Examinership and Other Restructuring Options
A Legal and Commercial Analysis
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Event starts at 11.30am
Today’s Speakers

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Examinership
What is it?

- A **statutory scheme** under the provisions of the **Companies Act, 2014** for the **rescue** of individual **companies** where the **protection of the Court** is obtained from **creditor action** for a limited period to assist the Company’s survival while its affairs are investigated by an **examiner** with a view to establishing whether the company can be rescued.
Examinership
Purpose?

- To facilitate the **survival** of the Company and the whole or part of its undertaking as a going concern by seeking to **address/cram down historical liabilities** under a **scheme of arrangement** and ensuring future profitability by:-
  - injection of adequate working capital
  - removal of onerous contracts such as leases (if applicable)
  - changes by agreement to work and other practices
- **Focus of examinership legislation**: means of saving **viable businesses** and **jobs**;
- clear attempt to **avoid receivership and/or liquidation**.
Examinership – Overview of Process

- Definite timeline - **150-day** process;
- Must show **inability to pay debts** as they fall due or must be likely to be unable to pay its debts;
- Petition presented to **Court** by interested party; **ex parte application** made;
- **Immediate court protection** from all creditors, including secured creditors;
- Independent Experts Report must accompany petition (unless specific exceptions apply); demonstrate reasonable prospect of survival;
- **Interim appointment** can be made prior to the hearing of the petition.
Examinership – Overview of Process

• Examiner: non-executive, *supervisory role* only;

• Examiner is focused on *restructuring the affairs* of the company; not an operational role;

• Management (including directors) stay in place (not displaced), unless a separate application is made for Examiner executive powers;

• Formulates scheme of arrangement; must ensure creditors receive a *greater dividend* than in a winding-up/receivership;

• Minimum *one class of creditors* must *vote in favour of scheme* and Court must confirm the scheme.
Examinership – Recent Developments


• The key provisions relating to examinership are as follows:

  ✓ during the interim period the examiner can seek to extend the protection period to 150 days in total in “exceptional circumstances” which include (but are not limited to) “the nature and potential or actual impact of Covid-19 on the company”;

  ✓ creditors meetings can be held virtually during the interim period so long as certain conditions including accessibility and security are met.

• The interim period is due to cease on 31 December 2020 but can be extended by Ministerial Order

• CLRG has reported to the Minister for Enterprise Trade and Employment on reducing the cost and administrative burden associated with current rescue frameworks for SMEs
Key requirements to enter Examinership

• Petition and verifying Affidavit;
• Company must be insolvent;

• Independent Expert’s Report, must include:-
  • A statement of affairs of the company prepared on both a going concern basis and on a winding up basis to the latest practical date;
  • An opinion as to whether the expert believes the company has a reasonable prospect of survival;
  • Conditions required (if any) in forming that view must be listed.
Independent Expert’s Report

511. (1) report must be prepared by “...either the statutory auditor of the company or a person who is qualified to be appointed as an examiner of the company...”

(2) “independent expert”.

(3) (a) “names and addresses of the officers of the company...”; 

(b) list “...names and addresses of any other bodies corporate of which the directors of the company are also directors...”;

(c) “…a statement as to the affairs of the company...” , “...the company's assets and liabilities...” “...the names and addresses of its creditors, the securities held by each of them...”
Independent Expert’s Report
Opinions and Recommendations

d) “…deficiency between the assets and liabilities of the company has been satisfactorily accounted for…”

(e) “…reasonable prospect of survival…”, “…statement of the conditions…”

(f) “…scheme of arrangement would offer a reasonable prospect of the survival of the company…”;

(g) “…continue the whole or any part of the undertaking would be likely to be more advantageous to the members as a whole and the creditors as a whole than a winding-up…”;
Independent Expert’s Report
Opinions and Recommendations

(h) “...course he or she thinks should be taken...”;

(i) “...further inquiries with a view to proceedings...”;

(j) “...extent of the funding required...”

(k) “...which liabilities incurred before the presentation of the petition should be paid...”;

(l) “...creditor’s committee...”

(m) such other matters as he or she thinks relevant.
<table>
<thead>
<tr>
<th></th>
<th>Liquidation</th>
<th>Going Concern</th>
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</thead>
<tbody>
<tr>
<td>Property</td>
<td>100</td>
<td>200</td>
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<tr>
<td>(Fixed Chg)</td>
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<tr>
<td>Equipment</td>
<td>70</td>
<td>200</td>
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<td>(leasing)</td>
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<tr>
<td>Cash</td>
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<td>Stock</td>
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<td>Assets</td>
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<td>Unsecured</td>
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<tr>
<td>Liabilities</td>
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<td>1150</td>
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<tr>
<td>Deficit</td>
<td>-830</td>
<td>-490</td>
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</table>
Other Key Requirements

• Details of the funding required during the period of protection (usually presented by way of a detailed 13 week cashflow or 20/21 weeks in the case of 150 day protection period)

• A recommendation as to whether any pre-petition liabilities should be paid

• Nomination and consent of the proposed Examiner
Examinership – Timeline

Day 1 Protection starts for 70 days → Day 10 (Approx.) Protection Continues → Day 35 Protection Continues → Day 70 Protection Continues → Day 100 (max) → Day 100+ → Protection ceases

Independent Experts Report + Petition Apply to Court Directions – Interim Examiner?

Petition heard – Examiner? Creditors may have a view!

Examiner formulates a plan and convenes meetings of Creditors to approve plan and Shareholders to consider plan → Examiner delivers report to Court or applies for extension

Examiner may apply for a further extension of 30 days to deliver his report

Examiner must deliver his report and Court fixes date for hearing to confirm plan and may continue protection → Court hearing to confirm plan Creditors may have a view → Effective date protection ceases and the plan is binding on creditors and shareholders

No Examiner

Examiner pulls plug

No plan

Plan Rejected

No Extension

No Extension

No Confirmation

Liquidation / Receivership

Liquidation / Receivership
Scheme of Arrangement – Components

• Specify each class of members and creditors;
• Specify each class of members and creditors whose interests or claims will not be impaired by the proposals and those whose interests and claims will be impaired;
• Provide equal treatment for each claim or interest of a particular class unless creditor agrees to less favourable treatment;
• Provide for implementation of the proposals;
• If necessary, specify if changes need to be made to the management or direction of the company and/or the constitution;
• Other matters as the Examiner deems appropriate (i.e. costs);
• Statement of assets and liabilities as at the date of the proposals;
• Statement of estimated outcome on a winding up.
Creditors’ Meetings

- Limited advance notice of meetings; minimum of 3 days;
- Completion of Proxy;
- Proposals shall be deemed to be accepted by a particular class if a majority in number representing a majority in value of the claims represented at that meeting have voted (by person or proxy) in favour of the proposals;
- Modifications to the Proposals may be put to the meeting but can only be accepted with the consent of the Examiner;
- A minimum of one class of creditor whose rights have been impaired must vote in favour of the scheme.
From the Creditors’ Perspective

• Retention of Title / Certification / Refusal to Supply under new contract;
• Engage with Examiner to agree position;
• Subject to limited exceptions, only creditors that have objected or didn't vote can object at the confirmation hearing;
• Possibility of repudiation of contracts;
• A minimum of one class of creditors whose rights have been impaired must vote in favour of the scheme, the proposals must be fair and equitable in relation to any class of impaired members or creditors who did not accept the proposals and they must not be unfairly prejudicial;
• Court approved scheme of arrangement binding on all creditors – actual and contingent.
• Section 549, Companies Act 2014; transfer of vote
Requirements for exiting Examinership

• New investment in: scheme payments + working capital;
• Formulate Proposals for a Scheme of Arrangement;
• Convene creditors’ meetings within 150 day period for each class of creditor and obtain the support of a minimum of one impaired class;
• Preparation of section 534 Examiner's Report;
• Confirmation Hearing;
• Investor confidence that no hidden liabilities exist post investment
<table>
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<tr>
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<th>Liquidation</th>
<th>Investment €250k</th>
<th>Post</th>
<th>Dividend</th>
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<tr>
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<td>100%</td>
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<tr>
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<td>17%</td>
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<td><strong>360</strong></td>
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Case Study 1 – Property Debt

- Trading business
- Protracted debt settlement negotiations / Impact on Trade
- Receiver appointed – 3 days to appoint Examiner
- Court Protection
- Retention of title over stock / continuity of supply
- Landlord negotiation – threat of repudiation / lease terms varied
- Investment – scheme of arrangement, working capital
- Revenue debt written down
- Agreement to dispose of secured asset (leaseback)
- Secured creditor settled, Company survival.
Case Study 2 – Contractor Cashflow

- School builder
- Main Contractor (customer) Insolvency
- Impact on Cashflow
- Court Protection from Creditors
- Employer support / Investor support
- Employee lay offs
- Renegotiation of loss making contracts
- Continuity and Potential New Contract
- Termination of Contracts / Bondsman
- Failure to win New Contract
Case Study 3 – Retail Stores

- Chain of shops
- Loss-making due to changing consumer habits
- Employees with long services
- Revenue liabilities
- Over-rented landlord / tenant leases
- Redundancy liability crystallised
- Court Protection from Creditors
- Retention of title over stock / continuity of supply
- Landlord negotiation – threat of repudiation / lease terms varied
- Shareholder investment
- Liabilities written down / some leases exited
• Court-sanctioned scheme of arrangement under Part 9 of the 2014 Act
  o agreement between a company and its members and/or creditors which generally involves the *compromise of debt* and/or the alteration of rights of creditors or members – may involve some or all categories of creditors;
  o Need to be able to demonstrate that the creditors would *fare better under the scheme* than they would do if the company was wound up;
  o Potential for bringing application for *court protection* staying proceedings against the company;
  o a *majority in number representing at least 75% in value of the creditors* or each affected creditor class or member class (or members or creditors in total) must approve the scheme;
  o the company can then make an application to Court to approve the scheme
  o **Test**: an intelligent and honest person, who is a member of the class concerned, acting in respect of his or her interests might reasonably approve the scheme
Other processes
Formal and Informal Schemes

- Non court-sanctioned voluntary scheme of arrangement under Section 676 of the 2014 Act:
  - Company must be “about to be, or in the course of being, wound up”;
  - creditors representing 75% of the creditors in both number and value can bind the remaining creditors to a scheme of arrangement;
  - at least 75% of the members must also vote in favour of the scheme;
  - does not involve any applications to Court to sanction the scheme;
  - disgruntled creditor can seek to appeal the scheme within 21 days of the completion of the arrangement - creditor would likely need to show a procedural irregularity or a particular prejudice they would face if the scheme was approved
## Contrasting Schemes of Arrangement & Examinership

<table>
<thead>
<tr>
<th></th>
<th>Formal scheme</th>
<th>Informal Scheme</th>
<th>Examinership</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Court protection</strong></td>
<td>On application to the Court</td>
<td>None</td>
<td>On presentation of the Petition – broad protection</td>
</tr>
<tr>
<td><strong>Threshold for approval</strong></td>
<td>A majority in number representing at least 75% in value of each creditor class or member class</td>
<td>75% of all the creditors in both number and value and 75% of all the members</td>
<td>Majority in number representing a majority in value of at least one class of creditors having voted in favour of the proposals</td>
</tr>
<tr>
<td><strong>Solvency</strong></td>
<td>Not necessary</td>
<td>About to be or in the course of being wound up</td>
<td>Unable or unlikely to be able to pay debts</td>
</tr>
<tr>
<td><strong>Court sanction</strong></td>
<td>Yes</td>
<td>No (but subject to appeal by creditors)</td>
<td>Yes</td>
</tr>
<tr>
<td><strong>Member restructuring</strong></td>
<td>Yes</td>
<td>No</td>
<td>Yes</td>
</tr>
<tr>
<td><strong>Time constraints</strong></td>
<td>No – subject to Court directions</td>
<td>No</td>
<td>Up to 150 days</td>
</tr>
<tr>
<td><strong>Guarantees</strong></td>
<td>Included</td>
<td>Included</td>
<td>Usually not possible</td>
</tr>
<tr>
<td><strong>Advantages</strong></td>
<td>Control retained</td>
<td>Most control</td>
<td>Court protection</td>
</tr>
<tr>
<td></td>
<td>Potentially a cheaper process</td>
<td>Cheapest</td>
<td>Highly experienced insolvency practitioner</td>
</tr>
<tr>
<td></td>
<td>No strict timelines</td>
<td>No strict timelines</td>
<td>Directors generally retain control</td>
</tr>
<tr>
<td></td>
<td></td>
<td>No sanction of the Court required</td>
<td>Relatively tight and controlled process</td>
</tr>
<tr>
<td><strong>Disadvantages</strong></td>
<td>High approval threshold</td>
<td>High approval threshold</td>
<td>Relatively tight timelines</td>
</tr>
<tr>
<td></td>
<td>Lack of examiner to guide through the process</td>
<td>Appeal possible</td>
<td>Must show reasonable prospect of survival</td>
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Questions?