



AMERICAN
BANKRUPTCY
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2017 International Insolvency & Restructuring Symposium

U.S./Ireland Restructurings: A Friendly Affair?

Hon. Mr. Justice Brian McGovern,
Moderator

Ireland High Court; Dublin

Henry P. Baer, Jr.

Finn Dixon & Herling LLP; New York

Tony O'Grady

Matheson; Dublin

Kieran Wallace

KPMG; Dublin

US / Ireland restructurings – a friendly affair?

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moderator

Tony O’Grady, Partner, Matheson

Henry P. Baer, Partner, Finn Dixon & Herling LLP

Kieran Wallace, Partner, KPMG (Dublin)

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Overview

- Brief overview of restructuring procedures in Ireland
- Enforcement and recognition of foreign insolvencies – Irish perspective
- Recognition – US perspective
- US bankruptcy overview

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Brief overview of restructuring procedures in Ireland

1. Examinership
2. Receivership
3. Liquidation
4. Schemes of arrangement

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Examinership

- Principal restructuring tool
- Similar in many respects to Chapter 11
- Key features
 - usually initiated by company (but shareholder or creditor can also petition)
 - proofs: insolvency and reasonable prospect of survival
 - 100 day process
 - debtor in possession

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Examinership cont'd

- examiner formulates proposals for scheme of arrangement usually entailing new investment for equity and cramming down of debt
- secured creditors require to be cashed out if crammed down (McInerney Homes Limited & ors & Companies (Amendment) Act 1990 [2010] 475 COS)
- one class of impaired creditor required to vote in favour

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Examinership cont'd

- examiner required to show that no creditor has been unfairly prejudiced
- applies to Irish registered companies (or if related company, company which has a sufficient connection with Ireland)
- arguably applies to any company with COMI in Ireland

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Liquidation

- purpose is realisation of assets and payment of creditors
- provisional liquidator can be appointed
- restructuring potential
- can be used as restructuring tool by selling to related company
- pre-pack within 3 – 4 days
- necessity to give all creditors 14 days' notice if above requisite value (section 629(3) of Companies Act 2014)
- share sale can circumvent notice
- applies to all companies with a sufficient connection to Ireland

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Receivership

- receiver usually appointed on foot of fixed and floating charge
- pre-packs permissible
- 14 day notice required also (section 439(3) of Companies Act 2014)

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Schemes of arrangement

- Part 9, chapter 1 of Companies Act 2014
- rarely used for restructuring
- similar to UK
- 75% in value and over 50% in number
- court approval required
- since 2014 applies to companies with sufficient connection to Ireland

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Enforcement and recognition of foreign insolvencies – Irish Perspective

- RIR (Recast Insolvency Regulation, Regulation (EU) 2015/848)
- Common law
- Statutory recognition in provisions not implemented (despite UK recognition)
- UNCITRAL not adopted

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Enforcement and recognition of foreign insolvencies – Irish Perspective

- Common Law
 - Not codified or as developed as in US
 - Key decisions
 - David Drumm
 - Sean Dunne

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Enforcement and recognition of foreign insolvencies – Irish Perspective

Common law cont'd

- David Drumm case
 - application by US trustee to have former family home transferred pre-bankruptcy vested in trustee
 - inherent jurisdiction of court based on comity
 - court accepted sufficient equivalence between US and Irish codes
 - court relied on Banque Indosuez S.A. v Ferromet Resources Inc and Cambridge Gas Transportation Corporation cases (Privy Council)
 - Drumm submitted to US jurisdiction
 - no public policy reason to refuse
 - advantageous to creditors

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Enforcement and recognition of foreign insolvencies – Irish Perspective

Common law cont'd

- Sean Dunne case
 - filed for Chapter 7 bankruptcy in US
 - adjudicated bankrupt in Ireland subsequently on foot of bank creditor's petition
 - appeal against Irish bankruptcy order on grounds, amongst others, of universality of insolvency proceedings
 - Supreme Court upholding High Court decision held that where compliance with Irish jurisdictional rules court no reason to look beyond this
 - US trustee was supportive – applied for limited lifting of stay in US
 - proposal to enter into a protocol

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Enforcement and recognition of foreign insolvencies – Irish Perspective

- Sean Dunne case cont'd
 - court appeared to endorse Lord Hoffmann in *re HIH Casualty and General Insurance Ltd v Chase Manhattan Bank* [2003] UKHL 6

"That principle requires that English courts should, so far as is consistent with justice and UK public policy, co-operate with the courts in the country of the principal liquidation to ensure that all the company's assets are distributed to its creditors under a single system of distribution."

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Enforcement and recognition of foreign insolvencies – Irish Perspective

- Sean Dunne case cont'd

- also Finnegan J quoted in *Flightlease (Irl) Ltd (In Vol Liq) & Cos Act*, [2012] IESC 12 (2012)

"In the area of conflicts of law it is desirable to await development of a broad consensus before developing the common law and it has not been suggested that such a consensus exists among common law jurisdictions. It is in any event desirable that such a significant change in the common law should be by legislation as appears to be the case in the United Kingdom. It is suggested by commentators that the common law in the United Kingdom is developing so that it will approximate with Council Regulation (E.C.) No. 1346/2000. For such a change to occur in this jurisdiction it is desirable that it should occur by way of legislation rather than by judicial development having regard to the significant changes which would be wrought in the common law."

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Enforcement and recognition of foreign insolvencies – Irish Perspective

- Conclusion

- general but cautious aspiration to co-operate
 - Drumm is only recent example

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Recognition – US Perspective

- Chapter 15 –Ancillary and Cross-Border Cases
 - Can be recognized as Foreign Main Proceeding or as Foreign Nonmain Proceeding
 - Foreign Main Proceeding is pending in country where the debtor has its center of main interests
 - Foreign Nonmain Proceeding is a proceeding, other than a foreign main proceeding, where the debtor has an establishment
 - Must be filed by Foreign Representative
 - Immediate relief upon filing of petition for recognition

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Recognition – US Perspective (Cont'd)

- US Courts also recognize foreign proceedings that are not formally recognized under Chapter 15 of the US Bankruptcy Code
- Courts typically afford comity to a foreign proceeding
 - In affording comity, US courts do not require that foreign law be identical to US law, but rather that such foreign law not be “repugnant to American laws and policies.”
 - US courts typically afford comity to Irish courts

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US Bankruptcy Overview

- Various insolvency regimes within the United States
 - Bankruptcy
 - Chapter 7
 - Chapter 9
 - Chapter 11
 - Chapter 13
 - Uniform Commercial Code (Article 9)
 - Assignments for the Benefit of Creditors (ABCs)
 - Receiverships

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Chapter 11

- Initiated with filing of petition
- Automatic Stay immediately in place. Precludes all acts:
 - To obtain property of the estate or to exercise control over such property
 - To create, perfect or enforce security interest
 - To commence or continue, or effect service of process with respect to, any judicial or administrative proceeding
- Constituencies: Debtor in Possession (DIP), official committee of unsecured creditors, US trustee, individual creditors, and maybe examiner or chapter 11 trustee

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Chapter 11 Exits

- Three traditional conclusions to chapter 11 cases:
 - Plan of Reorganization/Liquidation
 - If consensual, can provide for almost any structure or workout
 - If not consensual, can be confirmed over objection if “fair and equitable” and if it doesn’t discriminate unfairly
 - Sale of substantially all assets, followed by conversion to chapter 7
 - Conversion/Dismissal

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Recent Developments

- “Free and Clear Sales” continue to evolve
- Inter-creditor (inter-lender) disputes continue to arise
- Fundamental bankruptcy paradigm seems to have shifted
 - Filings down year over year for several years in a row
 - Availability of credit continues to be meaningful, and new products (e.g. unitranche loans) have created new issues
 - Participation of hedge funds and other non-regulated entities have changed the tolerance for risk and dispute, and have introduced potentially conflicting (and often opaque) economic interests that change traditional incentive structure.

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