolvency, the directors must have regard to the interests of a company's creditors; this usually means considering the impact that a material step/transaction may have on creditors. Failure to adhere to this principle can in rare cases result in personal sanction for an Irish director.

This can present practical challenges in the context of a group restructuring when the interests of the group may not align with directors responsibilities to the creditors of individual local companies. In particular, where the directors of an Irish company do not receive the comfort of a recognised court order that they can subsequently rely on if the restructuring is unsuccessful, and individual companies are placed into an insolvent liquidation, this can present challenges for directors. It is important therefore to ensure that the Irish directors are afforded adequate and timely financial and legal advice.

Which jurisdiction should the bankruptcy filing be made in?

Debtor's COMI

In an EU context, one of the most important factors in assessing the jurisdiction in which to file is where the debtor's COMI is located and the prospects of a court accepting jurisdiction of the proceedings. This will also be important in assessing the risk of creditor challenge.

Choice of law under finance documents

Where the underlying finance documents contain a choice of law clause that is different to the geographical location of the debtor's business, a decision will need to be made as to which is the most appropriate jurisdiction to conduct a restructuring. Part of the assessment will likely turn on the complexity of the restructuring and the ability to successfully conclude it within the timeframes permitted under the relevant restructuring and bankruptcy provisions.

Will the US bankruptcy process be recognised by the Irish courts?

Ireland does not automatically recognise the US Bankruptcy Code or orders made by US Bankruptcy Courts. This can present practical challenges in the context of global restructurings in which companies in a number of different states are brought under the umbrella of a US bankruptcy process. Against this challenge, we would expect an Irish court to respect both the process and orders made by a US Bankruptcy Court, in particular, if disgruntled creditors sought to re-litigate before the Irish courts issues that had already been determined by a US Bankruptcy Court. The challenge for an Irish court is where there is a disconnect between Irish company law and the actions or orders made in the US bankruptcy process.

The location of significant creditors

The decision about the jurisdiction in which to file will also be influenced by the location of the more significant creditors and their familiarity with the available restructuring tools and Court processes. This decision will need to be given careful consideration when assessing the prospects of a successful restructuring. A US Order will carry considerable weight for US based creditors (or those with material US interests) even if not directly enforceable in Ireland but it may not stop non US creditors taking actions against the Irish company.

Restructuring funding

Another key consideration will be the funding required to ensure that the group can continue to trade through a restructuring process. There will be little point in making a restructuring filing or proposal unless the group has sufficient liquidity to trade through the restructuring or alternatively the ability to raise funds to provide a sufficient liquidity buffer.

Under Irish examinership it is possible for an examiner to approve the discharge of certain liabilities which are afforded priority and can be discharged from a company's floating charge assets but not a company's fixed charge assets if the restructuring is unsuccessful. As a matter of practice, this power is exercised sparingly by examiners. However, outside of this process, as a matter of Irish law it is not possible to advance funds to a distressed company on a first priority secured basis or to secure priority of repayment of those funds if the restructuring is unsuccessful. In the event of the company ultimately being placed into an insolvent liquidation, the monies advanced rank as an unsecured claim in the liquidation and repayment of those monies rank behind any return to secured creditors.

This is in contrast to the position in US Chapter 11 proceedings where it is possible to advance 'debtor in possession' funding on a secured basis subject to the agreement of creditors and the US Bankruptcy Court. This is also of importance to the directors who may otherwise be charged with further prejudicing the financial position of existing creditors by increasing the indebtedness of a company if there is a risk that the restructuring is ultimately unsuccessful.

Aircraft specific remedy – Alternative A

One area that is harmonised to a large extent across a number of jurisdictions is the availability of remedies relating to aircraft assets under the Cape Town Convention. Ireland is one of the Contracting States to the Cape Town Convention and applies the Alternative A insolvency remedy. This means that a regime substantially similar to the long established Chapter 1110 insolvency remedy in the US applies to aircraft assets the subject of a lease, a security agreement or a conditional sale agreement registered on the international registry applies in Ireland. The key aspect of this remedy is that within 60 days of an insolvency-related event of a lessee, mortgagor or conditional purchaser, the lessor, financier or conditional seller will either get the aircraft asset back or all defaults (other than the default occasioned by the insolvency itself) will have been cured and an undertaking given as to future obligations. The adoption of Alternative A is an exception to the Irish examinership process as it reduces the usual 100 day waiting period to 60 days for qualifying aircraft leasing and security arrangements. The remedy is very much focused on the aircraft assets rather than the company and assumes the aircraft are either located in Ireland or in the possession of the debtor e.g. lessee in question. Pursuant to the terms Article XXX(4) of the Aircraft Protocol to the Cape Town Convention, the courts of other Contracting States (for example, the bankruptcy courts of the United States) are bound to act in conformity with the declarations (if any) made by the primary insolvency jurisdiction of the debtor. While this has not been tested in an Irish context, this would mean that in dealing with a bankruptcy filing of an airline or aircraft lessor whose primary insolvency jurisdiction is Ireland, a US bankruptcy court should respect and apply Alternative A, even if there are no concurrent proceedings in Ireland.

Tax considerations

Where there is the possibility of a structural unwind or the disposal of assets as part of a Group restructuring involving an Irish company, it will be important that Irish tax considerations are taken into account pre-implementation.

Conclusion

When evaluating group restructuring options it will be important to consider what local law challenges or considerations may need to be taken into account prior to making any formal decisions as to the most appropriate jurisdiction and tools to implement the restructuring. It pays to have worked through the likely outcomes for key operating and obligor companies within the group (including how issues such as directors' duties can be managed) well in advance of electing which process in which jurisdiction should anchor the restructuring.

For more information, please get in touch with your usual A&L Goodbody contact or any member of the Aviation & Transport Finance, Finance or Restructuring & Insolvency teams.

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