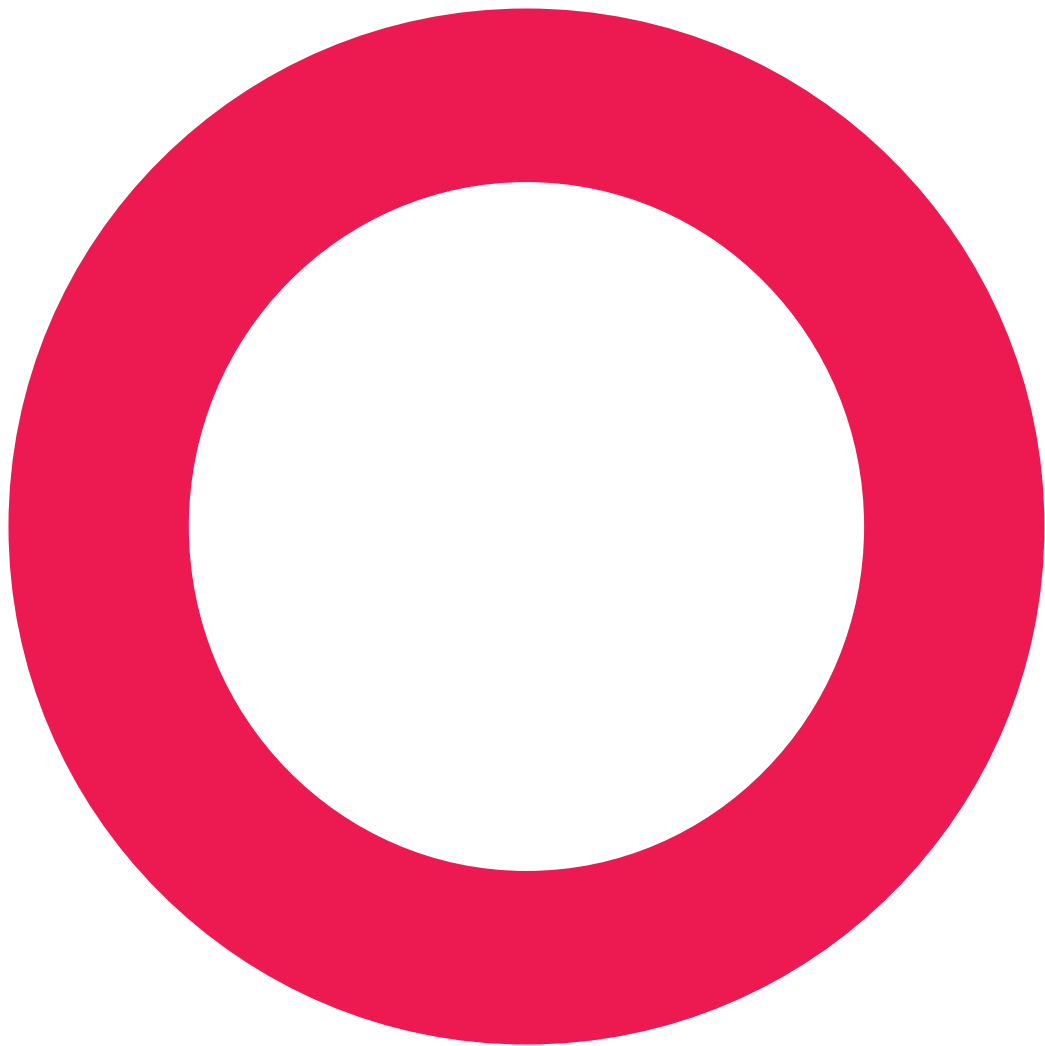


**Ogier**

# **Restructuring and Insolvency guides**

Ireland



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We advise banks, trustees, financial intermediaries and corporates, and have extensive international experience advising on contentious and non-contentious offshore restructuring and insolvency matters. We often advise in conjunction with onshore counsel and other professional services providers in connection with company structures.

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## Ireland

## Restructuring and Insolvency Guide

## Domestic Procedures

## Question

## Answer

What are the principal insolvency procedures for Companies in your jurisdiction?

- Liquidation (i) creditors' voluntary (ii) Court ordered
- Receivership
- Examinership
- Small Company Administrative Rescue Process (SCARP)
- Scheme of Arrangement

There are other insolvency procedures, including administration, which are applicable only in very limited circumstances.

Are any of the procedures available on a provisional basis?

Yes. S573 of the Companies Act, 2014 provides for the appointment of a provisional liquidator. The process for making the application is prescribed by Order 74 Rule 14 of the Rules of the Superior Courts. The provision is reserved for serious cases where urgent action is required to preserve assets and value. The appointment is made by the High Court where the Court is persuaded that the appointment will likely benefit creditors including where information exists suggesting the imminent dissipation of assets. It is almost always an emergency application and it is often made ex parte. The application avoids delay caused by the requirement for certain statutory notices and notice periods prior to the presentation of a winding up petition.

An interim examiner is often appointed in the first instance as the application is usually an urgent one. The interim examiner will retain that status until the hearing of the petition when their appointment as examiner will be affirmed or they are removed as interim examiner. The appointment of an examiner will displace the appointment of a provisional liquidator although a provisional liquidator may be appointed as examiner.

What requirements are to be satisfied for the procedures to be pursued?

**Creditors' Voluntary Liquidation (CVL):** The company must be unable to pay its debts as they fall due. That is determined on the basis of one of two tests, the balance sheet test and the cash flow test. Of the two, the cash flow test is likely the more important.

**Compulsory or Court Ordered Liquidation:** The High Court has jurisdiction to wind up a company and appoint a liquidator on the basis either that it is just and equitable to do so or that the company cannot pay its debts.

**Receivership:** The secured creditor must have a valid mortgage, charge or debenture and an event of default as prescribed in the security document must have occurred before a receiver can be appointed. Any other creditor may apply to the High Court in limited circumstances for the appointment of a receiver on the basis that is just and equitable to do so. (Note that in certain circumstances a receiver may be appointed by the Court pursuant to a specific statutory power).

...continued

## Domestic Procedures

### Question

### Answer

What requirements are to be satisfied for the procedures to be pursued?

**Examinership:** The company must be unable or will shortly become unable to pay its debts as they fall due and no resolution has been passed, nor any court order made, to wind up the company and there is a reasonable prospect of survival for the company and all or part of its undertaking as a going concern.

**SCARP:** The company must be unable or will shortly become unable to pay its debts as they fall due and no resolution has been passed, nor any court order made, to wind up the company and there is a reasonable prospect of survival for the company and all or part of its undertaking as a going concern. In addition the company must be either a small company (turnover <€12M + balance sheet <€6M + <50 people) or a micro company (turnover <€700K + balance sheet <€350K + <10 people).

**Scheme of Arrangement:** This is a voluntary process for which there are no prescribed requirements for initiation. Once approved by its members and creditors (and subject ultimately to Court sanction) a company can use a scheme to implement a range of possible objectives including for example restructuring, reorganisation, merger and demerger.

What is the procedure and how long typically does it take?

**Creditors' Voluntary Liquidation (CVL):** This is usually initiated by the company's directors. A shareholders' meeting and a creditors' meeting are called. The shareholders resolve that the company is insolvent and a liquidator is appointed. A statement of affairs is compiled and presented by the directors at the creditors' meeting, including a list of creditors and amounts owed and realisable value of the company's assets. Ten days' notice of the meeting must be issued to all creditors and shareholders. The meeting must also be advertised in at least two daily newspapers. Creditors have the right to interrogate the Statement of Affairs. A majority of creditors may appoint a different liquidator to that appointed by the company. There are any number of factors that contribute to the duration of a liquidation but the size and complexity of the company's trading operation is a significant factor as is the extent of cooperation of the directors of the company with the liquidator.

**Compulsory or Court Ordered Liquidation:** Where the application is being made on the basis that a company is unable to pay its debts as they fall due then the application is usually initiated by a creditor. The process begins with the delivery of a statutory demand to the registered office of the debtor. If payment is not made within 21 days the company is deemed to be unable to pay its debts as they fall due. The creditor will then file a winding up petition with the High Court supported by a grounding affidavit. The company is entitled to oppose the petition including by seeking an injunction to prevent either the filing of the petition or its post filing advertisement. Where a petition is not opposed then a liquidator can be appointed usually in matter of 3 to 4 weeks. Where the petition is opposed then the appointment might be delayed by usually 1 to 3 months but possibly more depending on the complexity of the matter. Where an application to wind up a company is made on the basis that it is just and equitable to do so, for example in a minority oppression action, then that can take longer usually between 12 and 18 months.

...continued

## Domestic Procedures

### Question

### Answer

...continued

What is the procedure and how long typically does it take?

**Receivership:** Once the secured creditor has a valid mortgage, charge or debenture and an event of default as prescribed in the security document has occurred then appointing a receiver is relatively straightforward process which can be completed in a matter of days. The receiver must be appointed strictly in accordance with the charging document the terms of which must be reflected accurately in the deed of appointment. The appointment is usually preceded by a demand letter and there is usually little delay between the issuing of the demand and the appointment. Where there is no opposition to the appointment of a receiver then the process takes as long as is required for the receiver to secure the asset and sell it. The appointment of a receiver usually does not require publication as it is a matter of private contract. Where a receiver is appointed over a company then the Registrar of Companies must be notified within 7 days and furthermore the notice of appointment must be published in *Iris Oifigiuil* (Ireland's official gazette).

**Examinership:** The application to appoint an examiner is usually made on an ex parte basis and it is grounded on a petition and grounding affidavit which must exhibit an Independent Expert Report. The IER must demonstrate that the company is unable or will shortly be unable to pay its debts as they fall due and no resolution has been passed, nor any court order made, to wind up the company and there is a reasonable prospect of survival for the company and all or part of its undertaking as a going concern. The application is made in the first instance on an ex parte basis when the Court may or may not appoint an interim examiner. The hearing of the petition itself will be adjourned for a short period to enable notice to be given to parties including those who may wish to object. On appointment by the Court the examiner will examine the state of affairs of the company and prepare a restructuring plan to enable the company to continue as going concern. In this regard the examinership process in Ireland is modelled on US Chapter 11 proceedings and to a lesser extent administration proceedings in the UK. Creditors are segregated into classes of generally similar interests. Voting by creditors to approve the restructuring plan has been complicated by the implementation of the EU (Preventative Restructuring) Regulations, 2022. For a plan to be approved, a majority of classes of creditor must agree and one of those classes must rank ahead of ordinary unsecured creditors or must be 'in the money' creditors. The process takes the 100 days the examiner is given to present the rescue plan (currently extended to 150 days) plus the time it takes the Court to approve it. These timelines can be extended by application to the Court in certain exceptional circumstances.

...continued

## Domestic Procedures

### Question

### Answer

...continued

What is the procedure and how long typically does it take?

**SCARP:** The process is designed to avoid the costs associated with the examinership process by limiting the Court's involvement. Before the start of the formal process the company will prepare a Statement of Affairs and an independent insolvency expert, the Process Advisor, will prepare a Report confirming the Process Advisor's opinion that the company has a reasonable prospect for survival. 7 days after receipt of the Report the company will pass a resolution to begin the formal process. The Process Advisor will then engage with creditors who must detail their claims within 14 days after which the Process Advisor will prepare a draft Rescue Plan. This plan must satisfy the 'best interests of creditors' test being that the plan will put each creditor in a better position than in a liquidation. A meeting between the Process Advisor and each creditor must be completed by day 42 and each creditor must have 7 days' notice of the meeting. Creditors must be invited to vote on the plan by day 49. A 60% majority in number and a simple majority of value in respect of at least one class of creditors is required to approve the Rescue Plan. If approved by creditors and there is no other objection the plan becomes binding after 7 days. There is no requirement for Court approval. Any objector has 21 days within which to file an objection which is done in the Circuit Court.

**Scheme of Arrangement:** This process is the least complicated recovery process analysed in this note. It begins with the company convening a scheme meeting of different classes of creditor and of its members. (The High Court can be asked to determine the constitution of classes if necessary). Once convened notice of the meeting known as a circular is issued to members and creditors explaining the effects of the arrangement on various stakeholders. The meeting itself is usually limited to a vote on the arrangement which must be passed by a special majority. If approved the company will apply to the High Court to sanction the proposed arrangement. The company is required to advertise the fact of the vote and the court application in two newspapers and in *Iris Oifigiúil*. The entire process can be completed within a relatively short timeframe of for example two months. More complicated schemes, for example those requiring an application for a reduction in capital, can take much longer.

Can any procedures be pursued without the involvement of the Court?

**Creditors' Voluntary Liquidation (CVL):** This can be pursued without the involvement of the Court. However, liquidators can seek the assistance of the High Court in determining any issue that has arisen in the liquidation.

**Receivership:** Again this can be pursued without the involvement of the Court. However, the Court can become involved where a debtor objects to the appointment of the receiver or the exercise by the receiver of their power. And the receiver can apply to the High Court to determine any issue in the receivership.

**SCARP:** The process was designed to allow small companies avail of a cost effective rescue process by avoiding the requirement for court intervention. However, the Rescue Plan can be opposed and this can lead to a very significant amount of Court intervention, delays and costs.

## Domestic Procedures

### Question

### Answer

What is the effect upon control of the company and its assets during those procedures?

**Creditors' Voluntary Liquidation (CVL):** Once the liquidator is appointed the directors' powers cease and the liquidator assumes management of the company. The liquidator is obliged to administer and distribute the property of the company as prescribed by the Companies Act, 2014. Creditors will engage with the liquidator to prove their claim in the winding up. Creditors are also entitled to establish a committee of inspection to oversee the liquidator's activities.

**Compulsory or Court Ordered Liquidation:** Where a Court appoints a liquidator that liquidator assumes the same status and role as a liquidator appointed in a CVL. In addition to being the agent of the company the liquidator will also be an officer of the Court.

**Receivership:** Where a receiver is appointed over an asset of a company, this in theory would not of itself impact on the control of the company or other assets. Where a receiver is appointed over a company, then ostensibly at least there is no impact on the board. However, in reality the directors' powers will be limited by the charging document which will mean in effect that the board's power will be significantly curtailed.

**Examinership:** The directors usually remain in control of the company and its day-to-day operations. The examiner can apply to the High Court to assume the powers of the directors where the Court, on the examiner's application, is of the view that the directors are impeding the process. An examinership is usually predicated on new investment and therefore usually results in the change or alteration of control of the company and of its assets. The examiner's focus is on saving jobs and dealing with creditors including by repudiating onerous contractual obligations. However the examiner may apply to the court for permission to sell assets that are free from claims and even secured assets, if the secured creditor receives the value of the asset.

**SCARP:** Again the directors usually remain in control of the company and its day-to-day operations. The process can involve new investment which can result in a change of ownership.

**Scheme of Arrangement:** The process itself has no effect on the control of the company and its assets which are matters to be determined and agreed if at all by the members and creditors.

Is there an automatic moratorium and if so when does it come into effect and what is its effect?

**Creditors' Voluntary Liquidation (CVL):** Apart from certain employee claims, no claim against the company can be continued or started once the liquidator has been appointed without the permission of the High Court.

**Compulsory or Court Ordered Liquidation:** As above.

**Receivership:** The appointment of a receiver does not inhibit the appointment of a liquidator save where a receiver manager has been appointed they will continue to manage the business. A receiver cannot be appointed to a company to which an examiner has been appointed and an examiner will not be appointed to a company where a receiver has been appointed for 3 days.

**Examinership:** On the appointment of an examiner a 100 day moratorium on claims against the company begins. This is currently extended to 150 days.

**SCARP:** There is no automatic moratorium on proceedings as this would require a court application which the process is designed to avoid. However an application for protection can be made to the Circuit Court if deemed necessary.

**Scheme of Arrangement:** As with SCARP there is no automatic moratorium on proceedings but an application for protection can be made to the High Court if deemed necessary.

## Domestic Procedures

### Question

### Answer

Can companies be forcibly wound up other than when insolvent?

Yes. The High Court has jurisdiction to wind up a company and appoint a liquidator on the basis either that it is just and equitable to do so the company cannot pay its debts. Petitions to wind up a company can be presented by creditors, members, the company or by the Director of Corporate Enforcement. Petitions filed on just and equitable grounds are frequently filed in shareholder oppression actions. It is an abuse of process for a creditor to use the winding up procedure for the purpose of collecting a debt. However, creditors frequently use or threaten to use the process to recover debts.

To what extent are the procedures designed to facilitate a rescue of a company's business?

None of the creditors' voluntary winding up, compulsory winding up or receivership processes are designed to facilitate a rescue of the company's business. They are designed to protect the interests of creditors. By contrast each of the examinership, SCARP and Scheme of Arrangement processes is specifically designed to rescue a company's business and to allow it continue as going concern on a restricted basis.

Can the procedures be used to facilitate the sale of all or part of the insolvent company's business?

Liquidators have the power of sale over the company's business and that is the liquidator's primary function. Unless secured, those assets can be sold 'free and clear'. Receivers are appointed specifically for the purpose of an asset or company sale depending on the nature of the charge. Pre-packaged sales are allowed and are most often a feature in provisional liquidations and receiverships. Any of the rescue processes (examinership, SCARP or Scheme of Arrangement) could be used to facilitate the sale of all or part of the business. In the case of examinership and SCARP, new equity investment is often an inherent part of the process.

## Cross Border

### Question

### Answer

To what extent do the Courts in your jurisdiction lend assistance to overseas appointees (through recognition) and in what circumstances?

As a preliminary note, the European Insolvency Regulation (Recast) applies to all collective insolvency proceedings and to some restructuring proceedings involving a company with its COMI in the EU. Under EIR (Recast) the Irish courts will automatically recognise foreign restructuring or insolvency main proceedings commenced in another Member State.

Ireland has not adopted the UNCITRAL Model Law on Cross-Border Insolvency Proceedings. Where the company's COMI is outside the EU, the foreign IP can apply to the High Court pursuant to common law for recognition and an order in aid of the foreign proceedings.

Are there any limitations typically imposed in respect of the recognition of an overseas appointee?

In determining whether or not to recognise the foreign, non-EU proceedings, the High Court will consider several factors including:

- Is recognition being sought for a legitimate purpose
- Will recognition prejudice any creditor in Ireland
- Will recognition infringe any Irish law
- Is the foreign insolvency procedure sufficiently similar to that in Ireland
- Will recognition infringe public policy in Ireland

## Cross Border

### Question

Do the courts in your jurisdiction assist in applications to subject a company incorporated in your jurisdiction becoming subject to an insolvency procedure in another jurisdiction?

### Answer

Yes. See answers to 12 and 13 above. Note in terms of the EIR (Recast) where the Courts will recognise primary proceedings initiated in another EU state, EIR (Recast) allows for the initiation of secondary proceedings. These secondary proceedings are designed to protect local creditors whose claims might be treated differently in the primary proceedings due to differences in legal frameworks.

## Creditors

### Question

What are the principle forms of security taken in your jurisdiction in respect of movable and immovable property?

### Answer

Immoveable: real estate including land, the buildings on the land and anything immovable on the land or permanently fixed to it.

- Legal mortgage
- Equitable mortgage
- Fixed charge
- Floating charge (in certain limited circumstances)

Moveable: e.g. goods, trading stock, agricultural stock, plant machinery, ships and aircraft.

- Fixed charge
- Floating charge
- Statutory ship mortgage

Other common forms of security include retention of title, pledges, liens and guarantees.

What is the effect on secured creditors of the commencement of an insolvency procedure?

Generally, the assets securing a secured creditor's debt are ringfenced in an insolvency. If the funds realised by the sale of a secured asset are insufficient to repay the debt then the balance of the debt is pooled with the general class of unsecured creditors. Secured creditors are entitled to enforce their security outside of the liquidation. Secured creditors are usually able to enforce their security in Ireland without having to make applications to court for example by way of the appointment of receiver pursuant to the terms of the charge. It is important that the receiver is appointed strictly in accordance with the contractual terms of the charge.

Which creditors are preferred and to what extent?

The following is the general priority ranking in an insolvency:

- Super preferential claims (payments in respect of certain unremitted social welfare payments)
- Examiner's fees, costs and expenses
- Fixed charge claims
- Liquidator's costs and expenses
- Preferential claims of employees and the Irish Revenue Commissioners
- Holders of a floating charge that did not crystallise before the date of liquidation
- Unsecured creditors

Within each class of claimant, the pari passu rule applies so that if realisations are insufficient to pay any class of creditors in full, they are paid in equal proportion to their debts. The order of priority of claims is established through a combination of legislation, contract law and common law.

## Creditors

### Question

What is the position regarding the recoverability and quantum of liquidator's fees and expenses of the insolvency procedure?

### Answer

In any liquidation, the liquidator's costs including their fees have priority. Those fees and expenses are usually discharged by the proceeds sale of unsecured assets. The costs recoverable by the liquidator include:

- Costs and expenses of the creditors' meeting
- Costs and expenses of preparing the statement of the company's affairs
- Necessary disbursements
- The liquidator's legal costs
- The liquidator's professional fees

It is prudent for a liquidator and their legal advisors to keep '*proper and contemporaneous records*' of time expended on a matter. However, in *Re Custom House Capital Ltd (in liquidation)* [2018] IEHC the High Court found that, notwithstanding the requirement to keep timely and proper records, a liquidator was not required to produce contemporaneous timesheets in support of an application for remuneration. The requirement was only to satisfy the court that the amount sought was reasonable in respect of the work done.

## Avoidance transactions

### Question

What if any categories of transaction can be avoided/set aside?

### Answer

A fraudulent preference can be avoided or set aside. Any transaction which has the effect of preferring one creditor over another may be set aside as can any transaction that has the effect of prejudicing the general pool of creditors or that was made at an undervalue. Any transaction or disposal made within 6 months prior to the start of the winding up process will be reviewed by the Court. If the disposal is to a connected party the 6 month period will be extended to two years and the Court will presume that the disposal was intended to prefer and the onus will then fall to the connected party to demonstrate that the transaction was legitimate. Any third party who obtains an asset at arm's length and in good faith will not be prejudiced. A floating charge created within 12 months (two years if a connected party is involved) before the start of the winding up process may be voided unless it is proven that the company was solvent immediately after the creation of the charge.

Who is responsible for seeking orders to set aside such transactions?

The liquidator.

## Contributions to the liquidation estate and liability of officers

### Question

### Answer

**Can directors or shareholders be required to contribute to the liquidation estate?**

Yes. A director is required to act honestly and responsibly. At the point that a company is unable to pay its debts, or where it appears that creditors may not be repaid, a director's duty becomes primarily due to the creditors of the company. Where a court determines that a director has breached their fiduciary duty then that director can be made personally liable for the debts of the company. Some specific acts or omissions which can result in personal liability for a director include:

- Reckless trading
- Fraudulent trading
- Breaching a disqualification or restriction order
- Breaching obligations in respect of transactions with directors
- Failure to keep adequate accounting records
- Making a declaration of solvency unreasonably
- Executing a statement of satisfaction of a charge knowing it to be false

Subject to the rights of creditors in each company, the High Court can order that a related company must contribute to the whole or a part of the debts of the insolvent company. In making such a pooling order the High Court will consider several factors including:

- The extent of involvement by one company in the running of the other
- The conduct of each company towards the creditors of the other
- The effect of the order on the creditors of the related company

**What liability can directors or other officers attract in respect of an insolvent company?**

Depending on the nature of the act or omission a range of liabilities and sanctions may be imposed on a director including:

- Criminal conviction with fine and/or imprisonment
- Personal liability for some or all of the debts of a company
- Restriction
- Disqualification

In every insolvent liquidation, the liquidator is obliged to apply to the High Court for a restriction order and against all of the company's directors unless relieved of the obligation by the Corporate Enforcement Authority.

**In what circumstances can directors be disqualified as a consequence of a company being wound up?**

A director can only be disqualified if their wrongdoing is found to have been culpable for example where the director has committed fraud or has otherwise demonstrated that they are unfit to be a director. The disqualification period is 5 years or another term to be determined at the discretion of the Court.

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