Bankruptcy and a fresh start: stigma on failure and legal consequences of bankruptcy

IRELAND

TITLE 1. INTRODUCTION

1.1 Historical and Political Development

§ 1. Development prior to 1990

At the time of its independence in 1921, Ireland inherited three statutes of the United Kingdom parliament relating to company law: the Companies (Consolidation) Act, 1908, which was the principal piece of legislation, the Companies Act, 1913 and the Companies (Particulars as to Directors) Act, 1917. The 1908 Act included provisions for the winding-up of insolvent companies, a procedure whose existence dates back to 1844 whereby a company's affairs are wound up by a liquidator and its property is distributed to its creditors. The first major overhaul of Irish company law after independence came with the enactment of the Companies Act, 1963 ("the 1963 Act"), which replaced the 1908 Act and made various alterations to the law on winding-up.

The key principle in Irish company law which allows for a fresh start after business failure is the concept of separate legal personality first recognized by the House of Lords in *Salomon v. Salomon & Co.* [1897] AC 22. According to this principle, a company is an artificial legal entity separate and distinct from the members of which it is composed, with the consequence that the members cannot be required to pay the company's debts save in exceptional circumstances, which, under the 1963 Act, generally required fraud. Under the 1963 Act, unless a person was disqualified from acting as a director, there was nothing to stop him from setting up another company after business failure. The disqualification procedures were rarely invoked.

As with previous legislation, the 1963 Act focused on the orderly winding-up of insolvent companies, rather than their possible rescue. While it did provide for the negotiation of a scheme of arrangement between a company and its creditors or members, which would become binding if accepted by a qualified majority of a class and if sanctioned by the High Court, this procedure was rarely used, partially because the Revenue Commissioners (tax authorities) apparently took the view that they were unable to compromise sums due to them under statute.

§ 2. Companies (Amendment) Act, 1990

The Companies (Amendment) Act, 1990 ("the 1990 Amendment Act") introduced for the first time a procedure known as examinership. Under this procedure, a company in financial difficulties but with a prospect of survival applies to the High Court for the appointment of an independent professional to assess its affairs, consider whether it is capable of rescue and, if so, to bring forward a scheme for this purpose. The system is subject to court supervision and, during the period of examinership, the company is under court protection with the effect that creditors cannot enforce their claims against it. The Act was modeled to a large extent on Chapter XI of the US Bankruptcy Code, with certain elements of the administration system found in the English Insolvency Act, 1986.

The 1990 Amendment Act had been placed before the legislature as part of a larger bill (the Companies Bill, 1987, the remainder of which became the Companies Act, 1990). Following the Iraqi invasion of Kuwait in 1990 and the imposition of a United Nations trade embargo, Goodman International, a large Irish beef exporter with considerable exposure to the Iraqi market, found itself in serious financial difficulties. Accordingly, the relevant part of the bill was rushed through the legislature in a very short time period and became the 1990 Amendment Act.

The examinership process attracted substantial criticism and was referred to the Company Law Review Group for consideration in 1994. The Company Law Review Group First Report of December, 1994 suggested substantial reforms to the process. The bulk of these reforms were implemented by the Companies (Amendment) (No. 2) Act, 1999 ("the 1999 Act").

§ 3. The Companies Act, 1990

The remainder of the Companies Bill, 1987 was enacted as the Companies Act, 1990 ("the 1990 Act"). Many of its provisions relating to insolvency sprang from an increased anxiety that limited liability was being abused in a widespread manner. Two major reforms were introduced. First, the range of circumstances in which members, generally directors, could become personally liable for the debts of an insolvent company were increased. In particular, personal liability was introduced where a company engaged in reckless trading, without the requirement to prove fraud.

The second major reform was the increase in the number of circumstances resulting in the disqualification of directors and the introduction of the restriction of directors, whereby a director of an insolvent company would be precluded from being involved in a company without a certain minimum capitalization, unless he could satisfy the High Court that no such restriction order should be imposed. At the time of enactment of the 1990 Act, certain commentators expressed concern that the introduction of the restriction order might deter otherwise well-qualified individuals from acting as directors of small companies. The application of the restriction procedure has perhaps been less draconian in practice than had been thought at the time of its introduction.

§ 4. The Company Law Enforcement Act, 2001

Continuing concern as to non-compliance with and poor enforcement of company law led to the establishment by the government in 1998 of a working group to consider this issue. Later that year, the Report of the Working Group on Company Law Compliance and Enforcement was published. Its main recommendation was the establishment of the Office of the Director of Corporate Enforcement, which would take over the prosecution of company law offences from the Minister for Enterprise, Trade and Employment and would have the power to apply to the High Court for various orders, including restriction and disqualification of directors. Further recommendations were made to improve compliance and enforcement.

The bulk of these measures were enacted by the Company Law Enforcement Act, 2001 (“the 2001 Act”), which provided for the establishment of the Office of the Director. The various provisions of the Act are in the process of being commenced into law.

1.2 Overview of Current Insolvency Legislation

There are three main procedures which can be applied to insolvent companies: liquidation (also known as winding-up), receivership and examinership.

§ 1. Liquidation

Liquidation, also called winding-up, is a procedure whereby the affairs of a company are wound up and its property is distributed to its creditors and, if there is any surplus, to its members. There are two main types of liquidation: voluntary and official.

In case of insolvency, a voluntary liquidation is commenced where the members of a company resolve in general meeting that the company cannot continue in business because of its liabilities. A meeting of the company’s creditors is called for the day on which or the day after which the winding up resolution is proposed. A liquidator is nominated at the members’ meeting and is subject to approval at the creditors’ meeting.

An official liquidation is commenced by the making of an application to the High Court, by the presentation of a written petition. The application can be made on a number of grounds, including where the company is unable to pay its debts. After the advertisement of the petition, the court will hear the application and appoint a liquidator if appropriate. A provisional liquidator may also be appointed by the court after the presentation of the petition but prior to its hearing.

In a voluntary liquidation, the directors of the company must present a statement of affairs to the creditors’ meeting, which will be discussed at the meeting. Similarly, in an official liquidation, the directors will generally be ordered to file a statement of affairs in court.

On appointment, the liquidator, who is usually a practicing accountant, assumes the functions and authority which the directors of the company previously had. The general functions of a liquidator are to wind up the affairs of the company, to inquire into its affairs, to realize and distribute its assets and to pay its debts. This may include taking possession of property and assets, including the company’s books and records, and selling such property and assets, carrying on the business of the company if necessary for a beneficial winding up and having disputed cases adjudicated in court. The liquidator may also decide to take legal action in order to swell the assets of the company, in particular by making directors or members personally liable for all or part of the company’s debts. A liquidator is required to take proceedings for the restriction of the directors of the company.

With effect from the entry into force of the 2001 Act, the liquidator is also required to liaise with and report to the Director of Corporate Enforcement. A voluntary liquidator is required to call meetings of the company each year where the liquidation is not concluded. An official liquidator liaises with the Examiner of the High Court and is subject to court supervision.

When the affairs of the company have been completely wound up, the company will be dissolved and its separate legal personality will terminate.

§ 2. Receivership

Where a company owes money under a debenture (a document which evidences a debt) which is secured by a charge over all or part of the company's assets, the debenture will normally provide that if the company commits an event of default, usually a failure by the company to make a payment, the debenture holder can appoint a receiver over the assets of the company which are subject to the charge. A receiver can also be appointed on application to the High Court.

The appointment of a receiver, who is usually a practicing accountant, does not affect the legal status of the company. However, any floating charges over its assets crystallize, becoming fixed charges. The powers of the company and the directors relating to the assets within the scope of the receivership are suspended and may only be exercised if the receiver so consents.

A receiver's main function is to take control of the assets of the company which have been mortgaged or charged by the company in favor of the debenture holder, to sell such assets and to apply the proceeds to discharge the debt owing to the debenture holder. In disposing of the assets, the receiver is required to exercise all reasonable care to obtain the best price reasonably obtainable for the property as at the time of sale.

§ 3. Examinership

Examinership is a procedure whereby the court appoints an independent person, usually a practicing accountant, to assess the affairs of the company, consider whether it is capable of rescue and, if so, bring forward a scheme for this purpose which must be approved by certain classes of creditors and the High Court.

An examiner can be appointed, where a company is or is likely to be unable to pay its debts and there is no winding up in being, provided that the court is satisfied that there is a reasonable prospect of the survival of the company and the whole or any part of its undertaking as a going concern. In order for an examiner to be appointed, an application is made to the High Court which must be accompanied by the report of an independent accountant setting out the affairs of the company and whether the company has a viable future. Following a hearing on the application, the court will decide whether it is appropriate to appoint an examiner.

During the period while the examiner is in place, usually seventy days from the initiation of the procedure, the company is placed under court protection. This means that no liquidation can be instituted or receiver appointed, a receiver appointed within three days prior to the appointment of the examiner must cease to act and creditors cannot seek to enforce debts or security against the company. The directors of the company retain their functions in relation to its management, unless the court orders otherwise.

Within thirty five days of his appointment, the examiner makes a first report to the court in which he states whether he has been able to formulate any proposals for a compromise or scheme of arrangement to rescue the company. Such a compromise or scheme will usually allow for a reduction and/or deferral in payment of debts to creditors and may specify changes in the management or direction of the company. Where the examiner is not able to put forward a compromise or scheme of arrangement, the court will generally make an order for the appointment of a liquidator to the company.

Where the examiner puts forward proposals for a compromise or scheme of arrangement, they will first be considered and voted upon at meetings of each class of members and creditors. They will then be considered by the court, which decides whether to confirm them (with or without modifications) or reject them. If accepted, they become binding.

TITLE 2. DEFINITIONS AND TERMINOLOGY

Examinership:
Where a company is or is likely to be unable to pay its debts and there is no winding up in being, a court can appoint an examiner to the company if it is satisfied that there is a reasonable prospect of the survival of the company and the whole or any part of its undertaking as a going concern. An examiner is an independent person, usually a practicing accountant, who assesses the affairs of the company, considers whether it is capable of rescue and, if so, brings forward a scheme for this purpose which must be approved by the court. During the period of protection, which is usually seventy days from the initiation of the procedure, creditors cannot seek to enforce debts or security against the company.

Receivership:
Most debentures which are created by the company in favor of an institutional lender include a provision that the debenture holder is entitled to appoint a receiver, usually a practicing accountant, to the company where an event of default occurs, such as default on payment. A receiver can also be appointed on application to a court. A receiver’s main task is to take control of the assets of the company which have been mortgaged or charged by the company in favor of the debenture holder, to sell such assets and to apply the proceeds to discharge the debt owing to the debenture holder.

Liquidation:
Liquidation, also called winding-up, is a procedure whereby the affairs of a company are wound up and its property is distributed to its creditors and, if there is any surplus, to its members. A liquidator, usually a practicing accountant, also inquires into the company’s affairs. There are two main types of liquidation: voluntary and official. A voluntary liquidator can be appointed by the members of a company, where the company is solvent, by its creditors, where it is insolvent. An official liquidator is appointed by a court and has slightly enhanced powers.

Scheme of Arrangement:
A scheme of arrangement is a compromise or arrangement which a company negotiates with its creditors or members. If the compromise or arrangement is accepted by a majority in number representing three-quarters in value of the creditors, members, or a class thereof, it shall become binding on that group, if sanctioned by a court. The procedure is rarely used. A similar procedure can be used where a company is in liquidation.

Bankruptcy:
In Irish law, the term bankruptcy is reserved to private individuals. A person may be adjudicated a bankrupt, following a court application, where he is unwilling or unable to discharge his debts. When a person is adjudicated a bankrupt, his property vests in an assignee to be realized for the benefit of his creditors. The bankrupt loses his capacity to deal with the property and becomes subject to various legal disabilities.

TITLE 3. WARNING LIGHTS AND PREVENTION OF INSOLVENCY

There are a number of statutory provisions requiring companies to keep financial information which can serve as a warning light for insolvency, such as the keeping of books and records, the auditing of the accounts of most companies and the filing of an annual return. It appears, however, from the descriptions of insolvent companies in written decisions of courts, that many private companies which become insolvent do not keep adequate books and records.

Under s.202 of the 1990 Act, a company is required to keep proper books of account which:

(i) correctly record and explain its transactions;
(ii) enable its financial position to be determined with reasonable accuracy at any time;
(iii) enable its directors to ensure that any balance sheet, profit and loss account, or income and expenditure account comply with statutory requirements; and
(iv) enable the accounts to be readily and properly audited.

Books of account must be kept on a continuous basis, give a fair view of the company’s state of affairs and explain its transactions. They must contain:

(i) day to day entries of money received and expended by the company and the matters in respect of which the receipt and expenditure take place;
(ii) a record of the company’s assets and liabilities;
(iii) a record of all goods purchased and sold, with relevant invoices, and a statement of stock at the end of the financial year, where the company’s business involves dealing in goods;
(iv) a record of services provided and relevant invoices, where a company’s business involves dealing in goods.

It is a criminal offence for a company to breach its requirement to keep proper books of account. Furthermore, directors can be made personally liable for the debts of the company in certain circumstances where it becomes insolvent and proper books have not been kept (see infra at Chapter 5.5).

The books of account must be available for inspection at all reasonable times, without charge, by the officers of the company.

Under s.148 of the 1963 Act, the directors must place a balance sheet and profit and loss account before the company's members at its annual general meeting. The accounts must be signed by at least two directors on behalf of the board.

With the exception of certain small companies exempted under ss. 31 to 33 of the 1999 Act, all companies are obliged by s.193 of the 1990 Act to have their accounts audited on an annual basis by an independent professionally qualified auditor. The auditor examines the accounts of the company along with certain additional books and records of the company and produces a report for the annual general meeting of the company. The auditor's report gives his opinion, *inter alia*, as to whether the accounts have been properly prepared in accordance with statutory provisions and whether they give a true and proper view of the company's affairs. Where a company suffers a serious loss of capital, it is obliged to call an extraordinary general meeting under s.40(1) of the Companies (Amendment) Act, 1983. The auditor's report states whether such a loss has occurred. The auditor has been described as "a watchdog, not a bloodhound" (*Re Kingston Cotton Mill Co. (No. 2)* [1896] 2 Ch 279).

Under s.125 of the 1963 Act, as amended by s.59 of the 2001 Act, company is required to make an annual return to the Registrar of Companies, the body which maintains statutory information relating to companies. The balance sheet, profit and loss account and auditors' report must be attached to this return, subject to exemptions for small and medium sized companies. This return can be inspected by members of the public.

TITLE 4. LEGAL POSSIBILITIES TO CONTINUE ECONOMIC ACTIVITIES

Chapter 4.1. Examinership

§ 1. Comprehensive description of the regime as well as its underlying philosophy

1.1. Description

The examinership regime is described in detail at Chapter 1.2§ 3 supra and is further detailed infra. The underlying philosophy behind the examinership regime was set out by the then Minister for Industry and Commerce in parliamentary debates on the 1990 Amendment Act, where he stated that there was obvious merit in providing a system where a company which was beset by temporary financial difficulties could be given a "breathing space" in which to reorganize or reconstruct (Albert Reynolds T.D, 383 Dail Debates 1701, 3 November, 1988).

During the breathing space, the company cannot be wound up, a receiver may not be appointed and debts and security cannot be executed against the company. At the same time, an independent court-appointed examiner attempts to put together a survival package for the company. The goal is to facilitate the survival of the company and the whole or any part of its undertaking as a going concern. The survival package is put to meetings of creditors and members and, if approved, goes to the court for confirmation. If confirmed, it becomes binding. The concept of formulating proposals designed to ensure the future of the company is in some respects inspired by the scheme of arrangement provisions under s.201-4 of the 1963 Act, which are considered further at Chapter 4.2 infra.

In *Re Atlantic Magnetics Ltd* [1993] 2 IR 561, McCarthy J. stated in the Supreme Court that the purpose of the act was protection- protection of the company and consequently of its shareholders, workforce and creditors. In *Re Selukwe Ltd.* (High Court, unreported, Costello J., 20 December, 1991), the court, in considering whether to confirm a scheme, focused on the saving of jobs.

While there are significant differences to both procedures, the examinership regime is influenced by both Chapter 11 of the U.S. Bankruptcy Code and the administration procedure under the English Insolvency Act, 1986.

1.2. Critical analysis

A key feature of the Irish regime which is taken from Chapter 11 is that the management of the company remains in place unless the court otherwise orders. This provision of the U.S. and Irish regimes has been the subject of criticism. In contrast, under the English Insolvency Act, 1986, an administrator appointed by the court takes over the management of the company from the directors of the company. Furthermore, an administrator essentially takes on the role of a receiver, albeit one charged with the task of rescuing the company rather than protecting the debenture holder’s security.

Another significant departure from the English regime is that while an English debenture holder who wants to appoint a receiver has a veto over the appointment of an administrator, in Irish law, an examiner can be appointed unless a receiver has been in office for at least three days before the application.

The emphasis in the examination procedure is on the survival of the company as distinct from its underlying business. This has been criticized: in certain cases, the preferred outcome would have been to hive down parts of the business into a viable entity, which is possible in a receivership but was not possible having regard to the requirement to facilitate the survival of the company. Furthermore, Lynch, Marshall and O’Ferrall (*Corporate Insolvency and Rescue*, at p.303) argue that such a focus can lead to abuse, becoming a method for businessmen and directors to rescue their own livelihoods through the rescue of their company rather than rescuing the business.

In *Re Tuskar Resources* (High Court, unreported, McCracken J., 26 February, 2001), McCracken J. held that the wording of the Act precluded the court from making an order appointing an examiner to a holding company simpliciter, as the holding of shares could not be called “a going concern”. However, this difficulty can be obviated by s.4 of the 1990 Amendment Act, which provides that an examiner can be appointed to related companies, provided that the related company is registered in the jurisdiction.

§ 2. Classification of the procedure among branches of law, competent jurisdictions, overview of the procedure followed before these jurisdictions, implications of international private law

2.1. Description

As with all areas of insolvency law, examinership is generally a civil, as opposed to criminal, matter- criminal sanctions are, however, available where certain breaches occur, such as where a petitioner or examiner fails to give notification of his appointment as required under s.12 of the 1990 Amendment Act. The examination procedure is a private, as opposed to public, law matter.

The 1990 Amendment Act makes no reference to the implications of international private law. An examiner can only be appointed to an Irish registered company (see *Re Tuskar Resources* (High Court, unreported, McCracken J., 26 February, 2001)).

The competent jurisdiction for examinership is generally the High Court. While s. 3(8) of the 1990 Amendment Act provides that the matter may be remitted to the Circuit Court in whose circuit the company has its registered office or principal place of business where the total liabilities of the company do not exceed €317,434, there are no recorded cases where this has occurred.

2.2. Critical analysis

Historically, company law matters, including insolvency, have been dealt with exclusively by the High Court. While a working group headed by Supreme Court judge Mr. Justice Niall Fennelly has recently commenced a study of court organization in general, it is unlikely that the High Court will lose its role in relation to examinership, having regard in particular to the complex legal issues which can arise in such circumstances and the short time period available for the examinership procedure.

§ 3. Criteria to benefit for the regime (the origin of the criteria (legal, case-law, practice) must be specified)

3.1. Description

Section 2(1) of the 1990 Amendment Act provides that a court may appoint an examiner where it appears to it that:

(i) a company is or is unlikely to be unable to pay its debts and

(ii) there has not been any resolution or court order to wind-up the company.

Section 3(6) of the 1990 Amendment Act, as amended by s. 180 of the 1990 Act, provides that where a receiver has been appointed to a company for three days, an examiner cannot be appointed.

Section 2(2) of the 1990 Amendment Act, as substituted by s.5 of the 1999 Act provides that no order shall be made appointing an examiner unless the court is satisfied that there is a reasonable prospect of the survival of the company and the whole or any part of its undertaking as a going concern.

Section 3(3A) of the 1990 Amendment Act, as inserted by s.7 of the 1999 Act, provides that where an application is made to put a company into examinership, the application must be accompanied by a report in relation to the company prepared by a person ("the independent accountant") who is either the auditor of the company or a person who is qualified to be appointed as an examiner of the company.

The report gives the independent accountant's opinion as to whether the company has a reasonable prospect of survival as a going concern and what course should be taken, including possible arrangements with creditors. In particular, the report must detail the extent of the funding required to enable the company to continue trading during the protection period and recommend as to which of the company's liabilities incurred before the presentation of the petition should be paid.

Where due to exceptional circumstances outside the control of the petitioner which it could not reasonably have anticipated, the report of the independent accountant is not available at the time of the making of the application, the company can be put in examinership for a period of up to ten days prior to the presentation of the report. Section 3A(3) of the 1990 Amendment Act, as inserted by s.9 of the 1999 Act provides that the fact that a receiver has been appointed to the whole or part of the company's property does not of itself constitute exceptional circumstances.

3.2. Critical analysis

Prior to the 1999 Act, the test for the appointment of an examiner under s.2(2) was whether the making of an order would be likely to facilitate the survival of the company. This was interpreted to mean that the appointment of an examiner was appropriate where there was "some" prospect of survival (*Re Atlantic Magnetics Ltd* [1993] 2 IR 561). This was criticized by the Company Law Review Group in 1994, which recommended the amendment of the legislation to refer to a reasonable prospect. The Group considered that the purpose of examinership was to facilitate a company in overcoming temporary difficulties and allow for the continuation of the viable part of its undertaking. It should not be to postpone, at the expense of others, an inevitable failure. The Group stated that that requiring a reasonable prospect of survival would help to focus the legislation on those for which it is most suitable and reduce the potential for damage to the interests of other parties.

The requirement for the report of the independent accountant is another recommendation of the Group. Previously, examinership was a two stage process: the examiner would first investigate the company and report to the court within twenty one days, pursuant to s.15 of the 1990 Amendment Act. This section has now been repealed. In *Re Tuskar Resources* (High Court, unreported, McCracken J., 26 February, 2001), McCracken J. considered that the requirement for the report clearly meant that the court should decide at the initial stages of the application whether the company had a reasonable prospect of survival. He further stated that there was no statutory restriction on the court appointing the independent accountant as examiner, although there may be cases where it would be undesirable to do so.

A difficulty arises from the fact that frequently examinership is only sought where a debenture holder appoints a receiver to the company. In such circumstances, an examiner must be appointed within three days. While a company can be put into examinership for up to ten days prior to the presentation of the report "in exceptional circumstances", the fact that a receiver has been appointed to the whole or part of the company's property does not of itself constitute exceptional circumstances.

Murphy ("Examinerships after the Companies (Amendment) (No. 2) Act, 1999", (2000) 5 Bar Review 482, at p.483) points out that it would be difficult for a company or its directors to have such a report prepared within three days and it would be almost impossible for a creditor (and, depending on circumstances, a member) to do so. He suggests, however, that creditors who could not have anticipated the appointment of the receiver and who do not receive the full co-operation of directors upon the appointment of a receiver cannot be said to be rely on the appointment of the receiver in itself as the exceptional circumstance. Instead, such a creditor would be relying on the absence of information about the company's affairs prior to the appointment and the lack of co-operation afterwards as exceptional circumstances.

§ 4. Specification of the possible initiators of the procedure

4.1. Description

Section 3(1) of the 1990 Amendment Act provides that the following can apply to court for the appointment of an examiner:

(i) the company, or

(ii) the directors of the company, or

(iii) a creditor, or contingent or prospective creditor (including an employee) of the company, or

(iv) members of the company holding not less than 10% of the shares in the company with voting rights.

Section 3(2) of the 1990 Amendment Act provides that where the company is an insurer, an application may be made only by the Minister for Enterprise, Trade and Employment. As amended by s.6 of the 1999 Act, it further provides that where the company is a bank, an application may be made only by the Central Bank while various other financial services companies must inform the Central Bank of the making of an application.

Section 4A of the 1990 Amendment Act, as inserted by s.13 of the 1999 Act, provides that an applicant must exercise utmost good faith. Otherwise, the court can decline to hear the petition.

Under s.2 of the 1990 Amendment Act, the procedure is instituted by the presentation of a petition in the High Court by the applicant. On the same day as its presentation, an application for directions is brought to the High Court pursuant to the relevant rules of court (Order 75A, Rule 4 of the Rules of the Superior Courts, 1986, as amended). Order 75A, Rule 5 provides that at the hearing of the application, the court will give directions in relation to, inter alia, the parties on whom the petition should be served and whether and how the petition should be advertised. At the hearing of the petition, the court will decide whether to appoint an examiner.

4.2. Critical analysis

Following the introduction of the requirement for the independent accountant's report, a potential difficulty arises where the creditors or members of a company wish to make an application. Compliance with the requirement for the independent accountant's report may be impossible without the co-operation of the company and its directors. The Company Law Review Group considered this point but did not favor such an exemption- it considered, having regard to the fact that in the vast majority of cases the company or its directors make the application, that the benefit of ensuring that the court had full information available to it outweighed the desirability of accommodating the small number of cases in which this difficulty would arise.

The position is improved by s. 3A(4) of the 1990 Amendment Act, inserted by s. 9 of the 1999 Act, which provides that where the petitioner is a creditor or a member(s) of the company, the directors may be required to co-operate in the preparation of the report.

The difficulties referred to supra at 5§3.2 in relation to the preparation of the independent accountant's report where a receiver has been appointed are also relevant to this point.

§ 5. Administration of the procedure (who manages the assets of the individual or the company, the role of the different actors in the proceedings (creditors, debtor, State, appointed manager, court, etc)

5.1. Description

A key distinction should be made between the administration of the rescue procedure, which is the duty of the examiner, and the management of the company, which remains in the hands of the directors unless the court orders otherwise.

Once an examiner is appointed, he tries to formulate rescue proposals for the company, known as a compromise or scheme of arrangement, along with carrying out any other duties which the court may direct.

Sections 7 and 8 of the 1990 Amendment Act, as amended by s.18 of the 1999 Act, set out the powers of an examiner. He has a right of access to the books, accounts and vouchers of the company. All officers and agents of the company are required to produce books and documents relating to the company to him, to attend before him when required to do so, to give information and explanations to him and otherwise to give him all assistance which they are reasonably able to give. He also has the power to halt, prevent or rectify decisions of the company which are likely to be to the detriment of the company or any interested party, subject to the legitimate interests of parties acquiring rights in good faith.

An examiner has the power to convene, set the agenda for and preside at directors' meetings and general meetings of the company. He also has the right to attend board meetings and general meetings and to be given reasonable notice of such meetings. He can apply to court for the determination of any question arising in the course of his office.

On appointment of an examiner, the directors of the company retain their functions in relation to its management. Section 9 of the 1990 Amendment Act provides, however, that an examiner is entitled to apply to court to seek to have all or any of the directors' powers vested in him. The court will make such an order if it considers that it is just and equitable to do so, having regard to consideration such as whether the company's affairs are being conducted or are likely to be conducted, in a manner which is calculated or is likely to prejudice the interests of the company as a whole.

Where such an order is made, an examiner has the power to dispose of the company's assets, if the examiner considers that this would facilitate the achievement of his objectives. In such circumstances, assets which are subject to a security can be disposed of as if they were not subject to the security.

Section 13(6) of the 1990 Amendment Act provides that an examiner is personally liable on any contract entered into by him in the performance of his duties but that if he incurs any personal liability, he is entitled to an indemnity out of the company's assets.

Section 13A of the 1990 Amendment Act, which was inserted by s.21 of the 1999 Act, provides that the High Court may hold a hearing to consider irregularities in the company's affairs, where it appears to it there is evidence of a substantial disappearance of property of the company or other serious irregularities. Where directed by the court to do so, the examiner must prepare a report setting out matters which he considers may assist the court at such a hearing.

5.2. Critical analysis

One of the major criticisms which has been made of the examinership procedure is that the management of the company, which will invariably bear some culpability for the company's difficulties, will remain in place after the appointment of an examiner, unless the examiner makes a s.9 application. While this provision gives an incentive to management to act early to rescue the company and to co-operate with the examinership procedure, in some cases it fails to address a fundamental weakness of the company and can also lead to confusion for those continuing to deal with the company. It is also possible that the examiner will not have sufficient power to carry out his functions unless he makes a court application.

Section 9 has been used relatively infrequently by examiners. O'Donnell (*Examinerships: The Companies (Amendment) Act, 1990*, at p.24) considers that one reason for this is the lack of information readily available to an examiner immediately after his appointment on how the company has been managed. He points out that adding a direct managerial role to the examiner's functions is also likely to increase the cost of the examinership. However, he submits that examiners should not be slow to avail of the facility where necessary, in particular where there is evidence of gross incompetence on the part of the old management.

From a practical perspective, the vast majority of examinerships have been initiated by company management and the relationship between the examiner and management has been operated successfully in those circumstances. However, in the *Irish Press Newspapers* examinership, which was commenced on the application of employees in the company, the examiner encountered more resistance from management and, more particularly from members of the company.

§ 6. Restructuring plan (if applicable, who must file it, how, where, must it be voted by creditors, is there a court intervention, etc.)

6.1. Description

Under s.18 of the 1990 Amendment Act, as amended by s. 22 of the 1999 Act, the examiner must, as soon as possible after his appointment, formulate proposals for a compromise of scheme of arrangement in relation to the company. He is obliged to report to the court within thirty five days of his appointment on whether he has been able to formulate any such proposals. Where he is not able to do so, he may apply for directions to the court, and the court may make such order as it sees fit, including an order for the winding up of the company.

Section 21 of the 1990 Amendment Act provides that for the purpose of formulating proposals for a compromise or scheme of arrangement, an examiner may appoint a committee of creditors to assist him, and must do so if the court so orders. The committee must be provided with a copy of the proposals and may express an opinion on them.

Section 22 of the 1990 Amendment Act details the contents of the proposals. They must specify the various classes of members and creditors, ensuring that each class is treated equally, unless the holder of a particular claim agrees to less favorable treatment. The compromise or scheme of arrangement must also provide for the implementation of the proposals, specify any necessary changes to the management or direction of the company or in the memorandum or articles of association of the company and include such other matters as the examiner deems appropriate. The proposals should also include a statement of the assets and liabilities of the company and describe the estimated financial outcome of a winding up of the company for each class of members and creditors. Any other matters which the court so directs must also be included.

Under s. 23 of the 1990 Amendment Act, as amended by s.23 of the 1999 Act, the proposals as formulated are put to meetings of each class of members and creditors. They are deemed to have been accepted by a class of members if a majority of votes cast at the meeting are in favor. They are deemed to have been accepted by a class of creditors when a majority in number representing a majority in value of the claims represented at the meeting have voted in favor of the proposals. Along with the notice convening the meeting sent to the creditors and members, a statement must be sent explaining the effect of the compromise or scheme of arrangement.

In order to remove any potential difficulty relating to the ability of the Revenue Commissioners to compromise sums due under statute, s. 23(5) of the 1990 Amendment Act specifically provides that any state authority, including the Revenue Commissioners, which is a creditor of the company is entitled to accept proposals which would impair its rights.

Under s. 24 of the 1990 Amendment Act, as amended by s.24 of the 1999 Act, the proposals are then brought before the court, which decides whether to confirm them (with or without modifications) or reject them. The court cannot confirm the proposals unless:

(i) they have been accepted by at least one class of creditors whose interests would be impaired by their implementation,
(ii) they are fair and equitable in relation to any class of members or creditors who have not accepted them and whose interests would be impaired and
(iii) they are not unfairly prejudicial to any interested party.

The court also cannot confirm the proposals if their sole or primary purpose is the avoidance of payment of tax due.

Section 25 of the 1990 Amendment Act provides that at the court hearing, any member or creditor whose interests would be impaired by implementation of the proposals is entitled to object to their confirmation on any one of the following grounds:

(i) that there was some material irregularity at or in relation to a meeting of members or creditors;
(ii) that the acceptance of the proposals was obtained by improper means;
(iii) that the proposals were put forward for an improper purpose;
(iv) that the proposals unfairly prejudice the interests of the objector.

Where a party has voted to accept the proposals at a meeting of members or creditors, it cannot object to their confirmation except on ground (b) or, if he became aware of it after the voting to accept the proposals, ground (c).

Section 24(5) of the 1990 Amendment Act provides that if the court confirms the proposals, they are binding on everyone concerned. They are also binding on anyone who is liable for the debts of the company, for example, a guarantor of the company's debts. Section 25A of the 1990 Amendment Act, inserted by s.25 of the 1999 Act, provides that a guarantor's liability is not affected by the fact that the debt is the subject of a compromise or scheme of arrangement. It further provides that where a creditor proposes to enforce the guarantor's liability, it must offer to transfer to the guarantor the right to vote in respect of the proposals at the relevant meeting. The creditor can still object at any court hearing.

Where the court makes modifications to the proposals which alter them in a fundamental way, further meetings of members and creditors are required (*Re*

Goodman International, High Court, unreported, 28 January, 1991). Where the court refuses to accept the proposals, the company will invariably be wound up.

6.2. Critical analysis

The requirement that the proposals be sanctioned by the court before becoming effective differs from the English Insolvency Act, 1986. This requirement perhaps stems from the fact that an examiner can be appointed in a greater range of circumstances than an English administrator, with the result that court supervision is consider more appropriate.

The test of unfair prejudice applied by the court is one which is not defined in the legislation. Lynch, Marshall and O'Ferrall (*Corporate Insolvency and Rescue,* at p.301) argue that some legislative criteria should be introduced to clarify this concept.

See also the comments in relation to protection of creditors and members at Chapter 4.1§7 infra.

§ 7. The degree of protection of the actors implied in the procedure: public investors, creditors (secured and unsecured, preferential or not), shareholders, stakeholders,…), as well as the way to carry out this protection

7.1. Description

Various measures protect members and creditors of the company at each stage of the examination procedure.

In the first place, under s. 3 of the 1990 Amendment Act, a creditor of the company or members holding over 10% of shares in the company with voting rights have the right to apply for the appointment of an examiner.

Section 3B of the 1990 Amendment Act, as inserted by s.10 of the 1999 Act, provides that each creditor who indicates that he desires to be heard by the court must be afforded an opportunity to be heard prior to the making of a decision on an examiner's appointment.

Section 3C of the 1990 Amendment Act, as inserted by s.11 of the 1999 Act, provides that any interested party can obtain a copy of the independent accountant's report. It is likely that a creditor of the company falls within the meaning of an interested party. The court can, however, direct that parts of the report be omitted from any copy supplied to an interested party.

Once an examiner is appointed, the rights of creditors are diminished by s.5 of the 1990 Amendment Act, which provides that during the examinership period, the company is under the protection of the court with the effect that no liquidation can be instituted or receiver appointed, a receiver appointed within three days prior to the appointment of the examiner must cease to act and creditors cannot seek to enforce debts or security against the company, except with the consent of the examiner.

In Re Holidair Ltd [1994] 1 ILRM 481, the Supreme Court held that a bank's instruction to a company in examinership which had borrowed from it to lodge the proceeds of its book debts into a designated bank account after the appointment of an examiner was in breach of s.5. It further suggested that floating charges which have crystallized will de-crystallize on the appointment of an examiner and that an examiner can ignore a negative pledge clause.

Section 21 of the 1990 Amendment Act provides that for the purpose of formulating proposals for a compromise or scheme of arrangement, an examiner may appoint a committee of creditors to assist him, and must do so if the court so orders. Unless the court otherwise directs, the committee must consist of not more than five members and include the three largest unsecured creditors willing to serve. The committee must be provided with a copy of the proposals and may express an opinion on them.

Once proposals have been formulated, members and creditors have further rights under ss. 23-25 of the 1990 Amendment Act, as amended, relating to meetings and the subsequent court hearing which are detailed at Chapter 4.1§6.1 supra.

The rules relating to such meetings are detailed at Order 75A, Rule 18 of the Rules of the Superior Courts, 1986, as amended. At least three days notice of the meeting is required and notice of the relevant meeting is sent to all creditors and members by post. It is not necessary to send a complete copy of the proposals: all that is required is a statement explaining the effect of the proposals and their effect on any material interests of the directors of the company. O'Donnell (*Examinerships: The Companies (Amendment) Act, 1990*, at p.61) states that every effort should be made to ensure that the statement is clear and unambiguous and that it should, if possible, set out the main facts which enable the parties to exercise their judgment on the proposed scheme. Furthermore, if a complete copy of the proposals is requested by a creditor or member, an examiner should accede to this request unless it is unreasonably onerous or inconvenient for him to do so.

Under Rule 18, the examiner is obliged to preside at and be chairman of any meeting and should conduct the business of the meeting in an orderly manner so as to ensure the proper discussion of all proposals. At least three creditors must attend a creditors' meeting, while at least two members must attend a members' meeting. Appearances may be in person or by proxy.

Section 23(2) of the 1990 Amendment Act provides that a modification of the proposals may be put to the meeting but may only be accepted with the consent of the examiner.

At the court hearing under s.24 of the 1990 Amendment Act, as amended, s.24(2) provides that any creditor or member whose claim or interest would be impaired if the proposals were implemented may appear and be heard. In *Re Antigen Holdings Ltd.* (High Court, unreported, McCracken J., 8 November, 2001), the court allowed representations from an investor and from the trade unions representing employees. McCracken J. specifically expressed the view that while the 1990 Amendment Act stated that certain persons had a right to be heard, this did not in any way preclude the court from hearing other people. Similarly, in *Re 3V Multimedia Group* (High Court, unreported, Costello J., 20 August, 1992), the court allowed a proposed investor to address it on the extent of a modification which the court had made to a proposed scheme.

7.2. Critical analysis

While the general trend in Irish company law has been to strengthen the rights of creditors, under the examinership procedure, their rights are diminished: they cannot enforce security during the period of examinership and, as is discussed infra at Chapter 4.1§10, in the event that the examinership is not successful, their claims will be inferior to the remuneration, costs and expenses of the examiner and also, in the case of an unsecured creditor, to the expenses incurred by the examiner.

Furthermore, the proposals may involve a significant reduction in the sums payable to creditors. One of the most controversial aspects of the procedure is the ability of the court to confirm the proposals even where an entire class of creditors, whose interests are impaired rejects the scheme. These provisions are known as "cram down" provisions. This significantly differs from the position under schemes of arrangement under the 1963 Act and reduces creditor protection. It has been suggested that the "cram down" provisions could be challenged on constitutional grounds although no such challenge has taken place and a challenge to similar provisions of Chapter 11 of the US Code was unsuccessful (*Hanover National Bank v. Moyses* (1902)).

The Company Law Review Group Report, 1994 suggested that the minimum requirement that one class of creditors, whose interests would be impaired, approve the proposals be altered to a requirement that a majority by value of creditors accept them, in effect abolishing the concept of "cram down". Such an amendment, which was not made when the 1999 Act was enacted, would have the effect of giving a large amount of power to the largest creditor, usually a financial institution or the Revenue Commissioners. Lynch, Marshall and O'Ferrall (*Corporate Insolvency and Rescue,* at p.302) argue that this would give too much power to major creditors and that it would be preferable to amend the Act so that approval from a majority in value and number of creditors be required. It can be argued that such an amendment might give too much power to creditors, in particular where the proposals remain subject to court approval.

The interests of creditors have been improved to a certain extent by the 1999 Act, which, inter alia, gave them a statutory right of audience at the hearing of the petition, shortened the protection period, abolished the requirement of shareholder consent and gave priority to sums due to secured creditors over the certified expenses of the examinership

§ 8. Termination of the procedure

8.1. Description

Section 5(1) of the 1990 Amendment Act, as substituted by s.14 of the 1999 Act, provides that subject to the provisions concerning interim protection prior to the presentation of the report, the company shall be deemed to be under the protection of the court during the period beginning with the date of the presentation of the petition and ending on the expiry of seventy days from that date or on the withdrawal or refusal of the petition, whichever first happens.

Section 5 is subject to s. 18(3) and (4) of the 1990 Amendment Act, as amended by s.22 of the 1999 Act. Section 18(3) provides that where the court is satisfied that the examiner would be unable to report to the court within seventy days but that he may be able to make a report if that period were extended, the court may by order extend that period by not more that thirty days to enable him to do so. Section 18(4) provides that where a report has been submitted, the court may extend the seventy day period by such period as it considers necessary in order to enable it to take a decision as to whether to confirm the proposals.

Section 26 of the 1990 Amendment Act provides that, subject to s.5, the protection shall cease on the coming into effect of a compromise or scheme of arrangement or on such earlier date as the court may direct.

Section 27 of the 1990 Amendment Act provides that the company or any interested party may within 180 days after the confirmation of the proposals by the court apply to the court for revocation of the confirmation if it was procured by fraud.

8.2. Critical analysis

The period of protection is frequently extended by the court. However, the time periods are tight, in particular in comparison to the English procedures under the Insolvency Act, 1986, which are open-ended.

There is no procedure for re-entering the proceedings to monitor the process of the scheme or otherwise. O'Donnell (*Examinerships: The Companies (Amendment) Act, 1990*, at p.82) states that there seems no reason why this could not be done, albeit without the protection of the court.

Where the court terminates the procedure without proposals being confirmed, the company will invariably go into liquidation.

§ 9. Degree of information on the development of the procedure towards creditors (e.g. access to (court) files, etc.)

9.1. Description

The information provided to creditors during the procedure is detailed at Chapter 4.1§6.1 and, more specifically, 4.1§7.1 supra. Creditors may also receive information pursuant to the publicity obligations outlined at Chapter 4.1§12.1 infra. Creditors do not have access to court files. However this will not necessarily have any real impact on creditors because, as stated supra, each creditor will be provided with a statement of the effect of the proposals and will usually be given a complete copy of the proposals, unless it is unreasonably onerous or inconvenient for the examiner to do so.

9.2. Critical analysis

See Chapters 4.1§6.2 and 4.1§7.2.

§ 10. Costs related to the procedure, if applicable (e.g. fees trustee, receiver etc)

10.1. Description

Section 29 of the 1990 Amendment Act, as amended by s.28 of the 1999 Act, provides that the remuneration, costs and expenses of an examiner which have been sanctioned by order of the court shall be paid in full and shall be paid before any other claim, secured or unsecured, under any compromise or scheme of arrangement or in any receivership or winding-up of the company to which he has been appointed. The examiner's remuneration, costs and expenses have priority over the remuneration, costs and expenses of a subsequently appointed liquidator (*Re Springline Ltd.* [1997] 1 IR 467).

Section 10(1) of the 1990 Amendment Act provides that any liabilities incurred by the company during the examination period shall be treated as expenses properly incurred by the examiner, provided that such liabilities are certified by the examiner as being incurred in circumstances where, in his opinion, the survival of the company as a going concern during the protection period would otherwise be seriously prejudiced. This certification can be reviewed by the court (*Re Don Bluth Entertainment Ltd.*, High Court, unreported, Murphy J., 24 May, 1993).

Section 29(3A) of the 1990 Amendment Act, as inserted by s.28 of the 1999 Act, provides that such liabilities shall be paid in full before any other claim but after any claim which arises by way of a fixed charge.

10.2. Critical analysis

The priority given to liabilities incurred by an examiner during the examination period was, prior to the insertion of s.29(3A), perhaps the most contentious aspect of the examinership process. Previously, liabilities incurred by the examiner had the same priority as the examiner's own remuneration, costs and expenses. The Company Law Review Group recommended in 1994 that this be altered to the current position, in order to give further protection to secured creditors. It pointed out that the ability to secure debts on property was an important element in the financing of commercial activity in the State and that any doubt over the value of a security, in particular that of a fixed security, impacted on the availability and cost of credit to Irish business.

§ 11. Competence, knowledge and functioning of insolvency (bankruptcy) courts

11.1. Description

Order 75A, rule 2 of the Rules of the Superior Courts, 1986, as amended, provides that applications and proceedings concerning examinership shall be assigned to such judge or judges of the High Court as the President of the High Court shall assign. By Practice Direction of the 5th September, 1992, the President of the High Court assigned three judges to hear such petitions. The Practice Direction also requires that after the presentation of the petition, all applications in relation to a specific examinership shall be assigned to the same judge, unless this judge is unavailable. The identity of the assigned judges has changed from time to time.

11.2. Critical analysis

The High Court is not currently divided into divisions. Accordingly, the assignment of specific judges to hear examinership applications is a departure from the norm. Having regard to the complexity of the process and the speed with which it must be conducted, the current system, where specific judges with company law expertise hear examinership applications on a continuous basis, would seem appropriate. The Company Law Review Group First Report 2001 stated that there was no general perception of problems or inadequacies currently applying in the corporate litigation system in general. It recommended the establishment of a dedicated "Companies List" with a named judge assigned as having overall responsibility with a number of dedicated back-up judges. This would suggest that the process used for allocating examinership applications is an appropriate model for other areas.

§ 12. Publicity conditions, if applicable (e.g. newspaper, official gazette)

12.1. Description

Section 12(1) of the 1990 Amendment Act provides that within three days of the making of an application, which is by presentation of a petition, notice of the petition shall be delivered by the applicant to the Registrar of Companies.

Section 12(2), as amended by s.20 of the 1999 Act, provides that an examiner shall, within three days after his appointment, cause a notice of his appointment and the date thereof to be published in at least two daily newspapers circulating in the district in which the registered office or principal place of business of the company is situate. It further provides that an examiner shall cause the same notice to be published in Iris Oifigiuil (equivalent to an official gazette) within twenty one days after his appointment.

Section 12(3) provides that an examiner shall, within three days of his appointment, deliver to the Registrar of Companies a copy of the order appointing him.

Section 12(4), as amended by s.20 of the 1999 Act, provides that where a company is in examinership, every invoice, order for goods or business letter issued by or on its behalf on which its name appears, shall include the words "in examination (under the Companies (Amendment) Act, 1990".

Section 12(5) provides that a person who fails to comply with s.12 shall be guilty of an offence and liable on conviction to a fine of up to €12,700.

Where a court makes an order relating to a hearing regarding irregularities into the company's affairs, the confirmation of the examiner's proposals by the court or the revocation of such confirmation, the relevant court order shall be delivered to the

Registrar of Companies. Section 30 of the 1990 Amendment Act, as amended by s. 29 of the 1999 Act, provides that the examiner, or such other person as the court may direct, shall within fourteen days after the delivery to the Registrar of Companies of every such order, cause to be published in Iris Oifigiuil notice of such delivery. A person who fails to comply with s. 30 shall be guilty of an offence and liable on conviction to a fine of up to €1,270.

12.2. Critical analysis

In addition to these specific requirements, examinerships frequently receive a degree of coverage in the media, in particular the business press. While it is possible under s.31 of the 1990 Amendment Act for the whole or part of any proceedings to be held *in camera* (i.e. not in public), the Supreme Court has heard in relation to proceedings under other parts of the Companies Acts that for a hearing to be in camera, it must be shown not only that a public hearing would be seriously prejudicial to the legitimate interests of the company but also that a public hearing would prevent justice being done (*Re R Ltd.* [1989] ILRM 757).

The requirement to inform creditors and members of meetings and to send details of the proposals to them, detailed at Chapters 4.1§6.1 and 4.1§7.1 are also relevant in this regard.

Chapter 4.2. Scheme of Arrangement

§ 1. Comprehensive description of the regime as well as its underlying philosophy

1.1. Description

A scheme of arrangement under s. 201 of the 1963 Act is a compromise or arrangement between a company and its creditors or members. It can occur *inter alia* where a company is in liquidation or where it is liable to be wound up. Under the procedure, the company, a creditor or member, or the liquidator in a liquidation, can apply to the High Court with a proposed compromise or arrangement and the court can order a meeting of the class of creditors or members. Where the application is made, the court may stay all proceedings against the company and restrain further proceedings for such period as it sees fit. If the compromise or arrangement is accepted by a qualified majority of the creditors, members, or a class thereof, it shall become binding on that group and on the company, provided that it is sanctioned by the High Court.

English caselaw suggests that as a compromise or arrangement is proposed *between* a company and its members or creditors, the company itself must provide some consideration for the agreement (*Re NFU Development Trust Ltd.* [1973] 1 All ER 135) and that otherwise it will not qualify as an arrangement.

Section 279 of the 1963 Act provides for a further procedure where a company is about to be or is in the course of being wound up. It provides that an arrangement entered into between a company in such a position and its creditors shall be binding on the company if sanctioned by a special resolution and on the creditors if acceded to by three quarters in number and value of the creditors, subject to a right of appeal by a creditor or contributory within a three week period to the High Court, which may amend, vary or confirm the arrangement. There are no recorded cases under s.279. Furthermore, its relationship with s.201 is not entirely clear.

The scheme of arrangement procedure is rarely used, in particular since the enactment of the 1990 Amendment Act- while it was not directly affected by this, Lynch, Marshall and O'Ferrall (*Corporate Insolvency and Rescue,* at p.262) point out that the examinership procedure is in effect a much more sophisticated version of the scheme of arrangement. Furthermore, the statutory provisions dealing with the scheme of arrangement are extremely brief relative to examinership. Accordingly, Chapter 4.2 is significantly shorter than Chapter 4.1

1.2. Critical analysis

Lynch, Marshall and O'Ferrall (*Corporate Insolvency and Rescue,* at p.329) point to a number of distinctions between this procedure and examination. First, the proposal is effectively negotiated prior to court involvement. Secondly, the court may decide to stay proceedings against the company for an open-ended period, which may be longer than that in examinership. Thirdly, there is no individual such as an examiner who is appointed to negotiate the settlement. Fourthly, there are no "cram down" provisions, whereby a court may approve a scheme even where an entire class of creditors or members rejects the scheme.

In relation to s.279, Lynch, Marshall and O'Ferrall (*Corporate Insolvency and Rescue,* at p.331) consider that it may offer a cheap and flexible method for a company to achieve a compromise with its creditors, in particular as, unlike s.201, there is no requirement to divide creditors into separate classes

§ 2. Classification of the procedure among branches of law, competent jurisdictions, overview of the procedure followed before these jurisdictions, implications of international private law

2.1. Description

The ss. 201 and 279 procedures are civil, private law ones. The competent jurisdiction is the High Court. The relevant provisions of the 1963 Act do not consider the implications of international private law.

2.2. Critical analysis

See the comments at Chapter 4.1.2.2.

§ 3. Criteria to benefit for the regime (the origin of the criteria (legal, case-law, practice) must be specified)

3.1. Description

Section 201(1) provides that where a compromise is proposed, the court may on an application order a meeting of the creditors, class of creditors, members or class of members to vote on it. Section 201(3) provides that the scheme must be approved by a majority in number representing three fourths in value of the creditors, class of creditors, members or class of members who vote on it. For the scheme to be binding on that class and the company, it must be sanctioned by the court.

In *Re Savoy Hotel Ltd.* [1981] 3 All ER 646, an English case considering a similar provision, the court stated that it would not approve a proposed arrangement unless the company itself supported it. A court will only confirm a scheme if the statutory provisions and procedures have been complied with, the prescribed majorities at each meeting acted bona fide and the compromise or arrangement is fair and equitable (*Re John Power & Sons Ltd.* [1934] IR 412).

English caselaw states that even if a class of members does not vote in favor of a scheme, the court may still sanction it if satisfied that that class has no interest whatsoever in the remaining company assets (*Re Tea Corporation Ltd.* [1904] Ch 12)

3.2. Critical analysis

Difficulties can arise in evaluating to which class a creditor belongs, in particular as the court will not rule in advance on this point (*Re Pye (Ireland) Ltd.*, High Court, unreported, Costello J., 12 November, 1984) All unsecured creditors will usually form one single class unless some are to be treated differently from the rest. If proper class meetings are not held, the court will not approve the scheme.

§ 4. Specification of the possible initiators of the procedure

4.1. Description

Section 201(1) provides that an application may be made to the court by the company itself, any creditor or member of the company or, in the case of a company being wound up, by the liquidator. The proposal will be effectively negotiated prior to court involvement.

4.2. Critical analysis

While a creditor or member can make an application for the holding of a meeting, a scheme would be unlikely to be sanctioned by the court if it did not have the support of the company.

§ 5. Administration of the procedure (who manages the assets of the individual or the company, the role of the different actors in the proceedings (creditors, debtor, State, appointed manager, court, etc)

5.1. Description

The administration of the company will remain with its directors. The involvement of creditors is set out at Chapter 4.2§6 infra. As stated supra, the court must order the holding of the meeting(s) and then sanction the scheme.

§ 6. Restructuring plan (if applicable, who must file it, how, where, must it be voted by creditors, is there a court intervention, etc.)

6.1. Description

As stated supra, the proposal will be effectively negotiated prior to seeking court approval for the holding of the meeting(s). If the court orders for the meeting to be summoned, s. 201(1) provides that it will also direct the way in which it will be summoned. Section 201(2) provides that where an initial application is made to court, the court may stay all proceedings or restrain further proceedings against the company for such period as to it seems fit.

Section 202(1) provides that where a meeting is summoned, a notice must be sent to every relevant member and creditor, which must also include a statement explaining the effect of the arrangement and in particular setting out the interests of the directors of the company and the effect of the scheme on their interests, in so far as it is different from the interests of other persons. It further provides that in every notice summoning the meeting by advertisement shall include such a statement or alternatively a notification of the place at which and the manner in which creditors or members may obtain copies of such a statement. Section 202(2) provides that where the compromise or arrangement affects the rights of debenture holders, the statement shall give a like explanation in relation to the trustees for any deed securing the issue of the debentures as given in relation to the directors.

In contrast to the examinership procedure, no statutory guidelines are given to the court when considering whether to approve the scheme. As stated supra, the court will only confirm a scheme if the statutory provisions and procedures have been complied with, the prescribed majorities at each meeting acted bona fide and the compromise or arrangement is fair and equitable (*Re John Power & Sons Ltd.* [1934] IR 412).

§ 7. The degree of protection of the actors implied in the procedure: public investors, creditors (secured and unsecured, preferential or not), shareholders, stakeholders,…), as well as the way to carry out this protection

7.1. Description

Section 202(1) provides that where a meeting is summoned, a notice must be sent to every relevant member and creditor, which must also include a statement explaining the effect of the arrangement and in particular setting out the interests of the directors of the company and the effect of the scheme on their interests, in so far as it is different from the interests of other persons. In contrast to the examinership procedure, there are no “cram down” provisions.

§ 8. Termination of the procedure

8.1. Description

Section 201(3) provides that if a court approves a scheme, it shall become binding on the company, its liquidator and contributories if being wound up, and on the group which voted in favor of it. Section 201(5) provides that any order made by a court approving a scheme shall have no effect until a copy of the order has been delivered to the Registrar of Companies for registration.

§ 9. Degree of information on the development of the procedure towards creditors (e.g. access to (court) files, etc.)

9.1. Description

The relevant information relating to the development of the procedure will be the details of the scheme. As stated supra, under s.202(1), creditors are entitled to receive a statement containing such details.

§ 10. Costs related to the procedure, if applicable (e.g. fees trustee, receiver etc)

10.1. Description

The costs involved in the procedure will be legal costs. There are no statutory provisions setting out the party required to bear such costs. As the scheme benefits the company, it would appear appropriate, in the absence of special circumstances, that it bear such costs.

§ 11. Competence, knowledge and functioning of insolvency (bankruptcy) courts

11.1. Description

See Chapter 4.1§11 supra.

§ 12. Publicity conditions, if applicable (e.g. newspaper, official gazette)

12.1. Description

The wording of s. 202(1) envisages that the court may direct that the meeting of the creditors or members be summoned by way of advertisement. As stated supra, s. 201(5) provides that any order made by a court approving a scheme shall have no effect until a copy of the order has been delivered to the Registrar of Companies for registration.

TITLE 5. LEGAL CONSEQUENCES OF BANKRUPTCY AND POSSIBILITIES FOR A FRESH START

Chapter 5.1. Bankruptcy procedure

A company can be liquidated or wound-up in a number of ways. As already stated, a distinction is made between voluntary liquidations and compulsory liquidations.

A voluntary liquidation of a *solvent* company can be initiated by its members by a resolution passed at a general meeting of the company. Such a liquidation is known as a members' voluntary liquidation.

A creditors' voluntary liquidation usually commences where the members of a company resolve in a general meeting that the company cannot by reason of its liabilities continue its business and that it be wound up. The members nominate a liquidator at this meeting. The company then calls a meeting of its creditors, which must be advertised in newspapers. The directors prepare a full statement of the company's affairs and list of the company's creditors. At the creditors' meeting, the creditors consider the statement of affairs, the possible replacement of the liquidator nominated at the members' meeting and the appointment of a committee of inspection. Such a committee is made up of a number of creditors and assists the liquidator in carrying out his functions.

A compulsory liquidation is one which is ordered by the High Court. The High Court can make such an order on a number of grounds, including where a company is unable to pay its debts.

A company is deemed to be unable to pay its debts in a number of circumstances, including where:

(i) a creditor to whom the company is indebted in a sum exceeding €1,270 has served a written demand on the company at its registered office to pay the sum due and the company has for three weeks failed to pay the sum due;

(ii) a creditor has obtained a judgment for a debt but has been unsuccessful in attempting to execute it;

(iii) it is otherwise proved to the court's satisfaction that the company is unable to pay its debts.

A number of parties can bring an application to the High Court for the winding-up company, including the company itself, any creditor, the Director of Corporate Enforcement and, in certain circumstances, its members. The application is initiated by the presentation of a written petition. Prior to the hearing of the application by the court, it is advertised in newspapers. When the court makes an order for winding-up, it will appoint a liquidator.

Chapter 5.2. Legal effects of the initiation of bankruptcy procedures

In a compulsory liquidation, s. 220(2) of the Companies Act, 1963 provides that where the High Court makes an order for the winding-up of a company, the winding-up will be deemed to commence at the time of the presentation of the petition for the winding-up. This means that any dispositions of property or transfer of shares will made after the presentation of the petition will be void, unless the court otherwise directs under s. 218 of the 1963 Act. The court will usually so direct where the dispositions are made bona fide and in the usual course of business. In a voluntary liquidation, s. 220(1) of the 1963 Act provides that the order dates from the passing of the appropriate resolution.

Upon the making of the order, the liquidator assumes the functions and authority which the directors previously had. The company is treated as being analogous to a trustee of its assets. Where an order has been made, s.219 of the 1963 Act provides that any execution against the property of the company after the commencement of the winding up is void to all intents. Where an order has been made, s.222 of the 1963 Act provides that no proceedings can be proceeded with or commenced against the company without the consent of the court.

Every invoice, order for goods or business letter issued by the company must state that it is being wound up.

Section 288 of the 1963 Act, as amended by s.136 of the Companies Act, 1990 provides that any floating charge on the undertaking or property of the company created within twelve months before the commencement of the winding up shall be invalid, unless the company was solvent immediately after the creation of the charge, except to the value of money actually paid or goods or services sold or supplied to the company in consideration for the charge. Where the floating charge is created in favor of a person who is connected to the company, the relevant period is two years.

Chapter 5.3. Legal effects of bankruptcy as such

When the affairs of the company have been completely wound up, in a compulsory liquidation, the High Court will make an order under s. 249 of the 1963 Act that the company be dissolved from the date of the order. Its separate legal personality will terminate as of that date.

Similarly, in a voluntary liquidation, when the affairs are fully wound up, the liquidator will call a general meeting of the company under s. 263 of the 1963 Act. Within one week of this meeting, the liquidator will send an account of the company to the Registrar of Companies and the company will be dissolved on the expiration of three months from the registration by the Registrar of the account.

Chapter 5.4. 'Excusability' following bankruptcy

(i) Restriction of Directors

Section 150 of the Companies Act, 1990 provides for the restriction of directors. If a director is restricted, he cannot be appointed or act in any way, directly or indirectly, as a director or secretary of a company or be concerned or take part in the promotion or formation of any company unless it have an allotted share capital of a nominal value of at least €63,487, or €317,435 in case of a public limited company. Certain further restrictions are placed on the company to ensure that it maintains its capital.

An application to restrict a director is brought where an insolvent company is in receivership or is being wound up. An application to restrict a director may also be brought where there is no winding-up but where the company is insolvent and the reason for its not being wound up is the insufficiency of its assets. The application can be brought by a liquidator, receiver or, with effect from the commencement of s.41 of the Company Law Enforcement Act, 2001, by the Director of Corporate Enforcement. The section applies to any person who was a director of an insolvent company within twelve months immediately prior to its winding up. Shadow directors can also be restricted.

A restriction order will not be made if a director can satisfy the court that:

(i) he has acted honestly and responsibly in relation to the conduct of the affairs of the company and there is no other reason why it would be just and equitable to restrict him; or

(ii) he was a director of the company solely by reason of his nomination as such by a financial institution in connection with the giving of credit facilities to the company by that institution, provided that the institution had not obtained any personal guarantee from any director of the company; or

(iii) he was a director solely by reason of his nomination as such by a venture capital company.

Section 150 provides for the restriction of a director for a five year period. However, the court can extend this period or may lift the restriction on the application of the restricted person within one year of the imposition of the order.

In *Re Squash Ireland Ltd.* (Supreme Court, unreported, 8 February, 2001) the Supreme Court considered the criteria which should be considered in determining whether a director has acted responsibly. The court considered the criteria considered by the High Court in *La Moselle Clothing Co. v. Souhali* [1998] 2 ILRM 345 to be of assistance. These are:

(i) the extent to which the director has complied with his statutory obligations under the Companies Acts;

(ii) the extent to which his conduct could be regarded as so incompetent as to amount to irresponsibility;

(iii) the extent of his responsibility for the insolvency of the company;

(iv) the extent of his responsibility for the net deficiency in the assets of the company disclosed at the date of winding up or thereafter;

(v) the extent to which, in the conduct of the affairs of the company, he displayed a lack of commercial probity or want of proper standards.

In *La Moselle*, the High Court further stated that a director's conduct after a liquidation commences, such as co-operation with a liquidator, is relevant in considering whether it was otherwise just and equitable to restrict a director.

As of 31 December, 2000, one hundred and thirteen people were restricted (see Department of Enterprise, Trade and Employment, Companies Report, 2000).

(ii) Disqualification of Directors

Section 160 of the Companies Act, 1990 provides for the disqualification of directors. When a person is disqualified, he cannot be appointed or act in any way, directly or indirectly, as a director or secretary of a company or be concerned or take part in the promotion or formation of any company.

A person may be disqualified from acting as a director in two distinct circumstances. First, where a person is convicted on indictment of any indictable offence in relation to a company, or involving fraud or dishonesty, he is deemed to be disqualified for five years from the date of conviction or such other period as the court may order.

Secondly, a court may make a disqualification order where it is satisfied that a person has been guilty of:

(i) a fraud in relation to the company, its members and creditors;

(ii) a breach of duty in relation to the company;

(iii) conduct which makes him unfit to be concerned with the management of a company, fraudulent or reckless trading which resulted in a declaration of personal liability for some or all of the debts of the company; or

(iv) default in complying with the filing, notification and other requirements of the Registrar of Companies.

Where a person acts as a director while disqualified, he is guilty of a criminal offence, the period of disqualification will be extended for a further ten years, and he will be made personally liable for the debts of the company if it becomes insolvent during or within a period of twelve months after the disqualification order.

In *Cahill v. Grimes* (Supreme Court, unreported, 1 March, 2002), the Supreme Court adopted the same approach to disqualification orders as had been taken by the English High Court in *Re Lo-Line Motors Ltd.* [1988] BCLC 698. In *Re Lo-Line Motors Ltd.*, it was stated that the primary purpose of disqualification was not to punish the individual but to protect the public against the future conduct of companies by persons whose past record had shown them to be a danger to creditors and others. As disqualification involves a substantial interference with the freedom of the individual, the rights of the individual must be fully protected. Ordinary commercial misjudgment is in itself not sufficient to justify disqualification. In the normal case, the conduct complained of must display a lack of commercial probity, although in an extreme case of gross negligence or total incompetence, disqualification could be appropriate.

As of 31 December, 2000, four people were disqualified (see Department of Enterprise, Trade and Employment, Companies Report, 2000).

Chapter 5.5. Responsibility of the Company's management in case of bankruptcy of a limited liability company

A director of an insolvent company can be made personally liable for all or part of that company's debts in a number of circumstances. A number of other provisions may lead to liability as a result of improper transactions.

(i) Fraudulent Trading

Section 297A of the Companies Act, 1963, as inserted by s. 138 of the Companies Act, 1990, provides that any person is knowingly a party to the carrying on of the business of a company with intent to defraud its creditors or for any other fraudulent purpose (also known as "fraudulent trading") can become personally liable for all or any part of the company's debts as the High Court, on an application, may direct. Such a person is also guilty of a criminal offence under s. 297 of the Companies Act, 1963, as amended by s. 137 of the Companies Act, 1990. As the provisions apply to "any person" managers of a company may be held liable as well as directors.

Cases which have been held by courts to constitute fraudulent trading, leading to personal liability being imposed on directors, include the keeping of two sets of books of account to conceal the fact that company assets had been siphoned off for the benefit of directors (*Re Aluminium Fabricators Ltd.*, High Court, unreported, O'Hanlon J., 13 May, 1983), the destruction of records and the transfer of assets in order to defraud the Revenue Commissioners (*Re Kelly's Carpetdrome Ltd.*, High Court, unreported, Costello J., 1 July, 1983) and the sale of the principal asset of the company where part of the purchase money was paid into a separate account for the benefit of the company's directors (*Re Hunting Lodges Ltd.* [1985] ILRM 75).

The fraudulent trading provisions were originally enacted in the 1963 Act. Because of the difficulties in establishing fraud, which Keane, *Company Law* describes (at p.457) as "a notoriously difficult burden to undertake", the provisions were infrequently used. Accordingly, the Companies Act, 1990 provided for the imposition of personal liability in cases of reckless trading. Since then, fraudulent trading has seldom been raised.

(ii) Reckless Trading

Section 297A of the Companies Act, 1963, as inserted by s. 138 of the Companies Act, 1990 provides that an officer of a company (which includes a director or shadow director[1] and the secretary) who is knowingly a party to the carrying on of any business of the company in a reckless manner (also known as "reckless trading") can become personally liable for all or any part of the company's debts as the High Court, on an application, may direct.

Such an application may be brought by a receiver, examiner, liquidator or any creditor or contributory of a company. The application can be brought in the course of an examinership or winding-up of an insolvent company or where there is no winding-up but where the company is insolvent and the reason for its not being wound up is the insufficiency of its assets.

An officer of the company is deemed to have been knowingly a party to reckless trading if:

(i) he was a party to the carrying on of such business and, having regard to the general knowledge, skill and experience that may reasonably be expected of a person in his position, he ought to have known that his actions or those of the company would cause loss to the creditors of the company, or any of them, or

(ii) he was a party to the contracting of a debt by the company and did not honestly believe on reasonable grounds that the company would be able to pay the debt when it fell due for payment as well as all its other debts (taking into account the contingent and prospective liabilities). In considering this, the court should have regard to whether the creditor in question was aware of the company's financial state of affairs at the time the debt was incurred.

Subject to this deeming provision, it has been held that an officer cannot be knowingly a party to reckless trading unless he is a party to carrying on business in a manner which he knows very well involves an obvious and serious risk of loss or damage to others and yet ignores that risk because he does not really care whether

[1] A shadow director of a company is a person with whose directions or instructions the directors of a company are accustomed to act. A person on whose professional advice directors are accustomed to act, such as a solicitor or accountant, is not a shadow director by reason only of that fact.

such others suffer loss or damage or because his selfish desire to keep his own company alive overrides any concern which he ought to have for others. Reckless has been described as "gross carelessness" (*Re Hefferon Kearns Ltd (No. 2)* [1993] 3 IR 191).

Where it appears to the court that an officer has acted honestly and responsibly in relation to the conduct of the affairs of the company or any other relevant matters, the court may relieve him either in whole or in part of personal liability.

Reckless trading proceedings are most frequently brought by the liquidator of an insolvent company. The bulk of such proceedings are settled prior to trial and there are few recorded decisions. Accordingly, it is not possible to provide an accurate estimate of the frequency with which such proceedings are brought.

(iii) Misfeasance Proceedings

Section 298 of the Companies Act, 1963, as substituted by s. 142 of the Companies Act, 1990 and amended by s. 50 of the Company Law Enforcement Act, 2001, provides that if in the course of a winding-up it appears that, inter alia, any past or present officer or person who has taken part in the formation or promotion of the company has misapplied or retained or become liable or accountable for any money or property of the company, or has been guilty of any misfeasance or breach of duty or trust in relation to the company, the High Court may, on application of the Director of Corporate Enforcement, liquidator, creditor or contributory examine the conduct of such individual and compel him:

(i) to repay or restore the money or property or any part thereof respectively with interest at such rate as the court thinks just, or
(ii) to contribute such sums to the assets of the company by way of compensation as the court thinks just.

Proceedings can also be taken where there is no winding-up but where the company is insolvent and the reason for its not being wound up is the insufficiency of its assets.

In all cases it must be shown that actual financial loss has been caused to the company (*Re SM Barker Ltd* [1950] IR 123). Where an officer or promoter is guilty of mere negligence or carelessness, such proceedings cannot be brought (*Re Mont Clare Hotels Ltd.*, High Court, Costello J., 2 December 1986). Section 391(1) of the Companies Act 1963 provides that the High Court may grant relief where the officer or promoter has acted honestly and reasonably and, having regard to all the circumstances, he ought fairly to be excused.

(iv) Return of Improperly Transferred Assets

Section 139 of the Companies Act, 1990 provides that where a company is being wound up and it is shown to the satisfaction of the court that any property of the company of any kind was disposed of in any way and the effect of such disposal was to perpetrate a fraud on the company, its creditors or members, the High Court, on application made by a liquidator, creditor or contributory, may, if it deems it just and equitable to do so, order any person who appears to have the use, control or possession of such property or the proceeds of the sale or development thereof to deliver it or pay a sum in respect of it to the liquidator on such terms or conditions as the court sees fit.

In deciding whether it is just and equitable to make such an order, the court has regard to the rights of persons who have bona fide and for value acquired an interest in the property in question.

The section also applies to receivers (s. 178, Companies Act, 1990). It does not apply to a transaction to which s. 286 of the 1963 Act applies (a fraudulent preference).

There are no recorded decisions relating to the section.

(v) Fraudulent Preference

Section 286 of the Companies Act, 1963, as substituted by s. 135 of the Companies Act, 1990, provides that any transaction entered into by a company which is unable to pay its debts as they become due in favor of any creditor with a view to giving such creditor, or any surety or guarantor for the debt due to such creditor, a preference over the other creditors, shall, if an insolvent winding-up of the company commences within six months, be deemed a fraudulent preference and be invalid accordingly.

The dominant intention of the transaction must have been to prefer. If the creditor, surety or guarantor puts sufficient pressure on the company to pay the debts so as to overbear the will of the company's controllers, the transaction will not be regarded as being a fraudulent preference (*Corran Construction Co. Ltd. v. Bank of Ireland* [1976-7] ILRM 175). In the absence of direct evidence of an intention to prefer, the court may be entitled to infer such intention from the surrounding circumstances (*Station Motors Ltd. v. Allied Irish Banks Ltd.* [1985] IR 756).

A transaction in favor of a person connected with the company made within two years before the commencement of the winding up shall, unless the contrary be shown, be deemed to have been made with a view to giving such person a preference over the other creditors and to be a fraudulent preference and shall be invalid accordingly. A connected person includes a director or shadow director, a person connected with a director and a surety or guarantor for a debt due to such a person.

(vi) Failure to Keep Proper Books and Records

Under s. 202 of the Companies Act, 1990, a company is under an obligation to cause to be kept proper books of account. Section 204 of the 1990 Act provides that where a company is in insolvent liquidation and has breached this obligation, the High Court may, on an application by the liquidator, a creditor or contributory of the company, declare that any one or more of the officers and former officers of the company in default shall be personally liable for all or part of the debts of the company if it considers that such contravention:

(i) has contributed to the company's inability to pay all of its debts, or
(ii) has resulted in substantial uncertainty as to the assets or liabilities of the company, or
(iii) has substantially impeded the orderly winding up of the company.

The application may also be brought where there is no winding-up but where the company is insolvent and the reason for its not being wound up is the insufficiency of its assets.

No declaration shall be made where the court considers that a person took all reasonable steps to ensure compliance by the company with its obligation or he has reasonable grounds for believing and did believe that a competent and reliable person, acting under the supervision or control of a director of the company who has been formally allocated such responsibility, was charged with the duty of ensuring that that section was complied with and was in a position to discharge that duty.

In considering the exercise of its discretion, the court must have regard to the extent to which the contravention of s.202 resulted in financial loss and, if it did, whether or not such losses were reasonably foreseeable by the officer as a result of the contravention.

TITLE 6. PROSPECTS AND RECOMMENDATIONS

The system of company rescue introduced by the 1990 Amendment Act has been extremely contentious. The amendments made by the 1999 Act were the result of a realization that the system did not give sufficient focus to viable companies or sufficient protection to the interests of creditors.

It is now generally accepted that examinership is only suitable to a limited number of companies which are facing periodic trading difficulties rather than complete financial disaster. Lynch, Marshall and O'Ferrall (*Corporate Insolvency and Rescue,* at p.298) point to two major difficulties which arise where examinership is easily available to companies: first, that a failed examination will deplete the assets of the company even further before an inevitable liquidation and secondly, that in some cases, the process can be abused by undeserving companies, benefiting unscrupulous owners and managers of insolvent companies with dubious trading histories.

The argument can be made that there is no need for the examinership procedure, having regard to the fact that many successful sales of businesses follow from receiverships and in some cases liquidations. Indeed, Lynch, Marshall and O'Ferrall (*Corporate Insolvency and Rescue,* at p.317) point out that this occurred to three businesses following the failure of a high profile examinership. They consider that courts are generally unaware of such sales and, accordingly, were unduly favorable towards examinerships, in the hope that businesses and, consequently, jobs would be saved.

However, it should be noted that receivership is not available for all companies and that the maintenance of the core of a viable company is not the main focus of receivership. While since the enactment of the 1999 Act there have been very few examinerships, the recent case of *Re Antigen Holdings Ltd.* (High Court, unreported, McCracken J., 8 November, 2001), where a scheme was approved by the court, suggests that there remains a role for it.

It is difficult to classify the current examinership system as being unduly favorable or unfavorable to business restarts. The Company Law Review Group First Report 1994 stated that as of December 1994, of 166 applications for examinerships, an examiner had been appointed in 138 cases and a scheme of arrangement had been reached in 91 cases. In 45 cases where an examiner had been appointed, a receiver or liquidator had subsequently been appointed, including 11 cases where a scheme of arrangement had been agreed. This survey is skewed somewhat by the large number of companies (58) involved in the *Goodman International* examinership. Irrespective of these statistics, it was generally considered prior to the amendment of the Act, that many undeserving companies obtained court protection. In contrast, very few companies now seek or obtain such protection.

As regards liquidations, many of the lacunae which existed in Irish legislation were removed by the 1990 Act, which significantly strengthened creditor protection and by the 2001 Act, which focused specifically on the question of enforcement. As was detailed in the Report of the Working Group on Company Law Compliance and Enforcement, 1998, Irish company law had been characterized by a culture of non-compliance. Such a lax approach inevitably acted as a deterrent to business survival by facilitating dishonest and incompetent company directors.

It remains to be seen how the creation of the Office of the Director of Corporate Enforcement under the 2001 Act will affect liquidations. It is likely that supervision of liquidations by the Director will lead to a large increase in the number of directors who are restricted and disqualified and should also lead to personal liability being imposed in more cases. Indeed, prior to the enactment of the 2001 Act, very few restriction applications were brought in voluntary liquidations, with the result that unscrupulous directors usually faced very few practical difficulties in starting new businesses post liquidation.

The Company Law Review Group, First Report, 2001, published in February, 2002 recommends significant reforms to Irish company law. In particular, it proposes widespread simplification of company law, including a shift in focus from public companies to private companies.

The report makes few proposals in relation to insolvency legislation, apart from recommending the introduction of a licensing system for insolvency practitioners. The Group recommends that the winding-up of companies be considered by it in its second work program.

The recommendation for the licensing of insolvency practitioners stems from difficulties which the Group perceived in relation to voluntary liquidations (i.e. those which were not subject to court scrutiny). Concerns included liquidators who failed to complete, or took an inordinate time to complete, liquidations, liquidators who took on too many cases and liquidators who failed to comply with their obligations under the Companies Acts. The powers given to the Director of Corporate Enforcement under the 2001 Act to supervise liquidators may address some of these concerns.

The Group also recommends that it consider in its second work program whether Ireland should introduce a state-funded public interest liquidation service, as already exists in most other common law jurisdictions. This issue was considered by the Report of the Working Group on Company Law Compliance and Enforcement, 1998, which recommended against the establishment of such a service. The primary factor for this conclusion appears to have been the cost of such a service to the State, relative to the size of the Irish economy.

In conclusion, the changes introduced by the 1999 and 2001 Act, when combined with a likely forthcoming study by the Company Law Review Group, suggest that Irish company law is in a state of flux.

TITLE 7. STATE OF KNOWLEDGE

Textbooks:

Keane, *Company Law* (3rd ed., Butterworths, Dublin, 2000)
Courtney, *The Law of Private Companies* (Butterworths, Dublin, 1994)
Ellis, *Modern Irish Company Law* (Jordans, Bristol, 2001)
Forde, *Company Law* (3rd ed., Round Hall Sweet & Maxwell, Dublin, 1999)
Callanan, *An Introduction to Irish Company Law* (Gill & McMillan, Dublin, 1999)
Ussher, *Company Law in Ireland* (Sweet & Maxwell, London, 1986)
Lynch, Marshall & O'Ferrall, *Corporate Insolvency and Rescue* (Butterworths, Dublin, 1996)
O'Donnell, *Examinerships: The Companies (Amendment) Act, 1990* (Oak Tree Press, Dublin, 1994)
McCormack, *The New Companies Legislation* (Round Hall Press, Dublin, 1991)
McCann (ed.), *Companies Acts, 1963-1990* (Butterworths, Dublin, 1993)

Legislation:

Companies Act, 1963
Companies (Amendment) Act, 1977
Companies (Amendment) Act, 1982
Companies (Amendment) Act, 1983
Companies (Amendment) Act, 1986
Companies (Amendment) Act, 1990
Companies Act, 1990
Companies (Amendment) (No. 1) Act, 1999
Companies (Amendment) (No. 2) Act, 1999
Company Law Enforcement Act, 2001

Rules of the Superior Courts (No. 3), 1991 (Statutory Instrument No. 147/1991, which inserts Order 75A into the Rules of the Superior Courts, 1986)

Reports:

Company Law Review Group, First Report, 1994
Report of the Working Group on Company Law Compliance and Enforcement, 1998
Department of Enterprise, Trade & Employment, Companies Report, 2000
Company Law Review Group, First Report, 2001

Journal Articles:

Murphy, “Examinerships after the Companies (Amendment) (No. 2) Act, 1999”, (2000) 5 Bar Review 482

Conference Papers:

Liabilities of Company Directors, Irish Centre for Commercial Law Studies Conference, 10 December, 1992
Examining Examinership, Irish Centre for Commercial Law Studies Conference, 22 September, 1994

Organizations:

Office of the Director of Corporate Enforcement,
Regus House,
Harcourt Road,
Dublin 2.

Company Law Review Group,
Earlsfort Centre,
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Companies Registration Office,
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