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Navigating the Crisis: A Spotlight on Business Re-organisation, Examinerships and Schemes of Arrangement

One of the abiding characteristics of the current global crisis is the uncertainty it has created in all aspects of life. Information and patterns are evolving daily, events have accelerated beyond our ability to process them and daily life has changed completely. There is a stark lack of certainty about what the future holds. Unfortunately, this also holds true in business.

Businesses are currently focused on day-to-day survival, managing cash flow as best possible and minimising costs.

Significant state and European Union (EU) aid will be required to counter an impending recession. The initial EUR 7 billion (bn) in funding announced by the Irish Government and EUR 750 bn bond-buying scheme by the European Central Bank are welcome, with additional EU support being negotiated as we speak. All indications are that governments are resolute in the need for producing large-scale global economic emergency responses.

Businesses will need to reorganise and plan for a new economic reality in which even the most optimistic forecasts assume that a large-scale recession is now inevitable.

The best scenario when navigating a challenging economic environment is to through an agreed negotiated position, allowing the business to maintain its core network of clients and supports and the maximum continuity in a period of extreme uncertainty. Achieving this requires presenting well thought out, realistic plans and proposals to obtain buy-in.

In order to avail of bank funding or government grant support, it is important to present your plans in a sufficiently clear, concise manner. Unfortunately, no matter how far-reaching economic stimulus is, it will be finite. In addition, the various funding bodies will be inundated with requests and will likely suffer from capacity constraints. To ensure the best possible outcome, it is vital to optimise your interactions with these organisations.

When using these supports, it is important to be aware of their priorities, the frameworks they operate in and the key criteria they require for providing support. This will enable you to best articulate how your company meets their requirements.

In addition to funding supports, businesses will need to proactively engage with other key stakeholders including staff, shareholders, landlords, Revenue Commissioners, trade creditors and suppliers.

The primary components to achieve a business reorganisation are worth re-stating:

PREPARE YOUR SHORT TO MEDIUM-TERM PLANS

You should prepare and regularly update rolling 13-week trading forecasts and cash flows in the context of the new trading environment, you are facing into. When doing so, consider questions such as: what fundamentals of your business have changed; have certain creditors provided forbearance and will this be addressed; has your supply chain altered; can previous trading patterns be resumed?

SCENARIO ASSESSMENT

It is important to look at different potential outcomes over the short to medium-term horizon and at base-case and worst-case scenarios. Use these scenarios to support decision making and ensure your business is robust if expected trading patterns don't materialise.

REACH OUT TO FUNDERS AND CREDITORS

Use your prepared and stress-tested forecasts to negotiate with your funders, be that for fresh capital, forbearance or restricted debt.

As well as using debt and equity to stabilise a company, creditor support and altered supply agreements may be an essential plank of any re-organisation process.

A significant number of businesses will need to recalibrate their balance sheet to continue trading on a long-term basis. As such, it will be a market feature people will come to expect. Being open, transparent and communicative during this process tends to yield the greatest results.

In seeking to informally renegotiate your position, an understanding of the broader legislation and principles which guide restructuring and insolvency can be vital in ensuring that any deal achieved is at least better than that available through more formal processes.

Banks, PE funds and large-scale creditors will, in part, be steered by the outcomes they would achieve through more formal processes and businesses should do the same.

Sometimes it is not possible to reorganise through an informal process and formal processes such as examinerships and schemes of arrangement can be useful in bringing about the fundamental changes needed to ensure business survival. Depending on circumstances either or both may be appropriate.

EXAMINERSHIPS

The Irish landscape has more traditionally used examinerships as a form of business rescue. The process provides court protection, for a maximum of 100 days, to a company while the examiner seeks to restructure the business and implement a scheme of arrangement where creditors must obtain at least what they would obtain if the company was wound up or placed in liquidation.

The process is intensive and best outcomes are achieved when pre-planning is maximised. Examinerships can be relatively costly and should be entered into with a clear picture of the likely outcomes, rather than as a last resort.

Examinerships enable existing management to retain control throughout the process and protects the company from the appointment of a receiver or liquidator during the 100-day protection period. The company can continue to trade throughout the process, providing management with time and space to rescue their business.

This gives those most familiar with the company an opportunity to contribute towards its rescue, and if feasible, to retain control on a long-term basis.

SCHEMES OF ARRANGEMENT

For challenged businesses, court sanctioned schemes of arrangement can be a useful means to reorganise the debt position of a company. Though less commonly used than examinerships, there are specific advantages to schemes of arrangement which can be utilised for timely, cost-effective reorganisation.

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Schemes of arrangement are typically brought forward by the company's directors. The directors will retain control of the company while the scheme is being implemented and can continue to trade.

An application can be made to the court to protect a company intending to enter into a scheme of arrangement from its creditors, although this is not a legal requirement, it can be useful in providing the space to implement the scheme.

The benchmark for approving a scheme of arrangement is high, with 75% of creditors by value and 50% by number required to support the scheme. If 75% of creditors support the scheme, then it is binding on all creditors. Historically, this has been a major disadvantage of schemes of arrangements undertaken outside the examinership process, however we expect that, in the new economic reality where large-scale balance sheet restructuring may be needed, they may become more prevalent.

It is worth noting that a scheme of arrangement can be used to deal with one class of creditor rather than all creditors, and as such can be tailored to deal with the specific circumstances of the company. Schemes of arrangement can, and often are, used to alter the capital and/or shareholding structure of a company.

For a scheme to be successful, it must be constructed so that any rational person acting in their own interests might reasonably be expected to agree to the scheme. This is both the legal threshold and the practical reality of these schemes.

Schemes of arrangement have the potential to provide a cost-effective means of reorganising a company, as unlike examinerships an independent expert report is not required and court protection proceedings are not required (but may be necessary). A scheme of arrangement does not necessarily require the intensive management or cost of an examinership and can be more agile.

CONCLUSION:

There are few certainties in the current environment. We don't know the length or ultimate severity of the pandemic or what the world will look like when normality resumes. International trade patterns could be substantially altered, and consumer patterns substantially different.

Directors face many challenges ahead. Among those include creating, structuring and growing their business where possible in this chaotic, challenging environment. It is vital to have the core structures of your capital, cost base and funding position reassessed and reorganised to create certainty and allow a focus on growth and business renewal.