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Restructuring across borders

Ireland

Corporate restructuring and insolvency procedures | January 2022

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Contents

Introduction

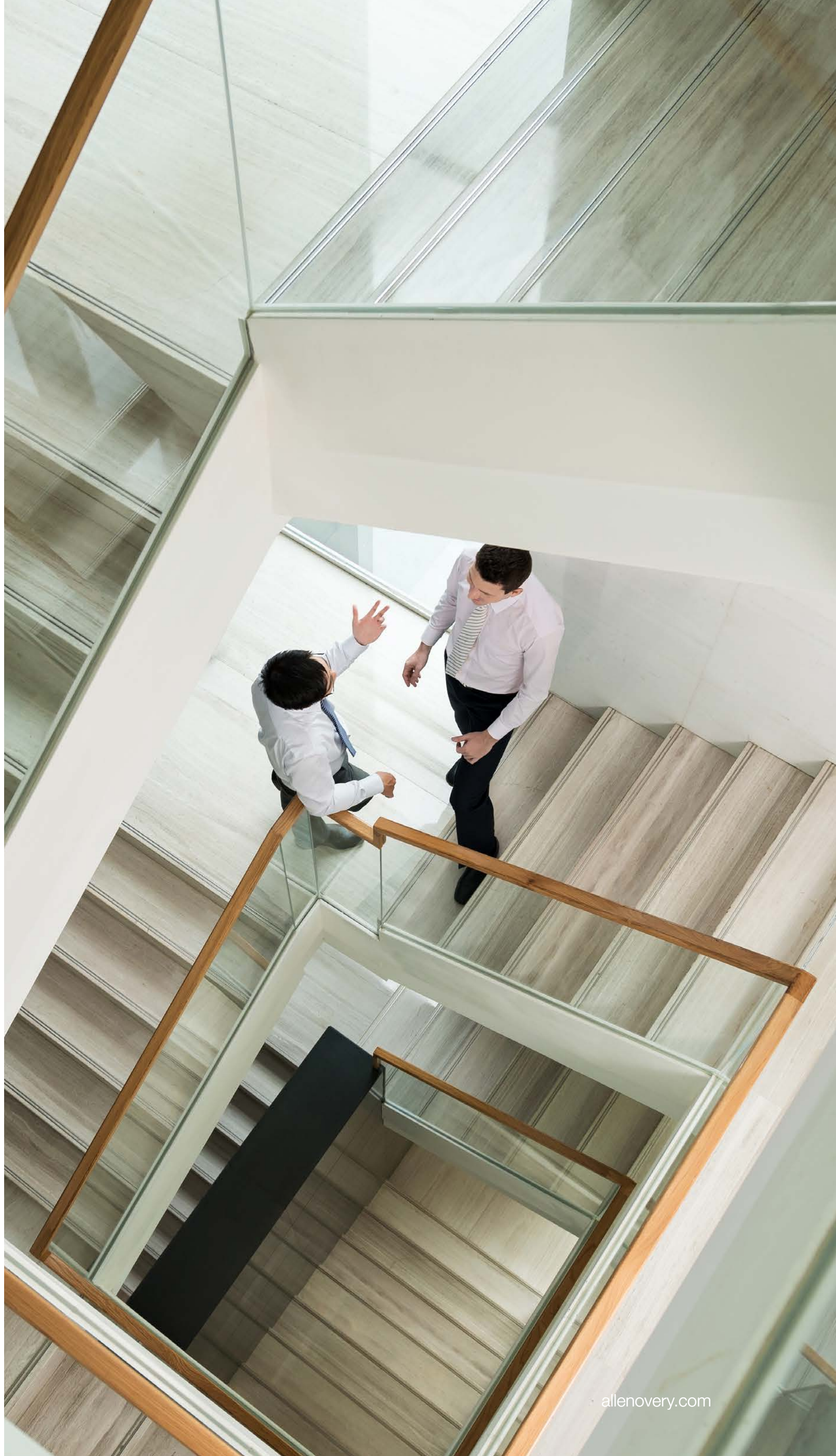
There are a number of restructuring, insolvency and enforcement processes available under Irish law for Irish (and in certain cases international) companies for the benefit of debtors, creditors and/or sponsors.

The optimal process will depend on the circumstances and the objective of the relevant stakeholder but the principal processes can be broadly, although not exclusively, categorised as follows:

- Restructure and/or rescue:
  - examinership under Part 10 of the Companies Act 2014 (the **CA2014**) (**Examinership**)
  - scheme of arrangement under Part 9 of the CA2014 (**Part 9 Scheme**)
- Creditor enforcement:
  - receivership pursuant to security instruments and Part 8 of the CA2014 (**Receivership**)
- Liquidations under Part 11 of the CA2014:
  - compulsory or court ordered liquidation (**Compulsory Liquidations**)
  - creditors' voluntary liquidation (**CVL**)
  - members' voluntary liquidation (**MVL**) (solvent companies only).

Each of these processes (with the exception of receivership which is not a collective insolvency proceeding) benefit from recognition within the EU, whether under the Regulation (EU) 2015/848 (the **Recast Insolvency Regulation**) where the debtor has its centre of main interests (**COMI**) or an establishment in Ireland or, in the case of the Part 9 Scheme and subject to satisfying certain jurisdictional requirements, Regulation (EU) 1215/2012 (the **Judgments Regulation**).

In addition, Compulsory Liquidations, Part 9 Schemes and Examinership are available in respect of non-Irish companies that have, among other features, a "sufficient connection" to the jurisdiction. The processes discussed in this note have been deployed to implement significant cross-border restructurings of Irish, and in some instances non-Irish, incorporated debtors in recent years alongside their deployment by domestic businesses.



Restructure and rescue procedures

Examinership

Examinership is a statutory framework for restructuring companies in financial difficulty but which otherwise have a reasonable prospect of survival as a going concern post-restructuring. It is broadly comparable to Chapter 11 of the U.S. Bankruptcy Code and the recently-introduced Part 26A restructuring plan in the UK.

The essential features of Examinership include:

– an automatic stay of 70 days (extendable to 100 days or 150 days under temporary Covid-19-related provisions)[1] on creditor enforcement action during which a scheme of arrangement must be presented to the Irish High Court. The protection period continues thereafter for the purpose of judicial consideration of the scheme and its implementation (if necessary);

– an examiner nominated by the applicant (typically the company), and appointed by the court, formulates a scheme of arrangement for the restructuring of the company which, once approved, is binding on the company, its members and creditors;

– only one class of impaired creditor is required to approve the scheme of arrangement formulated by the examiner (acting by a majority in number representing a majority in value of those voting), which readily facilitates cross-class cram down; and

– the examiner's scheme is subject to confirmation by the Irish High Court which will principally consider whether the scheme is fair and equitable, provides the company with a reasonable prospect of surviving and whether any creditor is unfairly prejudiced or worse off under the scheme than in the most likely alternative scenario.

A wide range of solutions have been and can be employed to facilitate the survival of companies through Examinership including cross-class cram down of debt, terminating existing contractual commitments (including non-Irish law obligations), introducing new debt and/or equity investment (through public or private offerings), replacing existing equity in full and debt for equity swaps.

Furthermore, the process can be readily used in conjunction with other international processes and is capable of recognition and enforcement internationally (including automatic recognition across the EU under the Recast Insolvency Regulation, recognition under Chapter 15 of the U.S. Bankruptcy Code and recognition in England and Wales under Section 426 of the Insolvency Act 1986 in England and Wales prior to the introduction of the original EU Insolvency Regulation).

[1] Note that the relevant temporary Covid-19 related provisions were recently extended to 30 April 2022.

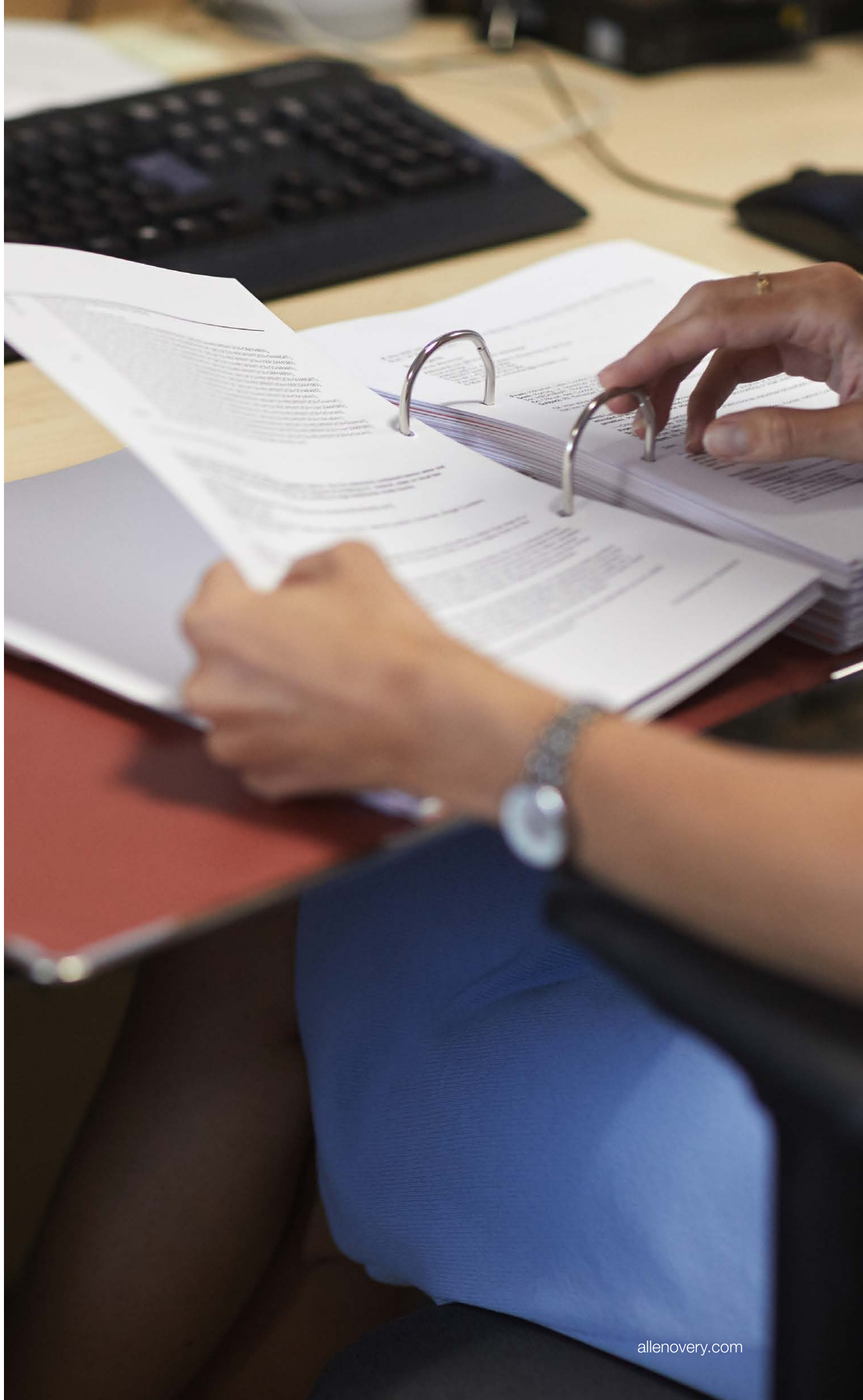
Restructure and rescue procedures (cont.)

Examinership is available to a company that (i) has its COMI or an establishment in Ireland (which will result in automatic recognition across the EU), (ii) an Irish incorporated company with a COMI outside the EU or (iii) a related company with a "sufficient connection" to the jurisdiction.

A company must have a reasonable prospect of survival as a going concern to avail of the process and although applications for Examinership are typically debtor-led, the application may be brought by sponsors or creditors. Further, whilst Examinerships are principally a rescue process and one that has an underlying objective of protecting enterprises and employment, a creditor-led Examinership can result in the effective enforcement of security or other senior debt obligations through debt-for-equity conversions or other restructuring strategies.

SCARP

The Companies (Rescue Process for Small and Micro Companies) Act 2021, which came into force in December 2021, provides for a new restructuring process modelled on Examinership (**SCARP**) for small and micro companies (eg annual turnover below EUR12 million; a balance sheet total of below EUR6m; and up to 50 employees). SCARP is a streamlined version of Examinership which is intended to be more cost effective for smaller companies by significantly reducing court involvement but has significant qualitative differences including the lack of an automatic stay (a broad stay is available on application) and the ability of State bodies to exclude certain debts from the process.



Restructure and rescue procedures (cont.)

Part 9 Scheme

Part 9 of the CA2014 provides for a "company" to enter into a compromise or arrangement with (a) its creditors or any class of them or (b) its members or any class of them. A scheme of arrangement is an extremely flexible tool and can facilitate a broad range of possible compromises or arrangements between a company and its creditors or members. Part 9 Schemes are effectively identical to the widely known and utilised English law schemes of arrangement and benefit from the consideration and application of international jurisprudence from other common law jurisdictions on schemes of arrangement.

Part 9 Schemes are separate and distinct from Examinerships (and the form of schemes of arrangement used within that process) and their deployment neither requires that a company is (or is likely to be) insolvent nor that the company has a reasonable prospect of survival if it is insolvent. In fact whilst there has been a marked increase in the use of Part 9 Schemes for debt restructurings since the landmark case of *Ballantyne Re plc* in 2019 there is also a longstanding and broad base of Irish jurisprudence on Part 9 Schemes for solvent companies.

The key features of a Part 9 Scheme include:

- the Part 9 Scheme must be proposed by the debtor to the relevant class or classes of creditors (and, if relevant, member class) impacted by the scheme;
- the scheme must meet the approval threshold which is both at least 75% of value and a majority in number of each creditor class (and, if relevant, member class) present and voting at scheme meetings;
- scheme meetings are convened by the High Court (or the board of directors of the debtor) with the class composition determined by the similarity of legal rights of creditors;
- in sanctioning the scheme the High Court will apply the widely known tests adopted by the English and other common law courts including whether the scheme of arrangement is such that an "intelligent and honest person" as a member of the class concerned, acting in his or her own interest, might reasonably approve it;
- the High Court has jurisdiction to sanction a scheme of arrangement for any Irish incorporated entity and non-Irish entity with "sufficient connection" to Ireland;
- Part 9 Schemes can benefit from the application of the Judgments Regulation and have been the subject of recognition under Chapter 15 of the U.S. Bankruptcy Code; and
- the release of third parties and the restructuring of non-Irish law debt of the company can be achieved.

Part 9 Schemes do not involve an automatic stay on creditor action but a stay on the issuance or continuation of legal proceedings against the debtor is available on application to the Irish High Court once the debtor has convened a scheme meeting or applied to the court to do so.

Part 9 Schemes (and their international counterparts) have proven to be extremely flexible and robust processes through which to restructure debtors with significant secured or senior debts which are otherwise profitable or, where necessary, to achieve capital releases to stakeholders.

Winding-Up Scheme

A company that is about to be wound up, or that is in the course of being wound up, may avail itself of a separate form of scheme of arrangement provided for in section 676 of the CA2014. It is similar to the Part 9 Scheme discussed above save that it is subject to approval by a special resolution of creditors (75% in number and value) and it is not subject to sanction by the Irish High Court unless it is challenged by an impaired creditor within a specified period.

Enforcement

Receivership

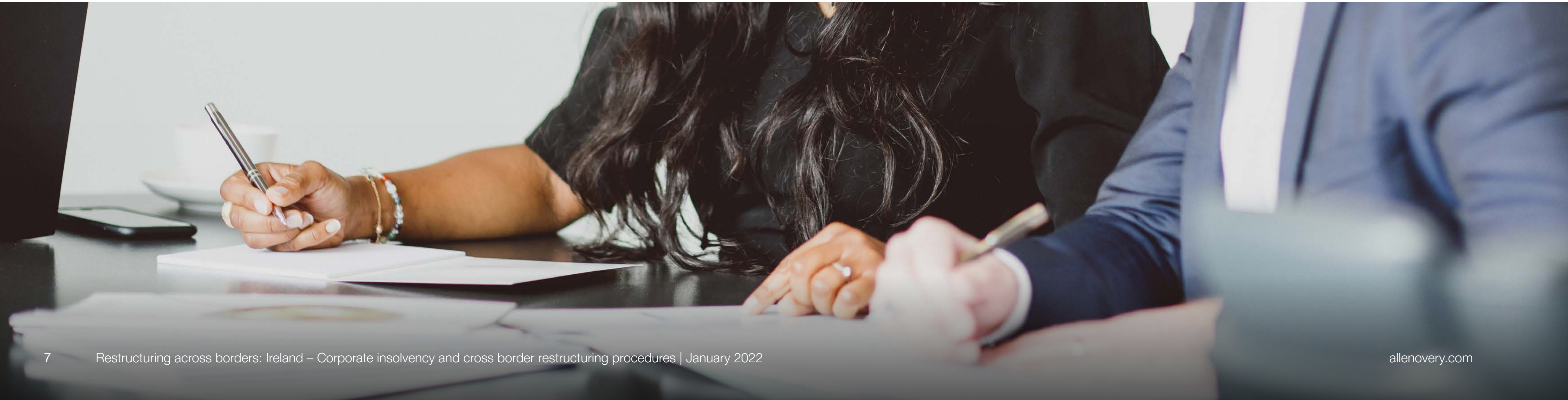
Receivership is a process by which the holder of security may enforce its security by appointing one or more individuals to act as receiver of secured asset(s) and realise value from that asset or assets by, for example, selling the secured asset(s), collecting income arising from the secured asset(s) or exercising rights associated with the asset(s) (including voting shares the subject of share security). The receiver acts in the interests of the secured creditor but as agent of the debtor (save where there is an intervening liquidation of the debtor which terminates the agency) and consequently provides a layer of protection for the secured creditor in realising its security.

A receivership is not an insolvency proceeding under the Recast Insolvency Regulation or otherwise, as it is typically the unilateral enforcement of security by a single or collective of secured creditors although it often results in the liquidation of the debtor after the receiver has disposed of the secured asset(s).

A receiver is typically appointed under a written instrument in pursuance of contractual powers under a security document and may also be appointed by the High Court in pursuance of its equitable jurisdiction. Once appointed, a receiver has, subject to any limitation in the instrument of appointment or court, a broad swathe of powers under the Part 8 of the CA2014 and (typically) under the underlying security document including to take possession of, sell or lease the secured asset(s).

A receiver appointed on the basis of a fixed charge over specific assets will act as receiver in respect of those assets only.

Where the security document provides for a full fixed and floating charge over the entire assets and undertaking of the debtor the receiver will typically be empowered to act as receiver and manager over all of the assets and undertaking of the debtor with full power to manage and carry on the business of the debtor (to the exclusion of its directors).



Enforcement (cont.)

The appointment of the receiver is temporary in nature (although it can apply for a number of years in certain cases) and does not change the status of the company (even where the appointment is made pursuant to a full fixed and floating charge). Although the directors cease to control the charged assets, their normal powers and duties continue in respect of the other assets and liabilities (if any) of the company. After a receiver has been discharged, the directors resume their normal functions in relation to all of the company's affairs, unless a liquidator has been appointed in the interim.

It is important to note that if a receiver is appointed pursuant to a floating charge as distinct from a fixed charge, the receiver must first pay in full those creditors whose claims would be accorded priority by statute in a winding up, ie the preferential creditors. Any other floating charges will crystalise on the appointment of a receiver.

A receiver has a statutory obligation to take reasonable care to obtain the best price for the secured asset(s). This obligation applies as at the time of sale and a receiver is not obliged to wait for an improvement in market conditions in order to achieve a better price. A receiver can however seek to enhance an asset prior to its sale, including by the development of real estate assets.

Irish law security is commonly taken over the shares in key companies within group structures, particularly at parent or holding company level, which allows the security holder to exert significant control in a default scenario who can appoint a receiver over the secured shares to control and vote the shares with the consequent ability to control the underlying company/ies.

Where the receiver has been appointed for less than three days and a petition for Examinership is presented, the court may make various orders in relation to the receiver, including an order directing that he ceases to act during the Examinership period. However, where a receiver has been appointed to a company for a period of more than three days, this prevents the presentation of an Examinership petition.

Other Enforcement Tools

Creditors may avail themselves of other tools under Irish law to enforce their rights, including the processes identified in this note, together with traditional debt recovery proceedings, enforcements of judgments and other actions.

Liquidation

Liquidation (or winding-up) is the formal procedure for dissolution of insolvent (and solvent) companies under Irish law and is regulated by Part 11 of the CA2014. It involves the appointment of one or more liquidators whose principal functions are to take control of all the property vested in the company, to realise the assets and, to the extent possible, pay the creditors in accordance with the applicable statutory priorities.

In fulfilling these obligations, the liquidator is subject to a varying degree of supervision by the High Court, creditors, shareholders and the Director of Corporate Enforcement (**DCE**) depending on the type of liquidation. At the end of the process of liquidation, the company is dissolved.

Liquidators (and in certain instances creditors) can (and in certain instances must) apply to the High Court for certain reliefs, including orders to restrict or disqualify creditors, directions on the conduct of the liquidation or to exercise asset-swelling powers such as applications to reverse unfair preferences or to make directors personally liable for wrongful trading (which includes knowingly carrying on any business of a company in a reckless manner) or fraudulent trading (which includes knowingly carrying on any business of a company with intent to defraud its creditors).

There are three different types of liquidation under Irish law, each is summarised below.

1. Compulsory Liquidation

A Compulsory Liquidation is commenced by an application to the High Court to order the winding up of a company and to appoint one or more liquidators. Where a liquidator is appointed, section 589(1) of the CA2014 provides that the date of commencement of the liquidation is the date of the presentation of the petition.

The parties who may apply to court for an order for the appointment of a liquidator (or liquidators) include the creditors, members or the company itself (on the authority of a special resolution to that effect) or the DCE.

The majority of court liquidations are initiated by an application of a creditor on the basis that the company is unable to pay its debts and is consequently insolvent. As a general rule, a company can be said to be insolvent where is satisfies either of the following two tests: (i) the cash flow test (applying a cash flow test, a company is deemed to be insolvent when it is unable to pay its debts as they fall due) and (ii) the balance sheet test (the balance sheet test considers whether the company's assets are insufficient to discharge its liabilities and, for the purpose of this test, regard must be had to contingent and prospective liabilities).

This is typically done as a last resort after debt recovery processes have been exhausted. Other grounds for an application include that it is just and equitable that the company should be wound up, which is a broad jurisdiction, or that its winding-up is in the public interest (this only arises on the application of the DCE).

An application to commence a liquidation will typically be heard two to three weeks after the application is first filed with the court and the hearing must, in any case, be advertised in advance. Where necessary the applicant may seek the appointment of a provisional liquidator (or provisional liquidators) pending the full hearing. Where the winding-up application is resisted by the company, the appointment of a provisional liquidator will be keenly contested as it would have a dramatic effect on the business of the company in the interim. It will only be granted, as per the relevant Superior Court Rules, 'upon proof by affidavit of sufficient ground' for such appointment. The purpose of appointing a provisional liquidator is usually to prevent dissipation of a company's assets and for this reason a provisional liquidator will generally be granted power to take possession of the assets.

Once the liquidation is commenced by the court order it will typically proceed in the same manner as a CVL subject to certain procedural differences (for example a provisional liquidator's fees and expenses remain subject to approval by the court).

Liquidations (cont.)

2. CVL

The majority of insolvent liquidations are CVL's and are commenced by ordinary resolution of the shareholders, prompted by a recommendation from the board of directors of a company to the effect that, by reason of its liabilities, the company must cease trading. This resolution places the company in liquidation and is followed shortly thereafter by a creditors' meeting.

A summary of the procedure is as follows:

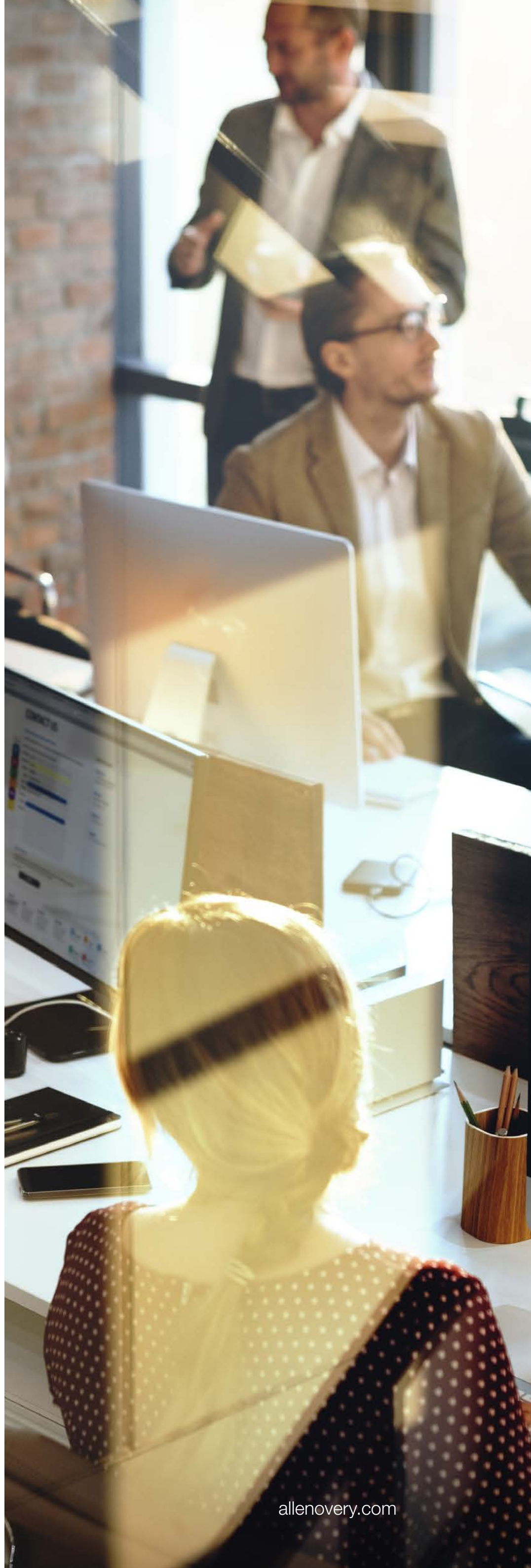
- the directors resolve that, because the company cannot by reason of its liabilities continue trading, steps should be taken to implement a CVL and appoint a liquidator;
- the company convenes a meeting of shareholders to consider resolutions to the effect that (i) the company cannot by reason of its liabilities continue to trade and ought to be wound up voluntarily, (ii) to appoint an identified person as liquidator and (iii) if necessary to nominate individuals to sit on the committee of inspection;
- a meeting of all creditors of the company is convened. Creditors must be given at least 10 days written notice of the meeting, and this notice period cannot be shortened/waived. The meetings must also be advertised in two daily newspapers circulating in the district of the registered office of the company;
- the creditors' meeting must be held on the same day as, or the day immediately following the day of, the shareholders' meeting referred to above;
- the purpose of the creditors' meeting is:
  - to inform the creditors of the winding up resolution passed by the shareholders;
  - to present the directors' statement of affairs to the creditors;
  - to consider the appointment of a liquidator. If creditors representing a majority in value of those attending and voting at the meeting resolve to appoint a different person as liquidator to the person nominated by the shareholders, then the person approved by the creditors will be appointed as liquidator in place of the shareholders' nominee; and
  - to consider whether it is necessary to elect a committee of inspection representing creditors and shareholders to supervise and consult with the liquidator.

In addition to the general obligations in a liquidation identified above, the liquidator(s) of an insolvent company must undertake a review of the conduct of the affairs of the company by its directors and prepare a report to the DCE. In that report the liquidator(s) must express a view as to whether the directors should be subject to restriction (or in extreme cases disqualification) under the CA2014.

3. MVL

A company must be solvent to commence a MVL and the directors must complete a declaration of solvency to the effect that the company will be able to pay all of its debts and liabilities in full within a period not exceeding 12 months from the commencement of liquidation. The directors can be personally liable if it transpires the company is unable to do so and they cannot show reasonable grounds for making the declaration.

Once the declaration has been made a MVL can be commenced by a resolution of the member(s) without recourse to the creditors. As in other liquidations the directors' powers and functions cease on the appointment of the liquidator although in a MVL certain powers can be retained pursuant to the resolution of the members.



Key contacts

If you require advice on any of the matters raised in this document, please contact any of our partners or your usual contact at Allen & Overy, or email **rab@allenovery.com**

This factsheet has been prepared with the assistance of William Fry LLP. Any queries under Irish law may be addressed to the key contacts listed below from William Fry.

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Further information

Developed by Allen & Overy's market-leading Global Restructuring Group, "**Restructuring Across Borders**" is a free and easy-to-use website that provides information and guidance on all key practical aspects of restructuring and insolvency in Europe, the Middle East, Asia and the U.S.

To access this resource, please **click here**.

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