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Banking & Finance

Ireland: Trends & Developments
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2020

Trends and Developments

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The beginning of 2020 seemed to be picking up right where 2019 left off - with financial markets remaining relatively buoyant despite the ongoing Brexit uncertainty. No one could have foreseen the arrival of COVID-19 and the paralysing effects it has had on global markets and, by extension, the domestic Irish market and life in general.

COVID-19

Impact on the Irish banking sector

Even prior to the introduction of strict lockdown measures in Ireland in the middle of March, many business sectors (for example, hotel, hospitality and retail) were already starting to see a negative impact in their revenue as consumer sentiment started to dip. Businesses that had access to undrawn commitments and revolving credit lines fared better in the short term than those who did not. The initial shock led to an influx of queries from lenders and borrowers worried about breaches of payment obligations and financial covenants in their facility agreements.

Payment deferrals and waivers

Given the unprecedented nature of COVID-19, initial advice to both lenders and borrowers in the Irish market was to be proactive, exercise tolerance, open the lines of communication with their counterparts and provide information as early as possible. As businesses hastily conducted financial reviews and attempted to analyse their projected cash flows, it became apparent that many were going to have to negotiate waivers for existing or forecasted payment breaches and/or amendments to the levels of financial covenants as well as having to consider potential COVID-19 specific carve outs for breaches of other restrictive covenants.

With most remedial measures only being temporary in nature as lenders and borrowers wait to see how the COVID-19 pandemic unfolds (most are operating from one interest payment date to the next), lawyers are likely to see this type of work continue until the year end and beyond into 2021, particularly as certain lockdown restrictions are extended or reinstated across the country.

MAC Clause

As well as considering the various payment deferrals and waiver requirements, in the early stages of the pandemic, there was a lot of discussion amongst lawyers around the material adverse change clause (the "MAC Clause") which is typically contained

in facility agreements. The consensus among lawyers was that such clauses, though seldom relied upon or litigated, are only as effective as they are properly drafted and the majority, if not all such clauses, would not have been drafted with COVID-19 in mind and therefore of limited value to lenders and borrowers alike. It is anticipated that MAC Clauses will be the subject of further negotiation and it has already been seen that COVID-19-related qualifiers are being introduced into certain representations and undertakings in facility agreements.

Casualties

As the pandemic has deepened, there have been a number of casualties in the market. Certain businesses who, were most likely already struggling somewhat pre-COVID-19, could not adapt or refinance once COVID-19 struck and have had no option but to seek the protection of the Irish courts by going down the examinership route, as has been the case for CityJet, New Look and Maxim Media, while others have ceased to operate altogether including Debenhams, Mothercare and Inglot. A further 40 plus companies are expected to enter liquidation by the end of the third financial quarter and the expectation is that this is just the tip of the iceberg with the numbers continuing to increase by the end of 2020 and into 2021.

Irish Stakeholders' Response to COVID-19

COVID-19 loans

As the pandemic unfolded, the government announced a stimulus package encompassing "COVID Loans" for business across the spectrum. These loans and the various schemes and initiatives that have been implemented are to incentivise the finance providers to play their role in supporting the availability of additional liquidity to Irish businesses to stimulate a jobs-led recovery and build economic confidence.

COVID-19 Credit Guarantee Scheme

One of the biggest schemes to date is the Irish Government's EUR2 billion COVID-19 Credit Guarantee Scheme, which provides an 80% state-backed guarantee to participating finance providers lending to eligible SMEs, small Mid-Caps and primary producers until the end of 2020 (currently), for terms between three months to six years on loans between EUR10,000 and EUR1 million. In addition, as well as the funds being used to fund working capital and liquidity requirements, in some circumstances, the funds can helpfully be used to refinance existing debt. It is important to note that offering this scheme to customers is at the participating finance provider's sole discre-

tion and businesses who have experienced adverse impacts due to COVID-19 but cannot evidence a realistic chance of future success are unlikely to be able to avail of funds.

It's too early to tell if the scheme will prove popular but under the existing credit guarantee scheme launched in 2018, 200 loans with a value of more than EUR37.6 million have been sanctioned but only 128 of these loans have been drawn down to a value of over EUR24.6 million and no claims have been submitted against the guarantee to the end of 2019.

Pandemic Stabilisation and Recovery Fund

Other state bodies including the Irish Strategic Investment Fund (ISIF), the Strategic Banking Corporation of Ireland, Enterprise Ireland and Microfinance Ireland have all announced their own supports for struggling businesses with loans available from EUR10,000 to €EUR1.5 million plus. In the case of ISIF, it has made available a EUR2 billion Pandemic Stabilisation and Recovery Fund to support medium and large enterprises in Ireland affected by COVID-19. Eligible enterprises must demonstrate that their business was commercially viable prior to COVID-19 and that they can return to viability and contribute to the Irish economy. It is clear that the Irish government bodies are actively working together during these uncertain times to ensure that their respective policy initiatives are complementary such that no sector of the market has not been provided for.

Countercyclical Capital Buffer

In April, the Central Bank of Ireland reduced the Countercyclical Capital Buffer, a time varying capital requirement which applies to banks and investment firms, from 1% to 0% in order to reduce the potential for regulatory capital requirements acting as an impediment to the supply of credit in the Irish economy. This is another measure introduced by the Government to support the Irish economy through the economic shocks arising from COVID-19 and to enable the banking system to be more resilient and less pro-cyclical given lessons learnt from the recession in 2008. The Central Bank does not expect any subsequent increase to be made before the first quarter of 2021.

Companies (Miscellaneous Provisions) (COVID-19) Act 2020 (the "COVID Act")

As well as new governmental schemes and policies being introduced, Irish company law has recently been amended as a direct result of COVID-19. The COVID Act became law on 21 August 2020 and introduced some welcomed legislative initiatives to a number of net areas of law that have created challenges for Irish companies over the past few months. Among the changes made, it has increased the protection period in an examinership up to 150 days (up from a maximum of 100 days) in exceptional circumstances and has increased the threshold at which a company is deemed unable to pay its debts to EUR50,000 (up

from EUR10,000, or EUR20,000 where two or more creditors are acting together).

The COVID Act applies for an interim period only, currently expiring on 31 December 2020. Though temporary in nature, the changes brought about as a result of the COVID Act are another example of measures being introduced to give additional breathing space to struggling Irish businesses while complementing the existing supports provided by the government stimulus packages.

Practical Considerations Arising as a Result of COVID-19

E-signing

With the number of Ireland's workforce working remotely as a result of COVID-19, businesses have been trying to stay connected and ensure business continuity. An important factor arising in light of this is the ability to sign documents using electronic signatures.

While electronic signatures have been legally recognised in Ireland since the Electronic Commerce Act 2000 (which implemented the Electronic Signatures Directive 1999/93/EC) was enacted, its adoption has been minimal. This is due in part to practitioner's familiarity with "wet-ink" signatures and a general unease around the process of e-signing. Lenders, borrowers and practitioners who adapted to working remotely now faced additional hurdles in order to close out existing and new transactions.

The pandemic has forced lawyers, with the benefit of The Law Society of Ireland's guidance note on "E-Signatures, Electronic Contracts and Certain other Electronic Transactions", issued in March 2020, and their clients to engage with the use of e-signatures and has accelerated their general adoption in the Irish market in line with other jurisdictions, particularly the USA.

Execution of deeds in counterpart

Given the statutory requirements for the execution of deeds which, in Ireland, requires the affixing of a physical seal for an Irish incorporated company and the counter-signing by either two directors or one director and the company secretary, difficulties arose when company directors were forced to work from home and no longer had access to each other nor indeed to the company seal. Deeds can, however, also be executed by way of a power of attorney (noting that such attorney's signature must be witnessed by a third party) providing a flexible alternative in the current circumstances. Nevertheless, the recent introduction of the COVID Act has provided a welcome workaround for the execution of deeds.

Now, companies who are either unable or unwilling to grant a power of attorney, may seal and execute a deed in counter-

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part and it is considered one instrument for the purpose of the Companies Act, 2014. Though the measures under the COVID Act are only temporary, it has sparked a discussion on the electronic execution of deeds. While the EU's eIDAS Regulation provides for the recognition of electronic seals and contemplates the technology to implement them, that technology is not yet in use in Ireland. This may well change as more businesses are exposed to the use of e-signing as a matter of necessity during COVID-19.

CRO's digital transformation project

A knock-on consequence from the use of e-signatures was whether it would affect the perfection of security. The Irish Companies Registration Office (CRO) has made great strides in the last five years in developing an online system to facilitate the registration of certain filings via its CORE (Companies Online Registration Environment) portal. However, transactions that required certain manual filings to be physically delivered were left in doubt when the CRO had to send their staff home in March 2020 and closed postal applications.

To the CRO's credit, a temporary solution was quickly put in place and COVID-19 just highlights the need for a more comprehensive e-filing regime. The CRO is currently undergoing a Digital Transformation Project which aims to have 95% of forms available to file online and see the CORE portal updated. The launch was due to be completed in September 2020 but has been postponed until December 2020, yet with remote working becoming the norm, the roll out will be of significant benefit to practitioners, lenders and borrowers.

Director's duties

Not since the global recession in 2008 have directors' duties come under such detailed scrutiny. With the anticipated increase in insolvent liquidations arising from COVID-19, directors are understandably worried about finding themselves subject to restriction and disqualification orders for breach of their duties.

The Office of the Director of Corporate Enforcement (ODCE) moved to clarify directors' duties in light of COVID-19 by issuing a helpful publication in June 2020 which should provide comfort to directors. It reiterates that the directors of an insolvent company should continue to act honestly and responsibly, in good faith, in the best interests of the company, and at all times exercise reasonable judgement given the circumstances. The guidance shows that the ODCE is cognisant of the external factors that can impact a company.

As for the COVID-19 pandemic itself, it has opened director's eyes to their ongoing duties which one should remember are owed to the company both in good times and in bad.

Regulation

Register of Beneficial Ownership

Since the introduction of the Central Register of Beneficial Ownership of Companies and Industrial and Provident Societies (the "Central Register"), there was concern that compliance with the legislation would be low, with reports in November 2019 stating that only 21% of Irish based businesses had submitted information to the Central Register. More recent figures show that the situation is improving with 80% of companies and 59.4% of industrial and provident societies registered as at February 2020.

A further step in the roll out of the EU's beneficial ownership regime sees ICAVs and unit trusts both required to report beneficial ownership information to the Central Bank by 25 December 2020. The practical consequence of this is that lenders are requesting delivery of a copy of the register of beneficial owners of a borrower as a condition precedent to closing.

The Central Register is part of the EU's action plan for a comprehensive policy on preventing money laundering and terrorism financing and one of the elements of the Fifth Anti-Money Laundering Directive (MLD5). In May 2020, the European Commission sent a letter of formal notice to Ireland for having only partially transposed MLD5 by the deadline of 10 January 2020. With the deadline for transposing the Sixth Anti-Money Laundering Directive fast approaching on 3 December 2020, Ireland is in danger of once again falling behind.

Fund financing

Ireland has managed to position itself as one of the major players in the creation and management of investment funds globally, though in recent years, its competitiveness as a jurisdiction of choice has waned somewhat against other jurisdictions. As of June 2020, assets in Irish domiciled funds reached EUR3.03 trillion with approximately 40% of the world's alternative investment funds being administered in Ireland.

Investment Limited Partnerships (ILPs) are the most popular and widely used collective investment vehicle globally though only a handful of ILPs have been established in Ireland since the enactment of the Investment Limited Partnerships Act 1994 (the "ILP Act"). The Investment Limited Partnership (Amendment) Bill 2019 (the "Bill") proposes changes that would align ILPs in Ireland more closely with equivalent structures in other international funds domiciles (eg, the Cayman Islands and Luxembourg) and are expected to make ILPs more appealing to venture capital and private equity funds in particular, where partnership structures are the default legal form.

Once the ILP Act has been reformed, it is expected that it will make Ireland a jurisdiction of choice for the domiciling and

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servicing of real assets, private equity and infrastructure funds. On 3 September 2020, the Business Committee of Dáil Éireann (Ireland's Lower House of Parliament) agreed to a request from the Minister for Finance to waive the requirement for pre-legislative scrutiny of the Bill indicating continued support of the Bill, notwithstanding the recent change in government and economic climate.

Looking Forward

Brexit

With all that has been going on in the last few months, one would be forgiven for forgetting that the end of the Brexit transition period is fast approaching. The EU Commission has said that a trade deal will need to be finalised by 26 November 2020 if there is any chance of it being ratified before the year is out. Undoubtedly, how Brexit plays out in the coming months will have a big impact on the lending market in Ireland but may also provide opportunities for those lenders well positioned to capitalise on the fallout from Brexit.

Alternate lenders

COVID-19 represents the first real challenge for alternate lenders since they moved into Ireland following the 2008 financial crash chasing returns. One advantage the alternate lenders have over the domestic pillar banks is that they tend to be "closed ended", that is, their funders can't withdraw their investment and walk away at the first sign of trouble. This represents a certain confidence in the market and commitment to Ireland in the longer term. Alternate lenders being unregulated are more concerned with their return on investment and as a result are better able to deal with impaired loans and more willing to restructure non-performing loans.

The first financial quarter of 2020 saw a big drop in European alternate lending, primarily as a result of the warehouse lenders, who part fund alternate lenders and are more risk adverse than their clients, putting a hold on funding of new deals in light of COVID-19. Alternate lenders have a small market share in Ireland and only time will tell if they can capitalise on COVID-19 to increase this or perhaps whether they withdraw from the market altogether.

Sustainable finance

Notwithstanding the impact of COVID-19, 2020 saw the EU continue to push towards a harmonised framework for sustainable finance. The Taxonomy Regulation, adopted in June 2020, sets out an EU-wide classification system and provides a common method for investors to identify environmentally sustainable economic activities and encourage private investment in those activities.

The move towards sustainable finance in Ireland is particularly important in light of Project Ireland 2040 which sets out the Government's long-term strategy for developing Ireland's infrastructure over the next 20 years, including an investment package of EUR116 billion in the years to 2027 with climate change objectives to fundamentally shape public capital investment choices across a range of sectoral areas.

Currently the taxonomy is limited to environmental objectives, but the development of a social and governance-focused taxonomy is likely to be accelerated in light of COVID-19.

Conclusion

The banking sector in Ireland has previously proven to be resilient in times of uncertainty and flux and there will no doubt be plenty of both in the future. As 2020 comes to a close, 2021 begins and the new normal has been solidly established, lawyers and their clients alike would do well to stay alert and flexible as changes are inevitable and those who are unable or unwilling to adapt may get left behind or worse.

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The Maples Group, through its leading international law firm, Maples and Calder, advises global financial, institutional, business and private clients on the laws of the British Virgin Islands, the Cayman Islands, Ireland, Jersey and Luxembourg. With offices in key jurisdictions around the world, the Maples Group has specific strengths in the areas of finance and banking, corporate commercial, investment funds, litigation and trusts. The banking and finance team in the Maples Group's Dublin office has a diverse practice and comprises three partners and

four associates. The team acts as lead counsel, as well as local counsel, for lenders and borrowers on a wide range of domestic and cross-border debt financings, including corporate and leveraged finance, real estate finance and funds finance, and provides commercially focused and solutions-oriented advice to clients. The firm's international perspective, working with both Irish and international financial and institutional clients, ensures best-in-class advice.

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