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The Hot Issue

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The **HOT** **100**

*The lawyers to watch out
for in 2021*

An aerial night photograph of a city, likely Dublin, featuring a river, bridges, and a large stadium with a distinctive roof structure. The city lights are visible in the background.

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New jurisdiction of choice for international restructurings?



Gabriella Kane

Now that Brexit is a reality, Ireland may be ideally placed as a nation inside the EU which has strong connections with the US and UK

On the panel



David Baxter
Head of restructuring,
A&L Goodbody



Nicholas Butcher
Ireland managing partner,
Maples and Calder



William Day
Head of restructuring and
insolvency, Arthur Cox



John Donald
Restructuring and insolvency
partner, Arthur Cox



Fergus Doorly
Head of corporate restructuring
& insolvency, William Fry



Jamie Ensor
Insolvency and corporate
recovery partner, Dillon Eustace



Kathleen Garrett
Finance partner,
Arthur Cox



Ruairi Rynn
Corporate restructuring and
insolvency partner, William Fry



With Brexit now a reality and the Withdrawal Agreement/Trade and Cooperation Agreement not providing all the answers, Irish restructuring lawyers have spent the past four years analysing the implications of some of the key EU insolvency rules that no longer apply in the UK and have focused on devising workarounds to make matters run as smoothly as possible.

The lawyers have been actively promoting Ireland as a jurisdiction in which to pursue complex international restructurings. Brexit has given that some impetus in so far as parties have begun looking at other options to secure EU wide (and broader international recognition) and have been able to see the benefit of Irish processes.

Brexit presents “both challenges to traditional option analysis and opportunities to look again at Irish processes for companies,” says William Fry’s head of corporate restructuring Fergus Doorly. “It has also required us to blow the dust off some of the older conflicts of laws books on international jurisdiction!”

Some of Ireland’s top firms spoke to *The Lawyer* about why Ireland is the jurisdiction of choice for international restructurings.

Q *What steps did and your practice take to prepare for Brexit?*

Jamie Ensor, Dillon Eustace: Our focus has been to be pro-active in working with our clients to identify as early as possible areas of weakness, threat and opportunity arising from Brexit and to advise them accordingly on their contingency planning. The firm’s pre-Brexit advisory work has been wide-ranging and varied. We have assisted our UK clients in retaining access to the EU markets through Ireland (including by way of establishing new Irish regulated hubs). We have also advised non-EU clients who may previously have chosen the UK as an EU domicile on how to access the rest of the EU through Ireland. There has been considerable associated regulatory and compliance advice required.

We have also (in conjunction with UK counsel where required) advised our Irish clients who operate in the UK on UK branch establishments, the impact of Brexit on EMIR, GDPR, the marketing of AIFs and UCITS to UK investors and a variety of other matters. For some time now clients have also been considering whether contracts that traditionally would have been governed by the laws of England and Wales



“

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Fergus Doorly, William Fry

Implementation Group, chaired by former taoiseach (or prime minister) and ambassador of the European Union to the United States John Bruton to promote Ireland as a leading centre globally for international legal services as part of its strategic response to Brexit in October 2019. It followed from a substantive report from the Law Society of Ireland and Bar Council of Ireland.

The group operates under the banner brand Ireland for Law (www.irelandforlaw.com) and has a broad mandate to promote Ireland as an international legal hub. This includes increasing the importance of Ireland as a hub for cross-border restructuring post-Brexit and highlighting the examinership regime and Irish schemes as effective tools for corporate restructuring post-Brexit. It has undertaken a number of specific briefings to international legal communities including a recent webinar with the New York State Bar entitled Using Irish Law and Courts for Corporate Restructuring, Intellectual Property, Data Protection, and Derivatives.

Ensor: In March 2019, Ireland signed a host country agreement with the Permanent Court of Arbitration in The Hague, which will provide a basis for international arbitration to take place in Ireland. The International Swaps and Derivatives Association Inc. (ISDA) in 2018 published an Irish version of its 2002 ISDA Master Agreement. Post-Brexit, it will enable parties to continue to transact derivatives under the laws of Ireland, as a remaining member state that is a common law jurisdiction. ►

and opted for the courts in London to hear disputes should be replaced with an alternative jurisdictional clause in favour of a remaining EU member state.

Q *How have the Irish government and state agencies promoted the use of Irish law and Irish legal services?*

Kathleen Garrett, Arthur Cox: The single biggest change in the past few years has been the appointment of specialist corporate and insolvency judges (including, in particular, the appointment of Mr Justice Michael Quinn, former insolvency and restructuring partner at one of Ireland’s largest corporate law firms). These judicial appointments have brought specialist expertise to the application of existing restructuring procedures in recent cross-border cases such as Weatherford, Ballantyne Reinsurance, Nordic Aviation and Norwegian Air Shuttle SAS.

Ruairi Rynn, William Fry: The Irish Government launched the Legal Services

Introducing 10 new partners in our Dublin and Belfast offices

Despite so much change and disruption, one thing is certain. We always invest in our people, our client service and our future.



Brian O'Malley
Restructuring & Insolvency



Noeleen Meehan
Employment



Mark Devane
*Financial Regulation
& Investigations*



Louise Byrne
White Collar Crime



Nicholas Cole
*Litigation & Dispute
Resolution*



David Fitzgerald
Property



Gregory Martin
Property – Belfast



Gillian McDonald
Legal Project Management



Robbie O'Driscoll
Finance



Christopher Jessup
Financial Regulation – Belfast

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Pictured from left to right are partners Niamh McGovern, Geoff Moore (Managing Partner), Ruth Lillis and Sarah McCague.

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Q What opportunities does Brexit present around utilising Ireland as a European hub for international restructurings?

Nicholas Butcher, Maples and Calder: Post-Brexit, Ireland has become the largest common law jurisdiction in the EU. Ireland's court system is efficient, pro-business, and the legal professional services sector has gained a strong global reputation as a centre of excellence. Multinationals should remember the benefits that the Irish legal sector can offer when considering basing operations abroad. Ireland is a safe and reliable EU jurisdiction, and our clients like that certainty.

Rynn: Regardless of Brexit, Ireland has much to offer as a European hub for international restructurings. We have two key processes: the Irish law scheme of arrangement (the 'Irish Scheme') and examinership, which are highly effective and compare strongly with the other international processes.

The Irish scheme is effectively identical to the better known English schemes with the same voting thresholds, jurisdictional basis (Irish companies and companies with a 'sufficient connection' to Ireland), class analysis, procedure, ability to bind third parties and international recognition. It has been increasingly used by Irish companies and international groups to implement complex restructurings in the past two years.

Examinership is a statutory framework for restructuring companies in financial difficulty and is broadly comparable to Chapter 11 of the US Bankruptcy Code. It is available to any company that has its centre of main interests (COMI) or an establishment in Ireland, any Irish incorporated company with a COMI outside the EU or a non-EU company that is related to an Irish company and has a sufficient connection to the jurisdiction. Key features include:

- an automatic stay of 100 to 150 days on creditor actions to provide a company with breathing space to restructure;
- the company must have a reasonable prospect of survival as a going concern to avail of the process;
- an independent examiner formulates proposals for the restructuring of the company which, once approved, are binding on the company and all its members and creditors;
- only one class of impaired creditor is required to approve the proposals by simple majority with the Irish High Court subsequently confirming the proposals; and



- cross class cram down is a frequent feature of an examinership.

Examinerships have been used to implement international restructurings in conjunction with a Chapter 11 process and are currently being deployed by Norwegian Air in its restructuring.

Brexit offers an opportunity for parties seeking EU-wide restructuring to implement this restructuring through Ireland as either an alternative or complementary process to the English scheme.

The Irish scheme will continue to benefit from EU-wide recognition on the basis of the rules and principles developed around English schemes following Brexit while offering a familiar process to the English scheme to experienced stakeholders and an effective judiciary and legal system. Furthermore, examinerships will continue to benefit from wide-ranging recognition and enforcement throughout the EU under the EU insolvency regulation.

William Day, Arthur Cox: We see the principal opportunities for utilising Ireland as a European restructuring hub as being:

- Assisting with cross-border restructurings by providing access to EU-wide recognition through the use of an Irish (and therefore an EU) process to implement restructurings that are negotiated in the UK and elsewhere (with s.426 of the UK Insolvency Act in particular allowing for UK recognition of Irish restructuring and insolvency procedures); and

- Given that a significant number of US businesses have one or more material Irish companies within their corporate structures, we also believe that Ireland will continue to be seen as an appropriate forum for the implementation of US-led restructuring cases (primarily through Chapter 11) by means of the commencement of parallel examinership or scheme of arrangement proceedings in Ireland. This will particularly be the case where the parent company is Irish, and the restructuring involves a debt for equity aspect, as was the position in the recent Weatherford case.

Although opportunities will arise across all industries, Ireland's prominence in particular industries, such as aircraft leasing, is likely to give rise to significant cross-border restructuring in this jurisdiction.

In addition, the availability of tried and tested restructuring processes in Ireland facilitates informal restructurings without recourse to those procedures themselves.

Q What are the Irish corporate and debt restructuring alternatives?

John Donald, Arthur Cox: We have schemes of arrangement, which are very similar procedurally and substantively to schemes of arrangement under UK law, and which have been available under the Companies Act of Ireland for over 60 years. In recent decades, schemes of arrangement have often been employed as a means to implement M&A transactions. However, they have also been employed more recently as a restructuring



tool for companies in financial difficulty. Recent cases involving Irish law schemes of arrangement include Nordic Aviation Capital, Ballantyne Reinsurance and two Asia Pulp Paper subsidiaries.

We also have examinership, which is broadly analogous to Chapter 11 under US law (albeit that there are a number of significant differences).

The principal difference between the examinership and the scheme of arrangement procedures is that, in order for the Court to confirm a Companies Act scheme of arrangement, at least 75 per cent of every affected class must approve the terms of the scheme. However, cross class cram down is available under the examinership procedure, and the Court can confirm the restructuring provided that at least one class of impaired creditor has voted in favour by a bare majority of 50 per cent plus.

Butcher: An example of how this works in practice is the Irish High Court's approval of the recent scheme of arrangement in respect of Nordic Aviation Capital, the world's largest regional aircraft leasing company. The scheme restructured approximately \$5.9bn (£4.3bn) of English, New York and German law-governed debt.

The approval of the Nordic scheme demonstrates that Irish schemes can provide a flexible and efficient tool for complex international debt restructurings. The Nordic scheme builds upon the recent trend of Irish schemes being used to effect debt restructurings of large international groups and showcases Ireland's ability to act as the jurisdiction of choice for such restructuring.

Q *What challenges will Ireland face over the next year?*

David Baxter, A&L Goodbody: Ireland's main challenges will revolve around: Covid-19 and fully opening up the economy at the correct time; managing the Brexit consequences, particularly around trade and supply chain frictions; and working through a plan to deal with the significant spike in government debt taken on during the pandemic (an expected €3bn surplus in 2020 has become a €19bn deficit).

The pandemic has demonstrated the need for Ireland to refocus its efforts in attracting tech and other knowledge sectors.

That said, Ireland should be confident in terms of its ongoing ability to attract international investment, to continue to build on its centres of excellences in sectors such as tech, pharma and aircraft

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The approval of the Nordic scheme demonstrates that Irish schemes can provide a flexible and efficient tool for complex international debt restructurings”

*Nicholas Butcher,
Maples and Calder*



leasing and to ensure it is a material player within the EU. Ireland has been very attractive as a foreign direct investment location because of its access to the EU's internal market; that will continue and there is almost no chance of Ireland following the UK in leaving the EU.

Ensor: As things stand, the Government's income supports to businesses are to continue to March 2021, but may be continued beyond that. Government Covid-19 loan and grant schemes are to continue to June 2021. The commercial rates waiver is due to end in March.

The Revenue's business support measures and debt warehousing schemes are also proposed to end this year. Unfortunately, this all points toward a significant number of companies that are currently on life

support, many of which will inevitably not be in a position to trade on when the business supports do come to an end, regardless of when that might be.

What will be of vital importance is that for those companies that are viable businesses, particularly those in the SME sector, that the Government's business support measures continue until the economy returns to some sort of normality.

Whether the economy can sustain the level of borrowings to keep those business supports going for that long is uncertain. The employee wage subsidies and Covid support schemes alone cost over €4.2bn last year. One way or another it is anticipated that the level of insolvencies and restructurings in the SME sector, much of which were postponed in 2020 because of the supports available, will see a marked increase in 2021. ●