

February 8, 2021

## Airline insolvency and repossession – Ireland

---

### What are the principal types of insolvency proceedings?

In Ireland, the principal insolvency proceedings are liquidation (a terminal procedure) and examinership (a rescue process).

In liquidation, the assets of the company are taken under the control of the liquidator who ultimately distributes the proceeds to the creditors and other stakeholders in accordance with the legal order of priorities.

Examinership is Ireland's main corporate rescue process which gives an insolvent company (or group of companies) protection from its creditors (including secured creditors) for a period of up to 100 days. In special circumstances relating to COVID-19 the protection period can be extended to 150 days. During this period a company (through a court-appointed examiner) secures investment and seeks to put a legally binding scheme of arrangement in place for the settlement of debts with its creditors. Examinership is only available to companies who can prove that there is a reasonable prospect of the survival of the whole or part of its business as a going concern.

It is a debtor in possession process allowing for the company to trade with its directors in situ while a scheme of arrangement is implemented to cram down both secured and unsecured debt on a cross-class basis. This cram-down will be facilitated by the court, provided that the creditors at issue have not been unfairly prejudiced by the scheme.

Once an examiner's scheme of arrangement is sanctioned by the court, it is binding on all creditors irrespective of their view on its terms. To be in a position to seek court sanction for the scheme, at least one class of creditors whose interests are impaired by the scheme's terms must vote in favour of it.

While the process is ongoing, there is a moratorium during which creditors are unable to enforce certain rights (including the repossession of leased aircraft) against the airline. This moratorium is to allow the enterprise to continue while the examiner looks to formulate a scheme of arrangement to restructure the company's affairs.

However, the length and extent of the examinership moratorium must be considered in the context of the Cape Town Convention and related Aircraft Protocol Alternative A insolvency regime which Ireland has implemented and which takes precedence where relevant.

Since the onset of the COVID-19 pandemic, examinership has been availed of by both Norwegian Air and City Jet.

# Has Ireland adopted the 2001 Cape Town Convention and its Aircraft Equipment Protocol (together, Cape Town)?

**Yes.** Ireland was the first EU member state to sign up to and ratify **Cape Town**. The Irish government ratified Cape Town and made it part of Irish domestic law via the International Interests in Mobile Equipment (Cape Town Convention) Act 2005 (the **CTC Act**). In doing so, Ireland made all of the key creditor-friendly Cape Town declarations, such as choice of law, self-help remedies and enforcement of IDERAs. On 10 May 2017, the Irish government (acting through the Minister for Transport, Tourism and Sport) made an order giving effect to Cape Town's Alternative A insolvency regime, providing for a maximum 60-day waiting period (**Alternative A**).

## Cape Town declarations

"Alternative A" insolvency regime	Yes, 60-day waiting period
IDERAs	Yes
Self-help remedies	Yes
Choice of law	Yes

For aircraft subject to registered international interests, Alternative A overrides all moratoria on repossessing aircraft that arise under Irish insolvency law. Unless the insolvent airline has cured all relevant defaults, creditors under registered international interests are entitled to the return of their aircraft no later than 60 days after the airline goes into insolvency.

## Can creditors use "self-help" to repossess leased or mortgaged aircraft?

**Yes.** Irish law allows a lessor or mortgagee to repossess an aircraft on a relevant default without a court order. Sometimes lessors or mortgagees voluntarily go to court to help them repossess. For example, under the CTC Act, if the lessor or mortgagor has evidence of a relevant default, the Irish courts may, at short notice and without a trial, order the grounding of an aircraft. Similar orders are available at common law and, with the right evidence, can be obtained very rapidly indeed and without notice to the airline.

## How long does the aviation authority typically take to deregister an aircraft when an IDERA is invoked?

The Irish Aviation Authority (the **IAA**) will typically deregister an aircraft on the basis of an IDERA in approximately five working days. Requests to shorten this time period may be made but cannot be guaranteed. If an export certificate of airworthiness is required for the aircraft, the application for deregistration under the IDERA should be made after the IAA has issued such certificate.

In addition to IDERAs, lessors and mortgagors typically take irrevocable deregistration powers of attorney (enabling

them to sign any other documents and take other actions that are required to export the aircraft). Irish law broadly recognises such powers of attorney as irrevocable and effective.

## Are there any non-consensual liens which would take priority to an ownership interest/mortgagee's rights as a secured creditor?

**Yes.** There are various Irish law aircraft liens and detention rights (together, **relevant rights**) that allow a creditor to detain an aircraft as security for specific liabilities and, in some circumstances, to sell it. They take priority to an ownership or security interests, including registered international interests under Cape Town. Relevant rights include statutory aircraft detention rights for certain airport charges as well as Eurocontrol and other navigation charges, common law liens (e.g. for maintenance providers in possession of an aircraft they have improved) and contractual liens.

However, relevant rights cannot be invoked to initiate the detention of an aircraft during any of the moratoria mentioned in this note.

## Are there any "fleet liens" (i.e. a lien for debts relating to one aircraft that may be asserted against any aircraft in the airline's fleet, regardless of ownership)?

**Yes.** The Irish airport authorities have the power to assert fleet liens.

## Examinership and Part 9 Schemes vs the rights of Cape Town creditors

When an examiner is appointed, a moratorium is put in place which prevents, amongst other things, the repossession of secured assets. This moratorium remains in effect for the duration of the process which can be up to 150 days in exceptional circumstances.

The adoption of Alternative A has amended the operation of the examinership moratorium for the owners of aircraft subject to registered international interests. In such cases, unless the insolvent airline has cured all relevant defaults, creditors under registered international interests are entitled to the return of their aircraft no later than 60 days after the airline goes into insolvency.

Whilst in examinership, a company can apply to the court for the repudiation of certain burdensome contracts (including aircraft leases) if that repudiation would assist in the successful restructuring of the company. If a contract is repudiated, the resulting damages must be calculated and addressed through the examiner's scheme of arrangement. However, neither the terms of the contract, the property or security rights in an aircraft financed, or leased aircraft, can be impacted in the absence of consent.

Schemes of arrangement under Part 9 of the Companies Act 2014 ("Scheme of Arrangement") are becoming

increasingly utilised for large-scale international restructurings. In 2020, the Part 9 Scheme of Arrangement process was used by Nordic Aviation Capital ("NAC") to restructure more than €5 billion of its debt.

A Scheme of Arrangement provides a mechanism for a company to reach agreement with its shareholders and/or creditors in relation to the restructuring of its debt obligations. Such schemes are different to schemes of arrangement proposed by an examiner under the examinership provisions of the Act. Unlike examinership, there is no automatic court protection pending the approval of a Scheme of Arrangement: however, an application for a stay can be made in court. In addition, to utilise the process under Part 9 of the Act a company need not be insolvent.

A scheme can be used to effect a solvent reorganisation of a company or group structure (and unlike examinership is not limited to going concerns but can include holding companies), as well as by insolvent or financially distressed companies who want to settle their debts and reach a binding agreement with their creditors. A proposed Scheme of Arrangement must be approved by a majority in number representing at least 75% in value of the creditors or class of creditors or members or both present and voting at the scheme meeting. This is materially different from a scheme of arrangement in an examinership which requires approval from only one class of creditors, at a minimum, whose interests are to be impaired by way of simple majority in number and value. Part 9 schemes are, unlike examinership, not court led processes. However a court must eventually sanction any compromise or scheme proposed under the Act for it to be binding.

While the question of whether or not a Scheme of Arrangement under Part 9 of the Companies Act is an insolvency proceeding or an "insolvency-related event" for the purposes of CTC has not been the subject of a judicial determination, the general view is that such schemes will not trigger these remedies.

In seeking sanction of the NAC scheme it was submitted to court that Alternative A protections were inapplicable on the basis that an Irish scheme of arrangement is not an "insolvency proceeding" or an "insolvency-related event" for the purposes of the CTC. The court found that on the basis of the high level of support for the Scheme of Arrangement and the absence of creditor opposition, any creditor who had abstained from voting at the creditors' meeting would be deemed to have given implied consent to the scheme. That being the case the High Court did not feel it was necessary to determine whether the scheme constituted an insolvency-related event under Alternative A of the CTC.

## Cape Town Creditor immunity from cram-down and cross-class cram-down?

Article XI of the Alternative A remedies set out in the Aircraft Protocol to the CTC provides that no obligation of the debtor under an agreement may be modified without the consent of the creditor. While not the subject of any judicial determination to date, the general position is that this does not affect the ability to cram down creditor claims arising out of agreements covered by CTC on a cross-class basis in any scheme formulated in an examinership. It simply means that the obligations of the debtor arising out of such an agreement cannot be interfered with in the absence of that debtor's consent.

## Overall assessment of Irish insolvency laws

Irish insolvency law is very pro-creditor. Usually, investor insolvency law concerns prevent airlines doing EETCs if they are in non-US states that have not incorporated Cape Town and its Alternative A insolvency regime into their domestic laws. When Alternative A became part of Irish law in 2017, the rights of financiers and lessors under affected transactions to repossess mortgaged or leased aircraft rapidly in an insolvency of an Irish airline became even more

robust. The Companies Act 2014 has slightly shifted the balance of Irish insolvency laws in favour of debt restructurings. However, Cape Town creditors, such as lessors of aircraft into Ireland, are immune from most of these pro-restructuring reforms. Overall, Irish law remains very pro-creditor – particularly for Cape Town creditors. Given Ireland's dominant share of the global aviation leasing market, Irish insolvency law is expected to feature more prominently in airline and lessor restructurings in the coming year.

## Key practical considerations for lessors and financiers

- **Speed** – prepare documents and terminate leases before aircraft are detained to avoid fleet liens
- **Location** – ground the aircraft and repossess outside Ireland if there are concerns about fleet liens
- **Eurocontrol charges** – keep an eye on the airline's Eurocontrol bill. Get a CEFA agreement and a valid Eurocontrol letter

---

This article was co-written by **Gemma Freeman**, Counsel in our office in Dublin.

## Your Key Contacts



**Gareth Steen**  
Partner, Dublin  
D +353 1 5828115  
[gareth.steen@dentons.com](mailto:gareth.steen@dentons.com)



**Mairéadh Dale**  
Partner, Dublin  
D +353 1 5828123  
M +353 87 7150973  
[maireadh.dale@dentons.com](mailto:maireadh.dale@dentons.com)



**Gemma Freeman**  
Counsel, Dublin  
D +353 1 5828122  
[gemma.freeman@dentons.com](mailto:gemma.freeman@dentons.com)



**Ross Mullane**  
Associate, Dublin  
D +353 1 5828101  
[ross.mullane@dentons.com](mailto:ross.mullane@dentons.com)