GRR Global Restructuring Review

Pioneering pathways for restructuring US law-governed debt in Ireland

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Dublin-based Maples of counsel **Kathlene Burke** and partners **Robin McDonnell** and **Karole Cuddihy** highlight a series of recent cross-border restructurings carried out using Irish restructuring tools and makes the case that multinational debtors and creditors should increasingly consider using Irish processes as the global economy continues to evolve.

Ireland has emerged as a strategic jurisdiction for companies seeking to restructure US law-governed debt. The innovative use of Irish corporate restructuring mechanisms has provided multinational corporations with effective tools to navigate complex cross-border financial restructurings.

The recent rise of using Irish proceedings as an ancillary proceeding to a US Chapter 11 proceeding to recognise and enforce restructurings in Ireland, and consequently the EU and potentially more widely, and the use of Irish proceedings as the main proceeding with Chapter 15 recognition, shows the flexibility and creativity of the jurisdiction, offering unique, cost efficient options and benefits to enable debtors to achieve their objectives.

Endo International: a new era of recognition

The recent case of Endo International marks a significant development in cross-border insolvency practices. By using an Irish Part 9 scheme of arrangement, a powerful restructuring tool on its own, and combining it with a US Chapter 11 proceeding, Endo was able to recognise and enforce its US restructuring plan in Ireland. The dual process released litigation claims for Endo across the EU, not only for its parent, but also non-debtor affiliates and related parties.

The success of the approach in Endo highlights the Irish legal system's capacity to align with international insolvency proceedings, providing a streamlined process for multinational corporations seeking to restructure their debts and requiring recognition and enforcement of that restructuring in EU states.

Endo is a US pharmaceuticals company with its headquarters located in Ireland. The company filed for bankruptcy in the US in August 2022 to restructure US$6 billion in debt, partly due to a wave of litigation relating to the opioid crisis. Following more than a year of negotiations, a Chapter 11 plan (US plan) was put forward for confirmation in New York. To implement the US plan in Ireland and to ensure the debtor companies and various parties benefited from the release of claims across Ireland and the EU, Endo also filed a parallel Part 9 scheme in Ireland (Irish scheme).

An Irish Part 9 scheme is a legal mechanism that allows a company to reach a binding agreement with its creditors or members (or any class of them) to restructure its debt. The company puts forward a restructuring proposal, which must be approved by a majority in number representing at least 75% in value of the creditors or members (present and voting) of

each class that has been included in the scheme.

Once the scheme is approved by these stakeholders, the company must then seek the court's sanction for the scheme to become effective. A scheme is a flexible tool that can provide for a variety of arrangements, including debt rescheduling, debt-for-equity swaps, and the release or compromise of claims, provided there is some level of “give and take” for each class included in the scheme.

Schemes of arrangement are a tried and tested restructuring tool which increase the legal certainty of the process. They provide a valuable alternative to insolvency proceedings, aiming to facilitate the survival of a company or the better realisation of its assets than would be the case in a liquidation.

Endo's Irish scheme was novel in that it was a parallel proceeding that relied upon the primary Chapter 11 proceeding for both the majority of the substantive content of the plan and the logistics of seeking approvals. Both the US plan and the Irish scheme were dependent on the approval of each other. But the Irish scheme and explanatory statement were only 69 pages and were almost entirely referential to the US plan, while the US plan alone spanned over 200 pages and represented a fulsome traditional Chapter 11 plan.

The Irish scheme was a bolt on to the Chapter 11 plan that, for efficiency, leveraged off the Chapter 11 plan as far as possible. The Irish scheme solicitation and voting was completed as part of the US plan process with no separate solicitation and voting. The US plan ballots provided that the Irish scheme creditors’ votes solicited through the US plan process would also be votes in respect of the Irish scheme.

The Irish scheme functioned as a recognition and enforcement proceeding with the Irish High Court approving certain provisions of the US plan and various non-consensual third-party releases for the parent scheme debtor and all of its affiliates in Ireland (and by virtue of the Brussels Regulation, across the EU), with a few key distinctions.

First, although most of Endo's major subsidiaries each filed their own Chapter 11 case and were part of the US plan, only the Irish parent needed to file in Ireland. Aside from the parent, none of the Chapter 11 debtor affiliates were debtors in respect of the Irish scheme. The parent used a deed of indemnity and contribution to take on the liabilities of all its subsidiaries and released those claims through the Irish scheme, obviating the need for each subsidiary to have a “sufficient connection” to Ireland, which would have been required had all of the subsidiaries sought to release their own liability through individual schemes. The Irish High Court accepted that there were “strong commercial reasons” that made it appropriate for the parent to enter into the deed of indemnity and contribution and approved its use in the Irish scheme.

Second, the Irish scheme only included a subset of the US plan creditors. A debtor can choose which classes of creditors to include in a scheme, whereas in a Chapter 11 case all creditors must be included. However, notwithstanding that the debtors and creditors were different and, in some cases, slightly mismatched, the solicitation agent was able to separately tally the votes for the US plan and the Irish scheme all as part of one solicitation process.

Finally, despite having different legal tests for sanction of a scheme in comparison to the test applied to confirm Chapter 11 plans, the Irish High Court was comfortable with the approach taken in the joint solicitation process. At the sanction hearing, the Irish High Court looked to the evidence that was adduced to independently confirm the requirements contained in the Irish Companies Act 2014 had been satisfied, making findings of fact and conclusions of law on the satisfaction of notice procedures, voting, class constitution and the statutory requirements for sanctioning a scheme. In all those areas, the Irish High Court was satisfied that the Irish scheme should be sanctioned.

The approach in Endo contrasts with prior cases, such as Mallinckrodt and Weatherford, where an Irish examinership process was used for recognition and enforcement purposes. Examinership under Part 10 of the Irish Companies Act 2014 is a rescue mechanism specific to Irish law that allows for court protection under the supervision of a court-appointed examiner. The examiner works with the company to put forward a scheme of arrangement that can include many Chapter 11-like powers, such as repudiating burdensome contracts or cancelling and issuing Irish shares. While examinership is a well-worn path for recognition and enforcement used in parallel with foreign proceedings, the Part 9 scheme offers another alternative for EU recognition. Although these processes both use the term 'scheme of arrangement' to describe the plan for emergence, the estates' powers and protections, scheme approval requirements and court procedures are very different. Determining which scheme process is the right fit depends on the facts.

Irish procedures as the primary proceeding

In instances where Irish restructuring procedures have been used as the primary restructuring tool, the outcomes have also been successful.

A Part 9 scheme was effectively employed by reinsurance special purpose vehicle Ballantyne Re (Ambac) demonstrating its versatility and robustness in handling large-scale restructurings. When combined with a US Chapter 15 recognition process, the scheme restructured US$1.65 billion of New York-law governed notes.

Norwegian Air used a Part 10 examinership process alongside a parallel Norwegian restructuring proceeding and a Chapter 15 recognition to compromise US$3.6 billion in debt, repudiate aircraft leases and raise US$535 million in new capital. A significant number of Norwegian Air’s leases were governed by English law but the Irish High Court was satisfied that the

Irish repudiation orders and the examiner's proposals could be recognised in England under section 426 of the UK Insolvency Act 1986, notwithstanding the English Rule in Gibbs (which has the effect that English law-governed debt and contracts cannot be discharged or compromised by a foreign insolvency proceeding).

Ireland is the only EU member state entitled to avail itself of the assistance provisions under section 426 of the UK Insolvency Act, providing a unique advantage now that the UK is no longer a member of the EU. Using these procedures together gave Norwegian Air's restructuring effectiveness across the US, UK, the EU and Norway.

Finally, paper product manufacturer Asia Pulp and Paper (aka Indah Kiat / Lighthouse) used a Part 11 (winding up) scheme of arrangement to restructure approximately US$1 billion in New York law-governed debt (APP liabilities) in Ireland and to obtain non-debtor releases for its affiliated companies.

In 2001, the APP group declared a standstill and subsequently consensually restructured approximately US$13.7 billion of outstanding debt. The remaining US$1 billion was not able to be resolved consensually. APP's subsidiary Indah Kiat initially put forward an English scheme of arrangement to restructure the debt, but the English court refused to convene creditor meetings and questioned whether the creditors could be grouped all together in the proposed scheme.

After the failed English scheme, APP formed a new Irish SPV, Lighthouse, to put forward an Irish Part 11 scheme, which involved executing a deed of contribution to assume and release the APP liabilities of its parent and affiliates. A Part 11 scheme can be used when the company is about to be or is in the course of being wound up. The scheme requires consent of 75% of all creditors with no requirement for creditors to be divided into classes. Approximately 90% of the scheme creditors approved the terms of the restructuring, which was recognised under Chapter 15 to discharge the New York law-governed debt and release Lighthouse, Indah Kiat, APP and the liquidator from liability. The restructuring showed the effectiveness of Irish procedures to implement complex international debt restructurings, even where other procedures have failed.

All three cases illustrate the strategic utilisation of Irish restructuring mechanisms, which have proven to be highly effective in facilitating complex cross-border restructurings to achieve comprehensive global solutions. The unique position of Ireland, being: the sole EU member state with the entitlement to invoke the recognition provisions under section 426 of the UK Insolvency Act; and in being able to benefit from the recognition and enforcement of restructurings across the EU through European Regulations designed to recognise and enforce EU judgments, further enhances the appeal of Ireland's restructuring framework.

The pro-release and pro-COMI-shifting stance taken by the Irish courts has led to successful outcomes for debtors through Irish restructuring procedures, especially when previous attempts in other jurisdictions failed to yield the desired outcomes. Collectively, these instances not only highlight the robustness and versatility of Irish restructuring procedures but also their compatibility and effectiveness in the broader context of international insolvency law.

Conclusion

Ireland's innovative use of corporate restructuring mechanisms has positioned it to become a key player in the global debt restructuring arena. The synergies between Irish and American insolvency frameworks provide a pathway that benefits multinational corporations facing complex multijurisdictional financial challenges. By leveraging the strengths of both jurisdictions, companies can broaden the jurisdictions in which a restructuring is capable of recognition and enforcement providing efficient and effective outcomes. As the global economy continues to evolve, the strategic use of Irish restructuring tools either alone or in conjunction with other global procedures is one that multinational debtors and creditors should increasingly be considering.

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