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I. INTRODUCTION

Among the volume of material written about the Irish debt crisis and its impact over the past few years, strikingly little has been written about the ability to save a financially distressed company under Irish law and whether corporate restructuring could have mitigated some of the financial damage to Irish companies, particularly those in the property and construction industries. There is a reason for this. The number of filings under the Examinership law – the rough equivalent of Chapter 11 in the United States – remained small and relatively constant during both the recent boom and the more immediate bust periods of the Irish economy. This article examines the Irish approach to corporate restructuring and questions whether the law could have been put to good effect over the past couple of years.

While much has changed in Ireland since the advent of the Irish debt crisis, the Examinership law has remained unchanged. In fact, in distinct juxtaposition issues with consumer insolvency – where the European Union demanded reform to the personal bankruptcy laws of Ireland as a condition to Ireland obtaining bailout money[1]– no such demand was made as related to business insolvency by the European Union, nor was there any meaningful internal discussion in Ireland about revising the Examinership law. There may be a good reason why no such changes to Examinership were contemplated. Examinership is a moderate and seemingly effective method of dealing with financially distressed businesses. The question then is why the law hasn't been applied better.

Irish Examinership came into being under rather unique and hurried circumstances. Despite its shaky origins, Examinership remains a sensible balance between the two extremes of corporate rescue regimes in the common law world. On one end of the business bankruptcy approach is the pro-debtor United States Chapter 11, where creditor considerations generally are subordinated in the reorganization process to the more compelling desire of providing maximum res-

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[1] Saranna Enraght-Moony & Dudley Solan, *New Personal Insolvency Legislation Intended for Ireland*, MAPLES (May 16, 2012), http://www.maplesandcalder.com/news/article/new-personal-insolvency-legislation-intended-for-ireland-240/.

cue opportunity to the business debtor. This is in large part to protect related third parties, such as employees, suppliers, and neighboring businesses. At the other end of the continuum is the Australian version of business restructuring, known as Voluntary Administration, where debtor considerations are clearly subordinate to ensuring creditor recovery. Examinership strikes a balance between the U.S. and Australian approaches, empowering both debtors and creditors. It makes a rational effort to effectively distinguish distressed but viable firms from those firms that have little prospect of long-term viability.

In this article, I examine the core of Irish insolvency law in comparison to its common law counterparts and question why, in an era where insolvency law is frequently employed elsewhere, it has been put to so little use in Ireland. Part II of the article provides a brief overview of the much-covered territory both of the Irish debt crisis and the cultural factors that led to it. Part III describes Examinership law in Ireland. Part IV places the Irish insolvency approach in context by comparing it to two radically different models of business rescue – American Chapter 11 and Australian Voluntary Administration. Part V addresses the viability of Examinership under the peculiar circumstances that existed in Ireland over the past few years and considers whether it could have been better employed as a tool to deal with the economic woes the Republic of Ireland has faced.

II. THE IRISH DEBT CRISIS — A PRIMER

The causes and the evolution of the Irish debt crisis have been well documented.[2] A brief primer of significant dates and events here will suffice. In the middle of 2008, after more than a decade of economic growth, signs began to appear that the Irish economy might be in trouble.[3] Government deficits increased,[4] many businesses began experiencing significant financial problems,[5] the rate of unemploy-

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[2] *See generally* Philip R. Lane, *The Irish Crisis*, THE EURO AREA AND THE FINANCIAL CRISIS (forthcoming), *available at* http://www.tcd.ie/iiis/documents/discussion/pdfs/iiisdp356.pdf.

[3] *Lenihan Admits 'Serious Problem' in Economy*, RTE NEWS (June 24, 2008) (Ir.), *available at* http://www.rte.ie/news/2008/0624/economy.html.

[4] *Irish Economy*, ECON. & SOC. RES. INST., *available at* http://www.esri.ie/irish_economy/ (last visited Feb. 6, 2012); *see also End-2008 Exchequer Returns*, DEP'T FIN., *available at* http://www.finance.gov.ie/viewdoc.asp?DocID=5614 (last visited Feb. 6, 2012).

[5] Press Release, Bank of Ir., Latest Bank of Ireland Barometer Indicates Fall in Entrepreneurial Activity (Oct. 10, 2008), http://www.bankofireland.com/about-boi-group/press-room/press-releases/item/142/latest-bank-of-ireland-barometer-indicates-fall-in-entrepreneurial-activity/; *Company Liquidations in Ireland More Than Doubled in 2008*, FINFACTS IR. (Jan. 5, 2009), http://www.finfacts.ie/irishfinancenews/article_1015605.shtml.

ment began to rise,[6] and the Irish Stock Index began to fall.[7] By September of 2008, the Irish government officially announced that the country was in a recession, thus becoming the first State in the Eurozone to officially recognize the existence of a recession.[8]

In response to the deteriorating economic situation, the Irish government expedited the introduction of its 2009 budget, introducing it in early October 2008 rather than during the more traditional December period.[9] Also, in September of 2008, recognizing the tremendous vulnerability of Irish banks, the Irish government announced a two-year blanket guarantee of the liabilities of Irish-controlled banks.[10]

In January of 2009, the Irish government announced plans to nationalize the Anglo Irish Bank, the country's third largest lender.[11] By February 2009, unemployment in Ireland had reached 11% – the highest it had been since 1996.[12] Protests began to arise in opposition to the government's handling of the economic situation.[13] In response, the Irish government announced that it would inject 7 billion euros

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[6] Int'l Monetary Fund [IMF], *Ireland: Extended Arrangement – Interim Review Under the Emergency Financing Mechanism*, at 5, 9, IMF Country Report No. 11/47 (Feb. 2011), *available at* http://www.imf.org/external/pubs/ft/scr/2011/cr1147.pdf; CENT. STATISTICS OFFICE IR., SEASONALLY ADJUSTED STANDARDISED UNEMPLOYMENT RATES (SUR), *available at* http://www.cso.ie/en/statistics/labourmarket/principalstatistics/seasonallyadjustedstandardisedunemploymentratessur/.

[7] *ISEQ Falls to 14-Year Low,* RTE NEWS (Feb. 24, 2009) (Ir.), *available at* http://www.rte.ie/news/2009/0224/markets.html; *see also Ireland Stock Market*, TRADING ECON., http://www.tradingeconomics.com/ireland/stock-market (last visited Sept. 25, 2012).

[8] ECON. & FIN. COMM. (ECOFIN), FINANCIAL CRISIS IN IRELAND 1, *available at* http://www.romun.org/semmuna/Background/ECOFIN11%20Ireland.pdf (last visited Feb. 6, 2012).

[9] *See* Government Statement, Dep't of the Taoiseach (Sept. 8, 2008), *available at* http://www.taoiseach.gov.ie/eng/News/Archives/2008/Government_Press_Releases_2008/Government_Statement1.html.

[10] Patrick Honohan, *Resolving Ireland's Banking Crisis*, 40 ECON. & SOC. REV. 207, 207 (Summer 2009), *available at* http://www.esr.ie/Vol40_2/Vol-40-2-Honohan.pdf; *The Economic Adjustment Programme for Ireland*, at 12, EUR. COMM'N (Feb. 2011), Occasional Papers 76, *available at* http://ec.europa.eu/economy_finance/publications/occasional_paper/2011/pdf/ocp76_en.pdf [hereinafter *Economic Adjustment Programme*].

[11] *Minister's Statement*, DEP'T OF FIN. (Jan. 15, 2009), *available at* http://www.finance.gov.ie/viewdoc.asp?DocID=5627.

[12] Henry McDonald, *Ireland's Unemployment Rises to 11.4%*, GUARDIAN, Apr. 29, 2009, http://www.guardian.co.uk/business/2009/apr/29/economy-ireland-joblessrise.

[13] *Protest in Ireland of Government Handling of Economy*, CNN, Feb. 22, 2009, http://www.cnn.com/2009/BUSINESS/02/21/ireland.economy/index.html.

into the Bank of Ireland and Allied Irish Bank in return for guarantees on lending, a decrease in senior bankers' pay, delaying collection of mortgage arrearages, and a government-held 25% indirect stake in each bank.[14]

In March of 2009, the Republic of Ireland lost its AAA credit rating.[15] Following this, in April 2009, the Irish government unveiled its second budget in six months.[16] It proposed a National Asset Management Agency to function as a "bad bank" which would acquire non-performing development loans in order to improve the availability of credit broadly to aid the Irish economy.[17]

In October of 2009, the Irish voted in favor of the Lisbon treaty,[18] which was expected both to protect tens of billions of dollars invested in Ireland by American companies and to save the government up to 200 million euros.[19]

By March of 2010, the Anglo Irish Bank had reported losses of 12.7 billion euros, the largest such loss in Irish corporate history.[20] By September of 2010, the Irish government had agreed to additional bailouts, increasing the cost of bailing out Ireland's banking system to 35 billion euros,[21] and raising the country's deficit to about one third of its Gross Domestic Product.[22]

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[14] Paul O'Brien et al., *AIB and BoI To Get 3.5bn Euros Each in Bailout*, IRISH EXAMINER, Feb. 12, 2009, http://www.irishexaminer.com/ireland/ideymhmhoj/.

[15] Ian Guider & Fergal O'Brien, *Ireland Loses AAA Rating at S&P on Deficit, Slump*, BLOOMBERG, Mar. 30, 2009, http://www.bloomberg.com/apps/news?pid=newsarchive&sid=A69.9_yL6P.w.

[16] *Ireland Unveils Emergency Budget*, BBC NEWS, Apr. 7, 2009, http://news.bbc.co.uk/2/hi/business/7986862.stm.

[17] *See* Quentin Fottrell, *Ireland Sets Up Its 'Bad Bank' Agency*, WALL ST. J., Apr. 9, 2009, http://online.wsj.com/article/SB123918353240000679.html; *see also The National Asset Management Agency: A Brief Guide*, IRISH TIMES, Mar. 30, 2010, http://www.irishtimes.com/focus/2010/namaguide/index.pdf.

[18] Henry McDonald, *Ireland Votes Yes to Lisbon Treaty*, GUARDIAN, Oct. 3, 2009, http://www.guardian.co.uk/world/2009/oct/03/ireland-votes-yes-lisbon-treaty.

[19] Graham Ruddick, *Lisbon Treaty Approval Could Save Ireland 200m Euros a Year in Debt Costs*, TELEGRAPH, Oct. 3, 2009, http://www.telegraph.co.uk/finance/economics/6258132/Lisbon-Treaty-approval-could-save-Ireland-200m-a-year-in-debt-costs.html.

[20] Henry McDonald, *Anglo Irish Bank Reports 12.7bn Euros Loss As EU Launches Enquiry into State Aid*, GUARDIAN, Mar. 31, 2010, http://www.guardian.co.uk/business/2010/mar/31/anglo-irish-bank-10-billion-rescue.

[21] Finbarr Flynn & Louisa Fahy, *Anglo Irish Cost May Exceed 35 Billion Euros, S&P Says*, BLOOMBERG NEWS, Sept. 28, 2010, http://www.bloomberg.com/news/2010-09-28/anglo-irish-cost-may-exceed-35-billion-euros-s-p-says-update1-.html.

[22] *Irish Deficit Balloons After New Bank Bailout*, BBC NEWS, Sept. 30, 2010, http://www.bbc.co.uk/news/business-11441473.

Markets did not respond well to Ireland's self-imposed measures, which in large part served only to greater illuminate the scope of its problems. As a result, the Irish government agreed in November 2010 to an 85 billion euro rescue package with the European Union and the International Monetary Fund.[23] The bailout was for a 16-year term with interest at just under 6%, and it included, among other elements, an austerity program comprising four years of both tax increases and spending cuts.[24]

The result was that the Irish banking system effectively was a life support system.[25] The banking problems were largely the result, as has been exhaustively documented, of too much mortgage lending into an unsustainable housing and construction market in a classic speculative bubble.[26] Much of this lending was in turn financed by foreign entities.[27] The property and construction boom had at least an air of credibility that it was more than just a bubble.[28] Such confidence in the long-term viability of the real estate boom was based on the presence of lower interest rates in Ireland following the advent of the euro, as well as the continuing expansion during the 1990's of output, employment, and population.[29] And while a number of economists foresaw a market correction in housing, few anticipated the eventual solvency problems of the Irish banking industry.[30]

All of this is set against the backdrop, of course, of one of the great economic rises in European history. When Ireland joined the European Economic Community in 1973, it was the poorest member of that group, and its economic performance significantly underperformed that of the other members until the late 1980s.[31] In a country where nearly one-third of its citizens lived below the poverty

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[23] Lane, *supra* note 2, at 17, 19; *see also* James G. Neuger & Simon Kennedy, *Ireland Gets $113 Billion Bailout as EU Ministers Seek To Halt Debt Crisis*, BLOOMBERG NEWS, Nov. 29, 2010, http://www.bloomberg.com/news/print/2010-11-28/ireland-wins-eu85-billion-aid-germany-drops-threat-on-bonds.html.

[24] Lisa O'Carroll, *Ireland Bailout: Full Irish Government Statement*, GUARDIAN, Nov. 28, 2010, http://www.guardian.co.uk/business/ireland-business-blog-with-lisa-ocarroll/2010/nov/28/ireland-bailout-full-government-statement.

[25] *See* Honohan, *supra* note 10, at 207.

[26] *Id.* at 208.

[27] *Id.*

[28] *See id.*

[29] *Id.*

[30] *Id.*

[31] *See* KLAUS REGLING & MAX WATSON, A PRELIMINARY REPORT ON THE SOURCES OF IRELAND'S BANKING CRISIS 21 (2010), *available at* http://www.bankinginquiry.gov.ie/Preliminary%20Report%20into%20Ireland's%20Banking%20Crisis%2031%20May%202010.pdf.

level as recently as the 1980s,[32] by the start of the millennium, Ireland had transformed itself into the second wealthiest country in the world, according to the Bank of Ireland, with an unemployment rate as low as 4%.[33] In 1996, Ireland's per capita gross national income was 83% of the EU-15 average, but by 2006 that number had reached 113%.[34]

Myriad explanations have been offered as to how Ireland became a destination country rather than a country of departure for workers. The key elements typically noted in such explanations included the fact that Ireland had eliminated trade barriers and it had reduced corporate tax rates. Still, no consensus seems to ever have emerged as to how exactly the "Celtic Tiger" came to fruition. What is clear is that the Celtic Tiger was built largely around exports, with export growth averaging 17.8% between 1996 and 2000.[35] Ireland certainly benefited from the launch of the EU Single Market, but it is noteworthy that Irish banks did not play a central part in export financing.[36]

In the early part of the twenty-first century, however, Irish banks were able to borrow enormous sums of money from abroad due to both the global savings glut and the lack of risk associated with exchange rates once the use of the euro became finalized.[37] Without this massive borrowing from abroad, the Irish property boom could not have exploded in the same fashion as it did during this period.[38] As

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[32] Tim Callan & Brian Nolan, *Income Inequality and Poverty in Ireland in the 1970s and 1980s* 14–17 (Econ. & Soc. Res. Inst., Working Paper No. 43, 1993), *available at* http://www.esri.ie/UserFiles/publications/20071024100057/WP043.pdf.

[33] Brian McCormick, *Unemployment Trends in Ireland 1997–2002*, FAS LAB. MARKET UPDATE, Nov. 2002, at 3, *available at* http://www.fas.ie/en/pubdocs/UnemploymentTrends1997to2002.pdf.

[34] *Economic Adjustment Programme, supra* note 10, at 6.

[35] *The Irish Economy in Perspective*, DEP'T OF FIN. (June 2011), *available at* http://www.finance.gov.ie/documents/publications/economicstatsetc/irisheconomyjune2011.pdf.

[36] *See* Patrick Honohan, *To What Extent Has Finance Been a Driver of Ireland's Economic Success?*, ESRI Q. ECON. COMMENT., Dec. 2006, at 59–72, *available at* http://www.esri.ie/UserFiles/publications/20061220145614/QEC2006Win_SA_Honohan%20.pdf.

[37] In 2003, Irish banking indebtedness to the rest of the world was approximately 10% of Irish GDP. By 2008, that number had grown to an astonishing 60% of gross domestic product. Jerome L. Stein, *The Diversity of Debt Crises in Europe*, 31 CATO J. 199, 202 (2011), *available at* http://www.cato.org/pubs/journal/cj31n2/cj31n2-2.pdf.

[38] Clearly other factors were at work as well, such as the lessening of tax restrictions in regard to construction. *See* Gordon Barham, *The Effects of Taxation Policy on the Cost of Capital in Housing – A Historical Profile (1976 – 2003)*, CBFSAI FIN. STABILITY REP., 2004.

additional wealth came into Ireland from thriving exports, a growing need developed for housing expansion, fueled not only by higher incomes but also by a larger population and lower interest rates. The result was not just a rise in housing prices, but also a dramatic increase in construction. The cost of housing and construction in turn skyrocketed, with housing price inflation the highest in Europe between the mid-1990s and 2006.[39]

Not surprisingly, the degree to which the Irish banks increased their lending share related to real property was significant as well, moving from less than 40% of their lending prior in 2002 to greater than 60% of their lending by 2006.[40] Total lending rose precipitously as well, with a growth in lending by the covered banks[41] rising from 120 billion euros in 2000 to almost 400 billion euros in 2007.[42] In fact, the average growth rate to Irish households between 2004 and 2006 was almost 30%.[43] A significant imbalance in the funding structure of Irish banks resulted from these lending changes. The loan-to-deposit ratio of Irish banks with respect to domestic resident clients grew from 133% in January of 2003 to 215% by May of 2008.[44] This gap could only be ameliorated by more borrowing from international capital markets.

Yet, all of this occurred despite the increasing recognition that housing prices had likely exceeded their equilibrium point and the scale of new construction had become a cause of concern.[45] As early as 2007, Morgan Kelly was the first to notably question whether the Irish banks could survive the anticipated drop in housing prices.[46] And fall they did, with estimates for the decline in housing prices ranging from a 38% decrease between 2006 and 2010 to a number as high as a 75%

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[39] *Economic Adjustment Programme*, *supra* note 10, at 6; *see also* David Rae & Paul van den Noord, *Ireland's Housing Boom: What Has Driven It and Have Prices Overshot?* (OECD Econ. Dep't, Working Paper No. 492, 2006); Janis Malzubris, *Ireland's Housing Market: Bubble Trouble*, 5 ECFIN COUNTRY FOCUS (Sept. 26, 2008), *available at* http://ec.europa.eu/economy_finance/publications/countryfocus_en.htm.

[40] *See* Honohan*, supra* note 10, at 209.

[41] The six primary domestic credit institutions were the Bank of Ireland, Allied Irish Banks, Anglo, Irish Bank, Irish Life and Permanent, Irish Nationwide Building Society, and the Educational Building Society.

[42] *Economic Adjustment Programme*, *supra* note 10, at fig. 3.

[43] *Id.* at fig. 5.

[44] *Id*. at 10.

[45] *See* IMF, *Ireland: Selected Issues*, at 35, IMF Country Report No. 04/349 (Nov. 2004), *available at* http://www.imf.org/external/pubs/ft/scr/2004/cr04349.pdf.

[46] *See* Morgan Kelly, *Banking on Very Shaky Foundations*, IRISH TIMES*,* Sept. 7, 2007, at 3, *available at* http://www.tmcnet.com/usubmit/2007/09/07/2919218.htm.

drop in value during this time period.[47] As in the United States, a credit crunch ensued. This was true of financing to individual households for housing and consumption as well as to the non-financial corporate sector.[48]

The Irish economy was effectively thrown into chaos.

On September 21, 2010, the Irish government established a Statutory Commission of Investigation into the Banking Sector in Ireland.[49] In March of 2011, the Commission issued a report entitled "Misjudging Risk: Causes of the Systemic Banking Crisis in Ireland."[50] One key finding of the Commission was that the willingness of Irish banks to accept enormous risk and make "shockingly" large loans primarily for commercial property was a significant factor in the eventual instability of the Irish economy.[51] There was a gradual adaptation of lower credit standards by Irish banks as a way of ensuring market share and profitability.[52] Bank loans expanded enormously and quickly because "neither banks nor borrowers apparently really understood the risks they were taking," as the long increase in property values "eroded the awareness both of banks and customers in Ireland."[53] Thus, "both sides of the market assumed that the other side knew what it was doing."[54]

What evolved was a self-reinforcing upward spiral. Easy credit increased property prices, and increased property prices resulted in easy credit. Meanwhile, regulation was clearly insufficient. Although both the Central Bank and the Financial Regulator noted the existence of macroeconomic risk in Ireland as the result of banking practice, neither took decisive action to restrain questionable banking

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[47] *See Economic Adjustment Programme*, *supra* note 10, at 10; *see also* Patrick Koucheravy, *Latest Figures Suggest a 75% Fall in Land Values*, DAFT.IE (Oct. 5, 2010), *available at* http://www.daft.ie/report/patrick-koucheravy.

[48] There are numerous statistics illustrating this. For example, during the last three months of 2010, the average net flow of lending to households decreased 413 million euros for the three months ending December 2010, and lending to the non-financial corporate sector declined 1.2% during calendar year 2010. *See* CENTRAL BANK OF IRELAND, MONEY AND BANKING STATISTICS: DECEMBER 2010 (2011), *available at* www.centralbank.ie/polstats/stats/cmab/Documents/2010m12_ie_monthly_statistics.pdf.

[49] Commissions of Investigation Act 2004 (Act No. 23/2004) (Ir.), *available at* http://www.irishstatutebook.ie/2004/en/act/pub/0023/index.html.

[50] COMM'N OF INVESTIGATION INTO THE BANKING SECTOR IN IRELAND, MISJUDGING RISK: CAUSES OF THE SYSTEMIC BANKING CRISIS IN IRELAND (2011), *available at* http://www.bankinginquiry.gov.ie/Documents/Misjuding%20Risk%20-%20Causes%20of%20the%20Systemic%20Banking%20Crisis%20in%20Ireland.pdf.

[51] *Id*. at ii.

[52] *Id.*

[53] *Id.*

[54] *Id*. at iii.

decision-making.[55] What's more, the International Monetary Fund, the European Union, and the Organization for Economic Cooperation and Development were, though occasionally nominally critical, on the whole, supportive of the direction of the Irish economy during the critical years at the start of the 21st century.

III. IRISH INSOLVENCY LAW

There are, in essence, four forms of insolvency law in Ireland.[56] The first is bankruptcy, the insolvency procedure related to natural persons or partnerships comprised of natural persons.[57] Irish bankruptcy law is governed by the Bankruptcy Act of 1988.[58] The second form of an insolvency proceeding is liquidation, which can occur either

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[55] In fact, the Commission noted the following:

> 1.4.3: For a systemic financial crisis to occur, at least the following factors must be present (although the last two may not be as essential as the others):
> • a sufficiently large number of households and investors who, at some point, start making serious mistakes in judging the value and liquidity of their major assets, holdings, and projects;
> • banks that provide financing, large in relation to their own capital, for these investments without thoroughly and sufficiently evaluating prospects and the creditworthiness of borrowers in the longer term;
> • providers of funds to such banks (often banks themselves but also depositors) that do not monitor bank soundness with sufficient diligence, in the case of private providers, possibly because of perceived implicit public support for at least important banks;
> • a banking regulator that remains unwilling or unable to detect or prevent banks from engaging in excessively risky lending or funding practices;
> • a government and a central bank that remains unaware of the mounting problems or is unwilling to do anything to prevent them;
> • a parliament that remains unaware of the mounting problems or concentrates its attention on other things perceived to be of greater immediate importance; and
> • media that are generally supportive of corporate and bank expansion, profit growth and risk taking while being dismissive of warnings of unsustainable developments. *Id.* at 5.

[56] The source of the laws governing liquidations in Ireland are a mix of corporate law, including the Companies Acts of 1963 and 2000, commercial law, contract law, property law, and equity and trust law. *See* ADRIAN BENSON & LOCRAN TIERNAN, CORPORATE INSOLVENCY IN IRELAND 1 (2009), *available at* http://www.dillon eustace.ie/download/1/Corporate%20Insolvency%20in%20Ireland.pdf.

[57] Bankruptcy Act of 1988 (Act No. 27/1988) (Ir.), *available at* http://www.irish statutebook.ie/1988/en/act/pub/0027/index.html.

[58] *Id.*

voluntarily[59] or by force.[60] The third option is receivership,[61] and the fourth – the corporate rescue provision — is known as examinership.

Liquidations are, in effect, a form of collective debt collection. They constitute a winding up of the affairs of the company.[62] Typically included in this process are gathering assets, fulfilling or terminating outstanding contractual obligations, discharging company debt, and distributing company assets to creditors.[63] Once the liquidation is complete, the company is dissolved and it is stricken from the company registry.[64]

Liquidations divide roughly into two kinds, those accomplished outside of court and those which transpire under court supervision, with the latter typically known as an involuntary, compulsory, or official winding up.[65] Company shareholders may opt to wind up the affairs of the company outside of court supervision – that is, on a voluntary basis.[66] This is known as a "members winding up," and it requires that the company be solvent at the time the resolution is passed.[67] Under this form of proceeding, creditors must be paid in full.[68] In fact, directors of the company are obligated to file with the Registrar of Companies a statutory Declaration of Solvency, which indicates that the company will be able to pay its debts in full within 12 months of commencing the liquidation.[69] Upon such a filing, a liquidator is appointed, and upon his or her appointment, the powers of the directors are terminated.[70]

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[59] MICHAEL FORDE & HUGH KENNEDY, COMPANY LAW (4th ed. 2008).

[60] For example, by court order. *Id.*

[61] BENSON & TIERNAN, *supra* note 56.

[62] *Id.*; *see* Companies Act of 1963 (Act No. 33/1988) (Ir.), *available at* http://www.irishstatutebook.ie/1963/en/act/pub/0033/index.html.

[63] BENSON & TIERNAN, *supra* note 56, at 1–2.

[64] *Id.* at 1; *see* Companies Act, *supra* note 62, § 221.

[65] BENSON & TIERNAN, *supra* note 56, at 1–2.

[66] *See* Companies Act, *supra* note 62, §§ 257–64.

[67] *See id*. § 251(1)(a) and (b):

> (1) A company may be wound up voluntarily:
>
> (a) when the period, if any, fixed for the duration of the company by the articles expires, or the event, if any, occurs, on the occurrence of which the articles provide that the company is to be dissolved, and the company in general meeting has passed a resolution that the company be wound up voluntarily;
>
> (b) if the company resolves by special resolution that the company be wound up voluntarily . . .

[68] *See id*. § 256.

[69] *Id.*

[70] *Id.* § 267.

A second form of voluntary winding up is known as a "creditors winding up." Creditors winding up deals with scenarios where the company is in fact insolvent and cannot pay its debts as they become due.[71] Under such circumstances, the shareholders, frequently on a recommendation from the board of directors, decide to put the company in liquidation. A creditors' meeting is subsequently called, where a liquidator's appointment is confirmed.[72]

Compulsory liquidations are situations where a court orders the winding up of a company.[73] Section 213 of the Companies Act of 1963 sets out a number of circumstances where this is appropriate, including, most commonly, when the company cannot pay its debts as they become due. One or more creditors with undisputed debts typically bring such a request. If a court grants a winding up order, the company is placed in liquidation and an official liquidator is appointed. The official liquidator becomes the company's sole officer.[74]

Receivership is essentially a method of enforcing a security, and is not in fact a true collective proceeding; however, it is frequently treated as a form of insolvency procedure. There are a number of different types of receiverships. The most common form is the scenario where a secured creditor, usually a lending institution, appoints a receiver under contractual powers granted by the company in a debenture/charge.[75] The debenture is a contractual document and all of the powers of the debenture holder and of the receiver are governed by this document except for a small number of statutory provisions.[76] The receiver's appointment extends only over the assets that have been charged. The appointment of the receiver does not alter the legal status of the company; rather, its result is that the directors cease to exert control over the assets on which the Receivership has been granted. The directors' normal powers continue, however, with regard to other assets and liabilities of the company. Receivership is a temporary condition that does not necessarily lead to liquidation. The principal function of the receiver is to realize the charged assets and to distribute the

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[71] *Id*. § 251(c) (stating that a voluntary wind up may also occur "if the company in general meeting resolves that it cannot by reason of its liabilities continue its business, and that it be wound up voluntarily").

[72] Companies Act, *supra* note 62, § 258.

[73] While called "compulsory," an involuntary winding up may be initiated by shareholders. *Id.* § 215.

[74] The liquidator's powers are set out in § 231.

[75] Dillon Eustace, *Corporate Insolvency in Ireland*, at 7, *available at* http://www.dilloneustace.ie/download/1/Corporate%20Insolvency%20in%20Ireland.pdf; *see also* Conveyancing and Law of Property Act, 1881, 44 & 45 Vict., c. 41, §§ 19-24 (Eng.), *available at* http://www.legislation.gov.uk/ukpga/1881/41/pdfs/ukpga_18810041_en.pdf.

[76] *Id*.

proceeds to the holder of the charge, subject to any other valid priorities.[77]

Examinership, the corporate rescue scheme that is the focus of this article, is an attempt to facilitate the rescue of an insolvent, or nearly insolvent, company. Its origins are in the Companies Act of 1990, which was enacted under unusual circumstances. When Iraq invaded Kuwait in 1990, a United Nations trade embargo was imposed. The Irish company Goodman International, which exported the majority of Irish beef to Iraq, was therefore in serious financial straits. In response to the company's difficulties, the Irish government decided to introduce and enact a stand-alone piece of insolvency legislation.[78] This legislation, with minor amendments, was subsequently encompassed within The Companies (Amendment) Act, 1990.[79]

Like other corporate rescue regimes, the purpose of Examinership is to provide for the rescue and return to financial viability of economically troubled but potentially viable enterprises. And like other corporate rescue schemes, Examinership requires a balance, as the "laudable"[80] goal of preserving failing companies requires "an exceptional jurisdiction. . . which negatively affects the rights of creditors."[81] As Justice Clarke stated in *Re Traffic Group Limited*:[82]

> "It is clear that the principal focus of the legislation is to enable, in an appropriate case, an enterprise to continue in existence for the benefit of the economy as a whole and, of equal, or indeed greater, importance to enable as many as possible of the jobs which may be at stake in such enterprise to be maintained for the benefit of the community in which the relevant employment is located. It is important both for the court and, indeed, for examiners, to keep in mind that such is the focus of the legislation. It is not designed to help shareholders whose investment has proved to be unsuccessful. It is to seek to save the enterprise and jobs."[83]

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[77] *Id.* at 8.

[78] 126 SEANAD DEB. col. 1059 (Aug. 29, 1990) (Ir.).

[79] Companies (Amendment) Act of 1990 (Act No. 27/1990) (Ir.) (as amended by the Companies (Amendment) (No. 2) Act of 1999) (Act No. 30/1999) (Ir.) (as amended by §§ 180-81 of the Companies Act of 1990) (Ir.) (providing for the appointment of an Examiner to a company); Rules of the Superior Court (S.I. No. 147/ 1991) (Ir.) (Order 74A of the Rules of the Superior Courts dealing with the procedure to be followed in Examinership applications), *available at* www.irishstatutebook.ie/1991/en/si/0147.html.

[80] *See* Re Vantive Holdings Ltd. (No. 2) [2009] I.E.S.C. 69 (Ir.).

[81] *See id.* ¶ 30.

[82] Re Traffic Group Limited, [2008] 2 I.L.R.M. 1 (Ir.).

[83] *Id.* ¶ 5.5.

Under Examinership, an insolvent, or nearly insolvent, company is entitled to a 70-day period during which it has "protection of the court."[84] During this period, general creditors cannot pursue their claims, nor can guarantees be enforced.[85] In addition, subject to certain protections, secured creditors cannot exercise their security, except where permitted by the Examiner. Further, the company cannot be subject to a resolution to wind up the company, and no receiver can be appointed.[86]

The Examinership petition may be initiated by any of four parties or by some combination of the parties jointly. The parties are the company itself, the directors of the company, a creditor of the company, or contingent or prospective creditors of the company, including employees.[87] There is a duty to act with utmost good faith. The court may decline to hear the petition if the petitioner has either failed to disclose relevant, available information or has in any other way failed to exercise the utmost good faith.[88] Over-optimism about the company's long-term prospects is not a per se indication of bad faith, however, and even where bad faith is established, whether to refuse the petition on that ground remains within the court's discretion.[89]

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[84] Companies (Amendment) Act of 1990, *supra* note 79, §5(2) (Act No. 27/1990) (Ir.), *available at* http://www.irishstatutebook.ie/1990/en/act/pub/0027/sec0005.html#sec5. The petition must be filed with utmost good faith, and may be dismissed by the High Court as an abuse of process and no scheme of arrangement allowed in its absence. *See* Re Wogans (Drogheda) Ltd, [1993] 1 I.R. 157 (H. Ct.) (Ir.); *see also* Companies (Amendment) Act § 4A (indicating that a court may decline to hear a petition if it appears that the petitioner or the accountant have failed to disclose materially relevant information).

[85] *See* Companies (Amendment) Act of 1990, *supra* note 79, § 5(2)(f), *available at* http://www.irishstatutebook.ie/1990/en/act/pub/0027.html; Credit Alliance Corp. v. Williams, 851 F.2d 119, 121 (4th Cir. 1988).

[86] *Id.* § 5(2).

[87] *See* Companies (Amendment) Act of 1990, *supra* note 79, § 3. However, where a Petition is being presented by a contingent or prospective creditor the court shall not hear the Petition until such security for costs has been given as the court considers reasonable. *See id.* § (3)(5).

[88] *See* Companies (Amendment) Act of 1990, *supra* note 79, § 4; *In re* Wogans (Drogheda) Ltd., [1993] 1991 H. Ct. 15465 (Ir.).

[89] Re Tuskar Resources PLC, [2001] 1 I.R. 668, 677 (Ir.); *see also* Re Traffic Group Ltd., [2007] I.E.H.C. 445 (Ir.). In *Re Traffic Group Ltd.*, the court noted the "significant obligation" on the petitioners to ensure that the financial state of the company is presented to the court in as accurate a way as is practically possible in the circumstances. However, the Court held that the statement of the company's financial position in the Petition need only be relatively accurate to form a proper basis for considering the scheme. *Id.*

Procedurally, under the E.C. Insolvency Regulation,[90] any primary insolvency proceeding, including Examinerships, must be commenced in the member state where the company has its center of main interests, though secondary proceedings solely for the purpose of liquidation – not to attempt an examinership restructuring – may be commenced in another member state in which the company has an establishment.[91] The verifying affidavit of the Petitioner should contain an averment that Ireland is the centre of main interests of the company.

The statutory test for the appointment of an Examiner requires a two-step process. First, the Petitioner must establish that the company has reasonable prospects of survival, as a whole or in any significant part of its undertakings as a going concern (the "reasonable prospects of survival" standard); and second, if there are reasonable prospects of survival, the court should, "in all the relevant circumstances of the case" exercise its discretion to appoint an Examiner.[92] Even if these standards are met, the decision to appoint an Examiner is not automatic; rather, the Court will weigh the competing interests in the case to determine if Examinership is in the best overall interest of all interested parties.[93]

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[90] Council Regulation 1346/2000, 2000 O.J. (L 160) 2 (EC), *available at* http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2000:160:0001:001:en:PDF.

[91] *Id.* at 5; *see also* Case C-341/04, Eurofood IFSC Ltd, 2006 E.C.R. I-3854, 59, 67, http://curia.europa.eu/juris/showPdf.jsf?text=&docid=56604&pageIndex=0&doclang=en&mode=doc&dir=&occ=first&part=1&cid=296776. Note, "secondary proceedings" may only concern "winding-up" proceedings and this does not include Examinerships. *See* Council Regulation 1346/2000, Annex B, 2000 O.J. (L 160) 2 (EC), *available at* http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2000:160:0001:001:en:PDF.

[92] *See* Re Vantive Holdings, [2009] I.E.H.C. 409 (Ir.).

[93] Re Gallium Ltd., [2009] I.E.S.C. 8 (Ir.) (explaining:

> "[A] petitioner does not, by getting over that threshold, acquire a right to have an order made. I still think it is fair to say that the section confers a 'wide discretion' on the court, or alternatively, that the court should take account of all the circumstances. The establishment of *a reasonable prospect of the survival* merely triggers the power, which remains discretionary. . . The court has the power to appoint an examiner if satisfied that there is a reasonable prospect of survival of the company. The entire purpose of examinership is to make it possible to rescue companies in difficulty. The protection period is there to facilitate examination of the prospects of rescue. However, that protection may prejudice the interests of some creditors. The court will weigh the existence and degree of any such prejudice in the balance. It will have regard to the report of the independent accountant.

Examinership is in force as soon as the petition for Examinership is presented, as long as the petition for Examinership is accompanied by a report of an independent accountant.[94] The independent accountant's report must include, among other things, the names and addresses of the officers of the company, a report on the company's assets and liabilities, a listing of creditors and a detailing of the security interests they hold, an opinion on what should be done in regard to any fraudulent conveyances or reckless trading that has transpired, recommendations as to which, if any, pre-petition liabilities of the debtor should be paid by the examiner, details as to how the company should be funded during the examination period, an opinion of whether the assets of the company have been satisfactorily accounted for, the accountant's opinion of whether the company has a reasonable likelihood of survival,[95] a statement of conditions necessary to ensure company survival, and an opinion on whether trying to continue the company in whole or in part would be advantageous to members and creditors.[96] Interestingly, the Court may allow certain information to be deleted before the report is made publicly available, most notably certain information which could act to the detriment of the long-term survival of the financially distressed entity.

When such conditions are met, the High Court may appoint an Examiner. According to section 2(2) of the Corporations Act: "The court

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> The court has to take account of all relevant interests. The independent accountant must consider whether examinership would 'be more advantageous to the members as a whole and the creditors as a whole than a winding-up of the company. . .' This does not limit the range of interests to be taken into account by the court under section 2. The interests of employees cannot be excluded. In the case of an insolvent company, it is natural that the creditors will have the greatest interest in the future, if any, of the company. The court will take a balanced approach, as suggested by the reference to the creditors as a whole.")

[94] *See* Companies (Amendment) Act of 1990, *supra* note 79, § 3(3)(a), *available at* http://www.irishstatutebook.ie/1990/en/act/pub/0027/sec0003.html#sec3. If for some reason the report cannot immediately be made available, the Court retains the right to place the Company under interim protection for a period of time not to exceed 10 days. *Id*. § 3(3a(1)).

[95] *See, e.g.*, Re Gallium Ltd. [2009], I.E.S.C. 8 (Ir.) ([N]oting the role of the independent accountant's report, Justice Fennelly stressed that it "must consider whether examinership would be 'be more advantageous to the members as a whole and the creditors as a whole than a winding-up of the company. . ."); *see also* Companies (Amendment) Act of 1990 (Act No. 27/1990) (Ir.) § 3(b) (stating an individual reaching the conclusion that Examinership is an appropriate next step for the failing Company is not required); Re Tuskar Resources PLC [2001], 1 I.R. 668 (Ir.).

[96] Companies (Amendment) Act of 1990, *supra* note 79, § 2(2), *available at* http://www.irishstatutesbook.ie/1990/en/act/pub/0027/index.html.

shall not make an order under this section unless 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."[97] This approach displaced a more liberal approach whereby mere likelihood of facilitating survival was enough to justify Examinership for companies that were effectively insolvent,[98] with insolvency encompassing a scenario where the company was either unable to pay its debts as they became due[99] or where the company's liabilities exceeded its assets.[100] In terms of what constitutes "a reasonable prospect of survival," the High Court stated in *Re Vantive Holdings (No. 2):*

> "Given that the whole purpose of the legislation is to facilitate the survival of enterprises and employment . . ., then it seems to me clear that that survival must be measured over a reasonable timeframe such as there would be some point from the perspective of society as a whole in facilitating that survival even at the cost of some creditors having to forgo their strict legal entitlements. In those circumstances, there does not seem to me to be any magic formula for the length of time which a company should be anticipated to survive after it comes out of a successful examinership. Each case needs to be considered on its own facts."[101]

The Examiner's function is to formulate proposals and prepare a report for a compromise or a scheme of arrangement between the company, its members, and its creditors. Such a scheme typically involves a combination of new investment, a write down of creditors' claims, and a payout of dividends to creditors over a period of months.[102]

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[97] *Id*. Similar to the rule in regard to the report, § 3 of the Companies Act of 1990 allows for *in camera* proceedings when the Court is convinced that a public hearing would result in the disclosure of commercially sensitive information that would be financially damaging to the company's survival prospects.

[98] *Id.* The Court can make such an appointment when three conditions are present. First, the company either is, or is likely to be, unable to pay its debts as they become due. Second, there is no resolution for the winding up of the company. Finally, there has been no order for the winding up of the company.

[99] *See* 11 U.S.C. § 303 (West 2012) (discussing the standard for "insolvency" for involuntary petitions under American Bankruptcy law).

[100] *See id.* § 2(3) (including prospective and contingent liabilities).

[101] *See* Re Vantive Holdings [2009], 2 I.E.H.C. 409 (Ir.).

[102] *See id.* at 3.11 ("In the normal sort of examinership to which I have referred, any such scheme of arrangement may involve the writing off of debt (which has, of course, to be seen in the context of the fact that a liquidation of the company - which is normally the only alternative - will probably lead to the writing off of the same, or a greater amount of debt, in any event), together with, in many cases, the

The Examiner's powers in terms of investigation and operation are broad. They include the same powers that would inhere in an auditor in terms of the supplying of information and cooperation. The Examiner can convene, set an agenda for, and preside at meetings of the Board of Directors.[103] He or she may supervise the management of the company and can enter into contractual relationships with third parties.[104] During the period of Examinership – as in other reorganization schemes globally – the company continues to trade. The directors generally remain in control of, and retain responsibility for, the day-to-day operations of the company, though the Court does have the ability to curtail any or all of the director's powers and transfer them to the Examiner for cause.[105] This is, of course, in stark contrast to liquidation, where the director's powers cease upon the appointment of a liquidator. In similar fashion, the ability to affirm or repudiate a contract involving some additional element of performance other than payment under § 20 is given to the company, not to the Examiner. As in the United States with executory contracts, this ability includes the right to repudiate or affirm leases.[106]

Subsequently, the Examiner calls one or more meetings of creditors and members to vote on the scheme of arrangement proffered. The Examiner's scheme will be deemed carried at a particular meeting if two voting criteria are met. First, a simple majority of the total number of creditors must favor the proposal; second, those creditors so voting must hold a majority of the total creditor claims in monetary value.[107] Additionally, the scheme of arrangement must incorporate a number of elements including each class of members and creditors of the company, which classes of creditors are impaired for voting purposes,[108] the implementation of the proposals, what changes

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injection of new capital. Any shortfall in the net assets of the company is normally proposed to be addressed in that way. On that basis, the court can form a reasonable estimate of whether the combination of debt write off and capital injection that might be anticipated would be sufficient to solve the problem. Likewise, the court will normally want to be satisfied that, providing that any such net deficiency in the company's assets can be met, what remains of the undertaking of the company, as of the date of the implementation of a possible scheme of arrangement, is such as will have reasonable prospects of survival into the future from that date.").

[103] Companies (Amendment) Act of 1990, *supra* note 79, § 7.

[104] The Examiner is personally liable for such contracts, but is entitled to indemnification for any liability from the Company. *See id*. § 13(6).

[105] *See id.* § 3(8).

[106] *See* Re Chartbusters Ltd.*,* [2009] 5 C.O.S. (Ir.).

[107] Companies (Amendment) Act of 1990, *supra* note 79, §18 (Act No. 27/1990) (Ir.), *available at* http://www.irishstatutebook.ie/1990/en/act/pub/0027/index.html.

[108] A creditor is impaired for purposes of the voting if it will not be paid the full amount owed under the proposals. *Id.* § 22(5).

will be made to the management or directors of the company, what changes will be made to the articles of the company, and whatever other matters the Examiner deems relevant.[109]

Further, § 24(4) of the Corporations Act provides that certain requirements must be satisfied before a court may confirm the proposals. For example, it requires that at least one class of creditors whose interests are impaired has accepted the plan. In the event this criteria is not met, the requirement may be satisfied if the Court determines that the proposals are fair and equitable in relation to any class of creditors that has not accepted the proposals and whose interests would be impaired by them, and that the proposals are not "unfairly prejudicial" to the interests of any interested parties.[110]

There is some debate as to what it means to be "unfairly prejudicial." While it generally appears that the mere fact that a creditor neither receives full payment under the scheme of arrangement nor receives at least what it would get in a liquidation does not per se indicate that the scheme is "unfairly prejudicial"; yet, there is precedent suggesting that secured creditors cannot be forced over their objection to accept less than the value of their security in settlement of a debt.[111] Unsecured creditors, however, are not entitled to the amount they would have received in liquidation. Courts have differentiated between proposals that are prejudicial to the interests of the objector and those that are unfairly prejudicial.[112] While the position of the unsecured creditor is typically compared with the position in a winding-up, the fact that the unsecured creditor will fare worse in the Examinership is no prohibition to confirming the scheme so long as the discrepancy is not extreme and disproportionate to the disparity as it relates to other creditors.[113]

The Examiner is required to report to the Court on the outcome of the meetings of members and creditors.[114] This must occur within 35 days of his or her appointment, unless the court grants additional time.[115] While the Examiner should present his or her report as soon

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[109] *Id.* § 22(f)-(h).

[110] *Id*. § 24(4).

[111] *See, e.g.,* Re Sharmand Ltd., [2008] 514 COS (where the secured creditor argued successfully that there is no precedent for the involuntary writing down of secured debt in an Examinership).

[112] Re Holidair Ltd., [1994] I.L.R.M. 481 (Ir); Re Antigen Holdings, [2001] 4 I.R. 600, 604 (Ir.).

[113] *See* Re Traffic Group Ltd., [2007] I.E.H.C. 445; [2008] 2 I.L.R.M. 1; [2008] 3 I.R. 253 (Ir.).

[114] Companies (Amendment) Act of 1990, *supra* note 79, § 23(4).

[115] Extensions beyond 35 days are common, as are extensions of up to 100 days. Companies (Amendment) Act of 1990, *supra* note 79, § 18(2); Companies (Amendment) (No. 2) Act § 22(b) (Act No. 30/1999) (Ir.).

as is practicable after appointment,[116] upon showing good cause, the Examiner may have up to 100 days from the date of the presentation of the Petition to present his or her report.[117] If the Examiner cannot formulate any proposals, he or she must report that fact to the court, and the court will then normally order the winding-up of the company.[118]

When the court confirms a scheme of arrangement, it becomes binding upon the company, its members, and the company's creditors.[119] The scheme becomes effective at the time the court orders, but no later than 21 days after the date of confirmation.[120] The company then resumes its ordinary operation with its affairs restructured, and the protection afforded the company ceases.[121] If the scheme is not confirmed by the court or is not successfully implemented, then protection of the court is removed.[122] Following the removal of such protection, the norm is that either a liquidation or receivership will follow in short order.

IV. COMMON LAW COUNTERPARTS – AUSTRALIA AND THE UNITED STATES

To establish the potential effectiveness of Examinership, a brief contrast with two of its common law counterparts is potentially revealing. The two approaches – one Australian, one from the United States – stand at opposite ends in terms of approach, with Examinership a seemingly reasonable hybrid middle ground.

A. Australian Voluntary Administration

Australian insolvency law is designed with creditor interests at the forefront. The modern law – enacted in 1993 and known as "Voluntary Administration" – is intended to maximize the value of the ongoing business and preserve the interests of employees and suppliers, while still fully protecting the value of the company's creditors' inter-

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[116] Companies (Amendment) Act § 22(1)(a).

[117] The Court cannot extend the time period for the Report. However, once the Report has been presented, the court may extend the protection period, if necessary, to enable the court to make the decision whether or not to approve the Examiner's proposals. *Id*. at §§ 18(3), (4); Companies (Amendment) (No. 2) Act § 22(c).

[118] Companies (Amendment) (No. 2) Act, *supra* note 79, §§ 22(3).

[119] Companies (Amendment) Act, *supra* note 79, §§ 24(5)-(6).

[120] *Id.* § 24(9).

[121] *Id.* § 26.

[122] *See id.* § 24(11).

ests should liquidation ultimately become unavoidable.[123] Voluntary Administration was expressly designed to be a rapid, inexpensive, straightforward, and flexible means of dealing with troubled companies[124] that are either insolvent or "likely to become insolvent."[125] The system has two parts. First, there is an appointment of an Administrator; and second, the company operates under a deed of company arrangement.[126] The deed of company arrangement is a fairly simple document that largely serves the same function as an Irish scheme of arrangement and an American plan of reorganization in Chapter 11.[127]

An Administrator must be a registered Insolvency Practitioner,[128] and his or her appointment is typically accomplished by the

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[123] *See* Corporations Act 2007 (Cth) sub-reg 435A (Austl.) ("The object of this Part is to provide for the business, property, and affairs of an insolvent company to be administered in a way that:

> (a) maximises the chances of the company, or as much as possible of its business, continuing in existence; or
> (b) if it is not possible for the company or its business to continue in existence – results in a better return for the company's creditors and members than would result from an immediate winding up of the company.")

[124] *See* 1 The Law Reform Commission, Report No. 45, General Insolvency Inquiry, ¶ 54 (1988) (Austl.) ("The procedure proposed was designed with the aim that it would be capable of swift implementation, as uncomplicated and inexpensive as possible and flexible, providing alternative forms of dealing with the financial affairs of the company.").

[125] *See Corporations Act 2001* (Cth) sub-reg 436A (Austl.). By "Insolvent," what is meant is a company that is unable to pay its debts as they become due. *See id*. reg 95A. While the name suggests the voluntary nature of the proceedings, Voluntary Administration can occur involuntarily. Pursuant to § 436B(1), "A liquidator or provisional liquidator of a company may by writing appoint an administrator of the company if he or she thinks that the company is insolvent, or is likely to be insolvent at some future time." *Id.* § 436B(1). In addition, pursuant to § 436C, it can also be commenced by a creditor holding a lien over all or substantially all of the Company's assets. *See id.* § 436C(1) ("A person who is entitled to enforce security interest in the whole, or substantially the whole, of a company's property may by writing appoint an administrator of the company if the security interest has become, and is still, enforceable.").

[126] *See* The Law Reform Commission, *supra* note 124, ¶ 56.

[127] A deed of arrangement is by design far more straightforward than other methods available to insolvent companies in Australia. It is a "simplified document of much less size and complexity than the present forms of 'scheme documents' that oppress creditors and others. The deed will incorporate (by simple reference) standard provisions contained in a schedule to the company's legislation. . . ." *Id*. ¶ 8.

[128] *See Corporations Act 2001* (Cth) sub-reg 448B (Austl.). A person must consent to the appointment and can only act as administrator of a company or a deed of trust if he or she is a registered liquidator.

company's directors merely signing a form.[129] In juxtaposition to Examinership, there is no need for a court filing.[130] The role of the courts in a Voluntary Administration is nominal and is largely limited to general supervision.[131] The rationale for keeping courts at a distance is telling. What transpires in a Voluntary Administration concerns solely the company and its creditors. As the restructuring is not seen as having broad social import, despite the potential effect on the company's employees, its suppliers, and its neighboring businesses, the ultimate resolution should be a reflection of that which is in the creditors' best interests.[132] Indeed, one of the express aims of the law is to protect creditor interests if the company is unsalvageable by providing "a more advantageous realization of the company's assets than would be effected" by an immediate winding-up.[133]

Upon the appointment of an Administrator, with certain exceptions, an immediate moratorium on all claims is established.[134] The Administrator cannot wind up the company via liquidation,[135] nor, may liens be enforced, save one major exception.[136] Further, neither owners nor lessors of property the company uses may reclaim their

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[129] In addition to directors, liquidators and creditors with liens over substantially all of the company's assets can also appoint an administrator. *Id*. §§ 436A-C. Empirical studies have shown that 98% of administrations, in fact, commence by appointment made by the company's directors. *See* ROMAN TOMASIC & KETURAH WHITFORD, AUSTRALIAN INSOLVENCY AND BANKRUPTCY LAW 168 (2d ed. 1997). Neither unsecured nor undersecured creditors may appoint an administrator.

[130] *See Corporations Act 2001* (Cth) sub-reg 436A (Austl.). Instead of a court proceeding, the document of appointment is filed with the Australian Securities Commission and appropriately made public.

[131] The Australian Law Reform Commission contemplated only a supervisory function for courts in the Voluntary Administration process. The Commission recommended "that the court have a broad power to make orders for the effective operation of the procedure. Although provision for extensive involvement of the court has been avoided to simplify and reduce the time and expense of the procedure, the court should have a role to ensure that the procedure operates in accordance with the law." The Law Reform Commission, *supra* note 124, ¶ 62.

[132] *See generally* K.J. Bennetts, *Voluntary Administration: Shaping the Process Through the Exercise of Judicial Discretion*, 3 INSOLVENCY L.J. 135 (1995).

[133] *See* The Law Reform Commission, *supra* note 124, ¶ 35.

[134] *See Corporations Act 2001* (Cth) sub-reg 440 (Austl.). This is consistent with the automatic stay provisions listed in 11 U.S.C. § 362. Justifications for the Australian moratorium are similar to those for the American automatic stay. For example, they provide for orderly administration of debtors' affairs rather than a race to the courthouse door, and they preserve certain assets for the state that may be necessary for successful reorganization.

[135] *See Corporations Act 2001* (Cth) sub-reg 440A(1) (Austl.).

[136] *Id.* sub-reg 440B.

property as a general matter.[137] The moratorium not only serves the purpose of halting creditor collection efforts, but it also provides leave for the Administrator to investigate the company's affairs and to accordingly prepare a report for use by the creditors.

There is, however, one major exception to the breadth of the § 440(d) moratorium. Upon appointment, an administrator must notify any holder of a charge over all, or substantially all, of the company's property of his her or her appointment.[138] That creditor then has the right to enforce its charge within a certain proscribed period.[139] This time period is referred to as the decision period.[140] Since the company cannot stop a majority lien holder from enforcing its interest during the decision period,[141] the effect is that a secured creditor can effectively opt out of an Australian bankruptcy proceeding and foreclose on property following default.[142] While many critics initially feared that secured creditors would routinely exercise their rights pursuant to this exception, this has not transpired as frequently as originally thought.[143]

Unlike the situation with Examinerships, the appointment of an Administrator largely suspends the powers of the officers of the cor-

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[137] *Id*. sub-reg 440B(1).

[138] *See id*. sub-reg 450A(3).

[139] *See id*. sub-reg 441A. While the provision governing secured creditors with a lien over substantially all of the company's assets is by far the most significant exception to the moratorium, two others do exist. First, secured creditors who have acted to enforce their rights prior to the appointment of the administrator may also enforce their lien, as may creditors with a security interest in perishable property. *See id.* §§ 441B, 441C, 441F.

[140] The decision period is typically 10 to 14 days. If the creditor fails to act within that time, he may still give notice pursuant to his security interest that he will enforce his interest when the administration ends. *See Corporations Act 2001* (Cth) sub-reg 441E (Austl.).

[141] *See Corporations Act 2001* (Cth) sub-reg 441A(3) (Austl.).

[142] By contrast, the Chapter 11 approach forces the secured creditor to participate in the bankruptcy process unless one of two primary circumstances has been met, in which case the creditor can lift the automatic stay. The first circumstance is "cause," including the lack of adequate protection. *See* 11 U.S.C. § 362(d)(1) (West 2012). The second circumstance is when the debtor has no equity in the property, and the property is not needed for an effective reorganization. *See* 11 U.S.C. § 362(d)(2).

[143] *See* Ron W. Harmer, *Bankruptcy in the Global Village: Comparison of Trends in National Law: The Pacific Rim,* 23 BROOK. J. INT'L L. 139, 148–49 (1997). Perhaps one reason why banks have been reluctant to routinely exercise this right is the fear of negative publicity because their financial best interests may not correlate with the financial well-being of the business community at large.

poration,[144] and the Administrator obtains these powers.[145] If a company's officers violate this provision, however, they may be held personally liable for any debts incurred.[146]

The Administrator handles both company operations and investigations into the company's affairs. Following appointment, proceedings in court or in relation to the company's property can only commence with either the written consent of the Administrator[147] or with leave of court.[148] Additionally, any transfer of shares is void absent court approval.[149] The Administrator further acts as company agent and has a wide range of authority,[150] including bringing and de-

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[144] While directors do remain in office, their powers are greatly truncated. "While a company is under administration, a person (other than the administrator) cannot perform or exercise, and must not purport to perform or exercise, a function or power as an officer . . . of the company," except with the administrator's written approval. *See Corporations Act 2001* (Cth) sub-reg 437C(1) (Austl.). Rather, the director's primary role becomes to assist the administrator. Directors are required to aid the administrator by the delivery of the company books and provide statements about the company's business, property, affairs, and financial circumstances, as well as provide any other information the administrator reasonably requires. *See id.* §§ 438B(1)–(3).

[145] *Compare id.* § 437A(1) ("While a company is under administration, the administrator: (a) has control of the company's business, property and affairs; and (b) may carry on that business and manage that property and those affairs; and (c) may terminate or dispose of all or part of that business, and may dispose of any of that property; and (d) may perform any function, and exercise any power, that the company or any of its officers could perform or exercise if the company were not under administration."), with 11 U.S.C. § 1107(a) (West 2012) ("Subject to any limitations on a trustee serving in a case under this chapter . . .. a debtor in possession shall have all the rights . . .. and powers, and shall perform all the functions and duties . . .. of a trustee serving in a case under this chapter.").

[146] *See Corporations Act 2001* (Cth) sub-reg 437E.

[147] As a general matter, any action on behalf of the company neither taken nor approved by the administrator is void. *See generally id.* § 437D. There are, however, some exceptions relating to certain payments by banks. *See id.* § 437D(3).

[148] *See id.* § 440D(1). Circumstances where a court will do so are rare. *See, e.g.*, Foxcraft v. Ink Group Pty Ltd. [1994] 15 A.C.S.R. 203, 205 ("It may be that where the company is insured against the liability the subject of the proceedings, the administrator will ordinarily consent or the court will give conditional leave, but outside this field it is hard to see situations where it would be proper to grant leave, though doubtless there are such situations.").

[149] *See Corporations Act 2001* (Cth) sub-reg 437F(1)(c) ("A transfer of shares in a company that is made during the administration of the company is void except if. . .(c) the Court makes an order under subsection (4) authorizing the transfer."). *See id.* §437F(8)(c) ("An alternation in the status of members of a company that is made during the administration of the company is void except if: (c) the Court makes an order under subsection (12) authorizing the alteration.").

[150] *See id.* § 437B.

fending legal actions and executing documents.[151] There are two noteworthy exceptions to the Administrator's power to bring legal action. First, once a company is under administration, any guarantee of the company's liabilities, which has been given by a director of the firm or a relative of a firm's director, is not enforceable except by court order.[152] Second, potentially voidable transactions may not be challenged by an Administrator.[153] Like his Examiner counterpart, an Administrator may be personally liable for debts incurred under his or her administration, including for goods bought and for property leased, used, or occupied,[154] though in both the Irish and Australian instances, the Administrator is entitled to indemnification for such liability from the company's assets.[155]

A primary power of the Administrator is to investigate. Shortly following appointment, the Administrator is charged with calling two meetings of creditors. The first meeting must be called within eight business days of the commencement of the administration; its purpose is to first, determine whether a committee of creditors should be appointed to aid the administration,[156] and second, to determine who are to be the committee's members, with their primary functions to be consultation regarding administrative matters and consideration of administrative reports.[157] A second meeting of creditors must be held within 5 days of the convening period,[158] generally within twenty days of the commencement of the administration.[159]

Thus, within a month – by the time of the second meeting – the Administrator will have examined the financial status of the ailing company and will have reported to the firm's creditors on both the fi-

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[151] *See id.* § 442A(c)-(d).

[152] *See id.* § 440J(1).

[153] However, such transactions may be challenged by a liquidator. Thus, the presence of such transactions may encourage creditors to vote for a liquidation rather than for a deed of arrangement so that such transactions may be legally challenged. *See Uncommercial Transactions*, WORRELLS (Feb. 6, 2011), http://www.worrells.net.au/Content/InsolvencyResources/InsolvencyResourceArticle.aspx?ArticleId=71.

[154] *Corporations Act 2001* (Cth) sub-reg 443A(1) ("The administrator of a company under administration is liable for debts he or she incurs, in the performance or exercise, or purported performance or exercise, of any of his or her functions and powers as administrator, for: (a) services rendered; or (b) goods bought; or (c) property hired, leased, used, or occupied . . . .").

[155] *See id.* § 443D.

[156] *See id.* § 436E(1)–(2). It is worth noting that creditors cannot vote to end the administration at this point.

[157] *See id.* §§ 436E(1)(b), 436F(1).

[158] *See id.* § 439A(2).

[159] *See id.* § 439A(5)–(7). This period of time may be extended if the Court finds it to be in the best interest of the creditors.

nancial condition of the company[160] and on the company's potential long-term viability.[161] If he or she deems the company viable, the Administrator will present the creditors with a deed of company arrangement, on which the creditors will then vote.

The reorganization decision is made via a vote of the creditors on the deed of company arrangement. A simple majority of creditors voting is required based both on the number of creditors and on the total dollar amount owed.[162] Creditors are held to the task of convening a commission whereby they may undertake the decision as whether to execute a deed of company arrangement, to end administration, or to wind up the company.[163] The deed binds virtually all parties, including unsecured creditors, the company itself,[164] the company's officers and members,[165] and the deed's Administrator.[166] Secured creditors who have voted affirmatively are also bound by the deed.[167] Secured creditors who have voted to reject a deed which is nonetheless confirmed by the majority are generally not bound by the deed, however, and may generally enforce their rights in their collateral as long as doing so will not result in a "materially adverse" impact

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[160] This includes investigating any past or present officer who may have committed misconduct or who may be otherwise accountable to the business. *See id.* § 439A.

[161] In giving notice of this meeting, the administrator must accompany the notice with the following:

> (a) a report by the administrator about—
>
> (i) the company's business, property, affairs, and financial circumstances; and
>
> (ii) any other matter material to the creditors' decisions to be considered at the meeting; and
>
> (b) a statement setting out the administrator's opinion, about each of the following matters:
>
> (i) whether it would be in the creditors' interests for the company to execute a deed of company arrangement:
>
> (ii) whether it would be in the creditors' interests for the administration to end:
>
> (iii) whether it would be in the creditors' interests for the company to be placed in liquidation; and
>
> (c) if a deed of company arrangement is proposed,a statement setting out details of the proposed deed. Corporations Act 2001 (Cth) sub-reg 439A(4) (Austl.).

[162] *See Corporations Regulations 2001* (Cth) reg 5.6.21(2) (Austl.).

[163] *See Corporations Act 2001* (Cth) sub-reg 439A-C (Austl.).

[164] *See id.* § 444G(a).

[165] *See id.* § 444G(b).

[166] *See id.* § 444G(c).

[167] *See id.* § 444D(1)–(2).

on the purpose of the deed, and as long as the secured creditor is adequately protected.[168]

Creditors may choose any of three options for the deed of company arrangement. First, the company may execute the deed of company arrangement specified in the resolution. As the deed is deemed to be largely a vehicle for creditor satisfaction, there is wide latitude as to what the deed may contain.[169] Deeds of arrangement, however, must meet certain proscribed conditions necessary to assure the ongoing operation of the company.[170] They must bind the company, its officers, members,[171] the deed's administrator,[172] and most of the company's creditors,[173] and they must be implemented within 15 days, unless an extension is obtained through a court.[174] Second, the administration

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[168] *See id.* § 444F(3)(a).

[169] Paul B. Lewis, *Trouble Down Under: Some Thoughts on the Australian-American Corporate Bankruptcy Divide*, 2001 UTAH L. REV. 189, n.69 (citing Phillip Lipton, *Voluntary Administration: Is there Life After Insolvency for the Unsecured Creditor?*, 1 INSOLVENCY L.J. 87, 92 (1993)) ("As one commentator put it: "It is hoped that the procedure will allow for considerable flexibility in order to enable the contents of the deed to meet the needs and circumstances of the company and its various creditors. The deed may provide for debts to be compromised or repayments delayed or paid in installments.").

[170] *See Corporations Act* 2001 (Cth) sub-reg 444A(4) (Austl.).

> ("The [deed] must specify the following:
> (a) the administrator of the deed;
> (b) the property of the company (whether or not already owned by the company when it executes the deed) that is to be available to pay creditors' claims;
> (c) the nature and duration of any moratorium period for which the deed provides;
> (d) to what extent the company is to be released from its debts;
> (e) the conditions (if any) for the deed to come into operation;
> (f) the conditions (if any) for the deed to continue in operation;
> (g) the circumstances in which the deed terminates;
> (h) the order in which proceeds of realising the property referred to in paragraph (b) are to be distributed among creditors bound by the deed;
> (i) the day (not later than the day when the administration began) on or before which claims must have arisen if they are to be admissible under the deed.")

[171] *See id.* § 444G.

[172] *See id.*

[173] *See id.* §§ 444D(1)–(2). It is however, possible to terminate the deed. An administrator may do so when it is no longer practicable to carry on the business. Under such circumstances, a creditors' meeting may be called to decide whether the company should be voluntarily wound up. *See id*. § 445C-F.

[174] *See id.* § 444B(2).

may end. If the administration is terminated,[175] the company reverts to its former position, subjecting the company once again to the prospect of receivership or liquidation. The third and final option is for the company to wind up.[176] In this case, the company is deemed to have wound up voluntarily.[177]

B. American Chapter 11

American insolvency law is designed with an emphasis on rescuing troubled firms to preserve the social and economic benefits that attend the existence of a successful business. A balancing of the competing interests is a distinctly lower level priority than in Ireland.[178] Under Chapter 11, it is the norm for the debtor to remain controlled by the existing management post-bankruptcy filing.[179] The existing management then operates as the "debtor in possession."[180] With the debtor in possession in charge – rather than an independent party, as is the case in Ireland and Australia – an incentive is created to seek Chapter 11 relief early when the company's prospects of ongoing viability may be greater. The debtor in possession can operate both without the constraints of a trustee and largely unfettered by creditors, so long as it is functioning within the boundaries of the ordinary course of business.[181]

A few general aspects of Chapter 11 are worth briefly noting. First, there is no insolvency requirement – either on a balance sheet or an equity basis – to file for Chapter 11.[182] Second, as is the case in

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[175] *See id*. §§ 435C(3)(a)-(h) (The administration typically ends for one of these three reasons; however, procedural matters, such as failure to hold the meeting, may bring about an end to the administration as well.).

[176] See Corporations Act 2001 (Cth) sub-reg 439C(c) (Austl.).

[177] *See id.* § 491(1).

[178] Reorganization is seen as preferable to liquidation in the United States. *See e.g.*, United States v. Whiting Pools, Inc., 462 U.S. 198, 203 (1983) (quoting H.R. REP. NO. 95-595, at 220 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5787) ("By permitting reorganization, Congress anticipated that the business would continue to provide jobs, to satisfy creditors' claims, and to produce a return for its owners. Congress presumed that the assets of the debtor would be more valuable if used in a rehabilitated business than if 'sold for scrap'.") (internal citations omitted).

[179] *Id.*; *see also* 11 U.S.C. § 1108 (West 2012).

[180] Sometimes abbreviated as DIP. It is possible in unusual cases in Chapter 11 to have a trustee or examiner appointed. *See* 11 U.S.C. § 1104 (West 2012). However, the debtor operating as debtor in possession is the norm.

[181] As long as the debtor is operating within the ordinary course of its business, the debtor in possession fully operates the business during the time the company is in Chapter 11. It has the right, subject to certain restrictions, to use, sell, or lease the property of the estate. 11 U.S.C. § 363 (West 2012).

[182] *See* 11 U.S.C. § 109 (West 2012).

Ireland and Australia, the filing of a Chapter 11 petition creates a moratorium – known as the automatic stay – on all collection efforts on pre-bankruptcy filing obligations.[183] Unlike the situation in Australia, however, the automatic stay generally binds secured creditors subject to certain exceptions.[184] Third, the debtor in possession is given the exclusive right to propose a plan[185] for the first 120 days following the filing of a petition,[186] a period which may be extended further for cause.[187] This "exclusivity period" provides certain leverage to the debtor in possession in negotiating a Chapter 11 reorganization plan.[188] If neither the debtor's plan nor any other plan can be successfully confirmed, the firm's assets will likely be liquidated.[189]

The Bankruptcy Code imposes multiple requirements for a plan to be confirmed.[190] All are mandatory, except one – that the plan be consensual.[191] Creditors vote on a plan by class.[192] A favorable vote can be obtained in either of two ways. Any class of claimants whose interests are unimpaired[193] under the plan is automatically deemed to accept the plan.[194] Alternatively, an impaired class may vote in favor of a plan. To do so, both the majority of creditors in the class must vote in favor of the plan, and the claims of those voting for the plan must

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[183] *Id.* § 362; *accord Corporations Act 2001* (Cth) sub-reg 440 (Austl.).

[184] The primary exceptions are that the creditor may have the stay lifted or modified if there is no equity in the property and the property is not needed for an effective reorganization, or if there is an absence of adequate protection of the secured creditor's secured claim. *See* 11 U.S.C. §§ 361, 362(d)(1)-(2) (West 2012).

[185] A plan proponent must also provide, in addition to the plan, a court approved disclosure statement containing adequate information for a creditor to evaluate the plan. *Id.* § 1125 (West 2012).

[186] *See id.* § 1121(b). This is called the exclusivity period. If the debtor has not filed a plan within 120 days, or if the plan has not been confirmed within 180 days, any party may file its own plan. *Id.* § 1121(c).

[187] *See id.* § 1121(d).

[188] The desire to give the debtor leverage to negotiate is made clear in the legislative history of the Code. *See* S. REP. NO. 95-989, at 64 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5787, 5850.

[189] *See generally* 11 U.S.C. § 1112 (West 2012) (providing for conversion of a case from Chapter 11 to one under Chapter 7 of the Code).

[190] *See id.* § 1129(a).

[191] *See id.* § 1129(a)(8).

[192] All holders of claims and interests may vote on the plan. *See id.* § 1126(a) ("The holder of a claim or interest allowed under section 502 of this title may accept or reject a plan."). *See generally id.* § 1122.

[193] A class is said to be impaired unless certain specified requirements are met which essentially leave unaltered the rights of the party in question. *See* 11 U.S.C. § 1124.

[194] *See id.* § 1124, 1126(f).

have a dollar value equal to at least 2/3 of the dollar value of all of the claims in the class.[195]

As long as the plan is consensual, the debtor's ability to retain ownership is determined contractually based upon the agreement of the parties rather than the rule of law. If the plan is not consensual, however, and an impaired class rejects the plan, the court can still confirm the plan in what is known as a "cram down" if certain requirements are met.[196] These requirements include, among other things, that at least one class of impaired creditors who are not insiders has accepted the plan,[197] that the plan does not discriminate unfairly,[198] that the "best interests test" is satisfied,[199] and that the plan is deemed "fair and equitable."[200]

The "fair and equitable" requirement may be satisfied in different ways depending upon the status of the creditor. For dissenting secured creditors, a plan is fair and equitable and can be crammed down if the secured creditor effectively receives the full economic equivalent of its secured claim.[201] The U.S. Code provides three alternative methods of accomplishing this. First, a dissenting secured creditor may keep its lien and receive payments on the plan's effective date equal to the amount of the secured claim.[202] Second, the creditor may receive the indubitable equivalent of its claim.[203] Third, the property can be sold free and clear of the lien, with the creditor's security interest attaching to the proceeds of the sale; this lien on proceeds may then be treated under either of the other two options.[204]

For impaired, dissenting unsecured creditors, a plan is deemed fair and equitable if it satisfies the terms of the Absolute Priority Rule. The Absolute Priority Rule follows the principle that since creditors have priority over equity in contracts under state law, it is appropriate that, absent an agreement to the contrary, the priority order be maintained in a reorganization.[205] Hence, this signaled the derivation of the Absolute Priority Rule, which holds that no junior class of claimants can receive a penny in a cram down unless all senior classes are

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[195] *See id.* § 1126(c).

[196] *See id.* § 1129(b).

[197] *See id.* § 1129(a)(10).

[198] *See* 11 U.S.C. § 1129(b)(1)

[199] The best interest test requires the dissenting impaired class of creditors to receive at least as much as it would in a Chapter 7 liquidation. *See id.* § 1129(a)(7).

[200] *See id.* § 1129(b)(1).

[201] *See id.* § 1129(b)(2).

[202] *See id.* § 1129(b)(2)(A).

[203] *See id.*

[204] *Id.*

[205] *See* N. Pac. Ry. Co. v. Boyd, 228 U.S. 482, 502–05 (1913).

paid in full.[206] Thus, a plan is fair and equitable with respect to an impaired class if that class will receive full compensation for its allowed claims before any junior class receives any distributions.

A significant issue in relation to the Absolute Priority Rule is the existence of the so-called "new value exception." The exception, implicitly recognized by the U.S. Supreme Court in *Bank of America National Trust and Savings Association v. 203 North LaSalle Street Partnership*,[207] has the effect of allowing the existing shareholders of a Chapter 11 debtor to retain ownership notwithstanding their inability to satisfy the Absolute Priority Rule, so long as they contribute new, necessary capital in a full value, market transaction in which they pay top dollar for the right to retain ownership. As will be discussed below, the Irish courts are currently considering a related issue with respect to Examinership. When confirmed, the court will implement a Chapter 11 plan, which will replace old debts with new debts so the company emerges as a reorganized entity not likely to need further economic restructuring.

C. Examinership vs. Voluntary Administration and Chapter 11

The Irish examinership approach to business restructuring appears to be a genuine effort to balance the competing interests of all relevant parties to the restructuring. It reflects a moderate intermediate compromise between the two more extreme approaches to business insolvency considered in this article. This compromise manifests itself in a number of different ways. For example, in Ireland, entry into examinership requires some independent determination of its necessity and its prospect of ultimate success. A report of independent accountant is required, and under section 2(2) of the Companies Act as amended, a Court "shall not make an order . . . unless it is satisfied that there is a reasonable prospect of the survival of the company and

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[206] *See* 11 U.S.C. § 1129(b)(2)(B), which provides:

> — For the purpose of this subsection, the condition that a plan be fair and equitable with respect to a class includes the following requirements:
>
> (B) With respect to a class of unsecured claims -
>
> (i) the plan provides that each holder of a claim of such class receive or retain on account of such claim property of a value, as of the effective date of the plan, equal to the allowed amount of such claim; or
>
> (ii) the holder of any claim or interest that is junior to the claims of such class will not receive or retain under the plan on account of such junior claim or interest any property. . .

[207] Bank of Am. Nat'l Trust and Sav. Ass'n v. 203 N. LaSalle St. P'ship, 526 U.S. 434 (1999).

the whole or any part of its undertaking as a going concern."[208] In the United States, neither a showing of insolvency nor a showing that Chapter 11 may ultimately be effective is required.[209] As a result, in the United States, any entity, solvent or insolvent, with or without realistic chances of reorganization, may be a debtor in bankruptcy.[210] Not surprisingly, this has given rise in the United States to strategic use of insolvency as something akin to a business-planning device. Insolvency law can be used to obtain otherwise unavailable delays, to reject executory contracts and to get out from under unfavorable labor agreements,[211] as well as for other strategic purposes.

Similarly, voting for an Irish scheme – like an Australian deed of arrangement – is based on a simple majority of creditors both by number and by dollar amount at stake. Claims are not classified. By contrast, the American voting system relies on the classification of a claim,[212] and there is a super-majority component required for a class to consent to a plan. As noted, in the U.S., unless a class is unimpaired, for it to vote in favor of a plan, the majority of creditors in the class must vote in favor of the plan, and their claims must have a value equal to at least two-thirds of the value of all of the claims in the class; yet, a compelling argument exists that super-majority voting is appropriate only where there is a fear that corporate decisions will, by their nature, affect majority and minority shareholders differently, such as is the case with a closely held corporation.[213] This is not true in Chapter 11, since each class member will receive a proportionate share of the distribution. While the benefits of a super-majority scheme in Chapter 11 are nominal, the costs are not. Further, the Irish approach mirrors non-bankruptcy corporate voting which, as a general matter, provides for a one vote per share approach.[214] Such an approach reflects the fact that each vote should correlate with the financial stake of the voter in the firm. Similarly, by employing simple

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[208] Companies (Amendment) (No. 2) Act of 1999, *supra* note 79, § 2(2) (Ir.), *available at* http://www.irishstatutebook.ie/1999/en/act/pub/0030/index.html.

[209] 11 U.S.C. § 301 (West 2012).

[210] *See id.*

[211] For example, the United Airlines bankruptcy.

[212] Note that this is not by the creditor's classification. A single creditor may have more than one claim. The classic example is an undersecured creditor, who has a secured claim up to the value of the collateral and an unsecured claim for the remainder. This creditor will vote both its secured and its unsecured claim.

[213] *See generally*, David Arthur Skeel, Jr., *The Nature and Effect of Corporate Voting in Chapter 11 Reorganization Cases*, 78 VA. L. REV. 461, 515–16 (1992).

[214] *E.g.*, 8 DEL. CODE ANN. tit. 8, § 212(a) (2002). However, corporations can generally alter this one vote per share model should they so choose. For an overview of corporate voting rules, *see* Frank H. Easterbrook & Daniel R. Fischel, *Voting in Corporate Law*, 26 J. L. & ECON. 395, 399 (1983).

majority voting, Examinership ensures that the vote will necessarily correlate with the financial stake of the voter, and takes into account the rights of small creditors who may be the most adversely affected by the bankruptcy, and whose interests may be contrary to those with the greatest value at stake.

Third, Ireland has no direct counterpart to the American debtor in possession.[215] Instead, an Irish Examiner has substantial, though not complete, control of the debtor entity. Not only does this in part remove management from the decision making process, which may have induced an endogenously caused insolvency,[216] it tends to avoid the moral hazard issues which arise from the debtor in possession law. A debtor in possession may be tempted to opt for high-risk strategies on the basis that it has nothing left to lose by doing so but potentially a substantial amount to gain. This strategy – surely tempting to the debtor in possession of any insolvent company – contains moral hazards analogous to those commonly associated with limited liability. As equity investors lose their investment before debt investors do, the equity holder (in charge as debtor in possession) has nothing left to lose and, thus, does not bear the full burden of its risky behavior. As a result, an incentive is created for the equity holders to direct a firm to behave in an excessively risky fashion. Further, the Irish approach avoids the inherent conflict in fiduciary obligations that exist in the United States. A debtor in possession, with all the rights and powers of a trustee in most instances, is responsible during the bankruptcy for, among other things, operating the business, assuming and rejecting executory contracts, and proposing a plan of re-

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[215] Interestingly, the Commission on the Bankruptcy Laws of the United States, created by Congress in 1970 to examine the existing bankruptcy laws, proposed that a trustee be appointed for any corporate bankruptcy case involving 300 or more security holders and debts of at least $1,000,000, unless a trustee was found to be unnecessary or the expense would be "disproportionate to the protection afforded." H.R. Doc. No. 93-137, at 221 (1973). As noted, however, when Chapter 11 was ultimately enacted, the debtor acting as debtor in possession was the established norm, and a trustee could only be appointed "for cause, including fraud, dishonesty, incompetence, or gross mismanagement of the affairs of the debtor by current management. . . ." 11 U.S.C. § 1104(a)(1) (West 2012).

[216] Perhaps most notably in recent years, Bradley and Rosenzweig have argued that this is a common occurrence. "More fundamentally, fashioning a firm's capital structure obviously involves certain choices regarding the use of debt financing. To the extent that managers, influenced by the availability of bankruptcy protection, *choose* to burden their firms with 'too much' debt or 'impossible' debt-payment obligations, financial distress is hardly an entirely exogenous event. On this view, corporate bankruptcy frequently is significantly *endogenous*, chosen by, rather than imposed upon, corporate managers." Michael Bradley & Michael Rosenzweig, *The Untenable Case for Chapter 11*, 101 YALE L.J. 1043, 1047 (1992).

organization.[217] By doing so, it makes numerous decisions that impact the value and viability of the business. These decisions will harm some parties and benefit others. Yet a debtor in possession simultaneously owes fiduciary obligations to a number of parties including creditors, officers, directors, and equity, whose interests rarely align.[218]

Fourth, there are obvious benefits to quickly resolving the financial issues of the company. In Ireland, the entire process is typically concluded within 70 days, and it must be concluded within 100 days at the most.[219] The speed of these processes results in several key benefits, including lower administrative costs and a smaller delay for investors hoping to reinvest their assets.

The related issues of the existence of creditor control and the presence of cram down provisions are core questions for any corporate rescue scheme. Insolvent firms are effectively owned by their creditors.[220] In situations of insolvency, creditors, who primarily bear the burden of further loss, should be given decision-making discretion. Irish law limits the powers of secured creditors by requiring secured creditor participation in the Examinership. While this binds all relevant parties by the process, it does create issues for secured creditors in that their rights are determined in part by those who bear no direct risk. As noted, however, these risks are ameliorated to a degree by the

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[217] *See* 11 U.S.C. § 363.

[218] For a thorough discussion of the conflict of interest problem, *see* Raymond T. Nimmer & Richard B. Feinberg, *Chapter 11 Business Governance: Fiduciary Duties, Business Judgment, Trustees and Exclusivity*, 6 BANKR. DEV. J. 1, 2 (1989).

[219] Companies (Amendment) (No. 2), *supra* note 79, § 22.

[220] *See* Kham & Nate's Shoes No. 2, Inc. v. First Bank of Whiting, 908 F.2d 1351, 1360 (7th Cir. 1990) ("Creditors effectively own bankrupt firms."). In fact, the fiduciary duty of a firm's directors shifts upon insolvency from the firm's shareholders to its creditors. *See In re* Mortgageamerica Corp., 714 F.2d 1266, 1269 (5th Cir. 1983) ("Becoming insolvent, the equitable interest of the stockholders in the property, together with their conditional liability to the creditors, places the property in a condition of trust, for the creditors, and then for the stockholders.") (quoting Hollins v. Briefield Coal & Iron Co., 150 U.S. 371, 383 (1893)); Clarkson Co., Ltd v. Shaheen, 660 F.2d 506, 512 (2d Cir. 1981), *cert. denied*, 455 U.S. 990 (1982) ("If the corporation was insolvent at that time it is clear that defendants, as officers and directors thereof, were to be considered as though trustees of the property for the corporate-beneficiaries [creditors].") (quoting New York Credit Men's Adjustment Bureau, Inc. v. Weiss, 110 N.E.2d 397, 398 (N.Y., 1953)); Credit Lyonnais Bank Nederland, N.V. v. Pathe Communications Corp., No. 12510, 1991 WL 277613, at *34 (Del. 1991) ("At least where a corporation is operating in the vicinity of insolvency, a board of directors is not merely the agent of the residue risk bearers, but owes its duty to the corporate enterprise."); FDIC v. Sea Pines Co., 692 F.2d 973, 976–77 (4th Cir. 1982), *cert. denied*, 461 U.S. 928 (1983) ("[W]hen the corporation becomes insolvent, the fiduciary duty of the directors shifts from the stockholders to the creditors.").

fact that there is precedent suggesting that secured creditors cannot be forced over their objection to accept less than the value of their security in settlement of a debt.[221] Such a protection should presumably help preserve the availability of credit at an appropriate cost in the future.

The second aspect of creditor control is the existence of cram down, or the allowance of confirmation of non-consensual plans of reorganization. In Ireland, a court can confirm a plan if the court is satisfied that the proposals are fair and equitable in relation to any class of creditors that has not accepted the proposals and whose interests would be impaired by them, and if the court is satisfied that the proposals are not unfairly prejudicial to any interested parties. Therefore, Irish law provides some protections for both dissenting secured and unsecured creditors as a balance to the rights of the equity holders.

IV. THE DEBT CRISIS AND EXAMINERSHIP IN IRELAND

The number of Examinership cases that have been filed in Ireland in recent years is stunningly small. There has been some significant increase in filings from boom to bust years by percentage, with the numbers of petitions rising by a factor of five, but this is somewhat misleading given the extremely small numbers involved. From 2006 – 2010, the numbers were as follows:[222]

	2006	**2007**	**2008**	**2009**	**2010 (@ 31 July)**
Petitions Presented	8	24	41	40	11
Interim Examiners	4	20	33	33	8
Examiners	4	22	39	40	9
Schemes Approved	6	17	27	32	6

The question for this paper is why such a seemingly moderate, sensible approach to corporate rescue has been virtually ignored through-

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[221] *E.g.*, Re Sharmand Ltd., [2008] 514 COS (where the secured creditor argued successfully that there is no precedent for the involuntary writing down of secured debt in an Examinership).

[222] The Honourable Mr. Justice Franke Clarke, *Court Supervised Corporate Recovery in Ireland: Recent Developments in the Use of the Examinership Provisions*, presented at the Annual General Meeting and Conference of the International Association of Insolvency Regulators at Dublin Castle, Ireland (Sept. 22, 2010).

out one of the worst economic periods in the history of the Republic of Ireland.

To begin with, the general economic environment in a country is likely to be a significant element in the success or failure of any corporate rescue scheme. In Ireland, the boom at the end of the twentieth century and into the early part of the twenty-first century was followed by a monumental bust. The problems leading to the need for recovery and the issues facing any possible solution must be considered against that backdrop.

There are several possible explanations for the overall small numbers of Examinership filings. One explanation may be that examinership is not well suited to deal with economic failures related to real property and its construction, industries responsible, along with the banking industry, for much of the economic ills by which Ireland has been bedeviled over the past few years. A second possible explanation is that once the economic environment in a country reaches a certain depressed point, corporate rescue ceases to be a viable option. This may be particularly true when the recession hits the nation's banks as deeply as was the case in Ireland, as the necessary funds for post-Examinership success – either through debt financing or through equity financing – were not available. A third, related possibility is that the restructuring process may create a deterrent to its application if the process leaves companies post-Examinership ill-equipped for long-term success. Unfortunately, there is no data available in Ireland as to the survival rate of companies post-Examinership.[223]

Beginning with property and construction companies – industries at the center of Ireland's economic problems – in reviewing proposals related to the Examinership of companies in such industries, courts have recently either declined to appoint an examiner or have refused to approve the scheme of arrangement proffered.[224] While the Examinership process is applied uniformly irrespective of the nature of the company's business, some critics have argued that aspects of the construction business may make the Examinership process more difficult for companies in that industry as compared to other industries.[225]

The devastation of the real property sector in Ireland during the past few years has been exhaustively documented. The majority of property in Ireland has declined significantly in value during this time, with perhaps the majority of property falling in value by fifty

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[223] *Id.* at 4.3.

[224] *See, e.g.*, Re Vantive Holdings, *supra* note 92, at 384; Re Laragan Dev. [2009] I.E.H.C. 390; Re Tivway [2010] I.E.S.C. 11.

[225] *See* Clarke, *supra* note 222, at 8.1–8.7.

percent or more.[226] The result has been devastating for companies in the business of construction and property development in Ireland. These companies have experienced financial difficulties at a rate exceeding any other sector of the Irish economy.

The Honourable Justice Frank Clarke, in a paper entitled "Court Supervised Corporate Recovery in Ireland: Recent Developments in the Use of the Examinership Provisions,"[227] noted a number of issues that have impacted the effective use of the Examinership provisions in Ireland in recent years. These issues include the following:

- Due to the massive losses suffered in the real estate and construction businesses, companies in those industries are likely to have exceptionally severe financial problems compared to an ordinary company seeking restructuring by Examinership.
- Further complicating the situation for such companies is the fact that virtually all of their property of value is likely to be subject to liens, and the holders of such liens may well prefer to have a Receiver appointed and realize on their security rather than try to salvage the existing company.
- A related issue arises for companies required under their lease agreements to pay rental amounts well above market value. As lease prices have fallen with property value, it would clearly be advantageous for companies in such circumstances to be able to get out from under such leases. As noted previously, Examinership allows for the repudiation of leases, but only under limited circumstances and with court consent.[228] While it has not historically been an uncommon occurrence for landlords to negotiate down the amount of rent in difficult financial times, this has been complicated by the fact that many landlords borrowed heavily themselves to finance the purchases of their properties, and may as a result may not be in an economically viable position to renegotiate a decrease in rent. In addition, if there are guarantees by shareholders or principals of the debtor-lessor, the incentives for the lessee to reduce rental amounts are likely to be substantially lessened.
- In a number of recent cases, the company's primary lender has opposed Examinership. While in many cases the company does have the support of its lender – perhaps because

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[226] Ronan Lyons, *Taking Stock of Ireland's Property Market, Five Years into the Crash*, DAFT.IE (2012), *available at* http://www.daft.ie/report/Daft-House-Price-Report-Q2-2012.pdf.

[227] Clarke, *supra* note 222, at 16.

[228] Re Linen Supply of Ireland Ltd., [2009] I.E.H.C. 544 (H. Ct.) (Ir.).

the undersecured lender sees an Examinership as creating the greatest likelihood of recovering lost value – cases dealing with real property tend to involve scenarios where the bank may prefer a Receivership to an Examinership. This leads to a core question in Ireland – namely, whether a debtor requiring ongoing financing can successfully establish a scheme of arrangement without the consent of its banks. Among the possible issues for consideration is whether a scheme can force the lender to accept adjusted and less favorable lending terms than that to which they originally agreed. The second question is whether the prohibition on a scheme being "unfairly prejudicial" precludes forcing a secured lender to accept a decreased payment than that to which they would otherwise be entitled.[229] These remain key issues to resolve under Irish Examinership law.[230]

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[229] Clarke, *supra* note 222, at 11.3.

[230] *See* 11 U.S.C. §§ 1129(b)(2)(a)(i)-(iii) (West 2012). Recall that in the United States, a plan can be confirmed over the consent of the secured claim in effect so long as the secured creditor receives the economic equivalent of its secured claim, which will equal the value of the collateral – not the value of the entire debt – if the creditor is under-secured. *See* § 1129(b)(2)(A), which reads in relevant part:

> (2) For the purpose of this subsection, the condition that a plan be fair and equitable with respect to a class includes the following requirements:
>
> (A) With respect to a class of secured claims, the plan provides—
>
> (i) (I) that the holders of such claims retain the liens securing such claims, whether the property subject to such liens is retained by the debtor or transferred to another entity, to the extent of the allowed amount of such claims; and
>
> (II) that each holder of a claim of such class receive on account of such claim deferred cash payments totaling at least the allowed amount of such claim, of a value, as of the effective date of the plan, of at least the value of such holder's interest in the estate's interest in such property;
>
> (ii) for the sale, subject to section 363(k) of this title, of any property that is subject to the liens securing such claims, free and clear of such liens, with such liens to attach to the proceeds of such sale, and the treatment of such liens on proceeds under clause (i) or (iii) of this subparagraph; or
>
> (iii) for the realization by such holders of the indubitable equivalent of such claims.

> • A general question of fairness has arisen in regard to schemes of arrangement where the only investors forthcoming are the existing shareholders of the company. While there is no legal prohibition to this in Ireland, it may create a situation where shareholders are allowed to retain ownership of the company notwithstanding the fact that creditors are not being fully repaid what they are owed. As Justice Clarke puts it:
> Where the investor is an independent third party, then it is difficult to second-guess that investor's commercial judgment of what the company may be worth when it comes out of examinership. Examiners normally advertise in an appropriate way for investors. Examiners will opt for the best investment package if there be more than one. If there is no other investor willing to put forward a better package, then it is difficult to avoid the conclusion that the package on offer represents a legitimate commercial valuation of the company. However, where the investor is, in substance, already in control of the company, and where that person or those persons will retain such control, then it seems to the courts that a greater degree of scrutiny needs to be applied to ensure that the investors are not simply using examinership as a means of writing off their debts and, possibly, avoiding any additional scrutiny that might arise in the context of liquidation. While no scheme of arrangement has yet been refused on such grounds, it is an issue which has arisen in a number of cases and may well require a definitive court ruling in due course. In such cases, fairness as between shareholders and creditors needs to be considered, in addition to fairness between different categories of creditor."[231]

As noted above, a similar issue was litigated in the United States in regard to the so-called new value exception (or corollary) to the absolute priority rule, and was ultimately resolved by the United States Supreme Court in *Bank of America National Trust and Savings Association v. 203 N. LaSalle Street Partnership,* where the Court implicitly allowed such a restructuring plan so long as the new equity was purchased at top dollar.[232] There are a number of policy justifications for allowing old ownership to bid to purchase the equity of the new company even when creditors are not paid in full, so long as the

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[231] *See* Clarke, *supr*a note 222, at 11.3.

[232] Bank of Am. Nat'l. Trust and Sav. Ass'n, *supra* note 207.

old ownership will pay more than any other willing buyer. These policy reasons include the basic concept that more bidders generally results in better auctions.[233] The more interested bidders, the greater the price the auction is likely to return, which in turn means more funds will be available for distribution to creditors.

Further, a rational equity holder may bid more than a rational third party creditor or a third party buyer. This is the case for a number of reasons. First, equity holders are already familiar with the business and are thus less likely to discount their bids for unknown risks.[234] Other motivations may include family name and identity associated with the business or embarrassment over failure to pay creditors. Second, the equity holders may also have personal liability, such as guaranties, linked to the continuation of the business, or personal income opportunities, such as employment compensation or management fees. Finally, an additional justification for desiring the availability of new value plans may be to increase the likelihood that the business may successfully reorganize rather than be liquidated.[235] The reorganization process may be viewed as more than a collective proceeding for the enforcement of rights held by creditors under state law. Rather, liquidations may have a negative impact on jobs, suppliers to businesses, and the economy as a whole. The ability of shareholders to remain in control and rehabilitate the business encourages reorganization instead of liquidation.

So why haven't there been more Examinerships during the Irish debt crisis? Clearly, there is a combination of contributing factors. First, to succeed, reorganizations must generally commence before the distressed entity is financially hopeless. Too many Irish housing and construction companies effectively reached the point of no return before any reorganization had commenced. Second, restructuring requires post-insolvency financing, and the credit crunch made the prospect of obtaining available financing a remote one for many businesses. One of the issues impacting the credit crunch in Ireland has been that restrictions on lending were imposed in order to improve the loan-to-deposit rations of Irish banks. A second is that bank managers – particularly those whose financial success is dependent upon staying in charge rather than based on an equity share of profits - may have sensed greatly increased incentives to be risk averse in their lending, particularly if their bank's capital is low.

Finally, distressed firms need to be restructured in decisive fashion, not merely kept alive. This has been shown to be particularly

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[233] *See generally* Nicholas L. Georgakopoulos, *New Value, Fresh Start*, 3 STAN. J. L. BUS. & FIN. 125 (1997).

[234] *See id.* at 148–51.

[235] *Id*. at 130.

true in dealing with property-based companies.[236] Thus, in addition to salvaging the banks by guaranteeing their obligations, more attention should have been paid to ensuring some degree of financial solidity of the building and construction companies most heavily hit during the debt crisis.

V. CONCLUSION

The Irish economy continues to struggle with the effects of an ongoing debt crisis that crippled its banks, caused the government to undertake massive guarantees of bank obligations, and saw the most vulnerable businesses – those in the housing and construction sector – fail at an alarming rate. The presence of a well-thought-out, but little utilized, corporate restructuring law did virtually nothing to ameliorate the effects on distressed businesses. Successful corporate restructuring is dependent upon more than just a sound law. Overall economic conditions, including the presence of a stable banking system, are a necessary prerequisite to the success of any scheme of distressed company restructuring.

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[236] *See, e.g.*, ALAN AHEARNE & NAOKI SHINADA, ZOMBIE FIRMS AND ECONOMIC STAGNATION IN JAPAN 4, 16–17 (2005), *available at* http://hi-stat.ier.hit-u.ac.jp/research/discussion/2005/pdf/D05-95.pdf; Gerard Caprio & Patrick Honohan, *Starting Over Safely: Rebuilding Banking Systems*, in FINANCIAL CRISES: LESSONS FROM THE PAST, PREPARATION FOR THE FUTURE 217–55 (Gerard Caprio, et al. eds., Brookings Inst. Press 2005).