

Response of the Irish Maritime Law Association

CMI

International Working Group on Cross-Border Insolvency

QUESTIONNAIRE

Section 1

Cross Border Maritime Insolvency Issues

Part 1: General Insolvency Principles Applicable to Foreign Creditors

Q1:

Ireland has not adopted the *UNCITRAL Model Law on Cross Border Insolvency*. The Company Law Review Group is currently considering the adoption of the Model Law as part of its Work Programme for the period 2012-2013.¹

Ireland adopted *Council Regulation 1346/2000 on Insolvency Proceedings* (The Insolvency Regulation) into domestic law by amending the Companies Acts and by the *European Communities (Corporate Insolvency) Regulations 2002*.² This regulation applies to all company insolvencies where the centre of operations of the bankrupt business is located in the EU, except Denmark.

The CMI will be aware of the operation of the Insolvency Regulation so it is proposed to simply deal with its aspects which are particular to Ireland..

Article 2 of the Insolvency Regulation defines ‘insolvency proceedings’ as “the collective proceedings referred to in Article 1(1). These proceedings are listed in Annex A.” Annex A lists the proceedings by jurisdiction. In Ireland they are: Compulsory winding up by the court, Bankruptcy, The administration in bankruptcy of the estate of persons dying insolvent, Winding-up in bankruptcy of partnerships, Creditors' voluntary winding up (with confirmation of a Court), Arrangements under the control of the court which involve the vesting of all or part of the property of the

¹ See the 2011 Annual Report (<http://www.clrg.org/cuuploads/editor/file/JEICLRGReport300512.pdf>)

² See SI 333/2002 (<http://www.irishstatutebook.ie/2002/en/si/0333.html>)

debtor in the Official Assignee for realisation and distribution, and Company examinerships.

Article 2 of the Insolvency Regulation defines 'liquidator' as "any person or body whose function is to administer or liquidate assets of which the debtor has been divested or to supervise the administration of his affairs. Those persons and bodies are listed in Annex C." Annex C lists these persons or bodies by jurisdiction. In Ireland they are: Liquidator, Official Assignee, Trustee in bankruptcy, Provisional Liquidator, and Examiner.

As the CMI will be aware the Insolvency Regulation does not apply to receiverships. In Ireland, receivership is a frequently used form of insolvency practice. This can prove problematic.

Non-Regulation Insolvencies are insolvencies that are not subject to the 2002 Regulation. *Forde, The Law of Company Insolvency (Round Hall 2009)* notes at page 396 that there is very little Irish case law on the various issues that arise. There is a Common Law jurisdiction to assist foreign insolvency proceedings but its scope is uncertain and virtually all of the relevant cases are English. Insolvency proceedings falling within this category are receiverships, schemes of arrangement and insolvent liquidations where the centre of operations is outside the EU excluding Denmark.

Quinn, *International and Cross Border Insolvency (Law Society of Ireland: Insolvency Law: Bloomsbury 2009)* states that the appointment of a liquidator will prima facie apply to all of the assets and affairs of a company. However, he states that the ability of Irish liquidators to take possession of and to realise all of the assets of a particular company located outside the EU (excluding Denmark) will depend on the willingness of the relevant jurisdiction to recognise the fact that the Company is in liquidation and the status of the appointment of a liquidator.

Quinn summarises the approach of Ireland to such matters as follows. Section 250 of the Companies Act 1963 provides that an order made by a court of any country recognised for the purposes of that section, and made for in the course of the

winding up a company may be enforced by the High Court in the same way and manner as if the order had been made by the Irish High Court. He notes that the only country that has been recognised for the purpose of the section is the United Kingdom.

Quinn notes that section 36 of the Companies (Amendment) Act 1990 contains a similar provision for orders made for or in the course of a reconstruction or reorganisation of a company but that no recognition order has been made under the section.

Q2:

A company may be wound up by a court or voluntarily.

A foreign creditor will have the same rights as a domestic creditor to petition the High Court to have a company wound up compulsorily. The grounds upon which a creditor can petition for the winding up of a company are set out in section 213 of the Companies Act 1963 at paragraphs (c) – (f). Most creditors will initiate proceedings on section 213(d), namely that the company is unable to pay its debts. This is a discretionary ground. A company will be deemed to be unable to pay its debts if it is indebted in a sum exceeding €1,269.74 and a written demand has been properly served and the sum has not been paid within 21 days. The court must be satisfied that the debt is a bona fide debt, that the debtor does not have a legitimate cross claim and that it is just and equitable to wind up the company.

A foreign administrator of insolvency proceedings may utilise the Insolvency Regulation if appropriate, or section 250(1) of the Companies Act 1963.

Q3:

Yes, aside from the general power of the Director of Corporate Enforcement to supervise liquidators, the *European Communities (Corporate Insolvency) Regulations 2002* lays down rules governing the operation of foreign insolvency administrators operating under the Regulation. These rules provide for the

registration of insolvency judgments with the Registrar of Companies, the publication of certain information in the Official State Journal and at least one daily morning newspaper circulating in the State, the role of the Master of the High Court in confirming a creditors voluntary winding up for the purposes of the regulation and the enforcement of judgments, the role of the High Court in preservation measures, and the role of the Circuit and District Court in relation to the powers of liquidators under Article 18 of the Regulation.

Q4:

No.

Q5:

Yes.

The Court has the power to remove a liquidator. In relation to compulsory liquidations, section 228 of the Companies Act 1963 provides that a liquidator may be removed for cause shown. A similar test is applied to voluntary windings up by section 277 of the Companies Act 1963. The Court has a broad discretion as regards what constitutes 'cause shown.'

Q6:

Irish law does not confer any immunity from suit on a liquidator.

Q7.

Irish law does not confer any immunity from suit on a receiver. Receivers are subject to the supervision of the Director of Corporate Enforcement under the Companies Acts. The Court also has jurisdiction to make a receiver comply with his/her duties where he/she is in default.

Part 2

Subject Matter or Territorial Jurisdiction

Q8:

Yes. Please see answer to Question One.

Part 3 Notice to Foreign Creditors

Q9.

Yes. Liquidators owe a duty to creditors who are the beneficiaries of a company's assets. Liquidators must ascertain the full extent of the company's liabilities. In a creditors' voluntary winding up, the Liquidator must call a meeting of creditors at the end of the first year of the winding up and within three months of each succeeding year. In a compulsory winding up the Court will direct when the meetings are held. See also Article 40 of the Regulation.

Q10.

Please see answer to Question One and Nine.

Q11.

Please see answer to Question One and Nine.

Q12.

Not specifically. Liquidators are required to notify their appointment in the Companies Registration Office Gazette and companies are required to publicise the appointment of liquidators

Q13:

No.

Q14:

N/A see answer to question Nine.

Part 4 Recognition of Foreign Claims

Q15.

Please see answer to Question One and Nine.

Q16.

No.

Q17.

Yes.

Q18.

No.

Q19.

No. Subject to a public policy qualification.

Part 5 Recognition of Foreign Insolvency Proceedings

Q.20

Yes. Please see answer to Question 1.

Q.21

Yes. Please see answer to Question 1.

Q.22

Yes. Please see answer to Question 1.

Q.23

Please see answer to Question 1.

Q.24

Please see answer to Question 1.

Q.25

Please see answer to Question 1.

Q.26

Yes. Please see answer to Question 1

Q.27

No.

Q.28

Yes. Please see answer to Question 1.

Part 6 Need for Reform

Q29.

Although there has not been much discussion on legal uncertainty or difficulty in the administration of cross border disputes, there has been discussion of the difficulties caused generally. There is widespread agreement that aside from cases which come within the terms of the Insolvency Regulation, Irish law is lacking in having in place statutory procedures which will facilitate the assistance of overseas liquidations and reorganisations. The Company Law Review Group is currently considering the adoption of the Model Law as part of its Work Programme for the period 2012-2013.

Section 2

General Maritime Insolvency Issues

Part 7: General Insolvency Principles Applicable to Foreign Creditors

Q.30

The former.

Q.31

No.

Q.32

No.

Q. 33

No.

Q. 34

No

Q 35

The former – although there are special Court lists for hearing insolvency cases within the High Court.

Q. 36

The test is the inability to pay debts as they fall due. A company is deemed to be unable to pay its debts in a variety of circumstances eg failure to comply with a demand by a creditor for payment of more than €1,269.74: Companies Act 1963 s.214

Q. 37

Please see answer to Question One.

Q. 38

Yes. Please see answer to Question Two.

Q. 39

No.

Q. 40

Yes. Please see answer to Question Two. Debtors can argue that it is not just and equitable, that the procedural requirements have not been met and that the debt is disputed or that there is a counterclaim.

Q 41.

Yes. The process is known as a voluntary liquidation. The liquidation is voluntary in the sense that it is commenced by shareholders (if the company is solvent) or creditors (invariably where the company is insolvent).

Q. 42

Yes, Creditors can oppose a voluntary winding up.

Q 43.

No.

Q 44

Yes.

Q 45

Yes if it is no longer possible to carry on the business of the company. This is without prejudice to any claim against the company that may be occasioned by such an action.

Q 46.

No.

Part 8: Acceleration of remedies

Q.47

Freedom of contract applies but priorities will prevail in the insolvency process.

Q 48.

No.

Part 9: Classes of Claims and Creditors

Q. 49

No specific rules apply to differing types of claim or creditors other than the standard priority rules.

Q 50.

No. The standard priority rules apply.

Q 51.

Irish law does not deal with this issue.

Part 10: Proposals for Reorganisation or Compromise

Q. 52

Yes. Section 201 of the Companies Act 1963 provides for schemes of arrangement. This provides:

“(1) Where a compromise or arrangement is proposed between a company and its creditors or any class of them or between the company and its members or any class of them, the court may, on the application of the company or of any creditor or member of the company, or, in the case of a company being wound up, of the liquidator, order a meeting of the creditors or class of creditors, or of the members of the company or class of members, as the case may be, to be summoned in such manner as the court directs.

(2) Whenever such an application as is mentioned in subsection (1) is made, the court may on such terms as seem just, stay all proceedings or restrain

further proceedings against the company for such period as to the court seems fit.

(3) If a majority in number representing three-fourths in value of the creditors or class of creditors or members or class of members, as the case may be, present and voting either in person or by proxy at the meeting, vote in favour of a resolution agreeing to any compromise or arrangement, the compromise or arrangement shall, if sanctioned by the court, be binding on all the creditors or the class of creditors, or on the members or class of members, as the case may be, and also on the company or, in the case of a company in the course of being wound up, on the liquidator and contributories of the company.

(4) Section 144 shall apply to any such resolution as is mentioned in subsection (3) which is passed at any adjourned meeting held under this section.

(5) An order made under subsection (3) shall have no effect until an office copy of the order has been delivered to the registrar of companies for registration, and a copy of every such order shall be annexed to every copy of the memorandum of the company issued after the order has been made, or, in the case of a company not having a memorandum, of every copy so issued of the instrument constituting or defining the constitution of the company.

(6) If a company fails to comply with subsection (5), the company and every officer of the company who is in default shall be liable to a fine not exceeding £20.

(7) In this section and in section 202, "company" means any company liable to be wound up under this Act, and "arrangement" includes a reorganisation of the share capital of the company by the consolidation of shares of different classes or by the division of shares into shares of different classes or by both those methods."

Examinership is another legal mechanism for the rescue or reconstruction of ailing but potentially viable companies. The central feature is the appointment by the court of an *examiner* and the placing of the company concerned under the protection of the court for 70 days. While the company is so protected, it may not be wound up, a receiver may not be appointed, and generally debts or securities may not be executed against it except with the consent of the examiner.

There are two stages to the examination process, first the application for the appointment of the examiner and second, if the examiner has been in a position to put together a scheme that has been approved by the requisite number of creditors, the confirmation stage.

The company, the directors, creditors and members have standing to petition for the appointment of an Examiner. The test is to be satisfied that the company must have a reasonable prospect of survival.

The Examiner has a duty to report to the Court and to set out his proposals for the company which may be made binding by the Court.

Q. 53

Please see answer to Question Fifty Two.

Q. 54

Please see answer to Question Fifty Two.

Q. 55

Under Section 24(4) of the Companies (Amendment) Act 1990, the Court may not confirm the proposals:

1. unless at least one class of members and one class of creditors whose interests or claims would be impaired by implementation of the proposals have accepted the proposals, or

2. if the sole or primary purpose of the proposals is the avoidance of payment of tax due, or
3. unless the court is satisfied that—
4. the proposals are fair and equitable in relation to any class of members or creditors that has not accepted the proposals and whose interests or claims would be impaired by implementation, and
5. the proposals are not unfairly prejudicial to the interests of any interested party.

Q. 56

Under Section 24(6) of the Companies (Amendment) Act 1990, where the court confirms proposals (with or without modification), the proposals shall, notwithstanding any other enactment, be binding on all the creditors or the class or classes of creditors, as the case may be, affected by the proposals in respect of any claim or claims against the company and any person other than the company who, under any statute, enactment, rule of law or otherwise, is liable for all or any part of the debts of the company.

Q. 57

No.

Part 11: Receiverships

Q. 58

Yes. The appointment of a receiver operates to *crystallise* floating charges which then become fixed; it also operates to suspend the company's powers and the directors' authority in relation to the assets covered by the receivership. A receiver is appointed by the court or by creditors of a company to manage the company's business until satisfaction of a debt. Oftentimes a debenture will authorise the appointment of a receiver on certain conditions being satisfied. The court has an inherent jurisdiction to appoint a receiver over charged assets.

Q. 59

There are no special rules governing receiverships involving maritime matters. A duty of good faith applies in selling the charged property. Receivers also have reporting obligations and must send copies of their reports to all debenture holders in so far as he/she is aware of their addresses as well as reporting to the authorities.