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The Republic of Ireland as an effective international restructuring jurisdiction

KEY POINTS

- On 31 December 2020, the United Kingdom left the European Union (the 'EU').
- While the UK no longer has the benefit of the Recast European Insolvency Regulation (Regulation (EU) No. 2015/848) (the 'REIR') which addresses the recognition of insolvency proceedings across the EU, the Republic of Ireland will retain this benefit making it an attractive location for centre of main interest ('COMI') migrations and the commencement of insolvency proceedings.
- Since the onset of the COVID-19 pandemic, a number of complex, international insolvencies have commenced in the Irish courts.
- In two recent cases in the aviation sector, the Irish courts have demonstrated the suitability of the jurisdiction to efficiently handle complex international restructurings while balancing the protection of creditor and debtor interests.
- In two further recent cases the Irish courts have considered issues impacting the position of landlords in the distressed retail space.

AVIATION RESTRUCTURINGS TAKE FLIGHT

The Scheme of Arrangement under Irish law is similar, in most respects, to its equivalent under English law.

It allows a company to come to a binding compromise or arrangement with its creditors or classes of its creditors. In order to be effective, the Scheme of Arrangement must be approved by a 'special majority' comprising of a majority in number representing 75% by value of the creditors (or each class of creditors). It must then be sanctioned by the High Court. Once confirmed by the court, it becomes binding on the company and all its members and creditors.

On 21 July 2020, the Irish High Court approved a scheme of arrangement to restructure the liabilities of Nordic Aviation Capital DAC ('Nordic'), the world's largest regional aircraft lessor in a clear endorsement of the suitability of the Republic of Ireland as a jurisdiction in which to implement complex, cross-border restructurings.

The Irish Court assumed jurisdiction under Article 8(1) of the Recast Brussels Regulation (Regulation (EU) 1215/2012) on the basis that there was a single but significant Irish-domiciled scheme creditor.

The scheme implemented a 12 month standstill and deferral of payments to both secured and unsecured creditors. Without the scheme, covenant breaches and a cross default of Nordic's principal and interest obligations would have arisen.

The scheme was implemented across 89 different facilities, which were governed by a mixture of New York, English and German law. It covered the scheme creditors' claims against both Nordic and all companies within the group who are debtors under the facilities.

Due to the overwhelming support of creditors, the Irish High Court was not required to determine whether an Irish scheme of arrangement constitutes an 'insolvency related event' and an 'insolvency procedure' for the purposes of the Cape Town Convention and the related Aircraft Protocol.

CityJet

In another recent example, regional airline CityJet utilised Ireland's examinership regime to implement a significant restructuring over the summer of 2020.

Examinership is Ireland's rescue process and is analogous in many ways to Chapter 11 in the United States. It provides for a court sanctioned 150 day maximum moratorium from creditor action to enable a scheme of arrangement to be arrived at by the examiner. To enter the process, a company must be unable to pay its debts (or be likely to be unable to do so) and there must be a reasonable prospect for the survival of the company and some or all of its undertaking as a going concern.

When implemented, the scheme allowed CityJet to continue as a going concern on a more streamlined basis and gave most creditors dividends ranging between 1.24% and 15%. The successful outcome of the scheme meant that CityJet was also able to retain over 400 out of its original 1,100 strong workforce.

Norwegian Air

On 7 December 2020, the Irish High Court approved the appointment of an examiner to a number of companies in the Norwegian Air Group. While five of the companies admitted into the process were Irish incorporated, the parent company, Norwegian Air Shuttle ASA ('Norwegian') was and is incorporated in Norway.

Notwithstanding this, the judge was satisfied that Norwegian had sufficient connection to the jurisdiction to enable it to be admitted into the process as a related company. As an additional layer of protection, Norwegian filed for protection in Norway on 8 December 2020. Both processes are ongoing as at the time of writing.

RETAIL RESTRUCTURING

Distressed retail: landlords have their say

In two recent decisions in the retail space, the Irish courts have shown that they will apply the law with both rigour and flexibility to vindicate creditor interests.

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New Look

In October 2020 the Irish court refused to appoint an examiner to the Irish arm of the global New Look fashion retailer.

New Look sought the protection of the Irish court in August 2020 to address financial difficulties and losses caused by the fallout from the COVID-19 pandemic.

In particular, it seemed that the company wanted, as part of the examinership process, to seek reductions in rent or possible repudiation of some unprofitable leases.

Four landlords in particular objected to the proposed examinership. They expressed concern that the company had sought to contrive insolvency for the purposes of using examinership to reduce its long-term liabilities even though its business had been broadly profitable for the last two financial years and had considerable cash reserves.

While the court did determine that New Look would be unable to pay its debts at some stage in the early part of 2021, the presiding judge used his judicial discretion to refuse to appoint an examiner.

Ultimately, it was the failure by New Look to engage meaningfully with its landlords in an attempt to negotiate more favourable terms of its rental obligations in advance of seeking protection that caused the judge to adopt this position.

In light of New Look's significant cash reserves, the court stated that it was premature to seek the appointment of an examiner. The court further indicated that it would not allow the use of the examinership process to renegotiate unfavourable contractual terms without a debtor having first entered into some form of negotiation with its creditors.

On the basis of the evidence before the court, it was inexplicable that the company had not taken more proactive steps during the initial period of lockdown (March to August of 2020) to resolve differences with landlords.

The case highlights the discretionary powers of the court to refuse court protection even where statutory conditions have been met.

The level of engagement with creditors prior to the application to appoint an examiner had not been a factor previously examined with any real substance by the courts.

Monsoon Accessorize

In October 2020, five landlords to the former Monsoon stores in Dublin and Cork won their case in the Irish court in which they claimed their leases remained in force in Ireland notwithstanding the existence of a Company Voluntary Arrangement (CVA) in England which sought to compromise these contracts. The Irish Court refused to grant recognition and declared the Irish landlords' leases were to remain in force notwithstanding the English CVA.

The Dublin landlords sued Monsoon Accessorize Ltd, the UK parent. The Cork owners had also sued Monsoon Accessorize Ltd and the Irish arm, Monsoon Accessorize Ireland Ltd. They each sought a declaration that the terms of their leases would continue in full force and effect and were unaffected by the terms of the CVA.

The Irish landlords argued that Article 11(1) of the REIR is an exception to the rule in Article 7(2) where the law of the member state, who is opening insolvency proceedings, is to determine the effects of those insolvency proceedings.

Article 11 states that where immovable property is concerned, the laws of the member state where that property is situated prevails.

The Irish landlords further argued that since the insolvency proceedings should be determined by the laws in which the immovable property is situated, Article 11(2) conferred on the Irish courts jurisdiction to approve the termination or modification of a contract falling within Article 11(1).

Therefore, as a matter of Irish law, the rights of the landlords could not have been impacted in the manner provided for in the CVA.

Moreover, Article 33 of the REIR states that a member state may refuse to recognise insolvency proceedings or enforce a judgment where to do so would be contrary to public policy of that member state.

The CVA process did not comply with the fundamental principles and constitutional rights of the Irish landlords as it sought to modify Irish lease obligations. As the landlords were not afforded an opportunity to make representations as to the effects of the proposed CVA, this infringed their constitutional rights, bringing it into the scope of Article 33.

Under Irish law, it is possible to vary the rights of creditors of a debtor company by means of scheme or arrangement or through examinership. However, in both scenarios, the position of creditors is protected in two ways. Firstly, the creditors are grouped into classes and secondly, both schemes will require court approval. In effect, dissenting creditors would have a right to be heard before a court confirms the scheme. This was not the case with the CVA process.

It was not enough for Monsoon to state that the landlords could have made representations at the creditors' meeting. The outcome of the vote is usually determined by proxies in advance of a meeting in a CVA process. The dissenting creditors must have been afforded the opportunity to make their representations prior to any vote/proxy casted before the creditors' meeting.

While McDonald J. found that the recognition of the CVA was contrary to the public policy of the State in this particular case, he did state that the procedural unfairness which arose could have been avoided had the appropriate measure been taken in the course of the CVA process.

For any future CVAs which contain Irish leases, it is recommended that an appropriate mechanism be introduced which would allow creditors to make representations. Such a mechanism should also allow the general body of creditors to consider these representations in advance of casting their votes.

CONCLUSION

While 2020 has been a challenging year for all, the aviation and retail sectors have been amongst the hardest hit by the pandemic for

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obvious reasons. However, it is reasonable to assume that other sectors will continue to encounter distress as the health emergency continues.

The cases referred to in this article display that Ireland is a sophisticated international restructuring destination that balances the rights of creditors and debtors with a view to enabling enterprise survival. ■

Further reading

- Lessons to be learnt in the conduct of English CVAs with non-UK creditors (*Apperley Investments Ltd v Monsoon Accessorize Ltd*) LexisPSL Restructuring & Insolvency; Restructuring; Corporate insolvency processes
- Lexis PSL Banking and Finance; International Comparator Tool; Getting the Deal Through
- Practice Note – Company voluntary arrangements in property insolvency – overview; LexisPSL R&I; Property Insolvency; Company Voluntary Arrangements