



CORPORATE AND COMMERCIAL

COVID-19: Restructuring of Company Debt

by **Jill Callanan, Clare Dowling**

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31st March 2020 | by Jill Callanan, Clare Dowling

Some businesses may soon (and indeed already) be faced with sudden cash flow and liquidity issues as a result of the sudden economic disruption caused by the COVID-19 pandemic.

Some of these businesses may be well advised to first seek to renegotiate arrangements with creditors whilst others may require formal court protection from creditors to assist them while arrangements with creditors are being put in place.

The three main legal avenues which are available to businesses seeking to restructure their debt under Irish law are as follows:

1. **The “contractual option”** in which the company and its creditors engage and reach agreement in relation to the amendment of payment terms of contracts, loans or facilities or restructuring of a debt. There is no need for court approval.
2. **Examinership.** This a full-scale corporate rescue device with court oversight at every stage. Court applications are required in respect of the appointment of the examiner and the sanctioning of the Scheme of Arrangement.
3. **The Scheme of Arrangement.** This is subject to court approval.

All three options may need to be considered by businesses struggling to pay their debts in the coming months due to the economic disruption precipitated by the COVID-19 pandemic. Below, we examine these three options and outline the main benefits of each.

1. The Contractual Option

Companies could seek to amend their contract terms with their creditors, both secured and unsecured. Of course, in normal times this may be difficult to achieve. Context is key and in circumstances where the fundamental balance of the economy has altered significantly, companies may find creditors are more willing to agree new payment terms. In general, such an option is preferable for all parties including creditors as it can in fact ensure creditors are fully repaid in the medium to long term. If a company enters liquidation many creditors often lose out significantly as there are insufficient funds remaining to pay them.

In order to successfully engage with creditors, management may find it useful to first develop a viable corporate restructuring plan to demonstrate how the business proposes to cut costs and return to profitability. This can demonstrate to creditors that there is a possibility that they can benefit from altering payment terms rather than the company entering liquidation.

2. Examinership

Examinership is the quintessential formal corporate rescue package in Ireland. Indeed, examinerships played a crucial role in the post financial crisis years and proved instrumental to the survival of many businesses across many different sectors.

What is examinership?

Examinership is a corporate rescue mechanism designed to provide insolvent companies with a period of protection from creditor claims for a limited period of time (between 70 and 100 days). The aim of this period of protection is to enable the insolvent company to put together a rescue plan to enable the survival of the company 'as a *going concern*' into the future.

This fundamental aim of saving jobs remains a key feature of examinership and it is a key factor that a court will consider when deciding to appoint an examiner to an insolvent company.

How does examinership work?

Examinership is essentially a two-step process comprising the following:

1. the initial appointment of an examiner by a court over the distressed company; and
2. court approval of a Scheme of Arrangement.

The Appointment of an examiner

An examiner (usually an accountant or insolvency practitioner) is appointed to an insolvent company upon an application before either the Circuit Court or High Court. This application is most often made on behalf of the company itself or its directors. The examiner is appointed for an initial 70-day period. During this period creditor claims (which include secured creditors) against the company are frozen, i.e. a creditor cannot take steps to call in debts due. For instance, a secured creditor cannot appoint a receiver over the company or its assets during this period of protection. During this period of protection the examiner is entrusted with the task of formulating a rescue package for the company - known as a Scheme of Arrangement.

The Scheme of Arrangement

The Scheme of Arrangement must be approved by the company and its creditors (with a majority of votes in each creditor class voting in favour) and it must then be ultimately approved by the Court. This Scheme of Arrangement will often involve a 'cram down' or write-off of certain debts of the company. Although not guaranteed, in most cases where a Scheme of Arrangement is agreed between the Company and its creditors, it will be approved by the Court.

3. Scheme of Arrangements

The Scheme of Arrangement is an often-neglected procedure to assist companies seeking to restructure. Two main steps are involved in this procedure:

1. an agreement between the company and its creditors termed a Scheme of Arrangement; and
2. a court application to sanction the proposed Scheme of Arrangement.

Whilst Schemes of Arrangement existed under previous company law legislation in Ireland, the process was streamlined considerably in the Companies Act 2014, which potentially makes it a very attractive option for companies in the current climate. Indeed, there is reason to believe that it may become a popular option for companies faced with sudden cash-flow issues due to the Covid-19 pandemic.

The Scheme of Arrangement option might also become a preferred option for companies seeking to reformulate their debts as opposed to the examinership route. As set out above Examinership requires amongst other things:

1. the formulation of an independent accountant's report;
2. the appointment of an examiner by a court;
3. court oversight of the examinership; and
4. the approval of a Scheme of Arrangement by the same court.

The advantage of a Scheme of Arrangement is that it allows the distressed company to avoid steps (i)-(iii)

above and permits the company to proceed straight to step (iv) once a Scheme has been agreed with its creditors. In addition, courts have proved to be (and have indeed stated their preference) for approving such Schemes as they tend to defer to arrangements agreed between parties.

The main advantages of the Scheme of Arrangement are as follows:

1. It can be agreed with all creditors in one package;
2. If the appropriate thresholds are met (75% voting in favour amongst both secured and unsecured creditors) it can be imposed amongst dissenting creditors;
3. When a scheme is proposed and a meeting of creditors is proposed, an application to court can be made to stay all proceedings and restrain any further proceedings against the company by its creditors for a limited time period;
4. The management and directors of the company can remain the same;
5. The corporate structure of the company can remain the same;
6. It encourages discussion and solutions with creditors;
7. Ultimate court approval ensuring that the new arrangement is enforced on all creditors even dissenting ones; and
8. Limited court involvement leading to reduced legal costs.

LK Shields is ready to advise

Any business considering engaging in a corporate recovery exercise is well advised to first examine all options available to it. The team at LK Shields has extensive experience in successfully navigating businesses in a diverse range of sectors through each of these three corporate rescue avenues. If you require further information please contact Jill Callanan (jcallanan@lkshields.ie), Clare Dowling (cdowling@lkshields.ie) or Redmond Arigho (rarigho@lkshields.ie).

To view our cross-disciplinary coverage of business continuity during the COVID-19 outbreak, please visit our dedicated [special insights page](#) and sign up to our mailing list by [clicking here](#).

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