

Examinership: A missed opportunity



By Andri Antoniou*

As part of the new insolvency framework enacted in Cyprus in May 2015 following the near collapse of the economy, the concept of Examinership was incorporated into the Cyprus Companies Law Cap 113, a procedure largely based on Irish legislation.

Examinership is a debt restructuring and corporate rescue mechanism for companies which are insolvent or likely to become insolvent but have reasonable prospects of success as a going concern.

Following the filing of the petition together with an Independent Expert's Report, the company gains the protection of the court for 4 months (extendable to 6 months). The purpose of the stay is to give a company a period of protection from its creditors, in order to facilitate its survival as a going concern and to save viable businesses and jobs.

This is of course a welcome step and one designed to assist debtor companies to restructure or compromise their debts. Nevertheless, Cyprus has always been a creditor friendly jurisdiction and introducing a debtor friendly mechanism results in a paradox; this tool is proving very difficult to implement, in the absence of necessary amendments to our legislation.

Examinership was intended to bridge the gap for debtor companies which have a genuine opportunity to survive, to provide them with much needed "breathing space" and effectively give them a second chance not previously available to them. Over 3 years since its introduction, however, there has not been a single appointment of an Examiner (with the exception of an interim Examiner appointment which was subsequently dismissed by the court), which begs the question, why is this process, through which thousands of jobs have been saved in Ireland, not being successfully implemented in Cyprus, where we have the second highest level of NPL's in Europe, after only Greece?

From the Examinership petitions made to date and their fate, the reasons it is proving so difficult to implement are abundantly clear and arguably inevitable given the wider legal framework and the lack of efficiency of our court system.

A report of the European Commission published in 2018 concluded that the length of court proceedings in Cyprus is among the longest in the EU, our courts are simply not sophisticated enough to process Examinership petitions within the stringent timescales provided; within the 4 (or maximum 6) month court protection period the court must decide whether to appoint an Examiner, who must then prepare his proposals to creditors, convene meetings of members and creditors or classes of creditors and finally apply to court for the scheme to be sanctioned.

Given that our legislation provides that all interested parties must be given notice of the application within 3 days of a petition for the appointment of an Examiner being filed, and all those parties served, including secured and unsecured creditors having the right to file objections to the Examinership petition, this further exacerbates the problem faced by the courts in processing the applications in good time.

For any creditor who wants to frustrate an Examinership petition filed by a debtor, filing an objection is the easy way to achieve this, in the knowledge that, this alone, despite its merits, will mean that by the time the court has even heard the opposition, most, if not all, of the 4-6 months available for the entire process has passed, and the application will either be withdrawn or be dismissed; this is a near certainty leaving the petitioner with potentially vast legal bills.

Consequently, so far, the only beneficiaries of this process are the lawyers appointed to petition the court or file oppositions (of which there are likely to be several in any given case) and the accountant or insolvency practitioner instructed to prepare the Independent Expert's Report, definitely not the creditors, shareholders or employees of the ailing companies. Even if the company had any prospects of survival when the petition was made by the time this process has reached its conclusion, assets will be depleted by soaring professional fees which will no doubt soak-up funds which may otherwise have been used to pay creditors, with detrimental implications for secured and preferential creditors.

Furthermore, most of the petitions for the appointment of an Examiner filed to date follow the appointment of a Receiver and Manager by floating charge holders. For directors who will go to any length to maintain control of their company, Examinership is the obvious choice; a petition for the appointment of an Examiner can be filed for up to 30 days from of the appointment of a Receiver and Manager (in contrast to Irish legislation where this period is limited to 3 days).

Therefore, in many cases, this is being used as a tool to frustrate the actions of the floating charge holder, irrespective of the chances of survival of a company as a going concern, the directors of the company know that this will buy them time as the courts will take months to decide and, in the interim, the Receiver and Manager's actions are subject to the protection of court and his or her powers may be limited by the court. Despite that this is happening repeatedly, there have not been any efforts

taken to punish those responsible for making the application purely to abuse the system.

Another key reason which explains the lack of any Examinership appointments is the fact that there is no provision in our legislation similar to Reckless Trading in Ireland or the Wrongful Trading offence by virtue of the Insolvency Act 1986, whereby directors can be held personally accountable where they knew or ought to have known there was no reasonable prospect that the company would avoid going into insolvent liquidation thereby incurring more liabilities by continuing to trade. By the time directors seek assistance or take any action its usually too late for the company to be rescued, or they do it solely because a RM was appointed and the court eventually finds the company did not have any prospects of survival, in any event.

Regrettably, however, after several failed attempts to appoint an Examiner, no efforts have been made to amend the legislation to make the process more “user friendly” and viable for the Cypriot court system, or to try to encourage directors to seek assistance early, before the banks take their own measures, or put safeguards in place to ensure that those using this mechanism to abuse the system face any punishment.

In its existing form, whether being used by unscrupulous directors as a tool to serve their own purposes or even where the petition is filed with a genuine intention to rescue a company, the reality is that in the time available and our slow court system, this mechanism, unless amended, is difficult to implement with the risk of further loss to creditors being clear and unavoidable.

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