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The International Comparative Legal Guide to:

Corporate Recovery & Insolvency 2018

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A practical cross-border insight into corporate recovery and insolvency work

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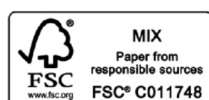

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Ireland

Tony O'Grady

Karen Reynolds

Matheson

1 Overview

1.1 Where would you place your jurisdiction on the spectrum of debtor to creditor-friendly jurisdictions?

Irish corporate law and, in particular, restructuring and insolvency law, is both creditor-friendly and flexible, featuring processes that facilitate rescue and restructuring of corporate groups with complex structures. The corporate recovery and insolvency framework in Ireland balances the need for creditors to have effective enforcement rights, and certainty regarding enforcement process and procedure, with the requirement for the rights of debtors to be adequately protected. The Irish Legal Framework provides a broad range of remedies for creditors, and, in particular, the rights of secured creditors are protected. Irish courts will generally observe statutory and/or contractual rights to ensure that debtors are adequately protected when their loans have been acquired by third parties.

1.2 Does the legislative framework in your jurisdiction allow for informal work-outs, as well as formal restructuring and insolvency proceedings, and to what extent are each of these used in practice?

The legal framework in Ireland contains a broad range of procedures which are available to insolvent companies. In the event that a company which is in financial distress is unable to reach a consensual arrangement with its creditors, there are a number of statutory insolvency processes available. The main corporate restructuring and insolvency procedures available in Ireland are receivership, liquidation, and examinership. In addition, under the Companies Act 2014, Ireland offers new procedures to merge and divide, as well as retaining established mechanisms for reorganising companies, namely court-sanctioned schemes of arrangement and the compulsory acquisition of minority shareholdings.

Examinership is a court-managed process which provides an insolvent company with court protection for a limited period to enable it to negotiate with its creditors and to obtain investment.

An insolvent company can enter liquidation either by a resolution of the shareholders (known as a creditors' voluntary liquidation) or by an order of the court following a petition by the creditors, the company itself or the company's members.

Receivership is the appointment of a receiver by a secured creditor for the purpose of realising the secured assets.

A company may seek to avail of examinership to resolve its financial issues, failing which it may then avail of liquidation and/or its secured creditors may resort to appointing a receiver to the secured assets.

2 Key Issues to Consider When the Company is in Financial Difficulties

2.1 What duties and potential liabilities should the directors/managers have regard to when managing a company in financial difficulties? Is there a specific point at which a company must enter a restructuring or insolvency process?

There is no obligation under Irish law on a company or its directors to take any steps to wind up the company or to put it into examinership when a company is insolvent. Directors of an insolvent company (or a company which is likely to imminently become insolvent) do, however, have a duty to act in the interests of the creditors of the company. It therefore follows that as soon as a director is aware or apprehends that there is no reasonable prospect of avoiding insolvent liquidation, he/she, with the other directors, must take action and would be well advised to seek professional advice. Directors must exercise caution not to incur further credit or increase borrowings at a time where there is a risk of the company not being able to repay such debts.

Whilst the fact of insolvency and/or trading a company whilst it is insolvent, solely of themselves, do not give rise to criminal or civil liability for directors, very serious consequences may follow for the directors if an examiner or liquidator is appointed to an insolvent company.

An element of an examiner's or liquidator's investigation into an insolvent company will include (but will not be limited to) a review of the actions of the company's directors prior to and at the time of his appointment, whether such actions contributed to the company's insolvency and whether the directors acted honestly and responsibly in exercising their duties.

A number of actions may be taken against a director of an insolvent company under the Companies Act 2014. A director may be subject to a fraudulent/reckless trading action, or an action for failing to keep proper books and records, pursuant to which personal liability may be imposed on the directors, including, if appropriate in the circumstances, for the debts of the company. A director of an insolvent company may also have restriction or disqualification proceedings initiated against them, which, if upheld by the court, would have serious consequences for their ability to act as directors in the future.

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2.2 Which other stakeholders may influence the company's situation? Are there any restrictions on the action that they can take against the company? For example, are there any special rules or regimes which apply to particular types of unsecured creditor (such as landlords, employees or creditors with retention of title arrangements) applicable to the laws of your jurisdiction?

A company under financial strain can also be influenced by its creditors, both secured and unsecured, and its shareholders.

If a company is placed under the protection of the court and an examiner is appointed to the company, the creditors of the company are prevented from taking any action to enforce their security or to take enforcement action of any kind against the company during this period (which can last for a maximum of 100 days). In situations where the appointment of an examiner may be imminent, secured creditors may take steps to quickly appoint a receiver to enforce their security. However, a receiver can be removed if a petition for the appointment of an examiner is filed within three days of the appointment of the receiver. Outside this period, the court will refuse to hear a petition to appoint an examiner.

A petition to wind up the company may be presented by the company itself, its creditors or the Director of Corporate Enforcement. The Central Bank of Ireland has similar powers in respect of certain companies subject to its regulation. A petition to wind up the company cannot be brought if an examiner has been appointed to the company.

In relation to "special rules", as further outlined in question 6.1, certain claims by employees which cannot be met by an insolvent company will be paid out of a government-funded insolvency payments scheme. Additionally, creditors with retention of title arrangements will be able to subsequently repossess their property if the retention of title clause in the contract of sale constitutes a valid retention of title. The validity of retention of title clause will depend on (a) the type of clause used by the seller, and (b) the facts of each case (i.e. what happened to the goods once they came into the possession of the company).

2.3 In what circumstances are transactions entered into by a company in financial difficulties at risk of challenge? What remedies are available?

Generally, it is the liquidator who may challenge certain transactions which an insolvent company has completed. If a challenge is successful, the transactions in question may be set aside.

Transactions in favour of a creditor taking place within six months prior to the commencement of a winding up (or within two years if in favour of a connected person) made with a view to preferring such a creditor are referred to as unfair preferences under the Companies Act 2014 and are liable to also be set aside on application by the liquidator to the High Court.

A liquidator (or a creditor) can also apply to the High Court for the return of assets where they show that the transfer of the assets in question perpetrated a fraud on the company, its creditors or members.

The court may also order former directors of a company to repay money or contribute sums to the assets of the company by way of compensation in respect of any misapplication, retainer, misfeasance or other breach of duty.

3 Restructuring Options

3.1 Is it possible to implement an informal work-out in your jurisdiction?

In Ireland, it is possible to implement informal work-outs between debtors and creditors. Informal schemes of arrangements are implemented outside the ambit of the courts.

An informal work-out process will require consensus of all creditors and stakeholders in order to be successful. As the company cannot avail of court protection, or a mandatory moratorium in respect of creditor enforcement action, during this period, any creditor may take action to seek to recover its debt, including, for example, issuing judgment proceedings and/or if it has security, seeking to enforce its rights by way of appointment of a receiver. There is also a possibility of a winding up petition being issued. If, therefore, a company perceives a threat of liquidation or receivership, it could be preferable to seek to avail of examinership under the Companies Act 2014.

3.2 What formal rescue procedures are available in your jurisdiction to restructure the liabilities of distressed companies? Are debt-for-equity swaps and pre-packaged sales possible? To what extent can creditors and/or shareholders block such procedures or threaten action (including enforcement of security) to seek an advantage? Do your procedures allow you to cram-down dissenting stakeholders?

Ireland has a flexible corporate rescue process, which international corporates will recognise as similar to the Chapter 11 procedure in the US. Examinership is a court-supervised process available to insolvent companies which have a reasonable prospect of survival as a going concern. The procedure is commenced by way of presentation of a petition to the court seeking the appointment of an examiner (usually an insolvency practitioner, nominated by the petitioner). Upon presentation of the petition for the appointment of an examiner, the company is placed under the protection of the Irish High Court for up to 100 days. The examiner and the company attempt to formulate proposals for a scheme of arrangement with its creditors and to procure new investment, thus securing the future viability of the company. If one class of creditors votes in favour of the proposals, by way of simple majority in number and value, the examiner puts the proposals before the Irish High Court for approval. Court approval of the proposals is binding on all creditors and shareholders and typically results in shareholder equity being diluted or eliminated entirely.

The directors retain control and executive power of the company – similar to the US Chapter 11 "debtor-in-possession" concept. The court is empowered to direct, upon application made, that the examiner assumes some or all of these functions for the period of examinership (although this is not a commonly used provision). The examiner may obtain court approval to dispose of property subject to a fixed or a floating charge on the basis that this would facilitate the survival of the company (subject to certain conditions to protect the rights of the secured creditor). The liabilities of a secured creditor can in certain circumstances be crammed down.

During an examinership, no proceedings may be commenced against guarantors or other third parties liable in respect of the debts of the company. Additionally, specific rules govern the enforcement of guarantees in an examinership and certain steps must be taken by the secured creditors in order to preserve their rights under the guarantees.

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There is also a mechanism whereby a company can propose a compromise or arrangement between itself and its members and creditors with the assistance of the court (section 450 of the Companies Act 2014 (previously section 201 of the Companies Act 1963). However, in practice, this is rarely used, most likely because there is no automatic protection afforded to a company with this process and the threshold for approval of the proposals is considerably higher than with examinership.

Debt-for-equity swaps and pre-packaged sales do occur in Ireland. The usage of pre-pack insolvency sales is less developed in Ireland than in other jurisdictions, but there has been an increasing number of asset sales structured through pre-pack receiverships in recent times. However, there is no current legislative basis for a pre-packaged sale.

3.3 What are the criteria for entry into each restructuring procedure?

The criteria for entry into examinership are:

- the company is, or is likely to be, unable to pay its debts;
- no resolution has been passed, nor has any order been made, to wind up the company; and
- there is a reasonable prospect of survival of the whole or part of the business as a going concern.

Save in exceptional circumstances, an application for the appointment of an examiner must be accompanied by an independent expert's report verifying that the company has a reasonable prospect of survival as a going concern.

3.4 Who manages each process? Is there any court involvement?

The examinership process is commenced by way of petition to the High Court (or the Circuit Court, in some circumstances). The court remains involved throughout the process. During the examinership period, the directors of the company remain in place and the company continues to trade while the examiner analyses the company's finances, establishes which parts of the business can be rescued and negotiates with: (i) investors in terms of new investment being injected in the company; and (ii) creditors and shareholders to prepare proposals for a scheme of arrangement which, if implemented, will facilitate the company's survival.

Once the examiner has formulated his proposals, he must convene and preside at meetings of each class of creditor who may vote in favour of or against the proposals. A report is then prepared by the examiner which is filed in court. The scheme will only become binding on the members and creditors of a company if the court makes an order confirming the proposals. It may only do so if at least one class of impaired creditors has voted in favour of the proposals. The court will also not approve a scheme if its purpose is to avoid tax or if it is unfairly prejudicial to any class of creditors.

3.5 What impact does each restructuring procedure have on existing contracts? Are the parties obliged to perform outstanding obligations? Will termination and set-off provisions be upheld?

Although most contracts provide that examinership activates a right of termination, examinership does not of itself operate to terminate contracts which the company has entered. However, where a company is under court protection following a petition to court, its creditors are prevented from exercising certain rights against the company in respect of pre-petition debts.

A company in examinership may, however, repudiate any contract under which some element of performance other than payment remains to be rendered by both parties, provided such repudiation is approved by the court. In recent years, this provision has frequently been availed of by tenant companies to repudiate onerous leases. Any person who suffers loss as a result of the repudiation (for example, the landlord) would become an unsecured creditor in the examinership and the court may assess the value of his loss.

With regard to set-off provisions, notwithstanding the company is in examinership, these will be upheld.

3.6 How is each restructuring process funded? Is any protection given to rescue financing?

The costs of examinership are usually significant. Where a successful investment is concluded, the examiner's proposals will generally provide for the payment of his agreed remuneration, costs and expenses from such investment.

If an examinership is unsuccessful, the question of what priority is afforded to the examiner's remuneration, costs and expenses arises. Section 554(3) provides that the remuneration, costs and expenses of the examiner which have been sanctioned by the court shall be paid before any other claim, secured or unsecured, out of the assets of the company.

With regard to rescue funding, no specific protection exists under Irish law for any new finance provided to a company by way of rescue funding.

4 Insolvency Procedures

4.1 What is/are the key insolvency procedure(s) available to wind up a company?

An insolvent company may be wound up by way of an official liquidation (also referred to as a court liquidation) or by way of a creditors' voluntary liquidation.

A petition may be presented to the Irish High Court where the company is unable to pay its debts. The petition can be presented by a number of parties including the company itself and/or any creditor. In other circumstances, contributories and the Director of Corporate Enforcement are entitled to present a petition. In the majority of cases, a creditor of the company petitions to have the company liquidated.

A company may also be placed into a creditors' voluntary liquidation. Only the company's members can commence a creditors' voluntary liquidation. The process is commenced by the members passing an ordinary resolution that the company cannot by reason of its liabilities continue on its business.

Strictly speaking, a receivership is not an insolvency process, but the enforcement by a secured creditor of its contractual rights pursuant to its security. The most common type of company receiver is the receiver appointed pursuant to the terms of a debenture (which can, generally, incorporate both fixed and floating charges over the assets of the company). The receiver typically takes control of, and realises, the assets to apply the proceeds towards the repayment of the debt owed to the debenture holder.

A solvent company can be dissolved by way of a members' voluntary liquidation. As part of this process, the directors of the company are required to make a declaration that the company will be able to pay its liabilities in full within a period not exceeding 12 months from the commencement of the liquidation, commonly referred to as a declaration of solvency.

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4.2 On what grounds can a company be placed into each winding up procedure?

A company can be placed into official liquidation by the High Court on a number of grounds including if the company is unable to pay its debts, or it is just and equitable or within the public interest that the company be wound up. The most common ground for petitioning the High Court is where the company is unable to pay its debts. This is typically established where the company has failed to pay a debt exceeding €10,000 within 21 days of a demand in writing being made on the company by a creditor.

A creditors' voluntary liquidation may be initiated by the company in a general meeting resolving by way of an ordinary resolution that it cannot by reason of its liabilities continue its business.

A members' voluntary liquidation is commenced by a special resolution of the members.

4.3 Who manages each winding up process? Is there any court involvement?

Each form of liquidation results in the appointment of a liquidator who takes control of the company, realises its assets and distributes the proceeds among the creditors and/or, where there is any surplus, the members of the company. Under the Companies Act 2014, the High Court's supervisory role in an official liquidation has been significantly reduced, although there is jurisdiction for a number of specified parties (including the liquidator and any creditor) to apply to the High Court to determine any question arising in the winding up. The Companies Act 2014 makes provision for the supervision of the liquidation by a committee of inspection (comprising not more than eight members with a majority representing the creditors of the company) to which the liquidator must report during the course of the liquidation. The committee of inspection plays an important role in supervising the exercise of certain powers of the liquidator. Where no committee is formed, all the creditors of the company oversee the liquidation.

A creditors' voluntary liquidation is supervised by a committee of inspection or, where no such committee is formed, the company's creditors. The committee supervises, in a similar manner to a court liquidation, the exercise of certain powers of the liquidator. Similarly, jurisdiction is given to specified parties (including the liquidator and any creditor) to apply to the High Court to determine any question arising in the winding up.

A members' voluntary liquidation is managed and supervised by the company's members as the ultimate beneficiaries where the company is solvent.

4.4 How are the creditors and/or shareholders able to influence each winding up process? Are there any restrictions on the action that they can take (including the enforcement of security)?

In an official liquidation the petitioning creditor is entitled to nominate the liquidator. The court has the power to appoint an alternative liquidator.

In a creditors' voluntary liquidation, the liquidator is initially nominated by the members. However the creditors are entitled to nominate an alternative liquidator at the creditors' meeting, and a vote of the creditors takes place where more than one alternative liquidator is nominated.

The creditors or the committee of inspection have a role in supervising the exercise by the liquidator of certain powers and authorising the payment of the liquidator's remuneration, costs and expenses. A creditor is also authorised to bring an application for directions to the High Court where it is dissatisfied with the conduct of the liquidation.

The rights of secured creditors are unaffected by the liquidation of a company. A secured creditor may decide to appoint a receiver over the secured assets or may be satisfied for the liquidator to realise its security, discharge its costs from the security and account to the secured creditor for the proceeds of sale of the secured assets. However, preferential creditors must be paid in priority to the secured creditor where the assets are realised from a floating charge.

4.5 What impact does each winding up procedure have on existing contracts? Are the parties obliged to perform outstanding obligations? Will termination and set-off provisions be upheld?

The effect of liquidation on a contract depends on the terms of the contract. Whether insolvency amounts to a breach of contract is governed by the terms of the contract. The commencement of a liquidation may constitute a breach of contract, may frustrate a contract or a contract may expressly provide how the commencement of a liquidation will affect the contract.

A liquidator has the power to apply to the High Court within 12 months after the commencement of the liquidation to disclaim an onerous contract. The other party interested in the property or contract can compel the liquidator to make up his mind whether to disclaim by applying in writing to the liquidator, following which the liquidator has 28 days to decide on the matter.

A party entitled to the benefit or subject to the burden of a contract may apply to the court for an order rescinding the contract on such terms as to payment as the court thinks fit.

Where a company is in liquidation, there are specific set-off rules which apply where there are mutual credits and debts between the company in liquidation and any person claiming as a creditor.

4.6 What is the ranking of claims in each procedure, including the costs of the procedure?

The general rule in insolvency law is that creditors of an insolvent company are to be paid *pari passu*, so if the realised assets of the company are not sufficient to pay any class of creditors in full, they are paid in equal proportion to their debts.

Not all assets realised by a liquidator may be available for distribution to the creditors (e.g. assets subject to a fixed charge, assets held in trust, monies that must be set off, etc.). Once these assets are dealt with, priority of distribution in a liquidation is as follows:

(1) the costs, charges and expenses incurred in a winding up;
(2) preferential creditors (which includes employees, the Revenue Commissioners);
(3) floating charge holders;
(4) unsecured creditors; and
(5) members and contributories.

The remuneration, costs and expenses of an examiner appointed prior to the liquidation of the company must be paid in full before any other claim in the liquidation.

4.7 Is it possible for the company to be revived in the future?

Where a company has been dissolved by way of a liquidation, the court may within a period of two years following the dissolution

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make an order declaring the dissolution to have been void. The application can be made by the liquidator or any interested party.

5 Tax

5.1 What are the tax risks which might apply to a restructuring or insolvency procedure?

Although there are no tax liabilities associated with insolvency proceedings, of themselves, a restructuring or insolvency process will not protect a company from incurring tax liabilities in the usual way, such as stamp duty, VAT, corporation tax and capital gains tax. Upon appointment, a liquidator or receiver will register for tax.

In a liquidation or receivership, liabilities to the Revenue Commissioners will be dealt with in the ordinary course of the liquidation or receivership and such liabilities will usually have preferential status.

Tax liabilities can be included in the debts which are subject to a scheme of arrangement approved by the court in an examinership; however, such a scheme will not be approved by the court if it is unfairly prejudicial to a creditor, including the Revenue Commissioners.

6 Employees

6.1 What is the effect of each restructuring or insolvency procedure on employees?

With regard to employees' contracts of employment, the effect of insolvency may be dealt with expressly or impliedly in such contracts. Otherwise, the effect on employees depends on the nature of the insolvency process.

In a receivership, the appointment of a receiver does not of itself automatically terminate contracts of employment. The sale of the business, a new agreement with the employee or where the particular role of the employee is inconsistent with the role of a receiver may affect contracts of employment. Employees are afforded preferential status in a receivership (e.g. arrears of wages, holiday pay, unfair dismissal) in respect of claims arising prior to the receiver's appointment, where the receiver has been appointed under a floating charge.

The effect of a liquidation depends on whether it is an official or voluntary liquidation. In an official (i.e. court) liquidation, the making of the winding up order of the company operates as a dismissal of the company's employees. On the other hand, the passing of a resolution to commence a creditors' voluntary liquidation does not necessarily automatically terminate contracts of employment and regard must be had to the facts of the particular case. A liquidator has the power to recommence and carry on the company's business as may be necessary for the beneficial winding up of the company and contracts of employment may be continued by the liquidator for a limited period of time.

In an examinership, the appointment of the examiner should not bring an end to contracts of employment as the examinership process is designed to facilitate the continuation of the company's business and a key aim of the process is the preservation of employment.

Employees are afforded preferential status in respect of certain entitlements (e.g. arrears of pay, holiday pay and pay *in lieu* of statutory notice and a range of other entitlements that might be owed to employees by the employer) and legislation exists in Ireland to permit eligible employees to recover such amounts from the insolvency payments scheme where their employment has been terminated because of an employer's insolvency. The insolvency payments scheme is backed by the government and the relevant Minister responsible is then entitled to claim as a preferential creditor in the liquidation (or receivership) for the sums paid out to employees.

Specific legislation exists regarding the transfer of an undertaking, business or part of a business from one employer to another and may result in the automatic transfer of employees (and their liabilities) to the purchaser where this occurs as part of an insolvency process.

7 Cross-Border Issues

7.1 Can companies incorporated elsewhere use restructuring procedures or enter into insolvency proceedings in your jurisdiction?

Pursuant to the European Insolvency Regulation (recast), where a company has its "centre of main interests" ("COMI") in Ireland, whether that company is incorporated in Ireland or not, winding up and examinership proceedings must be commenced in an Irish court. A company's COMI is generally the place where it conducts the administration of its interests on a regular basis as ascertainable by third parties. It is also possible, in certain circumstances, for a company incorporated in a country which is not subject to the provisions of the Insolvency Regulation to be wound up by the Irish Court.

7.2 Is there scope for a restructuring or insolvency process commenced elsewhere to be recognised in your jurisdiction?

Where the European Insolvency Regulation (recast) applies to the proceedings, such proceedings will be recognised automatically in Ireland. If the proceedings are not recognised by the Irish courts automatically, the insolvency officeholder (e.g. liquidator, receiver, administrator) can make an application to the Irish High Court for an order recognising the proceedings.

7.3 Do companies incorporated in your jurisdiction restructure or enter into insolvency proceedings in other jurisdictions? Is this common practice?

Companies incorporated in Ireland avail of the insolvency and restructuring processes available in Ireland. It is uncommon for an Irish incorporated company to enter into insolvency proceedings in another jurisdiction.

8 Groups

8.1 How are groups of companies treated on the insolvency of one or more members? Is there scope for co-operation between officeholders?

Typically an Irish company will be wound up as a separate legal entity and while the court has an inherent jurisdiction to pierce the corporate veil, this is most likely to occur only in exceptional cases.

Company law in Ireland grants a liquidator certain powers to swell the assets of the company in liquidation from the assets of related companies.

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A contribution order permits the court on the application of the liquidator or a creditor to order that a company related to the company being wound up contribute to the debts provable in the winding up.

A pooling order permits the court on the application of the liquidator or a creditor to order that two or more related companies be wound up together as if they were one company.

In making a pooling and contribution order, the court is required to take a number of factors into consideration in deciding whether it is just and equitable to do so and in practice pooling and contribution orders are rarely invoked.

Where the court appoints an examiner to a company, it may also appoint an examiner to a related company where this would be likely to facilitate the survival of the company or the related company or both.

9 Reform

9.1 Have there been any proposals or developments in your jurisdiction regarding the use of technology or reducing the involvement of the courts in the laws of your jurisdiction, which are intended to make insolvency processes more streamlined and efficient?

The laws relating to corporate rescue and insolvency were modernised and consolidated in the Companies Act 2014. The Companies Act 2014 provides for the harmonisation of the different modes of winding-up. This streamlined approach has led to greater consistency between the laws governing voluntary windings up and court-ordered windings up. Liquidators in all classes of liquidations are now permitted to take certain steps without seeking consent of the court, reducing the need for court involvement. The reduction of the court's supervisory role in favour of increased creditor involvement in court-ordered liquidations has allowed for the reduction of costs associated with such liquidations. The reduction has also provided creditors with more direct influence in respect of the important decisions in the liquidation process.

9.2 Are there any other governmental proposals for reform of the corporate rescue and insolvency regime in your jurisdiction?

There are no current governmental proposals for reform of the corporate recovery and insolvency regime in Ireland.

In 2017, Irish insolvency law was amended by the enactment of the Companies (Accounting) Act 2017 (the "2017 Act"). The most significant change relates to preferential creditors. The 2017 Act provides that claims for preferential creditors will now rank in priority to holders of floating charges. In the context of a winding-up or receivership, this priority will apply irrespective of the crystallisation of the floating charge prior to their commencement. It should also be noted that a receiver appointed under a floating charge which has crystallised must now ensure that any claims made by preferential creditors are paid in priority to charge holders.

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