Brexit: a Unique Irish Opportunity for Cross-Border Restructuring?

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Certainty is a key element in any business planning. For corporate restructuring practitioners who are planning or working on cross border transactions, the uncertainty relating to Brexit and the departure of the United Kingdom from the European Union ("**EU**") may have long-term significant consequences and a "no-deal" Brexit (without a withdrawal agreement and the certainty of a transition period) will have immediate and significant consequences for any such cross-border transaction.

In this context, Irish law and the Irish Courts can provide practical and effective solutions to assist corporates (and their advisors) restructure their business and affairs in a straight-forward and easily understood manner. It is also an opportunity for the Irish legal system to demonstrate its value to international practitioners. This opportunity was also recognised in a recent proposal document to the Irish Government produced by the Law Society of Ireland and the Bar Council of Ireland entitled "*Promoting Ireland as a leading centre globally for international legal services*" (the "**Report**").

In the context of the UK's exit from the EU, the Report states that "*we foresee a meaningful role for Irish law in certain areas and industry sectors allied with the provision of a greater range of legal services in Ireland for the benefit of international and Irish business. In a number of sectors, we believe that Ireland as a location and the Irish law and the Irish Courts are and can be advantageous contractual choices for international clients (now or in the future)*".

Mr Justice Frank Clarke, the Chief Justice of Ireland, affirms in the Report that the Irish legal system has much to offer and that "*Ireland has been responsive to changes in the domestic and international legal landscape*" and "*As Chief Justice, I am committed to ensuring that the judicial system continues to respond to these demands in the future*". On 4 January 2019, the Minister for Justice and Equality, Charlie Flanagan TD, announced that the Irish Government has agreed to support the initiative outlined in the Report and that the initiative, which is also being supported by IDA Ireland, will now form a component of the Government's Brexit strategy.

The Irish Alternatives to the English Scheme of Arrangement

English law has been promoted by City lawyers for many years as the most effective restructuring tool for both English and foreign companies. They have successfully established England as one of the main international restructuring hubs. A key advantage of the English scheme of arrangement is the ability and willingness of the English Courts to assume jurisdiction to sanction schemes of arrangements for foreign companies. However, in order for the English Court to agree to exercise its jurisdiction to sanction a scheme of arrangement for a foreign company, the English Court has to be satisfied that, amongst other requirements, the scheme for the foreign company is likely to be effective and achieve its purpose. In this regard and in a European context, significant reliance has always been placed upon the fact that once a scheme of arrangement is sanctioned by the English Courts it is a court order for the purposes of Regulation (EU) 1215/2012 (recast) (the "**Recast Judgments Regulation**") and will be automatically recognisable and enforceable throughout the EU.

Brexit will likely change things. This is because, whatever post-departure arrangements are put in place, the application of English law in a European context will be different and, perhaps, fundamentally so. For example, relevant EU legislation, including the Recast Judgment Regulation (and also the provisions of the EU company law codification Directive (2017/1132/EU) which supports cross-border mergers), will cease to have any direct applicability in England post-Brexit and after any transition period.

It is clear that Ireland with its common law system, English speaking jurisdiction and practical commercial approach to restructuring and insolvency matters has immediate and effective alternatives to offer those looking for a good substitute to the English scheme of arrangement.

Irish law and the Irish Court system have already attracted international affirmation and recognition. In 2018, ISDA launched its Irish law Master Agreement. This was a highly significant endorsement and "*shows that Irish law can be an attractive option for complex financial transactions post-Brexit, particularly where the preference is to choose the law of an EU member state and a common law system*".

The Irish corporate and debt restructuring alternatives are:

- Examinership – which provides Court protection and is analogous in many ways to US Chapter 11;

- Part 9 Scheme of Arrangement – similar in all significant ways to the current English scheme of arrangement; and
- Part 11 Scheme of Arrangement - available to corporates that are about to be, or are in the course of being, wound-up.

Although examinership has been the go-to corporate debt restructuring tool in Ireland to-date, Brexit has resulted in a marked increase of interest from international clients in Ireland's scheme of arrangement provisions.

Examinership

Examinership is a proven corporate rescue mechanism for ailing companies. It can and has been utilised by companies as a form of pre-packaged restructuring tool which can restructure and shed burdensome debt, the best example of which was the examinership of Eircom. That case was the largest and most successful examinership in Ireland to date – where €1.4 billion of debt totalling €4 billion was written off under a Court approved scheme.

Examinership offers the same principal advantages that have been attributed to the English scheme of arrangement, namely, it combines flexibility with a high degree of commercial and procedural certainty for all involved, including creditors.

Of all the available restructuring processes throughout the EU, examinership is the most similar restructuring process to US Chapter 11. Similar to the debtor-in-possession concept under US Chapter 11, the appointment of an examiner does not displace the company's board of directors and management. The company and its management continue to operate during the Court protection period.

Crucially, examinership facilitates cross border restructuring as follows:

- it is a specified insolvency process under Regulation (EU) 2015/848 on insolvency proceedings (recast)(the "**Recast Insolvency Regulation**"). As a result, the appointment of an examiner and any proposals under a scheme of arrangement for the company which have been confirmed by the Irish Court are, subject to limited exceptions, automatically recognised and binding through-out the EU. In addition, examinership is generally a recognised process in the United States under the US Chapter 15 recognition process; and

- it is open to any company which has its centre of main interests ("**COMI**") in Ireland. In addition, examinership can also be extended to any related company of the company in examinership. The definition of "company" for the purposes of the related company provisions under the Irish Companies Act 2014 (the "**Companies Act**") includes a company that is not incorporated or registered under the Companies Act. This is subject to the caveat that the foreign registered related company must still have its COMI in Ireland.

One benefit of examinership is a moratorium on actions against the company and its assets and which comes into immediate effect upon the presentation of an examinership petition. This prevents any enforcement action against the company or its assets for a period up to a maximum of 100 days.

It does have some constraints. In particular, an examiner must select an investor, formulate a scheme of arrangement, convene member and creditors meetings and submit his final report to the High Court by no later than 100 days from the date of presentation of the examinership petition. While this 100 day time period does fulfil the requirement of offering creditors and all stakeholders certainty within a relatively short time frame, it can be problematic in the context of large and complex cases across multiple jurisdictions and which involve a number of critical stakeholders. In addition, examinership can only be availed of by companies that are going-concerns and it may not be possible for an examiner to include guaranteed debt in his scheme of arrangement which can be restrictive in a group restructuring scenario.

Companies Act Schemes of Arrangement

There are two options under the Companies Act which are available to a company to formulate and propose a scheme of arrangement with its creditors:

- a scheme of arrangement under sections 449 to 455 of Part 9 of the Companies Act ("**Part 9 Scheme of Arrangement**"); and

- a scheme of arrangement under section 676 of Part 11 of the Companies Act ("**Part 11 Scheme of Arrangement**").

The Part 9 Scheme of Arrangement provisions are largely identical to the English scheme of arrangement provisions. Pursuant to this procedure a restructure proposal is submitted to a class or classes of creditors. In order for such a proposal to be approved by the requisite class or classes of creditors, the statutory majority, required by section 453 of the Companies Act is a "majority in number representing at least 75% in value of the creditors or class of creditors" who are present and voting. In essence it is a two-fold test whereby 75% in value and more than 50% in number must vote in favour of the proposal. In the event that the requisite majority is achieved, the proposed scheme of arrangement can be binding on the minority. Importantly, the Part 9 Scheme of Arrangement is not an insolvency process and does not require the Company to establish that it is insolvent.

The Part 11 Scheme of Arrangement provisions provide that an arrangement may be entered into by a company about to be, or in the course of being, wound up. Such an arrangement is entered into between the company and its creditors and requires the consent of the members of the company, which must be given by special resolution (a majority of 75% of the members), and the consent of 75% in number and value of all creditors of the company. There is no requirement for a meeting of creditors to be held and creditors are not divided into classes. The permission of the Court is not required to initiate this procedure or indeed to sanction it provided that the requisite majority of members and creditors assent. Once the arrangement has obtained the relevant support, it will be binding on the company, all of its creditors and any liquidator (if the scheme of arrangement is promoted by a liquidator). Any creditor who wishes to appeal against the arrangement has three weeks from the date of completion of the arrangement, to make an application to the Irish High Court. The court may then amend, vary or confirm the arrangement, as it thinks just.

A Part 9 Scheme of Arrangement or a Part 11 Scheme of Arrangement offer a number of key advantages that examinership does not otherwise provide:

- there is no time limit or constraint within which the company must formulate or put into effect the scheme of arrangement. This is particularly attractive in the context of large and complex cases across multiple jurisdictions and which involve a number of critical stakeholders;

- there is no requirement that the company be a going-concern. It can simply be a holding company. In addition to extending the scope of companies that can utilise these scheme provisions it also greatly facilitates strategic contingency planning in cases of a group restructuring; and

- there is no restriction on including guaranteed debt in the scheme of arrangement.

Importantly, both a Part 9 Scheme of Arrangement and a Part 11 Scheme of Arrangement facilitate cross border restructuring as:

- a Part 9 Scheme of Arrangement is ultimately sanctioned by the Irish High Court. As a result, it is a Court order for the purposes of the Recast Judgments Regulation and will be automatically recognisable and enforceable throughout the EU. In addition, it is possible that a Part 9 Scheme of Arrangement would be recognised in the United States under the US Chapter 15 recognition process; and

- a Part 11 Scheme of Arrangement, which if promoted by a liquidator of a company under a creditors' voluntary liquidation process and where that process is sanctioned by the Court, would be a recognised process for the purposes of the Recast Insolvency Regulation. Again, it is possible that a Part 9 Scheme of Arrangement would be recognised in the United States under the US Chapter 15 recognition process.

Future use of Irish law for cross-border restructuring

It is clear that the consequences of Brexit in the field of international corporate restructuring will be the greater use of Irish law options – examinership or schemes of arrangement.

Further, the endorsement of Irish law by ISDA together with positive support from the Chief Justice of Ireland and the Irish Government for the proposals outlined in the Report are likely to encourage overseas companies and their advisors to consider using Irish law options.

While examinership has been the preferred option to-date to effect a creditor scheme of arrangement, we anticipate that there will be a renewed focus on our scheme of arrangement provisions to deal with international debt restructurings.

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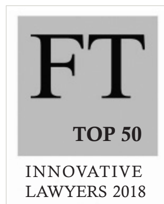

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