



THE STRATEGIC **VIEW**

Expert perspectives on international law

Corporate Restructuring 2016

Legal analysis, forecasts and opinion by
leading legal experts in key jurisdictions

THE STRATEGIC VIEW

Corporate Restructuring 2016

Contributing Editor
Tom Vickers,
Slaughter and May

glg global legal group

Published by
Global Legal Group Ltd.

59 Tanner Street
London SE1 3PL, UK
Tel: +44 20 7367 0720
Fax: +44 20 7407 5255

Email: info@glgroup.co.uk
Web: www.glgroup.co.uk

Head of Business Development
Dror Levy

Sales Director
Florjan Osmani

Sales Support Manager
Toni Hayward

Editor
Rachel Williams

Senior Editor
Suzie Levy

Group Editor
Fraser Allan

Publisher
Mark Eaton

Group Consulting Editor
Alan Falach

Group Publisher
Richard Firth

Cover image, chapter images
iStock.com

All other images courtesy
of the authors

Printed by
Stephens & George Print Group
February 2016

Copyright © 2016
Global Legal Group Ltd.

All rights reserved
No unauthorised reproduction

ISBN 978-1-910083-84-0
ISSN 2397-2971

*Further copies of this
publication and others can be
ordered from the publisher -
please call +44 20 7367 0720*



- 3  **PREFACE**
Tom Vickers Slaughter and May
- 5  **AUSTRALIA**
Dominic Emmett & Jessica Arscott Gilbert + Tobin
- 11  **AUSTRIA**
Florian Philipp Cvak & Martin Abram Schindler Rechtsanwälte GmbH
- 17  **BRAZIL**
Luiz Fernando Valente de Paiva & Andre Moraes Marques Pinheiro Neto Advogados
- 23  **CANADA**
Robert Chadwick & Brendan O'Neill Goodmans LLP
- 28  **DENMARK**
John Sommer Schmidt & Morten L. Jakobsen Gorrissen Federspiel
- 33  **ENGLAND & WALES**
Tom Vickers & Megan Sparber Slaughter and May
- 38  **FRANCE**
Nicolas Laurent & Olivier Puech Bredin Prat
- 43  **GERMANY**
Daniel Kress & Torsten Göcke Hengeler Mueller
- 49  **HONG KONG**
Mark Reed & Alexander Tang Stephenson Harwood
- 54  **IRELAND**
David Baxter A&L Goodbody
- 59  **ITALY**
Vittorio Lupoli & Lucio Guttilla BonelliErede
- 64  **JAPAN**
Shinichiro Abe Kasumigaseki International Law Office
- 68  **MEXICO**
Antonio Franck & Fernando Ballesteros Cameroni Jones Day
- 72  **NETHERLANDS**
Claudine Maeijer & Daniëlle Hack Eversheds B.V.
- 78  **NORWAY**
Stine D. Snertingdalen Kvale Advokatfirma DA
- 83  **POLAND**
Andrzej Wierciński & Jakub Jędrzejak WKB Wierciński, Kwieciński, Baehr Sp.k.
- 89  **RUSSIA**
Artem Kukin INFRALEX
- 94  **SOUTH AFRICA**
Riza Moosa Norton Rose Fulbright South Africa Inc
- 97  **SPAIN**
Alberto Núñez-Lagos Burguera & Álvaro Font Trancho Uría Menéndez
- 103  **SWEDEN**
Carl Hugo Parment & Michael Gentili White & Case LLP
- 108  **SWITZERLAND**
Thomas Rohde & Till Spillmann Bär & Karrer
- 113  **TURKEY**
Ufuk Yalçın & Deniz Peynircioğlu Hergüner Bilgen Özeke
- 119  **USA**
Alan Kornberg & Brian Hermann Paul, Weiss, Rifkind, Wharton & Garrison LLP

Disclaimer

This publication is for general information purposes only. It does not purport to provide comprehensive full legal or other advice. Global Legal Group Ltd. and the contributors accept no responsibility for losses that may arise from reliance upon information contained in this publication. This publication is intended to give an indication of legal issues upon which you may need advice. Full legal advice should be taken from a qualified professional when dealing with specific situations.



David Baxter
A&L Goodbody

IRELAND

David Baxter reviews alternative corporate restructuring processes available in Ireland, and highlights recent cases whereby these processes have been applied successfully to execute a deal.

1. What trends, in terms of activity levels, affected industries or investor focus, have you seen in the restructuring and insolvency market in your jurisdiction over the last 12 months?

Over the last 24 months there has been an unprecedented deleveraging of senior real estate-related debt by a number of Irish and UK financial institutions. This has resulted in Irish transactions making up a material percentage of the total level of loan portfolio sales across Europe.

These transactions have dominated the Irish restructuring market, not only from the perspective of deal activity levels but also in relation to the manner in which new debt-holders work out such debt. The purchasers of these loan books tend to

be large US private equity funds that have set up or partnered with local servicers.

As regards industry sectors – a number of retailers have availed of the Irish examinership process primarily in order to correct rental obligations. The financing of certain PPP projects (roads in particular) is being revisited due to the sustained failure of the project to meet revenue projections and some of these restructurings are already underway. Oil exploration companies are also under pressure, albeit none have yet availed of any formal restructuring process. Low interest rates and favourable foreign exchange rates (for those Irish businesses exporting to the UK and the US), combined with some reluctance by the major domestic banks to enforce, have resulted in

“ Although formal insolvency appointments are likely to reduce in 2016, a key factor will be the availability of local and international credit and the willingness of both corporate debtors and their lenders to right-size balance sheets where unsustainable debt levels remain ”

relatively few trading companies being placed into receivership.

2. What is the market view on prospects for the coming year?

While the vast majority of real estate loan portfolio sales in the primary market will have concluded by the end of 2015, the rump of these should trade by the end of Q2, 2016.

Although formal insolvency appointments are likely to reduce in 2016, a key factor will be the availability of local and international credit and the willingness of both corporate debtors and their lenders to right-size balance sheets where unsustainable debt levels remain. This is particularly the case in the SME (small and medium enterprises) market where 2012-2015 restructurings may need to be revisited.

The private equity debt holders will continue to work through their loan books and/or sell on portions via a secondary market. We can expect repackaged portfolios of performing loans (attractive to Ireland's pillar banks, AIB and Bank of Ireland) as well as the segmentation of industry specific loans (e.g. in the hotel and leisure sector) within this secondary market.

A number of listed Irish incorporated debt issuers, typically with UK/EU-based businesses/assets, may look to restructure their debt profile using the Irish scheme of arrangement procedure which is very similar to the scheme process available in England.

The negative impact of a potential Brexit on Ireland has been well documented in light of the UK's importance as Ireland's main trading partner, but this is unlikely, of itself, to trigger

any corporate default in 2016. A more immediate issue to the business community is the uncertainty surrounding a general election in Ireland that will take place in the first quarter of 2016, and which may result in a change to the current coalition and potential political instability.

3. What are the key tools available in your jurisdiction to achieve a corporate restructuring – are they primarily formal, court-driven processes, or are informal out-of-court restructurings possible? Do you feel that the tools you have available are effective in terms of providing speedy, fair and predictable outcomes?

Ireland's restructuring toolkit is broad and effective but underused.

Examinership, not dissimilar to US chapter 11, has significant flexibility in relation to both debt cram-down and change of ownership within a three-month court-overseen process. While significant influence vests in the office-holder (the examiner is typically appointed by the debtor), the process enables a business to benefit from a broad and speedy restructuring with a low creditor approval threshold.

We acted for the first lien lenders in the examinership of Eircom in 2012 where approximately €4bn worth of debt was restructured with the first lien lenders taking control of the business, having 15% of their debt written down and more than €1.3bn worth of junior debt being written off. The predictability of the outcome in this type of restructuring (a court welcomes an advanced plan being presented at the outset of the process) is assisted by significant pre-process preparation and key stakeholder engagement. In terms of speed: the court order sanctioning the examiner's scheme of arrangement in Eircom was made 54 days after the process commenced.

Pre-pack receiverships are not unusual and, assuming credit availability picks up, we should see an increased use of this restructuring tool in Ireland. The main attractions with this option – the senior creditors negotiate and settle the sale documents with a buyer so that the business assets can pass immediately upon enforcement – is to minimise value depletion, retain key staff and avoid a protracted insolvency process.

The Irish scheme of arrangement technology is very similar to that in England. While this procedure has been more prevalent in Ireland in relation to the reorganisation of shareholdings of large corporates, it is clear that it can also be used for complex debt restructurings. It tends to be the tool of choice for effecting the large-scale corporate inversion transactions currently in vogue with US/Irish pharmaceutical companies. The advantages of such schemes include the sheer flexibility of the process (as to what

- ▶ types of restructuring can be caught), its speed (8-12 weeks would not be unrealistic for this court process) and although voting thresholds for schemes are much higher than in examinerships, the scheme procedure has the benefit of not being an insolvency process.

4. In terms of intercreditor dynamics, where does the balance of power lie as between shareholders and creditors, and as between senior lenders and junior/mezzanine lenders? In particular, how do valuation disputes between different stakeholders tend to play out?

Ireland is, broadly speaking, a creditor-friendly jurisdiction. However, certain risks exist within examinership where, subject to where value breaks in a capital structure, the possibility of cram-down of all levels of debt can arise.

In practice, and particularly where ongoing support of the existing senior lenders is required by the debtor, forced cram-down of senior debt is rare. In an examinership context, junior/mezzanine creditors hold some modest leverage because examiners tend to offer a tip to out of the money creditors. That said, in Eircom's recent restructuring, all junior debt was written off with no return to that creditor class.

The full suite of debt enforcement entitlements is available to debt holders of a comprehensive security package. While the appointment of receivers by lenders can be challenged by a debtor

if a court is persuaded that examinership is a better option for the corporate debtor, such challenges are not commonplace.

Valuation disputes tend to be resolved following a court's consideration of expert evidence. The 2010 McNerney Homes examinership demonstrated the court's willingness to support the senior lenders' approach to valuation in the context of that stakeholder's preference to sweat assets via a long-term receivership rather than an imminent liquidation/fire-sale valuation. Absent a willingness to be the new money provider, out of the money junior creditors have very limited rights within an examinership.

Intercreditor arrangements within syndicated and structured lending in Ireland are similar to the UK and are often based on market or LMA type precedents.

5. Have there been any changes in the capital structures of companies based in your jurisdiction over recent years caused by the retreat of banks from loan origination? In particular, have you found that capital structures now increasingly comprise debt governed by different laws (such as New York law governed high yield bonds)? If so, how do you expect these changes to impact on restructurings in the future?

There have been limited changes to capital structures as a result of the reduction of traditional bank lending.



“ The extent of transactional activity over the last few years (together with the returns made by investors) demonstrates that Ireland is considered by distressed debt funds as a strong jurisdiction within which to invest capital to execute restructuring opportunities ”

Unsurprisingly, and in line with the broader European trend, larger Irish corporates have looked to avail of other liquidity sources (debt capital markets and alternative lenders) to rebalance the make-up of their financing, resulting in the percentage of their bank debt reducing.

The high yield bond market has been one of the staples for providing the necessary financing for corporate inversion transactions that have recently dominated the Irish M&A landscape. To the extent that restructurings of such vehicles are required in the future, the main change and challenge is likely to be the inter-creditor dynamic against a backdrop of some large debt levels and the potential for a flexible make-up of the key creditor stakeholders in this area.

6. Is there significant activity on the part of distressed debt funds in your jurisdiction? How successful have they been in entering the market, and how much has market practice (or law) evolved in response? If funds have not successfully entered the market, can you identify reasons why?

As noted earlier, the level of debt acquisition in Ireland by private equity funds is utterly unprecedented.

The extent of transactional activity over the last few years (together with the returns made by investors) demonstrates that Ireland is considered by distressed debt funds as a strong jurisdiction within which to invest capital to execute restructuring opportunities. Canyon Capital's acquisition and subsequent sale of its

debt position in the Moran Hotel Group is an example of a distressed debt fund acquiring senior debt and enjoying the upside of an early sale of a restructured business.

In many ways there has been little need for change in market practice or the related law as a result of the significant role of debt funds in Ireland over recent years. However, the creation of Ireland's bad bank, the National Asset Management Agency, in 2009, together with the legislation implementing the liquidation of the Irish Bank Resolution Corporation (IBRC) in 2013, meant that acquiring funds needed to quickly understand the rules of sale of these new vendors who controlled huge real estate loan books. We acted for the special liquidators of IBRC who sold approximately €22bn worth of par senior debt, primarily to international funds, over the course of 18 months.

A good example of distressed debt funds' activity in an All-Ireland context market was the restructuring of the Quinn Group in 2011. This is viewed as a strong case study in relation to challenging inter-creditor dynamics between banks, US private placement debt holders and debt funds.

7. Are there any unusual features of your insolvency or restructuring law that an external investor should be aware of (such as equitable subordination, or substantive consolidation)?

There are very few unusual features of Irish insolvency and restructuring law that would cause concern to an external investor.

The opportunities that examinership presents to external investors are relatively unique in an EU context simply because of the breadth, speed and effectiveness of this restructuring process.

As regards investors seeking to acquire loan portfolios of residential properties, it is fair to say that the ability of lenders to enforce on such loans (particularly family homes) can be protracted and complicated. In line with the broader trend in the EU, regulatory oversight in this area has increased.

8. Are there any proposals for reform of the legal framework that governs insolvency and restructurings in your jurisdiction?

Ireland's Company Code was consolidated and reformed in 2014. With the exception of some minor changes (the codification of directors' duties and the extension receivers' statutory powers), this will have limited impact within the world of restructuring and insolvency.

The minimum period for discharge of a personal bankrupt was recently reduced to 12 months in an effort to stimulate an under-utilised Personal Insolvency Regime and possibly to try and reduce bankruptcy tourism to the UK. ▶

- Very recently, legislation was introduced to extend the regulatory framework which applies to financial institutions in Ireland to acquirers of loan portfolios and/or their servicers.

9. If it was up to you, what changes would you make?

Dublin has been extremely effective at cementing itself as the EU headquarters for the leading US

technology businesses, as well as attracting huge foreign direct investment from other US industries, e.g. biotech and pharmaceuticals.

Assuming this trend continues, consideration should be given to introducing (in addition to examinership) a bespoke Irish chapter 11 regime which would only be available to debtors of a particular financial size. One cannot overstate the importance of familiarity with a restructuring environment and confidence in its procedures to foreign investors.



David Baxter dbaxter@algoodbody.com

David heads up A&L Goodbody's restructuring and insolvency group. He has acted for companies, distressed debt funds, international creditors and insolvency practitioners in the majority of significant restructurings and corporate collapses in Ireland over the last decade. Key mandates include acting for: the Special Liquidators to IBRC (the largest liquidation in Irish history and globally one of the 10 largest bankruptcy cases ever); the first lien lenders to the eircom Group in its 2012 restructuring; and the Quinn Group in its 2011 restructuring.

A&L Goodbody 

A&L Goodbody is internationally recognised as a market-leading corporate law firm. We advise clients on all areas of law from our offices in Dublin, Belfast, London, New York, San Francisco and Palo Alto. A&L Goodbody's Restructuring and Insolvency team has unrivalled experience and expertise in the Irish legal market. The combined Dublin and Belfast office teams include four specialist restructuring and insolvency partners. Together with other experts throughout the firm they advise domestic and international stakeholders on the full range of distressed situations.

www.algoodbody.com



THE STRATEGIC VIEW

glg global legal group

59 Tanner Street, London SE1 3PL, United Kingdom
Tel: +44 20 7367 0720 / Fax: +44 20 7407 5255
Email: sales@glgroup.co.uk

www.thestrategic-view.com