
Part A10 – Examinerships

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Part A10 – Examinerships

Chapter 1

Interpretation

Head 1 Defined terms

(1) “examiner” means an examiner appointed under Part A10, Head 2 [equivalent of Section 2 of the Companies (Amendment) Act, 1990];

“interested party”, in relation to a company to which Part A10, Head 2 [equivalent of Section 2 of the Companies (Amendment) Act, 1990] relates, means the —

- (a) a creditor of the company;
- (b) a member of the company;

“the Act” means the Companies Act. Any reference where so ever to any previous enactment shall be construed as referring to that Act;

“director” includes a shadow director within the meaning of Part A5, Head 3 [equivalent of Section 27 of the Companies Act, 1990];

“officer”, in relation to a company, includes—

- (a) a director, secretary or employee;
- (b) a liquidator;
- (c) any person administering a compromise or arrangement made between the company and its creditors;
- (d) an examiner;
- (e) an auditor; and
- (f) a receiver;

“the Minister” means the Minister for Enterprise, Trade and Employment;

“related company”, in relation to a company, has the meaning given to it by Subhead (2).

(2) For the purposes of this Part, a company is related to another company if—

- (a) that other company is its holding company or subsidiary;

(b) or more than half in nominal value of its equity share capital (as defined in Part A1, Head 6 (9) [equivalent of Section 155 (5) of the Companies Act, 1963]) is held by the other company and companies related to that other company (whether directly or indirectly, but other than in a fiduciary capacity); or

(c) more than half in nominal value of the equity share capital (as defined in Part A3, Head 6 (9) [equivalent of Section 155 (5) of the Companies Act, 1963]) of each of them is held by members of the other (whether directly or indirectly, but other than in a fiduciary capacity);

(d) or that other company or a company or companies related to that other company or that other company together with a company or companies related to it are entitled to exercise or control the exercise of more than one half of the voting power at any general meeting of the company;

(e) or the businesses of the companies have been so carried on that the separate business of each company, or a substantial part thereof, is not readily identifiable; or

(f) there is another body corporate to which both companies are related,

and “related company” has a corresponding meaning.

(3) For the purposes of this Part “company” includes any body which is liable to be wound up under this Bill.

(4) This Part is subject to Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings.

(5) The provisions of Part A11, Chapter 5 [equivalent of S.I. No.333 of 2002, EC (Corporate Insolvency) Regulations 2002] applies to proceedings under this Part.

Explanatory note

This head is a new.

Subhead (1) is taken in substance from Section 1 of the Companies (Amendment) Act, 1990. All cross-references have been updated in accordance with the structure of the Bill. The section has been amended insofar as new definitions have been added in order to create a comprehensive list of the defined terms for the purposes of the Part in accordance with the recommendation of the Company Law Review Group in its First Report.

The newly inserted definitions include the definition of a “director” to include a shadow director for the purpose of this Part. Shadow directors are also treated as directors for the purpose of Part A5 and a definition of an “officer” of a company has been newly inserted. All cross-references have been updated in accordance with the structure of the Bill.

Subhead (2) is a slightly amended re-enactment of Section 4(5) of the Companies (Amendment) Act, 1990, as amended by Section 180(1)(b) of the Companies Act, 1990 and Section 12 of the Companies (Amendment) (No.2) Act, 1999.

Chapter 2

Appointment of Examiner

Head 2 Power of Court to appoint examiner

- (1) Subject to Subhead (2), where it appears to the court that—
- (a) a company is or is likely to be unable to pay its debts;
 - (b) no resolution subsists for the winding-up of the company;
 - (c) no order has been made for the winding-up of the company,

it may, on application by petition presented, appoint an examiner to the company for the purpose of examining the state of the company's affairs and performing such duties in relation to the company as may be imposed by or under the this Bill.

- (2) The court shall not make an order under this head unless it is satisfied that there is a reasonable prospect of the survival of the company and the whole or any part of its undertaking as a going concern.
- (3) For the purposes of this head, a company is unable to pay its debts if, —
- (a) it is unable to pay its debts as they fall due;
 - (b) the value of its assets is less than the amount of its liabilities, taking into account its contingent and prospective liabilities; or
 - (c) Part A11, Head 11 (a) and (c) [equivalent of Section 214(a) or (b) of the Companies Act, 1963] applies to the company.
- (4) In deciding whether to make an order under this head, the court may also have regard to whether the company has sought from its creditors significant extensions of time for the payment of its debts, from which it could reasonably be inferred that the company was likely to be unable to pay its debts.

Explanatory note

This head is a slightly amended re-enactment of Section 2 of the Companies (Amendment) Act, 1990, as amended by Section 181(1)(a) of the Companies Act, 1990 and Section 55 of the Companies (Amendment)(No.2) Act, 1999. All cross-references have been updated in accordance with the structure of the Bill.

Subhead (3) is new. It applies the provisions of S.I. No.333 of 2002, EC (Corporate Insolvency) Regulations 2002 to reconstructions. This is also the current position as "insolvency proceedings" are interpreted as including reconstructions for the purpose of the Regulations.

Head 3 Petition for court

- (1) Subject to Subhead (2), a petition under Part A10, Head 2 [equivalent of Section 2 of the Companies (Amendment) Act, 1990] may be presented by—
- (a) the company; or
 - (b) the directors of the company; or
 - (c) a creditor, or contingent or prospective creditor (including an employee), of the company; or
 - (d) members of the company holding at the date of the presentation of a petition under that section not less than one tenth of such of the paid-up capital of the company as carries at that date the right of voting at general meetings of the company,
- or by all or any of those parties, together or separately.
- (2)
- (a) Where the company referred to in Part A10, Head 2 [equivalent of Section 2 of the Companies (Amendment) Act, 1990] is an insurer, a petition under that head may be presented only by the Minister, and Subhead (1) of this head shall not apply to the company.
 - (b) Where the company referred to in Part A10, Head 2 [equivalent of Section 2 of the Companies (Amendment) Act, 1990] is—
 - (i) the holder of a licence under Section 9 of the Central Bank Act, 1971,

- (ii) a company which a building society has converted itself into under Part A10 of the Building Societies Act, 1989,
 - (iii) a company which one or more trustee savings banks have been reorganised into pursuant to an order under Section 57 of the Trustee Savings Banks Act, 1989;
- (c) Where the company referred to in Part A10, Head 2 [equivalent of Section 2 of the Companies (Amendment) Act, 1990] is a company referred to in the Schedule [equivalent of Second Schedule of Companies (Amendment) (No. 2) Act, 1999], (not being a company referred to in paragraph 18, 19 or 20 of that Schedule or to which paragraph (b) applies) the following provisions shall apply—
- (i) a petition under Part A10, Head 2 [equivalent of Section 2 of the Companies (Amendment) Act, 1990] may be presented by—
 - (I) any of the persons referred to in paragraph (a), (b), (c) or (d) of Subhead (1) of this head (including by one or more of such persons acting together),
 - (II) the Central Bank, or
 - (III) one or more of such persons and the Central Bank acting together,
 - (ii) if the Central Bank does not present such a petition—
 - (I) the petitioner shall, before he presents the petition at the office of the court, cause to be received by the Central Bank a notice in writing of his intention to present the petition, and shall serve a copy of the petition on the Central Bank as soon as may be after the presentation of it at the said office,
 - (II) the Central Bank shall be entitled to appear and be heard at any hearing relating to the petition.
- (3) A petition presented under Part A10, Head 2 [equivalent of Section 2 of the Companies (Amendment) Act, 1990] shall nominate a person to be appointed as examiner.
- (4) In addition to the matters specified in Subhead (6), a petition presented under Part A10, Head 2 [equivalent of Section 2 of the Companies (Amendment) Act, 1990] shall be accompanied by a report in relation to the company prepared by a person (in this Bill referred to as 'the independent accountant') who is either the auditor of the company or a person who is qualified to be appointed as an examiner of the company.
- (5) The report of the independent accountant shall comprise the following—
- (a) the names and permanent addresses of the officers of the company and, in so far as the independent accountant can establish, any person in accordance with whose directions or instructions the directors of the company are accustomed to act;
 - (b) the names of any other bodies corporate of which the directors of the company are also directors;
 - (c) a statement as to the affairs of the company, showing in so far as it is reasonably possible to do so, particulars of the company's assets and liabilities (including contingent and prospective liabilities) as at the latest practicable date, the names and addresses of its creditors, the securities held by them respectively and the dates when the securities were respectively given;
 - (d) whether in the opinion of the independent accountant any deficiency between the assets and liabilities of the company has been satisfactorily accounted for or, if not, whether there is evidence of a substantial disappearance of property that is not adequately accounted for;
 - (e) his opinion as to whether the company, and the whole or any part of its undertaking, would have a reasonable prospect of survival as a going concern and a statement of the conditions which he considers are essential to ensure such survival, whether as regards the internal management and controls of the company or otherwise;

- (f) his opinion as to whether the formulation, acceptance and confirmation of proposals for a compromise or scheme of arrangement would offer a reasonable prospect of the survival of the company, and the whole or any part of its undertaking, as a going concern;
 - (g) his opinion as to whether an attempt to continue the whole or any part of the undertaking would be likely to be more advantageous to the members as a whole and the creditors as a whole than a winding-up of the company;
 - (h) recommendations as to the course he thinks should be taken in relation to the company including, if warranted, draft proposals for a compromise or scheme of arrangement;
 - (i) his opinion as to whether the facts disclosed would warrant further inquiries with a view to proceedings under Part A11, Head 152 [equivalent of Section 297 of the Companies Act, 1963] and Part A11, Head 152 [equivalent of Section 297 of the Companies Act, 1963],
 - (j) details of the extent of the funding required to enable the company to continue trading during the period of protection and the sources of that funding;
 - (k) his recommendations as to which liabilities incurred before the presentation of the petition should be paid;
 - (l) his opinion as to whether the work of the examiner would be assisted by a direction of the court in relation to the role or membership of any creditor's committee referred to in Part A10, Head 26 [equivalent of Section 21 of the Companies (Amendment) Act, 1990]; and
 - (m) such other matters as he thinks relevant.
- (6) A petition presented under Part A10, Head 2 [equivalent of Section 2 of the Companies (Amendment) Act, 1990] shall be accompanied—
- (a) by a consent signed by the person nominated to be examiner; and
 - (b) if proposals for a compromise or scheme of arrangement in relation to the company's affairs have been prepared for submission to interested parties for their approval, by a copy of the proposals.
- (7) The court shall not give a hearing to a petition under Part A10, Head 2 [equivalent of Section 2 of the Companies (Amendment) Act, 1990] presented by a contingent or prospective creditor until such security for costs has been given as the court thinks reasonable.
- (8) The court shall not give a hearing to a petition under Part A10, Head 2 [equivalent of Section 2 of the Companies (Amendment) Act, 1990] if a receiver stands appointed to the company the subject of the petition and such receiver has stood so appointed for a continuous period of at least 3 days prior to the presentation of the petition.
- (9) On hearing a petition under this head, the court may dismiss it, or adjourn the hearing conditionally or unconditionally, or make any interim order, or any other order it thinks fit.
- (10) Without prejudice to the generality of Subhead (9), an interim order under that Subhead may restrict the exercise of any powers of the directors or of the company (whether by reference to the consent of the court or otherwise).
- (11)
- (a) Where it appears to the court that the total liabilities of the company (taking into account its contingent and prospective liabilities) do not exceed €500,000, the court may, after making such interim or other orders as it thinks fit, order that the matter be remitted to the judge of the Circuit Court in whose circuit the company has its registered office or principal place of business;
 - (b) Where an order is made by the court under this Subhead the Circuit Court shall have full jurisdiction to exercise all the powers of the court conferred by this Bill in relation to the company and every reference to the court in this Bill shall be construed accordingly;
 - (c) Where, in any proceedings under this Bill which have been remitted to the Circuit Court by virtue of this Subhead, it appears to the Circuit Court that the total liabilities of the company exceed €500,000, it shall make, after making such interim orders as it thinks fit, an order transferring the matter to the court.

Explanatory note

This head is an amended re-enactment of Section 3 of the Companies (Amendment) Act, 1990, as amended by Section 180(1)(a) of the Companies Act, 1990 and Section 6, Section 7, Section 8 and Section 30 of the Companies (Amendment)(No.2) Act, 1999. The Subheads have been renumbered and all cross-references have been updated in accordance with the structure of the Bill.

Sections 3(2)(b)(iv), (v) and (vi) of the Companies Act, 1963 have not been included. These provisions related to applications to the court to appoint an examiner of ACC Bank PLC, ICC Bank PLC and ICC Investment Bank Ltd. As these are all Pillar B companies, they will all be dealt with in that Pillar of Parts.

The Review Group noted the High Court decision Re Tuskar Resources (2001) 1 IR 668 where, in his judgment, McCracken J expressed reservations about the independence of the person nominated to become the examiner in drawing up the independent accountant's report. It considered whether the proposed examiner should be explicitly allowed to prepare the independent accountant's report and following discussion, it was deemed unnecessary.

Subhead (11) is an amended re-enactment of Section 3(9) of the Companies (Amendment) Act, 1990. The Company Law Review Group decided to retain the Circuit Court jurisdiction under Section 3 (9) of the Companies (Amendment) Act, 1990. Although it is rarely, if ever, used, it is seen as a facilitatory jurisdiction and in the view of the Review Group should be retained for that reason.

The maximum figure for total liabilities of the company (taking into account its contingent and prospective liabilities) where an application to the Circuit Court is involved has been converted into euro and raised to €500,000.

Head 4 Pre-petition report in relation to company

(1) If a petition is presented under Part A10, Head 2 and the court is satisfied—

(a) that, by reason of exceptional circumstances outside the control of the petitioner, the report of the independent accountant is not available in time to accompany the petition; and

(b) that the petitioner could not reasonably have anticipated the circumstances referred to in paragraph (a), and, accordingly, the court is unable to consider the making of an order under that head, the court may make an order under this head placing the company concerned under the protection of the court for such period as the court thinks appropriate in order to allow for the submission of the independent accountant's report.

- (2) That period shall be a period that expires not later than the 10th day after the date of making of the order concerned or, if the 10th day after that date would fall on a Saturday, Sunday or public holiday, the first following day that is not a Saturday, Sunday or public holiday.
- (3) For the avoidance of doubt, the fact that a receiver stands appointed to the whole or any part of the property or undertaking of the company at the time of the presentation of a petition under Part A10, Head 2 [equivalent of Section 2 of the Companies (Amendment) Act, 1990] in relation to the company shall not, in itself, constitute, for the purposes of Subhead (1), exceptional circumstances outside the control of the petitioner.
- (4) If the petition concerned has been presented by any of the persons referred to in paragraph (c) or (d) of Part A10, Head 3(1) [equivalent of Section 3(1) of the Companies (Amendment) Act, 1990] and an order under Subhead (1) is made in relation to the company concerned, the directors of the company shall co-operate in the preparation of the report of the independent accountant, particularly in relation to the matters specified in paragraphs (a), (b) and (c) of Part A10, Head 3(5) [equivalent of Section 3(3B) of the Companies (Amendment) Act, 1990].
- (5) If the directors of the company concerned fail to comply with Subhead (4), the person who has presented the petition concerned or the independent accountant may apply to the court for an order requiring the directors to do specified things by way of compliance with Subhead (4) and the court may, as it thinks fit, grant such an order accordingly.
- (6) If the report of the independent accountant is submitted to the court before the expiry of the period of protection specified in an order under Subhead (1), the court shall proceed to consider the petition together with the report as if they were presented in accordance with Part A10, Head 2 [equivalent of Section 2 of the Companies (Amendment) Act, 1990]..

- (7) If the report of the independent accountant is not submitted to the court before the expiry of the period of protection specified in an order under Subhead (1), then, at the expiry of that period, the company concerned shall cease to be under the protection of the court, but without prejudice to the presentation of a further petition under Part A10, Head 2 [equivalent of Section 2 of the Companies (Amendment) Act, 1990].
- (8) Any liabilities incurred by the company concerned during the period of protection specified in an order under Subhead (1) may not be the subject of a certificate under Part A10, Head 18(2) [equivalent of Section 10(2) of the Companies (Amendment) Act, 1990].

Explanatory note

This Subhead is a slightly amended re-enactment of Section 3A of the Companies (Amendment) Act, 1990, as inserted by Section 9 of the Companies (Amendment) (No.2) Act, 1999. All cross-references have been updated in accordance with the structure of the Bill.

Head 5 Creditors to be heard

- (1) The court shall not make an order dismissing a petition presented under Part A10, Head 2 [equivalent of Section 2 of the Companies (Amendment) Act, 1990] or an order appointing an examiner to a company without having afforded each creditor of the company who has indicated to the court his desire to be heard in the matter an opportunity to be so heard.
- (2) Nothing in this head shall affect the power of the court under Part A10, Head 3(9) [equivalent of Section 3(7) of the Companies (Amendment) Act, 1990] to make an interim order, including the appointment of an examiner on an interim, in the matter.

Explanatory note

This Subhead is an amended re-enactment of Section 3B of the Companies (Amendment) Act, 1990, as inserted by Section 10 of the Companies (Amendment) (No.2) Act, 1999. All cross-references have been updated in accordance with the structure of the Bill.

Section 3B(2) of the Companies (Amendment) Act, 1990 has been amended insofar as the appointment of an interim examiner is now expressly provided for.

Head 6 Availability of independent accountant's report

- (1) The independent accountant shall supply a copy of the report prepared by him under Part A10, Head 3(4) [equivalent of Section 3(3A) of the Companies (Amendment) Act, 1990] to the company concerned or any interested party on written application being made to him in that behalf.
- (2) If the court, on application to it in that behalf, directs that that supply may be the subject of such omission, there may be omitted from any copy of the report supplied to the company or an interested party such parts of it as are specified in the direction of the court.
- (3) The court may, in particular, on such an application, direct that there may be omitted from such a supply of a copy of the report any information the inclusion of which in such a copy would be likely to prejudice the survival of the company or the whole or any part of its undertaking as a going concern.
- (4) If the company concerned is a company referred to in Part A10, Head 3(2)(c) [equivalent of Section 3(2)(c) of the Companies (Amendment) Act, 1990] and the Central Bank does not propose to present, or has not presented, (whether alone or acting together with other persons) a petition under Part A10, Head 2 [equivalent of Section 2 of the Companies (Amendment) Act, 1990] in relation to the company, the independent accountant shall, as soon as may be after it is prepared, supply a copy of the report prepared by him under Part A10, Head 3(4) [equivalent of Section 3(3A) of the Companies (Amendment) Act, 1990] to the Central Bank and Subheads (2) and (3) shall not apply to such a copy.

Explanatory note

This Subhead is a slightly amended re-enactment of Section 3C of the Companies (Amendment) Act, 1990, as inserted by Section 11 of the Companies (Amendment) (No.2) Act, 1999. All cross-references have been updated in accordance with the structure of the Bill.

Head 7 Related companies

- (1) Subject to Subhead (2), where the court appoints an examiner to a company, it may, at the same or any time thereafter, make an order—
 - (a) appointing the examiner to be examiner for the purposes of this Bill to a related company; or
 - (b) conferring on the examiner, in relation to such company, all or any of the powers or duties conferred on him in relation to the first-mentioned company.
- (2) In deciding whether to make an order under Subhead (1), the court shall have regard to whether the making of the order would be likely to facilitate the survival of the company, or of the related company, or both, and the whole or any part of its or their undertaking, as a going concern and shall not, in any case, make such an order unless it is satisfied that there is a reasonable prospect of the survival of the related company, and the whole or any part of its undertaking, as a going concern.
- (3) A related company to which an examiner is appointed shall be deemed to be under the protection of the court for the period beginning on the date of the making of an order under this head and continuing for the period during which the company to which it is related is under such protection.
- (4) Where an examiner stands appointed to two or more related companies, he shall have the same powers and duties in relation to each company, taken separately, unless the court otherwise directs.

Explanatory note

This head is an amended re-enactment of Section 4 of the Companies (Amendment) Act, 1990, as amended by Section 180(1)(b) of the Companies Act, 1990 and Section 12 of the Companies (Amendment) (No.2) Act, 1999. All cross-references have been updated in accordance with the structure of the Bill.

Section 4(5) of the Companies (Amendment) Act, 1990 has been included in Head 1 of this Part. That subsection defines a related company for the purpose of this Part.

Head 8 Duty to act in good faith

The court may decline to hear a petition presented under Part A10, Head 2 [equivalent of Section 2 of the Companies (Amendment) Act, 1990] or, as the case may be, may decline to continue hearing such a petition if it appears to the court that, in the preparation or presentation of the petition or in the preparation of the report of the independent accountant, the petitioner or independent accountant—

- (a) has failed to disclose any information available to him which is material to the exercise by the court of its powers under this Bill; or
- (b) has in any other way failed to exercise utmost good faith.

Explanatory note

This Subhead is a slightly amended re-enactment of Section 4A of the Companies (Amendment) Act, 1990, as inserted by Section 13 of the Companies (Amendment) (No.2) Act, 1999. All cross-references have been updated in accordance with the structure of the Bill.

Head 9 Disqualification of examiners

- (1) A person shall not be qualified to be appointed or act as an examiner of a company if he would not be qualified to act as its liquidator.
- (2) A person who acts as examiner of a company while disqualified under this head shall be guilty of a category two offence.

Explanatory note

This head is a slightly amended re-enactment of Section 28 of the Companies (Amendment) Act, 1990.

Subhead (2) now provides for a categorised offence, as opposed to merely resulting in a fine.

Head 10 Effect of petition to appoint examiner on creditors and others

- (1) Subject to Part A10, Head 4 [equivalent of Section 3A of the Companies (Amendment) Act, 1990], during the period beginning with the date of the presentation of a petition under Part A10, Head 2, and (subject to Part A10, Head 23(3) & (4) [equivalent of Section 18 of the Companies (Amendment) Act, 1990) ending on the expiry of 70 days from that date or on the withdrawal or refusal of the petition, whichever first happens, the company shall be deemed to be under the protection of the court.
 - (2) For so long as a company is under the protection of the court in a case under this Bill, the following provisions shall have effect—
 - (a) no proceedings for the winding-up of the company may be commenced or resolution for winding-up passed in relation to that company and any resolution so passed shall be of no effect;
 - (b) no receiver over any part of the property or undertaking of the company shall be appointed, or, if so appointed before the presentation of a petition under Part A10, Head 2 [equivalent of Section 2 of the Companies (Amendment) Act, 1990], shall, subject to Part A10, Head 18 [equivalent of Section 10 of the Companies (Amendment) Act, 1990], be able to act;
 - (c) no attachment, sequestration, distress or execution shall be put into force against the property or effects of the company, except with the consent of the examiner;
 - (d) where any claim against the company is secured by a mortgage, charge, lien or other encumbrance or a pledge of, on or affecting the whole or any part of the property, effects or income of the company, no action may be taken to realise the whole or any part of that security, except with the consent of the examiner;
 - (e) no steps may be taken to repossess goods in the company's possession under any hire-purchase agreement, except with the consent of the examiner;
 - (f) where, under any enactment, rule of law or otherwise, any person other than the company is liable to pay all or any part of the debts of the company—
 - (i) no attachment, sequestration, distress or execution shall be put into force against the property or effects of such person in respect of the debts of the company, and
 - (ii) no proceedings of any sort may be commenced against such person in respect of the debts of the company;
 - (g) no order for relief shall be made under Part A4, Head 72 [equivalent of Section 205 of the Companies Act, 1963] against the company in respect of complaints as to the conduct of the affairs of the company or the exercise of the powers of the directors prior to the presentation of the petition.
- (3) Subject to Subhead (2), no other proceedings in relation to the company may be commenced except by leave of the court and subject to such terms as the court may impose and the court may on the application of the examiner make such order as it thinks proper in relation to any existing proceedings including an order to stay such proceedings.
 - (4) Complaints concerning the conduct of the affairs of the company while it is under the protection of the court shall not constitute a basis for the making of an order for relief under Part A4, Head 72 [equivalent of Section 205 of the Companies Act, 1990].

Explanatory note

This head is a slightly amended re-enactment of Section 5 of the Companies (Amendment) Act, 1990, as amended by Section 180(1)(b) of the Companies Act, 1990 and Section 5 of the Companies (Amendment) (No.2) Act, 1999. All cross-references have been updated in accordance with the structure of the Bill.

Head 11 Restriction on payment of pre-petition debts

- (1) Subject to Subhead (2), no payment may be made by a company, during the period it is under the protection of the court, by way of satisfaction or discharge of the whole or a part of a liability incurred by the company before the date of the presentation under Part A10, Head 2 [equivalent of Section 2 of the Companies (Amendment) Act, 1990] of the petition in relation to it unless the report of the independent accountant contains a recommendation that the whole or, as the case may be, the part of that liability should be discharged or satisfied.
- (2) Notwithstanding Subhead (1), the court may, on application being made to it in that behalf by the examiner or any interested party, authorise the discharge or satisfaction, in whole or in part, by the company concerned of a liability referred to in Subhead (1) if it is satisfied that a failure to discharge or satisfy, in whole or in part, that liability would considerably reduce the prospects of the company or the whole or any part of its undertaking surviving as a going concern.

Explanatory note

This head is a slightly amended re-enactment of section 5A of the Companies (Amendment) Act, 1990, as inserted by Section 15 of the Companies (Amendment) (No.2) Act, 1999. All cross-references have been updated in accordance with the structure of the Bill.

Head 12 Effect on receiver or provisional liquidator of order appointing examiner

- (1) Where, at the date of the presentation of a petition under Part A10, Head 2 [equivalent of Section 2 of the Companies (Amendment) Act, 1990], in relation to a company, a receiver stands appointed to the whole or any part of the property or undertaking of that company the court may make such order as it thinks fit including an order as to any or all of the following matters—
- (a) that the receiver shall cease to act as such from a date specified by the court;

- (b) that the receiver shall, from a date specified by the court, act as such only in respect of certain assets specified by the court;
- (c) directing the receiver to deliver all books, papers and other records, which relate to the property or undertaking of the company (or any part thereof) and are in his possession or control, to the examiner within a period to be specified by the court;
- (d) directing the receiver to give the examiner full particulars of all his dealings with the property or undertaking of the company.

- (2) Where, at the date of the presentation of a petition under Part A10, Head 2 [equivalent of Section 2 of the Companies (Amendment) Act, 1990] in relation to a company, a provisional liquidator stands appointed to that company, the court may make such order as it thinks fit including an order as to any or all of the following matters—

- (a) that the provisional liquidator be appointed as examiner of the company;
- (b) appointing some other person as examiner of the company;
- (c) that the provisional liquidator shall cease to act as such from the date specified by the court;
- (d) directing the provisional liquidator to deliver all books, papers and other records, which relate to the property or undertaking of the company or any part thereof and are in his possession or control, to the examiner within a period to be specified by the court;
- (e) directing the provisional liquidator to give the examiner full particulars of all his dealings with the property or undertaking of the company.

- (3) The court shall not make an order under paragraph (a) or (b) of Subhead (1) or paragraph (c) of Subhead (2) unless the court is satisfied that there is a reasonable prospect of the survival of the company, and the whole or any part of its undertaking, as a going concern.

- (4) Where the court makes an order under Subhead (1) or (2), it may, for the purpose of giving full effect to the order, include such conditions in the order and make such ancillary or other orders as it deems fit.

- (5) Where a petition is presented under Part A10, Head 2 [equivalent of Section 2 of the Companies (Amendment) Act, 1990] in respect of a company at a date subsequent to the presentation of a petition for the winding-up of that company, but before a provisional liquidator has been appointed or an order made for its winding-up, both petitions shall be heard together.

Explanatory note

This head is a slightly amended re-enactment of Section 6 of the Companies (Amendment) Act, 1990, as amended by Section 16 of the Companies (Amendment) (No.2) Act, 1999. All cross-references have been updated in accordance with the structure of the Bill.

- (2) An order under Subhead (1) shall not be made without each creditor of the company of the following class being afforded an opportunity to be heard, namely a creditor any of the debts owed to whom by the company are debts which in a winding-up are, by virtue of the provisions of Part A11 [equivalent of Part VI of the Companies Act, 1963] relating to preferential payments, required to be paid in priority to all other debts.

Explanatory note

This head is a slightly amended re-enactment of Section 6A of the Companies (Amendment) Act, 1990, as inserted by Section 17 of the Companies (Amendment) (No.2) Act, 1999. All cross-references have been updated in accordance with the structure of the Bill.

Head 13 [Part A8, Head 13] equivalent of Section 98 of the Companies Act, 1963] does apply to receivers in certain circumstances

- (1) Without prejudice to the generality of Part A10, Head 12(1) [equivalent of Section 6(1) of the Companies (Amendment) Act, 1990], the court, on application being made in that behalf, may, in relation to a receiver who stands appointed to the whole or any part of the property or undertaking of a company, make an order providing that Part A8, Head 13 [equivalent of Section 98 of the Companies Act, 1963] shall not apply as respects payments made by the receiver out of assets coming into his hands as such receiver if—

- (a)
- (i) an examiner has been appointed to the company, or
 - (ii) an examiner has not been appointed to the company but, in the opinion of the court, such an appointment may yet be made;

and

- (b) the making of the order would, in the opinion of the court, be likely to facilitate the survival of the company, and the whole or any part of its undertaking, as a going concern.

Chapter 3

Powers of Examiner

Head 14 Powers of an examiner

- (1) Any provision of this Bill relating to the rights and powers of an auditor of a company and the supplying of information to and co-operation with such auditor shall, with the necessary modifications, apply to an examiner.
- (2) Notwithstanding any provision of this Bill relating to notice of general meetings, an examiner shall have power to convene, set the agenda for, and preside at meetings of the board of directors and general meetings of the company to which he is appointed and to propose motions or resolutions and to give reports to such meetings.
- (3) An examiner shall be entitled to reasonable notice of, to attend and be heard at, all meetings of the board of directors of a company and all general meetings of the company to which he is appointed.
- (4) For the purpose of Subhead (3) "reasonable notice" shall be deemed to include a description of the business to be transacted at any such meeting.
- (5) Where an examiner becomes aware of any actual or proposed act, omission, course of conduct, decision or contract, by or on behalf of the company to which he has been appointed, its officers, employees, members or creditors or by any other person in relation to the income, assets or liabilities of that company which, in his opinion, is or is likely to be to the detriment of that company, or any interested party, he shall, subject to the rights of parties acquiring an interest in good faith and for value in such income, assets or liabilities, have full power to take whatever steps are necessary to halt, prevent or rectify the effects of such act, omission, course of conduct, decision or contract.
- (6) Without prejudice to Subhead (7), nothing in this head shall enable an examiner to repudiate a contract that has been entered into by the company prior to the period during which the company is under the protection of the court.
- (7) A provision referred to in Subhead (8) shall not be binding on the company at any time after the service of the notice under this Subhead and before the expiration of the period during which the company concerned is under the protection of the court if the examiner is of the opinion that the provision, were it to be enforced, would be likely to prejudice the survival of the company or the whole or any part of its undertaking as a going concern and he serves a notice on the other party or parties to the agreement in which the provision is contained informing him or them of that opinion.
- (8) The provision referred to in Subhead (7) is a provision of an agreement entered into by the company concerned and any other person or persons at any time (including a time that is prior to the period during which the company is under the protection of the court) that provides that the company shall not, or shall not otherwise than in specified circumstances—
 - (a) borrow moneys or otherwise obtain credit from any person other than the said person or persons; or
 - (b) create or permit to subsist any mortgage, charge, lien or other encumbrance or any pledge over the whole or any part of the property or undertaking of the company.
- (9) The examiner may apply to the court to determine any question arising in the course of his office, or for the exercise in relation to the company of all or any of the powers which the court may exercise under this Bill, upon the application to it of any member, contributory, creditor or director of a company.
- (10) The examiner shall, if so directed by the court, have power to ascertain and agree claims against the company to which he has been appointed.
- (11) No professional or legal duty to which an examiner is subject by virtue of his appointment shall be regarded as contravened by, and no liability to the company, its shareholders, creditors or other interested parties shall attach to an examiner by reason of his compliance with an obligation imposed on him by or under this head.

Explanatory note

This head is an amended re-enactment of Section 7 of the Companies (Amendment) Act, 1990, as amended by Section 18 of the Companies (Amendment) (No.2) Act, 1999. The subsections have been re-numbered and all cross-references have been updated in accordance with the structure of the Bill.

Subhead (11) has been newly inserted. This provides that no liability will result from compliance with this head where the examiners are subject to a professional or legal duty.

Head 15 Production of documents and evidence

- (1) It shall be the duty of all officers and agents of the company or a related company to produce to the examiner all books and documents of or relating to any such company which are in their custody or power, to attend before him when required so to do and otherwise to give to him all assistance in connection with his functions which they are reasonably able to give.
 - (2) If the examiner considers that a person other than an officer or agent of any such company is or may be in possession of any information concerning its affairs, he may require that person to produce to him any books or documents in his custody or power relating to the company, to attend before him and otherwise to give him all assistance in connection with his functions which he is reasonably able to give; and it shall be the duty of that person to comply with the requirement.
 - (3) If the examiner has reasonable grounds for believing that a director, of any such company maintains or has maintained a bank account of any description, whether alone or jointly with another person and whether in the State or elsewhere, into or out of which there has been paid—
 - (a) any money which has resulted from or been used in the financing of any transaction, arrangement or agreement particulars of which have not been disclosed in the accounts of any company for any financial year as required by law; or
 - (b) any money which has been in any way connected with any act or omission, or series of acts or omissions, which on the part of that director constituted misconduct (whether fraudulent or not) towards that company or its members,
- the examiner may require the director to produce to him all documents in the director's possession, or under his control, relating to that bank account; and in this subsection "bank account" includes an account with any person exempt by virtue of Section 7 (4) of the Central Bank Act, 1971, from the requirement of holding a licence under Section 9 of that Act and 'director' includes any present or past director or any person connected, within the meaning of Part A5, Head 2 [equivalent of Section 26 of the Companies Act, 1990], with such director, and any present or past shadow director.
- (4) An examiner may examine on oath, either by word of mouth or on written interrogatories, the officers and agents of such company or other person as is mentioned in Subhead (1) or (2) in relation to its affairs and may—
 - (a) administer an oath accordingly; or
 - (b) reduce the answers of such person to writing and require him to sign them.
 - (5) If any officer or agent of such company or other person—
 - (a) refuses to produce to the examiner any book or document which it is his duty under this section to produce; or
 - (b) refuses to attend before the examiner when requested to do so; or
 - (c) refuses to answer any question which is put to him by the examiner with respect to the affairs of the company,
- the examiner may certify the refusal under his hand to the court, and the court may thereupon enquire into the case and, after hearing any witnesses who may be produced against or on behalf of the said officer, agent or other person or any statement which may be offered in defence, make any order or direction it thinks fit.
- (6) Without prejudice to the generality of Subhead (5), the court may, after a hearing under that subsection, make a direction—
 - (a) to the person concerned to attend or re-attend before the examiner or produce particular books or documents or answer particular questions put to him by the examiner; or
 - (b) that the person concerned need not produce a particular book or document or answer a particular question put to him by the examiner.

- (7) Part A13, Head 19 (1) [equivalent of Section 23(1) of the Companies Act, 1990] shall apply for the purposes of this head.
- (8) In this head, any reference to officers or to agents shall include past, as well as present, officers or to agents shall include past, as well as present, officers or agents, as the case may be, and “agents”, in relation to a company, shall include the bankers and solicitors of the company and any persons employed by the company as auditors, whether those persons are or are not officers of the company.

Explanatory note

This head is an amended re-enactment of Section 8 of the Companies (Amendment) Act, 1990, as amended by Sections 180(1)(c), (1)(d) and (1)(e) and Section 19 of the Companies (Amendment) (No.2) Act, 1999. The Subheads have been re-numbered and all cross-references have been updated in accordance with the structure of the Bill.

Head 16 No lien over company’s books, records, etc.

Where the court has appointed an examiner or a company under the protection of the court, no person shall be entitled as against the examiner to withhold possession of any deed, instrument, or other document belonging to the company, or the books of account, receipts, bills, invoices, or other papers of a like nature relating to the accounts or trade, dealings or business of the company, or to claim any lien thereon provided that—

- (a) where a mortgage, charge or pledge has been created by the deposit of any such document or paper with a person, the production of the document or paper to the liquidator or provisional liquidator by the person shall be without prejudice to the person’s rights under the mortgage, charge or pledge (other than any right to possession of the document or paper);
- (b) where by virtue of this head an examiner has possession of any document or papers of a receiver or that a receiver is entitled to examine, the liquidator or provisional liquidator shall, unless the court otherwise orders, make the document or papers available for inspection by the receiver at all reasonable times.

Explanatory note

This head is re-enacts Section 244A of the Companies Act, 1963, as applied to examinership by Section 180(2) of the Companies Act, 1990.

Head 17 Further powers of court

- (1) Where it appears to the court, on the application of the examiner, that, having regard to the matters referred to in Subhead (2), it is just and equitable to do so, it may make an order that all or any of the functions or powers which are vested in or exercisable by the directors (whether by virtue of the memorandum or articles of association of the company or by law or otherwise) shall be performable or exercisable only by the examiner.
- (2) The matters to which the court is to have regard for the purpose of Subhead (1) are—
 - (a) that the affairs of the company are being conducted, or are likely to be conducted, in a manner which is calculated or likely to prejudice the interests of the company or of its employees or of its creditors as a whole; or
 - (b) that it is expedient, for the purpose of preserving the assets of the company or of safeguarding the interests of the company or of its employees or of its creditors as a whole, that the carrying on of the business of the company by, or the exercise of the powers of, its directors or management should be curtailed or regulated in any particular respect; or
 - (c) that the company, or its directors, have resolved that such an order should be sought; or
 - (d) any other matter in relation to the company the court thinks relevant.
- (3) Where the court makes an order under Subhead (1), it may, for the purpose of giving full effect to the order, include such conditions in the order and make such ancillary or other orders as it sees fit.

- (4) Without prejudice to the generality of Subheads (1) and (3), an order under this head may provide that the examiner shall have all or any of the powers that he would have if he were a liquidator appointed by the court in respect of the company and, where such order so provides, the court shall have all the powers that it would have if it had made a winding-up order and appointed a liquidator in respect of the company concerned.

Explanatory note

This head is a re-enactment of Section 9 of the Companies (Amendment) Act, 1990.

Head 18 Incurring of certain liabilities incurred by examiner

- (1) Any liabilities incurred by the company during the protection period which are referred to in Subhead (2) shall be treated as expenses properly incurred, for the purpose of Part A10, Head 35 [equivalent of Section 29 of the Companies (Amendment) Act, 1990], by the examiner.
- (2) The liabilities referred to in Subhead (1) are those certified in writing by the examiner at the time they are incurred, to have been incurred in circumstances where, in the opinion of the examiner, the survival of the company as a going concern during the protection period would otherwise be seriously prejudiced.
- (3) In this head, "protection period" means the period, beginning with the appointment of an examiner, during which the company is under the protection of the court.

Explanatory note

This head is a slightly amended re-enactment of Section 10 of the Companies (Amendment) Act, 1990, as amended by Section 180(1)(f) of the Companies Act, 1990. All cross-references have been updated in accordance with the structure of the Bill.

Furthermore Subhead (2) has been amended insofar the examiner is now required to certify his expenses "in writing".

Head 19 Power to deal with charged property, etc

- (1) Where, on an application by the examiner, the court is satisfied that the disposal (with or without other assets) of any property of the company which is subject to a security which, as created, was a floating charge or the exercise by the examiner of his powers in relation to such property would be likely to facilitate the survival of the whole or any part of the company as a going concern, the court may by order authorise the examiner to dispose of the property, or exercise his powers in relation to it, as the case may be, as if it were not subject to the security.
- (2) Where, on an application by the examiner, the court is satisfied that the disposal (with or without other assets) of—
- any property of the company subject to a security other than a security to which Subhead (1) applies; or
 - any goods in the possession of the company under a hire-purchase agreement, would be likely to facilitate the survival of the whole or any part of the company as a going concern, the court may, by order, authorise the examiner to dispose of the property as if it were not subject to the security or to dispose of the goods as if all rights of the owner under the hire-purchase agreement were vested in the company.
- (3) Where property is disposed of under Subhead (1), the holder of the security shall have the same priority in respect of any property of the company directly or indirectly representing the property disposed of as he would have had in respect of the property subject to the security.
- (4) It shall be a condition of an order under Subhead (2) that—
- the net proceeds of the disposal; and
 - where those proceeds are less than such amount as may be determined by the court to be the net amount which would be realised on a sale of the property or goods in the open market by a willing vendor, such sums as may be required to make good the deficiency, shall be applied towards discharging the sums secured by the security or payable under the hire-purchase agreement.

- (5) Where a condition imposed in pursuance of Subhead (4) relates to two or more securities, that condition requires the net proceeds of the disposal and, where paragraph (b) of that Subhead applies, the sums mentioned in that paragraph to be applied towards discharging the sums secured by those securities in the order of their priorities.
- (6) An office copy of an order under Subhead (1) or (2) in relation to a security shall, within 7 days after the making of the order, be delivered by the examiner to the Registrar.
- (7) If the examiner without reasonable excuse fails to comply with Subhead (6), he shall be guilty of a category four offence.
- (8) References in this head to a hire-purchase agreement include a conditional sale agreement, a retention of title agreement and an agreement for the bailment of goods which is capable of subsisting for more than 3 months.
- (i) 21 days after his appointment in the case of CRO Gazette, and
- (ii) 7 days after his appointment in the other case referred to in that paragraph.
- (3) An examiner shall, within three days after his appointment, deliver to the Registrar a copy of the order appointing him.
- (4) Where a company is, by virtue of Part A10, Head 10 [equivalent of Section 5 of the Companies (Amendment) Act, 1990], deemed to be under the protection of the court, every invoice, order for goods or business letter issued by or on behalf of the company, being a document on or in which the name of the company appears, shall, immediately after the mention of that name, include the words 'in examination under Part A10 of the Companies Act 0000.'
- (5) A person who fails to comply with the provisions of this head shall be guilty of a category four offence.

Explanatory note

This head is a slightly amended re-enactment of Section 11 of the Companies (Amendment) Act, 1990, as amended by Section 181(1)(d) of the Companies Act, 1990.

Subhead (7) now provides for a categorised offence, as opposed to merely resulting in a fine.

Explanatory note

This head is an amended re-enactment of Section 12 of the Companies (Amendment) Act, 1990, as amended by Section 20 of the Companies (Amendment) (No.2) Act. All cross-references have been updated in accordance with the structure of the Bill. Furthermore, all references to the Registrar of Companies have been replaced by "Registrar" and references to Iris Oifigiúil have been replaced with references to the "CRO Gazette".

Subhead (5) now provides for a categorised offence as opposed to merely resulting in a fine.

Head 20 Notification of appointment of examiner

- (1) Where a petition is presented under Part A10, Head 2 [equivalent of Section 2 of the Companies (Amendment) Act, 1990], notice of the petition in the prescribed form shall, within 7 days after its presentation, be delivered by the petitioner to the Registrar.
- (2)
- (a) An examiner shall, within the time limits specified in paragraph (b), cause to be published in the CRO Gazette and in at least two daily newspapers circulating in the district in which the registered office or principal place of business of the company is situated a notice of his appointment and the date thereof;
- (b) The time limits referred to in paragraph (a) are—

Head 21 General Provisions as to examiners

- (1) An examiner may resign or, on cause shown, be removed by the court.
- (2) If for any reason a vacancy occurs in the office of examiner, the court may by order fill the vacancy.
- (3) An application for an order under Subhead (2) may be made by—
- (a) any committee of creditors established under Part A10, Head 26 [equivalent of Section 21 of the Companies (Amendment) Act, 1990]; or

- (b) the company or any interested party.
- (4) An examiner shall be described by the style of “the examiner” of the particular company in respect of which he is appointed and not by his individual name.
- (5) The acts of an examiner shall be valid notwithstanding any defects that may afterwards be discovered in his appointment or qualification.
- (6) An examiner shall be personally liable on any contract entered into by him in the performance of his functions (whether such contract is entered into by him in the name of the company or in his own name as examiner or otherwise) unless the contract provides that he is not to be personally liable on such contract, and he shall be entitled in respect of that liability to indemnity out of the assets; but nothing in this Subhead shall be taken as limiting any right to indemnity which he would have apart from this Subhead, or as limiting his liability on contracts entered into without authority or as conferring any right to indemnity in respect of that liability.
- (7) A company to which an examiner has been appointed or an interested party may apply to the court for the determination of any question arising out of the performance or otherwise by the examiner of his functions.
- (3) The examiner shall supply a copy of a report prepared by him under Subhead (2) to the company concerned on the same day as he causes the report to be delivered to the office of the court.
- (4) The examiner shall also supply a copy of a report prepared by him under Subhead (2) to each person who is mentioned in the report and any interested party on written application being made to him in that behalf.
- (5) If the court, on application to it in that behalf, directs that that supply may be the subject of such omission, there may be omitted from any copy of the report supplied to a person referred to in Subhead (4) or an interested party such parts of it as are specified in the direction of the court.
- (6) The court may, in particular, on such an application, direct that there may be omitted from such a supply of a copy of the report any information the inclusion of which in such a copy would be likely to prejudice the survival of the company or the whole or any part of its undertaking as a going concern.
- (7) The examiner shall, as soon as may be after it is prepared, supply a copy of the report prepared by him under Subhead (2) to—

Explanatory note

This head is an amended re-enactment of Section 13 of the Companies (Amendment) Act, 1990. All cross-references have been updated in accordance with the structure of the Bill.

Head 22 Hearing regarding irregularities

- (1) Where, arising out of the presentation to it of the report of the independent accountant or otherwise, it appears to the court that there is evidence of a substantial disappearance of property of the company concerned that is not adequately accounted for, or of other serious irregularities in relation to the company’s affairs having occurred, the court shall, as soon as it is practicable, hold a hearing to consider that evidence.
- (2) If, before the hearing referred to in Subhead (1) is held, the court directs the examiner to do so, the examiner shall prepare a report setting out any matters which he considers will assist the court in considering the evidence concerned on that hearing.
- (a) if the company concerned is a company referred to in paragraph (a) of Part A10, Head 3 (2) [equivalent of Section 3(2) of the Companies (Amendment) Act, 1990], the Minister; or
- (b) if the company concerned is a company referred to in paragraph (b) or (c) of Part A10, Head 3 (2) [equivalent of Section 3(2) of the Companies Act, 1990], the Central Bank, and Subheads (5) and (6) shall not apply to such a copy.
- (8) The following persons shall be entitled to appear and be heard at a hearing under this head—
- (a) the examiner;
- (b) if the court decided to hold a hearing under this head because of matters contained in the report of the independent accountant, the independent accountant;
- (c) the company concerned;
- (d) any interested party;

- (e) any person who is referred to in the report of the independent accountant or the report prepared under Subhead (2);
 - (f) the company concerned is a company referred to in paragraph (a) of Part A10, Head 3 (2) [equivalent of Section 3(2) of the Companies Act, 1990], the Minister;
 - (g) if the company concerned is a company referred to in paragraph (b) or (c) of Part A10, Head 3 (2) [equivalent of Section 3(2) of the Companies Act, 1990], the Central Bank;
 - (h) the Director of Corporate Enforcement.
- (9) The court may, on a hearing under this head, make such order or orders as it deems fit (including, where appropriate, an order for the trial of any issue relating to the matter concerned).
- (10) The court may, if it considers it appropriate to do so, direct that an office copy of an order under Subhead (9) shall be delivered to the Registrar by the examiner or such other person as it may specify.
- (2) Notwithstanding any provision of the Companies Acts relating to notice of general meetings, (but subject to notice of not less than three days in any case) the examiner shall convene and preside at such meetings of members and creditors as he thinks proper for the purpose of Part A10, Head 30 [equivalent of Section 25 of the Companies (Amendment) Act, 1990 and shall report on those proposals to the court, within 35 days of his appointment or such longer period as the court may allow, in accordance with Part A10, Head 28 [equivalent of Section 23 of the Companies (Amendment) Act, 1990].
- (3) Where, on the application of the examiner, the court is satisfied that the examiner would be unable to report to the court within the period of 70 days referred to in Part A10, Head 10 (1) [equivalent of Section 5(1) of the Companies (Amendment) Act, 1990] but that he would be able to make a report if that period were extended, the court may by order extend that period by not more than 30 days to enable him to do so.
- (4) Where the examiner has submitted a report under this head to the court and, but for this Subhead, the period mentioned in Part A10, Head 10 (1) [equivalent of Section 5(1) of the Companies (Amendment) Act, 1990] (and any extended period allowed under Subhead (3) of this head) would expire, the court may, of its own motion or on the application of the examiner, extend the period concerned by such period as the court considers necessary to enable it to take a decision under Part A10, Head 27 [equivalent of Section 22 of the Companies (Amendment) Act, 1990].
- (5) The examiner shall supply a copy of his report under this head—

- (a) to the company concerned on the same day as he causes the report to be delivered to the office of the court; and
- (b) to any interested party on written application being made to him in that behalf.

- (6) The examiner shall, as soon as may be after it is prepared, supply a copy of his report under this head to—

- (a) if the company concerned is a company referred to in paragraph (a) of Part A10, Head 3 (2) [equivalent of Section 3(2) of the Companies Act, 1990], the Minister; or

Explanatory note

This head is an amended re-enactment of Section 13A of the Companies (Amendment) Act, 1990, as inserted by Section 21 of the Companies (Amendment) (No.2) Act, 1999. All cross-references have been updated in accordance with the structure of the Bill and all references to the Registrar of Companies have been replaced by "Registrar".

Subsection (8) has been amended insofar as the Director of Corporate Enforcement is now entitled to appear and be heard at a hearing under this head.

Head 23 Report by examiner

- (1) An examiner shall—
- (a) as soon as practicable after he is appointed, formulate proposals for a compromise or scheme of arrangement in relation to the company concerned;
 - (b) without prejudice to any other provision of this Bill, carry out such other duties as the court may direct him to carry out.

- (b) if the company concerned is a company referred to in paragraph (b) or (c) of Part A10, Head 3 (2) [equivalent of Section 3(2) of the Companies Act, 1990], the Central Bank; or
- (c) the Director of Corporate Enforcement.
- (7) If the court, on application to it in that behalf, directs that that supply may be the subject of such omission, there may be omitted from any copy of the report supplied under Subhead (5)(b) to an interested party such parts of it as are specified in the direction of the court.
- (8) The court may, in particular, on such an application, direct that there may be omitted from such a supply of a copy of the report any information the inclusion of which in such a copy would be likely to prejudice the survival of the company or the whole or any part of its undertaking as a going concern.
- (9) If the examiner is not able to enter into an agreement with the interested parties and any other persons concerned in the matter or formulate proposals for a compromise or scheme of arrangement in relation to the company concerned, he may apply to the court for the grant of directions in the matter and the court may, on such application, give such directions or make such order as it deems fit, including, if it considers it just and equitable to do so, an order for the winding-up of the company.
- (b) any modification of those proposals adopted at any of those meetings;
- (c) the outcome of each of the required meetings;
- (d) the recommendation of the committee of creditors, if any;
- (e) a statement of the assets and liabilities (including contingent and prospective liabilities) of the company as at the date of his report;
- (f) a list of the creditors of the company, the amount owing to each such creditor, the nature and value of any security held by any such creditor, and the priority status of any such creditor under Part A11, Head 58 [equivalent of Section 285 of the Companies Act, 1963] or any other statutory provision or rule of law;
- (g) a list of the officers of the company;
- (h) his recommendations;
- (i) such other matters as the examiner deems appropriate or the court directs.

Explanatory note

This head is a slightly amended re-enactment of Section 19 of the Companies (Amendment) Act, 1990. All cross-references have been updated in accordance with the structure of the Bill.

Explanatory note

This head is an amended re-enactment of Section 18 of the Companies (Amendment) Act, 1990, as amended by Section 10 of the Companies (Amendment) (No.2) Act, 1999. All cross-references have been updated in accordance with the structure of the Bill.

Subhead 6(c) has been newly inserted. This requires the examiner to furnish the Director of Corporate Enforcement with a copy of his report prepared under this head.

Head 24 Content of Examiner's report

An examiner's report under Part A10, Head 23 [equivalent of Section 18 of the Companies (Amendment) Act, 1990] shall include—

- (a) the proposals placed before the required meetings;

Head 25 Repudiation of certain contracts

- (1) Where proposals for a compromise or scheme of arrangement are to be formulated in relation to a company, the company may, subject to the approval of the court, affirm or repudiate any contract under which some element of performance other than payment remains to be rendered both by the company and the other contracting party or parties.
- (2) Any person who suffers loss or damage as a result of such repudiation shall stand as an unsecured creditor for the amount of such loss or damage.

- (3) In order to facilitate the formulation, consideration or confirmation of a compromise or scheme of arrangement, the court may have a hearing and make an order determining the amount of any such loss or damage and the amount so determined shall be due by the company to the creditor as a judgment debt.
- (4) Where the examiner is not a party to an application to the court for the purposes of Subhead (1), the company shall serve notice of such application on the examiner and the examiner may appear and be heard on the hearing of any such application.
- (5) Where the court approves the affirmation or repudiation of a contract under this head, it may in giving such approval make such orders as it thinks fit for the purposes of giving full effect to its approval including orders as to notice to, or declaring the rights of, any party affected by such affirmation or repudiation.

Explanatory note

This head is a re-enactment of Section 20 of the Companies (Amendment) Act, 1990.

Head 26 Appointment of creditors' committee

- (1) An examiner may, and if so directed by the court shall, appoint a committee of creditors to assist him in the performance of his functions.
- (2) Save as otherwise directed by the court, a committee appointed under Subhead (1) shall consist of not more than five members and shall include the holders of the three largest unsecured claims who are willing to serve.
- (3) The examiner shall provide the committee with a copy of any proposals for a compromise or scheme of arrangement and the committee may express an opinion on the proposals on its own behalf or on behalf of the creditors or classes of creditors represented thereon.
- (4) As soon as practicable after the appointment of a committee under Subhead (1) the examiner shall meet with the committee to transact such business as may be necessary.

Explanatory note

This head is an amended re-enactment of Section 21 of the Companies (Amendment) Act, 1990.

Head 27 Proposals for compromise of scheme or scheme of arrangement

- (1) Proposals for a compromise or scheme of arrangement shall—
 - (a) specify each class of members and creditors of the company;
 - (b) specify any class of members and creditors whose interests or claims will not be impaired by the proposals;
 - (c) specify any class of members and creditors whose interests or claims will be impaired by the proposals;
 - (d) provide equal treatment for each claim or interest of a particular class unless the holders of a particular claim or interest agrees to less favourable treatment;
 - (e) provide for the implementation of the proposals;
 - (f) if the examiner considers it necessary or desirable to do so to facilitate the survival of the company, and the whole or any part of its undertaking, as a going concern, specify whatever changes should be made in relation to the management or direction of the company;
 - (g) if the examiner considers it necessary or desirable as aforesaid, specify any changes he considers should be made in the constitution of the company, whether as regards the management or direction of the company or otherwise;
 - (h) include such other matters as the examiner deems appropriate.
- (2) A statement of the assets and liabilities (including contingent and prospective liabilities) of the company as at the date of the proposals shall be attached to each copy of the proposals to be submitted to meetings of members and creditors under Part A10, Head 28 [equivalent of Section 23 of the Companies (Amendment) Act, 1990].

- (3) There shall also be attached to each such copy of the proposals a description of the estimated financial outcome of a winding-up of the company for each class of members and creditors.
- (4) The court may direct that the proposals include whatever other provisions it deems fit.
- (5) For the purposes of this head, Part A10, Head 29 [equivalent of Section 24 of the Companies (Amendment) Act 1990] and Part A10, Head 30 [equivalent of Section 25 of the Companies (Amendment) Act 1990], a creditor's claim against a company is impaired if he receives less in payment of his claim than the full amount due in respect of the claim at the date of presentation of the petition for the appointment of the examiner.
- (6) For the purposes of this head, Part A10, Head 29 [equivalent of Section 24 of the Companies (Amendment) Act, 1990] and Part A10, Head 30 [equivalent of Section 25 of the Companies (Amendment) Act, 1990], the interest of a member of a company in a company is impaired if—
 - (a) the par value of his shareholding in the company is reduced;
 - (b) where he is entitled to a fixed dividend in respect of his shareholding in or membership of the company, the amount of that dividend is reduced;
 - (c) he is deprived of all or any part of the rights accruing to him by virtue of his shareholding in or membership of the company;
 - (d) his percentage interest in the total issued share capital of the company is reduced; or
 - (e) he is deprived of his shareholding in or membership of the company.

Explanatory note

This head is a slightly amended re-enactment of Section 22 of the Companies (Amendment) Act, 1990. All references have been updated in accordance with the structure of the Bill and references to the nominal value of share capital have been replaced by references to par value of the share capital of the company.

Subsection (6) has been amended insofar as references to a "...shareholding in the company..." have been replaced by "...shareholding in or membership of the company".

Head 28 Consideration by members and creditors of proposals

- (1) This head applies to a meeting of members or creditors or any class of members or creditors summoned to consider proposals for a compromise or scheme of arrangement; save where expressly provided otherwise in this head, this head shall not authorise, at such a meeting, anything to be done in relation to such proposals by any member or creditor.
- (2) At a meeting to which this head applies a modification of the proposals may be put to the meeting but may only be accepted with the consent of the examiner.
- (3) Proposals shall be deemed to have been accepted by a meeting of creditors or of a class of creditors when a majority in number representing a majority in value of the claims represented at that meeting have voted, either in person or by proxy, in favour of the resolution for the proposals.
- (4) Nothing in Subhead (3) shall, in the case of a creditor who abstains from voting, or otherwise fails to cast a vote, in respect of the proposals, be construed as permitting such an abstention or failure to be regarded as a casting by that person of a vote against the proposals.
- (5) Part A4, Head 63 [equivalent of Section 144 of the Companies Act, 1963] shall apply to any resolution to which Subhead (3) relates which is passed at any adjourned meeting.
- (6) Part A9, Head 3 [equivalent of Section 202(2)-(6) of the Companies Act, 1963] shall, with the necessary modifications, apply to meetings held under this head.
- (7) With every notice summoning a meeting to which this head applies which is sent to a creditor or member, there shall be sent also a statement explaining the effect of the compromise or scheme of arrangement and in particular stating any material interests of the directors of the company, whether as directors or as members or as creditors of the company or otherwise and the effect thereon of the compromise or arrangement, insofar as it is different from the effect on the like interest of other persons.

- (8) Without prejudice to Subheads (1) to (8), in the case of a company referred to in paragraph (b) or (c) of Head 2(2), the examiner shall also afford the Central Bank an opportunity to consider the proposals for a compromise or scheme of arrangement and for this purpose shall furnish to the Central Bank a statement containing the like information to that referred to in Subhead (8).

Explanatory note

This head is an amended re-enactment of Section 23 of the Companies (Amendment) Act, 1990, as amended by Section 180(1)(h) of the Companies Act, 1990 and Section 23 of the Companies (Amendment) (No.2) Act, 1999. The subsections have been renumbered and all cross-references have been updated in accordance with the structure of the Bill.

Subsection 23(5) has been deleted from this head and migrated to Part A9.

- (a) unless at least one class of creditors whose interests or claims would be impaired by implementation of the proposals has accepted the proposals; or
- (b) if the sole or primary purpose of the proposals is the avoidance of payment of tax due; or
- (c) unless the court is satisfied that—
- (i) the proposals are fair and equitable in relation to any class of members or creditors that has not accepted the proposals and whose interests or claims would be impaired by implementation, and
- (ii) the proposals are not unfairly prejudicial to the interests of any interested party.

Head 29 Confirmation of proposals

- (1) The report of the examiner under Part A10, Head 23 [equivalent of Section 18 of the Companies (Amendment) Act, 1990] shall be set down for consideration by the court as soon as may be after receipt of the report by the court.
- (2) The following persons may appear and be heard at a hearing under Subhead (1)—
- (a) the company;
- (b) the examiner;
- (c) any creditor or member whose claim or interest would be impaired if the proposals were implemented;
- (d) in case the company is a company referred to in paragraph (b) or (c) of Part A10, Head 3 (2) [equivalent of Section 3(2) of the Companies (Amendment) Act, 1990], the Central Bank.
- (3) At a hearing under Subhead (1) the court may, as it thinks proper, subject to the provisions of this head and Part A10, Head 30 [equivalent of Section 25 of the Companies (Amendment) Act, 1990], confirm, confirm subject to modifications, or refuse to confirm the proposals.
- (4) The court shall not confirm any proposals—

- (5) Without prejudice to Subhead (4), the court shall not confirm any proposals in respect of a company to which an examiner has been appointed under Part A10, Head 7 [equivalent of Section 4 of the Companies (Amendment) Act, 1990] if the proposals would have the effect of impairing the interests of the creditors of the company in such a manner as to unfairly favour the interests of the creditors or members of any company to which it is related, being a company to which that examiner has been appointed examiner under Part A10, Head 2 [equivalent of Section 2 of the Companies (Amendment) Act 1990] or, as the case may be, Part A10, Head 7 [equivalent of Section 4 of the Companies (Amendment) Act, 1990].
- (6) Where the court confirms proposals (with or without modification), the proposals shall be binding on all the members or class or classes of members, as the case may be, affected by the proposal and also on the company.
- (7) Where the court confirms proposals (with or without modification), the proposals shall, notwithstanding any other enactment, be binding on all the creditors or the class or classes of creditors, as the case may be, affected by the proposals in respect of any claim or claims against the company and any person other than the company who, under any statute, enactment, rule of law or otherwise, is liable for all or any part of the debts of the company.

- (8) Any alterations in, additions to or deletions from the constitution of the company which are specified in the proposals shall, after confirmation of the proposals by the court and notwithstanding any other provisions of the Companies Acts, take effect from a date fixed by the court.
- (9) Where the court confirms proposals under this head it may make such orders for the implementation of its decision as it deems fit.
- (10) A compromise or scheme of arrangement, proposals for which have been confirmed under this head shall come into effect from a date fixed by the court, which date shall be not later than 21 days from the date of their confirmation.
- (11) On the confirmation of proposals a copy of any order made by the court under this head shall be delivered by the examiner, or by such person as the court may direct, to the Registrar for registration.

(12) Where—

- (a) the court refuses to confirm proposals under this head; or
- (b) the report of an examiner under Part A10, Head 23 [equivalent of Section 18 of the Companies Act, 1990] concludes that, following the required meetings of creditors of a company under this Bill, it has not been possible to reach agreement on a compromise or scheme of arrangement,

the court may, if it considers it just and equitable to do so, make an order for the winding-up of the company, or any other order as it deems fit.

- (13) Notwithstanding Subhead (4), or any other provision of this Bill, nothing in this Bill shall prevent the examiner from including in a report under Part A10, Head 23 [equivalent of Section 18 of the Companies (Amendment) Act, 1990] proposals which will not involve the impairment of the interests of members or creditors of the company, nor the court from confirming any such proposals.

Explanatory note

This head is an amended re-enactment of Section 24 of the Companies (Amendment) Act, 1990, as amended by Section 180(1)(i) of the Companies Act, 1990 and Section 24 of the Companies (Amendment) (No.2) Act, 1999.

The subsections have been renumbered and all cross-references have been updated in accordance with the structure of the Bill.

Subhead (5) is an amended re-enactment of Section 24(4A) of the Companies (Amendment) Act, 1990. The proposals must now have the effect of impairing the interests of the creditors of the company in such a manner as to “unfairly” favour the interests of the creditors or members of any company to which the company is related.

Head 30 Objection to confirmation by court of proposals

- (1) At a hearing under Part A10, Head 28 [equivalent of Section 23 of the Companies (Amendment) Act, 1990] in relation to proposals a member or creditor whose interest or claim would be impaired by the proposals may object in particular to their confirmation by the court on any of the following grounds—
- (a) that there was some material irregularity at or in relation to a meeting to which Part A10, Head 34 [equivalent of section 27 of the Companies (Amendment) Act, 1990] applies;
- (b) that acceptance of the proposals by the meeting was obtained by improper means;
- (c) that the proposals were put forward for an improper purpose;
- (d) that the proposals unfairly prejudice the interests of the objector.
- (2) Any person who voted to accept the proposals may not object to their confirmation by the court except on the grounds—
- (a) that such acceptance was obtained by improper means; or
- (b) that after voting to accept the proposals he became aware that the proposals were put forward for an improper purpose.
- (3) Where the court upholds an objection under this head, the court may make such order as it deems fit, including an order that the decision of any meeting be set aside and an order that any meeting be reconvened.

Explanatory note

This head is a slightly amended re-enactment of Section 25 of the Companies (Amendment) Act, 1990. All cross-references have been updated in accordance with the structure of the Bill.

Head 31 Liability of third parties for the debts of the company

- (1) The following provisions shall have effect in relation to the liability of any person ('the third person') whether under a guarantee or otherwise, in respect of a debt ('the debt') of a company to which an examiner has been appointed—
- (a) subject to paragraph (b) and save where the contrary is provided in an agreement entered into by the third person and the person to whom he is liable in respect of the debt ('the creditor'), the liability shall, notwithstanding Part A10, Head 29 (7) [equivalent of Section 24(6) of the Companies (Amendment) Act, 1990], not be affected by the fact that the debt is the subject of a compromise or scheme of arrangement that has taken effect under Part A10, Head 28 (10) [equivalent of Section 24(9) of the Companies (Amendment) Act, 1990];
 - (b) neither paragraph (a) nor any of the subsequent provisions of this subhead shall apply if the third person is a company to which an examiner has been appointed;
 - (c) if the creditor proposes to enforce, by legal proceedings or otherwise, the obligation of the third person in respect of the liability, then—
 - (i) he shall—
 - (I) if 14 days or more notice is given of such meeting, at least 14 days before the day on which the meeting concerned under Part A10, Head 30 [equivalent of Section 25 of the Companies (Amendment) Act, 1990] to consider the proposals is held, or
 - (II) if less than 14 days' notice is given of such meeting, not more than 48 hours after he has received notice of such meeting, serve a notice on the third person containing an offer in writing by the creditor to transfer to the third person (which the creditor is hereby empowered to do) any rights, so far as they relate to the debt, he may have under Part A10, Head 30 [equivalent of Section 25 of the Companies (Amendment) Act, 1990] to vote in respect of proposals for a compromise or scheme of arrangement in relation to the company,
 - (ii) if the said offer is accepted by the third person, that offer shall, if the third person furnishes to the examiner at the meeting concerned, a copy of the offer and informs the examiner of his having accepted it, operate, without the necessity for any assignment or the execution of any other instrument, to entitle the third person to exercise the said rights, but neither the said transfer nor any vote cast by the third person on foot of the transfer shall operate to prejudice the right of the creditor to object to the proposals under Part A10, Head 34 [equivalent of Section 27 of the Companies (Amendment) Act, 1990],
 - (iii) if the creditor fails to make the said offer in accordance with subparagraph (ii), then, subject to subparagraph (iv), the creditor may not enforce by legal proceedings or otherwise the obligation of the third person in respect of the liability,
 - (iv) subparagraph (iii) shall not apply if a compromise or scheme of arrangement in relation to the company is not entered into or does not take effect under Part A10, Head 29 (10) [equivalent of Section 24(9) of the Companies (Amendment) Act, 1990] and the creditor has obtained the leave of the court to enforce the obligation of the third person in respect of the liability;

- (d) if the third person makes a payment to the creditor in respect of the liability after the period of protection has expired, then any amount that would, but for that payment, be payable to the creditor in respect of the debt under a compromise or scheme of arrangement that has taken effect under Part A10, Head 29 (10) [equivalent of Section 24(9) of the Companies (Amendment) Act, 1990] in relation to the company shall become and be payable to the third person upon and subject to the same terms and conditions as the compromise or scheme of arrangement provided that it was to be payable to the creditor.
- (2) Nothing in Subhead (1) shall affect the operation of—
- (a) Part A10, Head 10 (2) (f) [equivalent of Section 5(2)(f) of the Companies (Amendment) Act, 1990]; or
 - (b) any rule of law whereby any act done by the creditor referred to in that subsection results in the third person referred to therein being released from his obligation in respect of the liability concerned.

Explanatory note

This section is a slightly amended re-enactment of Section 25A of the Companies (Amendment) Act, 1990, as amended by Section 25 of the Companies (Amendment) (No.2) Act, 1999. All cross-references have been updated in accordance with the structure of the Bill.

Head 32 Provisions with respect to leases

- (1) Subject to Subhead (3), proposals for a compromise or scheme of arrangement shall not contain, nor shall any modification by the court under Part A10, Head 9 [equivalent of Section 28 of the Companies (Amendment) Act, 1990] of such proposals result in their containing, a provision providing for either or both—
 - (a) a reduction in the amount of any rent or other periodical payment reserved under a lease of land that falls to be paid after the compromise or scheme of arrangement would take effect under Part A10, Head 29 (10) [equivalent of Section 24(9) of the Companies (Amendment) Act, 1990] or the complete extinguishment of the right of the lessor to any such payments;
 - (b) as respects a failure—
 - (i) to pay an amount of rent or make any periodical payment reserved under a lease of land, or
 - (ii) to comply with any other covenant or obligation of such a lease, that falls to be paid or complied with after the date referred to in paragraph (a), a requirement that the lessor under such a lease shall not exercise, or shall only exercise in specified circumstances, any right, whether under the lease or otherwise, to recover possession of the land concerned, effect a forfeiture of the lease or otherwise enter on the land or to recover the amount of such rent or other payment or to claim damages or other relief in respect of the failure to comply with such a covenant or obligation.
- (2) Subject to Subhead (3), proposals for a compromise or scheme of arrangement in relation to a company shall not be held by the court to satisfy the condition specified in paragraph(c)(ii) of Part A10, Head 29 (4) [equivalent of Section 24(4) of the Companies (Amendment) Act, 1990] if the proposals contain a provision relating to a lease of, or any hiring agreement in relation to, property other than land and, in the opinion of the court—
- (a) the value of that property is substantial; and
 - (b) the said provision is of like effect to a provision referred to in paragraph (a) or (b) of Subhead (1).
- (3) Subhead (1) or (2) shall not apply if the lessor or owner of the property concerned has consented in writing to the inclusion of the provision referred to in Subhead (1) or (2) in the proposals for the compromise or scheme of arrangement.

- (4) In deciding, for the purposes of Subhead (2), whether the value of the property concerned is substantial the matters to which the court shall have regard shall include the length of the unexpired term of the lease or hiring agreement concerned.

Explanatory note

This head is a slightly amended re-enactment of Section 25B of the Companies (Amendment) Act, 1990, as amended by Section 26 of the Companies (Amendment) (No.2) Act, 1999. All cross-references have been updated in accordance with the structure of the Bill.

Chapter 4

Conclusion of Examinership

Head 33 Cessation of protection of company and termination of appointment of examiner

- (1) Subject to Part A10, Head 10 [equivalent of Section 5 of the Companies Act, 1990], the protection deemed to be granted to a company under that head shall cease—
 - (a) on the coming into effect of a compromise or scheme of arrangement under this Bill; or
 - (b) on such earlier date as the court may direct.
- (2) Where a company ceases to be under the protection of the court, the appointment of the examiner shall terminate on the date of such cessation.

Explanatory note

This head is a slightly amended re-enactment of Section 26 of the Companies (Amendment) Act, 1990. All cross-references have been updated in accordance with the structure of the Bill.

Head 34 Revocation

- (1) The company or any interested party may, within 180 days after the confirmation of the proposals by the court, apply to the court for revocation of that confirmation on the grounds that it was procured by fraud and the court, if satisfied that such was the case, may revoke that confirmation on such terms and conditions, particularly with regard to the protection of the rights of parties acquiring interests or property in good faith and for value in reliance on that confirmation, as it deems fit.
- (2) As soon as practicable after the revocation under this head of such a confirmation, a copy of the order made by the court shall be delivered to—
 - (a) the Registrar;

- (b) in case the company to which the order relates is a company referred to in paragraph (a) of Part A10, Head 3 (2) [equivalent of Section 3(2) of the Companies (Amendment) Act, 1990], the Minister; and
- (c) in case the company to which the order relates is a company referred to in paragraph (b) or (c) of Part A10, Head 3 (2) [equivalent of Section 3(2) of the Companies (Amendment) Act, 1990], the Central Bank;
- (d) the Director of Corporate Enforcement,

by such person as the court may direct.

Explanatory note

This head is an amended re-enactment of Section 27 of the Companies (Amendment) Act, 1990, as amended by Section 27 of the Companies (Amendment) (No.2) Act, 1999. All cross-references have been updated in accordance with the structure of the Bill.

Subhead (2) has been amended insofar as a copy of the order made by the Court is now required to be delivered to the Director of Corporate Enforcement.

Head 35 Costs and remuneration of examiners

- (1) The court may from time to time make such orders as it thinks proper for payment of the remuneration and costs of, and reasonable expenses properly incurred by, an examiner.
- (2) Unless the court otherwise orders, the remuneration, costs and expenses of an examiner shall be paid and the examiner shall be entitled to be indemnified in respect thereof out of the revenue of the business of the company to which he has been appointed, or the proceeds of realisation of the assets (including investments).
- (3) The remuneration, costs and expenses of an examiner which have been sanctioned by order of the court (other than the expenses referred to in Subhead (4)) shall be paid in full and shall be paid before any other claim, secured or unsecured, under any compromise or scheme of arrangement or in any receivership or winding-up of the company to which he has been appointed.

- (4) Liabilities incurred by the company to which an examiner has been appointed that, by virtue of Part A10, Head 18(1) [equivalent of Section 10(1) of the Companies (Amendment) Act, 1990], are treated as expenses properly incurred by the examiner shall be paid in full and shall be paid before any other claim (including a claim secured by a floating charge), but after any claim secured by a mortgage, charge, lien or other encumbrance of a fixed nature or a pledge, under any compromise or scheme of arrangement or in any receivership or winding-up of the company to which he has been appointed.
- (5) In Subheads (3) and (4), references to a claim shall be deemed to include references to any payment in a winding-up of the company in respect of the costs, charges and expenses of that winding-up (including the remuneration of any liquidator).
- (6) The functions of an examiner may be performed by him with the assistance of persons appointed or employed by him for that purpose provided that an examiner shall, insofar as is reasonably possible, make use of the services of the staff and facilities of the company to which he has been appointed to assist him in the performance of his functions.
- (7) In considering any matter relating to the costs, expenses and remuneration of an examiner the court shall have particular regard to the proviso to Subhead (6).

Explanatory note

This head is a slightly amended re-enactment of Section 29 of the Companies (Amendment) Act, 1990, as amended by Section 28 of the Companies (Amendment) (No.2) Act, 1999. The numbering of the subsections has been revised and all cross-references have been updated in accordance with the structure of the Bill.

The Review Group considered amending Section 3B of the Companies (Amendment) Act, 1990. Section 3B was inserted by Section 28 of the Companies (Amendment) Act, 1999 to give statutory expression to the Supreme Court decision in Re Springline [1999] 1 IR 478. The net effect of this decision, and the newly inserted provision, was that the costs, expenses and remuneration of an examiner of a company that had been under the protection of the court would not be given priority to those of the official liquidator of that company if the company is subsequently wound-up.

The Review Group believed that any reversal of this decision would be a substantive deterrent to an examiner taking up such position in a company wishing to avail of court protection.

Head 36 Publicity

- (1) An examiner or, where appropriate, such other person as the court may direct, shall, within 14 days after the delivery to the Registrar of every order made under Part A10, Head 22 [equivalent of Section 13A of the Companies (Amendment) Act 1990], Part A10, Head 29 [equivalent of section 24 of Companies (Amendment) Act, 1990] or Part A10, Head 34 [equivalent of the Section 27 of the Companies (Amendment) Act, 1990] cause to be published in the CRO Gazette notice of such delivery.
- (2) Where a person fails to comply with this head, that person, and where that person is a company, the company and every officer of the company who is in default, shall be guilty of a category four offence

Explanatory note

This head is a slightly amended re-enactment of Section 30 of the Companies (Amendment) Act, 1990, as amended by Section 181(1)(2) of the Companies (Amendment) Act, 1990 and Section 29 of the Companies (Amendment) (No.2) Act, 1999. The numbering of the subsections has been revised and all cross-references have been updated in accordance with the structure of the Bill. Any references to the registrar of companies and Iris Oifigiúil have been replaced by "Registrar" and the "CRO Gazette". Furthermore, Subhead (2) now provides for a categorised offence as opposed to merely resulting in a fine. The amount of the fine will be prescribed later.

Head 37 Hearing of proceedings otherwise than in public

The whole or part of any proceedings under this Bill may be heard otherwise than in public if the court, in the interests of justice, considers that the interests of the company concerned or of its creditors as a whole so require.

Explanatory note

This head is a re-enactment of Section 31 of the Companies (Amendment) Act, 1990.

Head 38 Power of court to order the return of assets which have been improperly transferred

- (1) Where, on the application of an examiner of a company that is under the protection of the court it can be shown to the satisfaction of the court that—
 - (a) any property of the company of any kind whatsoever was disposed of either by way of conveyance, transfer, mortgage, security, loan, or in any way whatsoever whether by act or omission, direct or indirect; and
 - (b) the effect of such disposal was to perpetrate a fraud on the company, its creditors or members, the court may, if it deems it just and equitable to do so, order any person who appears to have the use, control or possession of such property or the proceeds of the sale or development thereof to deliver it or pay a sum in respect of it to the liquidator on such terms or conditions as the court sees fit.
- (2) Subhead (1) shall not apply to any conveyance, mortgage, delivery of goods, payment, execution or other act relating to property made or done by or against a company to which Part A11, Head 43 [equivalent of Section 286(1) of the Companies Act, 1963] applies.
- (3) In deciding whether it is just and equitable to make an order under this head, the court shall have regard to the rights of persons who have bona fide and for value acquired an interest in the property the subject of the application.

Explanatory note

This head is a new head. It is taken from Section 139 of the Companies Act, 1990, as applied to examiners by Section 180(2) of the Companies Act, 1990.

Head 39 Enforcement of reconstruction orders made by courts outside the State.

- (1) Any order made by a court of any country recognised for the purposes of this head and made for or in the course of the reorganisation or reconstruction of a company may be enforced by the High Court in all respects as if the order had been made by the High Court.
- (2) When an application is made to the High Court under this head, an office copy of any order sought to be enforced shall be sufficient evidence of the order.
- (3) In this head, “company” means a body corporate incorporated outside the State, and “recognised” means recognised by order made by the Minister.

Explanatory note

This head is a re-enactment of Section 36 of the Companies (Amendment) Act, 1990.

Head 40 Cross-border effect of examinerships within the European Community.

The provisions of Part A11, Chapter 14 [equivalent of Council Regulation (EC) No 1346/2000] shall apply to this Part.

Explanatory note

This head is new. It applies the Cross Border Insolvency Regulations [Council Regulation (EC) No. 1346/2000 of 29 May 2000] to this Part. Once insolvency litigation is commenced in the appropriate Member State, that State’s courts direct the proceedings, where so ever in the EU the other assets are located. Examinerships are included in the definition of “insolvency proceedings” for the purposes of the Regulation.

Head 41 Reporting to Director of Corporate Enforcement of misconduct by liquidators, receivers or examiners

- (1) Where a disciplinary committee or tribunal (however called) of a prescribed professional body finds that a member conducting an examinership, liquidation or receivership has not maintained appropriate records, or it has reasonable grounds for believing that a member has committed a category one or two offence during the course of an examinership, liquidation or receivership the body shall report the matter, giving details of the finding or, as the case may be, of the alleged offence, to the Director of Corporate Enforcement forthwith and if the body fails to comply with this head it, and every officer of the body to whom the failure is attributable, is guilty of a category three offence.
- (2) No professional or legal duty to which an auditor is subject by virtue of his appointment as an auditor of a company shall be regarded as contravened by, and no liability to the company, its shareholders, creditors or other interested parties shall attach to, an auditor, by reason of his compliance with an obligation imposed on him by or under this head.

Explanatory note

This head is an amended re-enactment of Section 58 of the Company Law Enforcement Act, 2001. It has been amended in accordance with the recommendation of the Company Law Review Group in its First Report that examiners should be made accountable to the Director of Corporate Enforcement.

Subhead (2) is re-enactment of Section 194(6) of the Companies Act, 1990.

Schedule

List of companies for the purposes of Head 3 (2)

1. A company that is a member firm within the meaning of the Stock Exchange Act, 1995.
2. A company that is a stock exchange within the meaning of the Stock Exchange Act, 1995.
3. A company that is an associated undertaking or a related undertaking of a member firm or stock exchange within the meaning of the Stock Exchange Act, 1995.
4. A company that is an investment business firm within the meaning of the Investment Intermediaries Act, 1995.
5. A company that is an associated undertaking or a related undertaking of an investment business firm within the meaning of the Investment Intermediaries Act, 1995.
6. A company to which Chapter VII, VIII or IX of Part II of the Central Bank Act 1989, applies.
7. A company that is engaged in the business of accepting deposits or other repayable funds or granting credit for its own account.
8. A company that is an associated body of a building society within the meaning of the Building Societies Act, 1989.
9. A company that is an associated enterprise of a credit institution within the meaning of the European Communities (Consolidated Supervision of Credit Institutions) Regulations, 1992 (S.I. No. 396 of 1992).
10. An investment company within the meaning of Part B9 [equivalent of Part XIII of the Companies Act, 1990].
11. A company that is a management company or trustee within the meaning of Part B9 [equivalent of Part XIII of the Companies Act, 1990].
12. A company that is an undertaking for collective investment in transferable securities within the meaning of the European Communities (Undertakings for Collective Investment in Transferable Securities) Regulations, 1989 (S.I. No. 78 of 1989).
13. A company that is a management company or trustee of an undertaking for collective investment in transferable securities within the meaning of the European Communities (Undertakings for Collective Investment in Transferable Securities) Regulations, 1989 (S.I. No. 78 of 1989).
14. A company that is a management company or trustee of a unit trust scheme within the meaning of the Unit Trusts Act, 1990.
15. A company that is a general partner or custodian of an investment limited partnership within the meaning of the Investment Limited Partnerships Act, 1994.
16. A company that is an undertaking with close links with a financial undertaking within the meaning of the Supervision of Credit Institutions, Stock Exchange Member Firms and Investment Business Firms Regulations, 1996 (S.I. No. 267 of 1996).
17. Any other company the carrying on of business by which is required, by virtue of any enactment or instrument thereunder, to be authorised by the Central Bank.
18. A company that is—
 - (a) a holder of an authorisation within the meaning of—
 - (i) Regulation 2 of the European Communities (Non-Life Insurance) Regulations, 1976 (S.I. No. 115 of 1976),
 - (ii) Regulation 2 of the European Communities (Non-Life Insurance) Framework Regulations, 1994 (S.I. No. 359 of 1994),
 - (iii) Regulation 2 of the European Communities (Life Assurance) Regulations, (S.I. No. 57 of 1984), or
 - (iv) Regulation 2 the European Communities (Life Assurance) Framework Regulations, (S.I. No. 360 of 1994);
 - or
 - (b) a holder of an authorisation granted under the European Communities (Non-Life Insurance) (Amendment) (No. 2) Regulations, 1991 (S.I. No. 142 of 1991).
19. A company that is an insurance intermediary within the meaning of the Insurance Act, 1989.
20. A company that is an excepted body within the meaning of the Trade Union Acts, 1871 to 1990.