SECURITISATION: THE IRISH INSOLVENCY FRAMEWORK

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Securitisation is a financing technique that, if applied under the appropriate circumstances, enables capital utilisation, improves market efficiency and allows a better allocation of risk. This financial tool has evolved over the past few decades and represented a substantial part of Irish and global debt capital markets.

The key to securitisation is the concept of bankruptcy-remoteness with respect to the securitisation special purpose vehicle ("SPV"). This because SPV will normally be a company which has only minimum outside creditors, and whose sole functions are to acquire and hold the assets and to issue the securities. Thus, the value of securities issued by the SPV will be determined by the performance of the pool of segregated assets, and not by the continuing creditworthiness of the originator the assets. The separation of the credit risk of the originator of the assets ("Originator") and the credit risk of the SPV in this way often enables the originator to obtain lower-cost financing through the SPV than it would otherwise be able to obtain. As a result, the objective of Irish securitisation structures is to isolate the SPV from insolvency risks. This article will explore the potential risks that investors in an Irish securitisation transaction may have to face should the underlying assets fail to perform as initially expected.

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I. INTRODUCTION

Securitisation in its classic form enables the undertaking (Originator) that wishes to divest its interests in a pool of assets, to transfer such assets to a conduit especially created for raising funds to purchase such assets. The income generated by the assets is then used by the conduit (SPV) to service its obligations to the holders of the securities. In Ireland, the SPV is the 'orphan' entity, which, once it has been specifically constituted by the Originator in compliance with the relevant insolvency, tax, accounting and legal requirements, will receive the asset, the pool of assets or exposure to risk. Thus, a securitisation typically entails the establishment and management of a stand-alone "bankruptcy remote"[1] special purpose

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[1] The use of the term "bankruptcy remote" is preferable to the employment of "insolvency remote" as the effect of a securitization transaction structure is to prevent the SOV from being susceptible to insolvent winding-up proceedings, not from being deemed "insolvent"; *see* BNY Corporate Trustee Services Ltd v Eurosail-UK 2007-3BL Plc & Ors [2011] EWCA Civ 227 per Lord Neuberger at 28.

company whose share capital is typically held on charitable trust. This vehicle is established specifically for the transaction by or for a "structuring principal," usually a financial institution arranging the transaction.[2] The SPV is used as a mechanism for gathering of a pool of receivables; it either buys the assets, acquires a financial interest in them through the use of derivatives[3] or enters into a loan with the Originator secured on the assets. The oldest and most common types of assets to be securitised are residential mortgages; however, as a result of more efficient financial analysis, "*one can expect virtually anything that has cash flow to be a candidate for securitisation*."[4] The SPV will only be able to acquire the receivables once it has secured the necessary financing. It will do so by offering securities (Notes) to Noteholders, mostly in the U.S. or European capital markets.

Despite its importance to the economy, the considerable market share that Ireland has achieved in the European market, scarce attention has been paid to the microstructure of the securitisation market. In particular, there seems to be limited academic analysis in respect of the key risk to a securitisation structure: insolvency.

The Irish securitisation model revolves around one key assumption: the SPV holding a bankruptcy remote status. The aim of bankruptcy remoteness "*is to prevent the issuer from being susceptible to insolvent winding up proceedings by ensuring so far as possible that, if its assets prove to be insufficient to meet its liabilities, a director of the issuer will not instigate bankruptcy proceedings in respect of it. Bankruptcy remoteness is one of the criteria used by the rating agencies which issuers of notes seek to satisfy so that their instruments will achieve the highest possible credit rating. That criterion is satisfied in other jurisdictions by provisions which limit the rights of noteholders against the issuer to the value of the issuer's assets*."[5]

To further bankruptcy remoteness, the key provisions and structure of a typical securitisation transaction are geared toward ensuring that there is, at most, a very remote risk that the issuing vehicle will be unable to pay its debts when they fall due. Thus, the structure of a securitisation transaction must be designed to ensure that the issuing vehicle will be in a position to discharge its obligations throughout the life of the transaction and that its financial security would not be undermined by the financial difficulties or insolvency of any other party.[6]

While some authors, admittedly prior to the 2008 financial crisis, used to call into question whether bankruptcy and bankruptcy-remoteness matter,[7] the numerous defaults, and the resulting litigation, of securitisation transactions in the aftermath of the financial crisis, however, proved that insolvency and bankruptcy-remoteness were correctly identified by practitioners as a key concern for investors.

In this context, it is crucial to understand the consequences and potential risks that would be facing investors and parties to a securitisation transaction should there be a shortcoming in this theoretical construct. Thus, an understanding of insolvency legislation[8] constitutes an essential prerequisite to determine how remote such risk is and whether the Irish insolvency legislation is securitisation enabling. This seemingly dry evaluation of certain SPV

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[2] Oldfield, *The Economics of Structured Finance*, JOURNAL OF FIXED INCOME (September 1997), p. 1.

[3] "*. . . derivatives are financial instruments, the value of which are derived from (hence the name) another asset commonly referred to as the 'underlying'…*" Awrey, *The FSA, Integrated Regulation and the Curious Case of OTC Derivatives*, 131 U. PA. J. OF BUS. L. 158, p. 3 (2010).

[4] Myerberg, 'The Use of Securitization by Investors and Issuers in International Markets' in Kendall and Fishman, *A Primer on Securitization* 146 (MIT Press, 2000).

[5] Per Lord Hope in BNY Corporate Trustee Services Ltd & Ors v Neuberger [2013] UKSC 28, para 55.

[6] Ellis Ferran, Mortgage Securitisation – Legal Aspects 198 170 (Butterworths, 1992).

[7] Carlson, for instance, argues that *'[o]ne is skeptical that mere hypothetical risks should be worth so much in the market. Nevertheless, securitization theorists have assumed that the cost of funds depends on the purely hypothetical question of bankruptcy jurisdiction.*' Carlson, *The Rotten Foundations of Securitization*, 39 WILLIAM AND MARY LAW REVIEW 1055, 1057 (1998).

[8] Particularly useful in this respect is THOMAS COURTNEY, THE LAW OF COMPANIES (Bloomsbury Professional, 2016).

related insolvency concerns is meant to outline the potential risks that investors in an Irish securitisation transaction could have to face should the underlying assets fail to perform as initially expected.

The remit of this article is limited to a number of issues which will be relevant to a securitisation transaction. It will focus on the aspects of insolvency law, which are the most significant or problematic in the context of a securitisation transaction, while it considers only incidentally the position of other parties involved in a securitisation transaction. Therefore, while the relationship between security and insolvency will be addressed, this article does not contain an analysis on the relationship between corporate governance and insolvency nor on the debate on conflict of law issues in insolvency.

II. Insolvency Concerns

One of the essential elements of a securitisation transaction is the creation of a security[9] whose credit quality is based on the performance of the underlying pool of assets and related credit enhancement and whose cash flow is not subject to interruption from adverse claims against the securitised assets or from the insolvency of the Originator.[10] The primary purpose of security is to render the performance of the secured obligation certain though the security documentation. However, it should be borne in mind that it will perform other subsidiary functions.

In a securitisation transaction, real security achieves this certainty by giving to each secured party (represented in a securitisation by a security trustee) a right of property (including a right of pursuit) and a right of preference or priority.

If a securitisation transaction fails to perform as expected the enforcement procedures contained in the trust instrument should provide for prompt realisation of the rights obtained in secured assets. In distressed markets, as in normal markets, enforcement systems play a crucial role in investment decisions and serve as a backdrop against which[11] measured. If legal rights can be enforced reliably and predictably, market values can be realised promptly, avoiding the loss of value due to delayed enforcement and reinvestment opportunities. Enforceability is easiest when the law allows parties to agree upon their own default remedies and, absent bad faith, creditors in a securitisation transaction should be entitled to apply the proceeds from the disposition of assets against their claims as early as possible.[12] In Ireland, the right of enforcement (principally through the appointment of a receiver - which could be subject to the examinership procedure) may be considered as a sub-category of the right to property.[13] The

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[9] It is beyond the scope of this work to describe the different types of security under Irish law. However, the following admirably concise passage from the judgment of Millet L.J. in *Re Cosslett (Contractors) Limited* [1998] ch 495 at p. 508 may be taken as also summarizing Irish law: '*There are only four kinds of consensual security known to English law: (i) pledge; (ii) contractual lien; (iii) equitable charge and (iv) mortgage. A pledge and a contractual lien both depend on the delivery of possession to the creditor. The difference between them is that in the case of a pledge the owner delivers possession to the creditor as security, whereas in the case of a lien the creditor retains possession of goods previously delivered to him for some other purpose. Neither a mortgage nor a charge depends on the delivery of possession. The difference between them is that a mortgage involves a transfer of legal or equitable ownership to the creditor, whereas an equitable charge does not*.'

[10] Joseph J. Norton, Paul R. Spellman, Mitchell S. Dupler, International Asset Securitisation 94 (Lloyd's of London Press Ltd. 1995).

[11] The World Bank, 'Principles and Guidelines for Effective Insolvency and Creditor Rights Systems', (April 2001) The World Bank. Electronic copy available at: http://siteresources.worldbank.org/GILD/PrinciplesAndGuidelines/20162797/Principles%20and%20Guidelines%20for%20Effective%20Insolvency%20and%20Creditor%20Rights%20Systems.pdf (last accessed in January 2020).

[12] Fidelis Oditah, Legal Aspects of Receivables Financing 12 (Sweet & Maxwell 2001).

[13] *Id.*

secured creditors' right to appropriate some specific property in satisfaction of his claims in the face of possible competing claims of third parties is of paramount importance in a securitisation transaction. Such a right would enable the secured creditors to resort to his security and stay outside the SPV's liquidation to the extent of their security, which in a securitisation transaction would amount to virtually all the assets of the SPV. As a result of any such restraint (i.e. where an examiner is appointed[14]) the secured creditors may lose control over both the timing and the conduct of enforcement of their security.[15]

Therefore, this paper, through an analysis[16] of the Irish insolvency's framework relating to the SPV, will also consider the risks, hindrances, and restraint facing a party that may need to enforce of security. However, prior to providing such analysis, the issue of consolidation of the assets of the SPV with those of any other entity in the event of insolvency will be considered.

A. Non-Consolidation

In general, under Irish law there are a number of statutory provisions, which enable an Irish court to disregard the principle of separate corporate personality. For example, pursuant to Section 610 of the Companies Act 2014 ("Companies Act"),[17] if, during the course of a winding up or an examinership of a company, any person ("persons" may be interpreted to include not only natural persons but also corporate persons) was "knowingly a party to the carrying on of any business of the company in a reckless manner" or "with intent to defraud creditors of the company or creditors of any other person or for any fraudulent purpose," [18] the Court,

> on the application of a receiver, examiner, liquidator, or any creditor or contributory," may, "if it thinks proper to do so, declare" that such person "shall be personally responsible, without any limitation of liability, for all or any part of the debts or other liabilities of the company as the Court may direct.[19]

Furthermore, in accordance with Section 599 of the Companies Act, "*on the application of a liquidator or creditor or contributory*" of a company that is "*being wound up, the Court, if it is satisfied that it is just and equitable to do so, may order any company that is or has been related to the company being wound up*" to contribute to the debts of the company in liquidation. Section 599(4) lays down guidelines which the Court must consider in assessing if it would be just and equitable that such an order should be made. The following matters should be considered: "*(a) the extent to which the related company took part in the management of the company being wound up; (b) the conduct of the related company towards the creditors of the company being wound up; (c) the effect which such order would be likely to have on the creditors of the related company concerned.*" Section 599(5) also provides that no order can

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[14] *Id.*

[15] Calvin R. Roy, *An Analysis of the Law and Practice of Securitisation* (2003) (Ph.D Thesis, Institute of Finance Law, University of Wolverhampton).

[16] Since the focus of this work is on the SPV's insolvency, the impact of the Personal Insolvency Act 2012 (S.I. N. 44 of 2012), as amended by the Personal Insolvency (Amendment) Act 2015 (S.I. N. 35 of 2015), and in particular of the debt resolution options for borrowers who are deemed under the provisions of such statute to have untenable indebtedness levels, will not be considered. This legislation, however, should be taken into account when considering the credit risk posed by certain types of underlying assets (such as consumer or auto loans).

[17] (No. 38 of 2014). For the purpose of this work the regime (Companies Act 1963 to 2013) preceding the Companies Act 2014 will not be considered, nor the transitional period ending on 30 November 2016 between the previous regime and the application of the 2014 Act will be subject to review.

[18] Companies Act 2014 (Act no. 38/2014) (Ir.), http://www.irishstatutebook.ie/eli/2014/act/38/enacted/en/html.

[19] *Id.*

be made "*unless the court is satisfied that the circumstances that gave rise to the winding up of the company are attributable to the actions or omissions of the related company*."

Moreover, under Section 600 of the Companies Act, where "*two or more related companies are being wound up*" and the High Court "*on the application of the liquidator . . . of any of the companies is satisfied that it is just and equitable to do so*," the High Court may order that, subject to the terms it may decide to impose and "*to the extent specified in the order, the companies shall be wound up together as if they were one company*. . . ." The High Court, when determining the terms of an order under Section 600, shall consider, in particular, the interests of the shareholders of part of the group of companies. In making such an order, the court can "*(a) . . . remove any liquidator of any of the companies, and appoint any person to act as liquidator of any one or more of the companies, (b) . . . give such directions as it thinks fit for the purpose of giving effect to the order, (c) nothing in*" [Section 600 of the Companies Act] "*or the order shall affect the rights of any secured creditor of any of the companies, (d) debts of a company that are to be paid in priority to all other debts of the company pursuant to*" [sections 621 and 622 of the Companies Act (dealing with preferential payments in a winding up)] "*shall, to the extent that they are not paid out of the assets of that company, be subject to the claims of holders of debentures under any floating charge created by any of the other companies, (e) unless the court otherwise orders, the claims of all unsecured creditors of the companies shall rank equally among themselves.*"

Pursuant to subsection 6, the High Court, when assessing if it would be just and equitable to make an order in accordance with Section 600, must have

> *regard to the following matters: (a) the extent to which any of the companies took part in the management of any of the other companies; (b) the conduct of any of the companies towards the creditors of any of the other companies; (c) the extent to which the circumstances that gave rise to the winding up of any of the companies is attributable to the acts or omissions of any of the other companies; (d) the extent to which the businesses of the companies have been intermingled.*

The mere fact that the companies are related, or that the creditors have relied on this fact in their dealings with the company being wound up, is not in itself sufficient to justify the making of an order under Sections 599 or 600. In order to ensure non-consolidation a company should:

- prepare and maintain its own full and complete books, records and financial statements and ensure that any such accounting documents comply with generally accepted accounting principles;
- in all dealings with third parties and the public, identify itself by its own corporate name as a separate and distinct entity and not identify itself as being a division or part of any other entity whatsoever;
- ensure that all decisions with respect to its business and daily operations are and will be independently made by it and will not be directed or dictated by any other entity;
- enter into all transactions on an arm's length basis;
- act solely in its own corporate name and through its own authorised officers and agents and, ensure that all communications including, invoices, purchase orders, contracts, statements, stationery, cheques and applications will be made solely in its corporate name;
- ensure that its assets are and will be kept separate from those of any other entity and are and will be maintained in a manner which facilitates their identification and segregation from those of any other entity whatsoever;

- observe all corporate formalities and governmental requirements and make all required filings to all applicable authorities;
- pay the salaries of its own employees (if any) and discharge all expenses incurred and liabilities incurred by it out of its own funds, and allocate fairly and reasonably any shared overheads;
- avoid the commingling of any of its money or other assets with the money or assets of any other entity;
- ensure that its bank accounts are kept separate from the accounts of any other person or entity.

Having addressed the potential risk of consolidation with other (insolvent) entities, this paper will now focus on the consequences for securities holders if the Issuer were to become insolvent. It will start by considering the impact of a specific feature of the Irish insolvency framework: the examinership regime.

B. Examinership

During the period that followed the 2008 financial crisis, there was a considerable rise in the number of petitions to put companies into the examinership process. The increased use of this corporate rescue process was reflective of the sharp downturn in the Irish economy and, in particular, in the property and financial sectors.

Examinership is a court moratorium/protection procedure which entails a period of 70 days (with a possible extension of 30 days), during which, the company is protected from its creditors,[20] an independent officer is appointed to examine the company's affairs,[21] and, if possible, to present proposals for a compromise[22] to be put before a meeting of the members and the company's creditors[23] and be confirmed by the Court.[24]

Where an Irish incorporated company (such as an SPV or an Originator in a securitisation transaction) is not, or may not be in a position to pay its debts, the High Court,[25] upon petition, may appoint an examiner if "*there is a reasonable prospect of the survival of the company and of all or part of its undertaking as a going concern*." In most cases, it will be necessary to furnish a report prepared by an independent accountant on any application to the Court which will set out, *inter alia*, a statement of opinion by the accountant that the company has a reasonable prospect of survival. According to Section 509(3), a company is deemed to be "unable to pay its debts" if:

> (a) it is not able to meet its obligations as they fall due;
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> (b) "the value of its assets is less than the amount of its liabilities, taking into account its contingent and prospective liabilities"; [26]
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> (c) failure to pay or secure, to the reasonable satisfaction of one creditor, a debt exceeding Euro 10,000 within 21 days of a demand in writing being notified to the company;

[20] *Id.*
[21] *Id.*
[22] *Id.*
[23] *Id.*
[24] *Id.*
[25] Or, pursuant to Section 509(7) of the Companies Act, the Circuit Court in respect of a small company as defined as Section 350(5) of the Companies Act, a category which would not encompass the typical SPV. *Id.*
[26] *Id.*

> (d) failure to pay or secure, to the reasonable satisfaction of two or more creditors, a debt exceeding Euro 20,000 within 21 days of a demand in writing being notified to the company; or
>
> (e) "if execution or other process issued on a judgment, decree or order of any court in favour of a creditor of the company is returned unsatisfied in whole or in part." [27]

Section 517 of the Companies Act provides that where an examiner is appointed by the High Court, the latter may also appoint an examiner to a related company where it is of the view that the latter may also have "a reasonable prospect of the survival of the related company and its undertaking as a going concern."[28]

Petitions may be presented either by the company, by its directors, by an actual or prospective creditor, or by its shareholders holding no less than 10% of the voting share capital,[29] or (in the case of certain insurers, credit and financial entities set out in Section 509 and in Schedule 5) also by the Central Bank.

1. Effects of Examinership

Upon appointment of an examiner the rights of secured creditors are suspended for the protection period. However, such an appointment does not affect the nature of the rights of such creditors or the terms of their security. Pursuant to Section 520(4)(c) of the Companies Act when a relevant body is under the High Court's protection "no attachment, sequestration, distress or execution" can be enforced against the assets of the entity subject to examinership other than with the consent of the examiner. The same Section also provides, among other things, that:

> *(a) no proceedings for the winding up of the company may be commenced or resolution for winding up passed in relation to the company and any resolution so passed shall have 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 shall, subject to section 522, be able to act;*
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> . . .
>
> *(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. . . .*

Subject to the above, without the leave of the Court, no additional proceedings in respect of the company may be commenced.

Certain pre-petition debts may be paid during the course of the examinership if payment is recommended by the independent accountant's report or authorised by the Court. In addition, the Court may authorise the payment of other such debts on the application of the examiner or other interested party if it is satisfied that a failure to do so would considerably reduce the company's prospects of survival as a going concern.

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[27] *Id.*

[28] Decan Murphy BL, *Examinership after the Companies (Amendment) (No. 2) Act, 1992*, 5 B. Rev. 482, 484 (July 2000).

[29] *Id.*

2. Powers of an Examiner

Section 520 of the Companies Act confers on the High Court broad powers to prevent any receiver or provisional liquidator who has been appointed before the commencement of the examinership from continuing to act as such. Under Section 524(5) and (6) of the Companies Act, where an examiner becomes aware of any act, omission, decision, or contract in respect of the company's assets or liabilities subject to examinership which is or is likely to be detrimental to it, he is given broad powers to take the necessary steps necessary to halt or prevent it.

The wording of Section 524(5) and (6) of the Companies Act stipulates that this provision does not enable an examiner to disclaim an agreement entered into before examination. Additionally, it sets out the examiner's powers in relation to negative pledges and borrowing restrictions in a company's agreements by providing that the examiner may, in relation to such restrictions contained in contractual arrangements to which the company is a party, serve notice on the other party or parties that such restrictions will not apply to the company during the protection period if he is of the opinion that the restriction would be detrimental to the survival of the company. However it is clear that an examiner may not rely on Section 524(5) and (6) of the Companies Act to deprive a secured party of a properly constituted security interest over the assets of the relevant body; hence, an examiner appointed to an SPV could not rely on such a statutory provision to set aside the security constituted by the securitisation security documents.

In relation to an equitable assignment, it might be argued that an examiner of the Originator could rely on Section 524 to prevent the perfection of the SPV's title to the assigned assets previously transferred to the SPV. It is submitted that an examiner should not be entitled to rely on Section 524 for this purpose if the relevant SPV had acquired beneficial ownership of those assets in good faith and had paid the purchase price to the Originator. In such circumstances, the Originator would have only a bare legal title to those assets. Thus, it would seem difficult to see how it could properly be concluded that the perfection of the SPV's title in those circumstances would constitute an act in respect of the Originator's assets or income which is or is likely to be detrimental to the Originator itself in the context of its examination.

3. Security Interests and Examinership

Section 530(1) of the Companies Act empowers the High Court to authorise an examiner of an entity subject to security which when created was:

> (a) a floating charge (i.e. a security that hovers[30] without restrictions over the actual and future property[31] of the company that is subject to it [32]), "*to exercise his powers in relation to it or to dispose of it as if it were not subject to the security*"; or

[30] "The hovering and ambulatory nature of a floating charge is another instrument of security for those providing loan or credit facilities." A-Wear Limited (In Receivership) & Cos Acts: Revenue Commissioners v. Taite [2016] IEHC 141 (H. Ct.) (Ir.).

[31] "[I]t is competent for anyone to whom book-debts may accrue in the future to create an equitable charge upon those book debts which will attach to them as soon as they come into existence is not disputed. That such a charge can accurately be described as a charge on book debts does not appear to me to be open to question." Independent Automatic Sales Ltd v Knowles & Foster [1962] 3 All E.R. 27, 36. *See also* Ashcoin Ltd v Moriarty Holdings Ltd [2012] IEHC 365 (H. Ct.) (Ir.).

[32] James Hanlon & Rob Heywood, *Spectrum Plus And Book Debts: The Final Chapter?*, 1 Web JCLI (2006).

(b) a fixed charge,[33] to dispose of the charged property as if it "*were not subject to the security*,"

and in each case provided that the Court is of the view that the disposal or exercise by him of his powers (in respect of assets charged by way of floating charge) "*would be likely to facilitate the survival of the whole or any part of the company as a going concern*."

Should property be disposed of in each of the above cases, according to subsection 3, "*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 or she would have had in respect of the property subject to the security.*"

4. Examinership and Powers of Attorney

The appointment of an examiner to an SPV or Originator may result in restrictions on the powers of any attorney appointed by such entity. Exactly what those restrictions are will depend on what powers the attorney possesses and the circumstances of the particular case. For example, a person who acts as an attorney of the relevant body by way of security (such as a trustee pursuant to a security power of attorney) would be subject to the restrictions on realisation and enforcement of secured assets imposed by Section 520 of the Companies Act.

If an Originator were to go into examination and the issuing vehicle and the trustee were subsequently to seek to perfect the legal transfer of the underlying assets assigned to the SPV in a securitisation transaction, using a power of attorney granted by the Originator to for the benefit of the SPV or the trustee for these purposes, there is a risk that the leave of the High Court or the consent of the examiner would be required by such person under Section 520 of the Companies Act. There is some doubt about how widely this Section would be construed to support the statutory stay on the exercise of security rights against a company in examination. It might be argued that the Section is wide enough to apply to the perfection of an SPV's title to the assigned assets. However, there seems to be good arguments which, on the balance of probabilities, should persuade a court that Section 520 would not apply to prohibit an SPV or a trustee from using the power of attorney granted by the Originator to perfect such transfer of legal title to the transferred assets in the situation where the Originator has only a bare legal title to such assets and all the beneficial interest in the such assets has been vested in the issuing vehicle. Accordingly, in such circumstances a power of attorney granted by the Originator should be capable of being used without the leave of the Court or without the consent of the examiner.

5. Financial vehicles and Examinership

It is now salutary to consider the practical implications of examinership in respect of special purpose vehicles. Structured Credit Company ("SCC") was an unlimited liability SPV providing credit risk protection to various market counterparties. In August 2007, as a result of the decrease in value of the collateral posted by SCC under the credit agreements, many counterparties made demands for additional collateral to be posted. SCC could not raise the additional collateral and it petitioned for protection under the then applicable Companies (Amendment) Act, 1990. When the petition was presented, SCC indicated that if an examiner was not appointed, the only option was liquidation and, if that occurred, the estimated deficit could be $300m (£151m). SCC believed, however, that there was an opportunity to restructure and save the business. An examiner was appointed.[34]

[33] The key characteristic of a fixed charge is that it "relates to specific property." Moorview Developments Ltd & Ors v. First Active PLC & Ors [2009] IEHC 367 (H. Ct.) (Ir.).

[34] Mark Traynor, *Republic of Ireland: Under Examination*, Legal Week, Apr. 10, 2008.

A further examinership case involving a financial vehicle was International Securities Trading Corporation ("ISTC"). ISTC's business included investing in bank and insurance capital, structured finance securities, and SIVs. By late 2007, it found itself subject to increased demands for additional cash and collateral from counterparties and creditors due to the decline in the SIV market. The petition presented stated that, should ISTC go into liquidation, the estimated deficit would be €871m. An examiner was also appointed.[35]

In deciding whether to appoint an examiner, the question the court had to consider in both cases was whether there was a reasonable prospect of the relevant undertaking (or at least a part of it) surviving as a going concern. In both cases, the court decided that such prospects existed.[36]

The SCC's examinership concluded with a scheme of arrangement approved by creditors and a new investor injecting necessary funds to continue the business and pay a dividend to creditors. Only one of the twelve original counterparties of SCC opted to continue trading with the company. Notwithstanding the fact that the business saved comprised only a small percentage of SCC's original business, the court deemed it appropriate to sanction the scheme and save the company.

In SCC and ISTC, most of the business transacted involved SCC and ISTC posting collateral to counterparties. The protection of the court did not impact on the rights of counterparties holding collateral to net or set-off the collateral against monies due (under the Netting of Financial Contracts Act 1995 and the European Communities Financial Collateral Regulations). However, whether selling such collateral is possible would depend on the circumstances of each case. In market conditions where non-cash collateral is in illiquid form, decisions will have to be taken by creditors as to how best to deal with the collateral to achieve maximum value. They are under a duty to mitigate any loss. Creditors can also expect that the examiner will investigate whether the company has rights to the collateral held by the company and whether any such collateral can be included into any scheme of arrangement.[37]

These types of cases present considerable challenges to the examinership regime in Ireland. Traditionally, companies that sought the protection of the Irish courts have been domestic manufacturing and service companies. While to date, the court has shown understanding and willingness to do whatever it can under the legislative framework to save these financial vehicles, it should be noted that one of the main concerns with this structure is that this process is not within the creditors control as, unlike the position in the UK, holders of floating charges (usually the Trustee to the applicable transaction) do not have a right to block the appointment of an examiner. Therefore, the Noteholders' rights to have direct recourse to the asset pool and to direct the security trustee to appoint a receiver over the collateral assets to sell or realise those assets will be disregarded when the SPV is in examinership. In addition, from the viewpoint of creditors dealing with SPVs in examinership, those holding security are not entitled to enforce while the company is under protection; thus, it could be argued that, as a result of the moratorium, creditors will not be compensated for the time value of money lost during the examinership protection and the contractual risk allocation process set out in the securitisation documentation would be disregarded.

6. Proposed exclusion of the effects of examinership on financial vehicles

As noted above and in the previous chapter in respect of whole business securitisation, the examinership legislation could constitute an obstacle to certain securitisation structures, an uncertainty factor and a risk of delay should the transaction need to be unwound and liquidated

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[35] *Id.*
[36] *Id.*
[37] Traynor, 'Republic of Ireland: Under examination', (10 April 2008) Legal Week.

(i.e. after an event of default has occurred under the transaction's documents). Moreover, the underlying rationale behind this process, that it is beneficial for the country's economy as a whole ensuring the survival of a company that can generate revenue and employment, would not be applicable to securitisation vehicles. As discussed at length during the course of this work, issuers in securitisation transactions are special purpose companies incorporated for specific and limited purposes, they are designed to be tax neutral, and they do not provide any direct benefit in terms of employment generation. Further, a noteholder or party involved in the transaction has the expectations that its dealings with the SPV would be regulated, as far as possible, by contractual provisions so as to limit uncertainty and reduce the impact of third-party discretion.

Arguably, therefore, the Irish legislator has missed an opportunity to provide for such an exclusion—thus closing the Irish securitisation competitive gap with certain jurisdictions[38] free of the hindrance of examinership—when the Companies Act was enacted in 2014. However, such an exclusion would not have been palatable at a time when the Irish economy was just recovering from the effects of the 2008 financial crisis.

With the Irish economy's recovery, it would be beneficial to provide for such an exclusion, which—by removing the theoretical risk of examinership being applied to securitisation transactions—would further market efficiency and would provide an incentive for Irish based firms (particularly those with considerable intellectual property assets) to use whole business securitisation structures for financing purposes.

It would, therefore, make commercial sense to amend Section 510 to the Companies Act by adding a newly drafted subsection 6 which should read: "*Where the company referred to in this section is a relevant securitisation company within the meaning of Section 362(3), no application by petition may be presented and the court shall have no jurisdiction to make an order under this Part*."

The above amendment may also be beneficial to project finance and other transactions involving special purpose investment vehicles, although an analysis of the consequences of any such extension would be beyond the scope of this work.

C. Liquidation Issues

A compulsory liquidation or winding up could arise on foot of a High Court order; the jurisdiction of the High Court to make such an order arises from Section 564 of the Companies Act which empowers it to wind up a company and to appoint a liquidator. Section 571 of the Companies Act, on the other hand, sets out the persons who are entitled to present a petition to have a company wound up: the company itself, a creditor of the company, a contributory, and in certain circumstances, a Director or a shareholder (in the event of oppression as per Section 212 of the Companies Act). However, Section 571 of the Companies Act limits the grounds upon which each of these categories can petition the court. Court liquidation occurs where[39] a creditor or the company itself petitions to the High Court for an order seeking the winding up of the company and the appointment of a liquidator. For insolvent companies the usual ground relied upon is the company's inability to settle its obligations as they fall due,[40] although an insolvent company may also be wound up on the basis that it is just and equitable to do so.[41] The liquidation procedure is deemed to have commenced when the petition for the winding up

[38] I.e. a special arrangement exists in England under Section 72A of the Insolvency Act 1986, as amended by virtue of the Enterprise Act 2002, which safeguards the power of "qualifying" floating charge holders in respect of "capital market arrangements" to appoint administrative receiver to deal with the assets provided as security.
[39] *See* Section 571 of the Companies Act for the parties entitled to petition for the winding up of a company.
[40] Section 569(1)(d) of the Companies Act.
[41] Section 569(1)(e) of the Companies Act and 1402(3) for an investment company.

has been filed,[42] unless a voluntary liquidator has previously been appointed, in which case, the liquidation shall be held to have started upon the passing of the winding up resolution.[43] Court liquidation is supervised by the High Court and by the Examiner of the High Court.

1. Improperly Transferred Assets

The validity of transfer of assets is essential in a securitisation transaction. Such validity could be questioned by an Irish court in the event that either the SPV or the Originator is in financial difficulties. It is important to stress that while a number of arrangements have been put in place to make insolvency a remote risk for the issuing vehicle, it is unlikely that the originator from which the SPV has acquired the assets would be in the same position.[44] In practical terms, the potential ramifications of an originator's financial difficulties in respect of the pool of underlying assets, even assuming the validity of the transfer, could be very significant. An originator in financial difficulties would probably become unable to provide new assets to use as substitutes in the assets pool. In addition, the underlying borrowers may wish to take their loans to be refinanced elsewhere, rather than being faced with the prospect of the consequences of the insolvency of the party with which they entered into the underlying agreements. This could result in the life of the issue being curtailed where, as it is usually the case, the securities would be subject to mandatory redemption provisions, which will be effective upon receipt by the SPV of principal from redemption, enforcement or disposal of the underlying asset. However, as noted above, even if the underlying debtors did not seek to transfer or redeem the underlying receivables, the securitisation's investors and secured parties could be deprived of the underlying assets if either the SPV or the Originator become insolvent.[45]

The analysis that will follow will discuss the arrangements between the Originator and the SPV and the security arrangements that could be vulnerable to adjustments if they constitute transactions at an undervalue or preference. An underlying assumption of the following discussion is that the transfer of receivables from the Originator to the SPV is a "true sale" and is not a transfer by way of security. True sale has been defined by Kravitt as "*a transfer of financial assets in which the parties state that they intend a sale and in which all of the benefits and risks commonly associated with ownership are transferred for fair value in an arm's length transaction*."[46]

Accordingly, the intention of the parties must be clearly recorded, a fair market value must be attributed to the transfer, the transaction must be on an arm's-length basis,[47] and the Originator's benefits and risk in respect of the underlying assets must be transferred. The courts will take a view that the characterisation of a transaction by its terms will not be determined by its designation alone, as the label attached to the transfer document by the parties provides some, though not particularly conclusive, evidence as to their intentions. A court will concern itself with questions of law that operate independently of the parties' intentions. The rights and obligations under the relevant transfer document will be analysed to determine whether a true

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[42] Section 589 of the Companies Act. Presentation of the petition takes place when the petition is filed in the Central Office of the Court and the Registrar allocates a date for the hearing of same.
[43] Section 590 of the Companies Act.
[44] The transaction, however, could be structured in such a way that there is an another SPV between the originator and the issuing vehicle, making it more difficult to invalidate the transfer of the underlying receivables to the issuing vehicle on the basis of one of the grounds described below.
[45] Ellis Ferran, Mortgage Securitisation – Legal Aspects 198 (Butterworths, 1992).
[46] Jason H. P. Kravitt, Securitization of Financial Assets 92 (Aspen Law & Business, 1992).
[47] Please refer to Chapter 5.6 for the meaning of arm's length. *See also* Robert Clark & Blanaid Clarke, Contract Cases and Materials Ch. 11 (Gill & MacMillan, 4th ed. 2008).

sale has been effected.[48] Since it is the document in its entirety that governs this question, it follows that if, upon its true construction, "*the effect of the document as a whole is inconsistent with the terminology which the parties have used, then their ill-chosen language must yield to the substance*."[49]

Irish courts will, however, generally permit parties to structure their affairs as they see fit and, provided that the arrangements made by such parties are not a sham[50] and the contractual description reflects the actuality of the contractual terms, they would not generally attempt to re-characterise such arrangements merely on the basis that a transaction has an economic resemblance to another form of transaction.[51] Moreover, Irish securitisation transactions (including the transfer of assets as a result of such arrangements) have been dealt with "*in a number of High Court decisions including Freeman v. Bank of Scotland [2014] IEHC 284, Wellstead v. Judge White & Ors. [2011] IEHC 438, and Harrold v. Nua Mortgages Ltd. [2015] IEHC 15*"[52] and the nature of the sale of the receivables was never subject to questioning or re-characterisation by any such courts. It should be noted, however, that mortgage-backed securitisation transactions (including the transfer of assets as a result of such arrangements) have been dealt with "*in a number of High Court decisions including Freeman v. Bank of Scotland [2014] IEHC 284, Wellstead v. Judge White & Ors. [2011] IEHC 438, and Harrold v. Nua Mortgages Ltd. [2015] IEHC 15*,"[53] and the nature of the sale of the receivables was never subject to questioning or re-characterisation by any such courts. In the context of trade receivables securitisation transactions, practical bankers occasionally may wish to let sellers apply the cash proceeds of "sold" receivables in a manner inconsistent with the sale documents; that is, by treating them as their own. However, if there are informal arrangements in place between the purchaser and seller that represent a departure from what is prescribed in the sale documents, the risk arises that the documents will not be found to represent the intentions of the parties.[54]

In this respect, it should be noted that if it can be shown, under Section 608(1) of the Companies Act, "*on the application of a liquidator or creditor of a company which is being wound up, to the satisfaction of the Court that*" any of the company's assets have been transferred ("including by way of charge, security assignment or mortgage") and "*the effect of such a disposal was to perpetrate a fraud on the company, its creditors or members*," the Court is empowered, "*if it deems it just and equitable*," to order anyone who "*appears to have the use, control or possession*" of the assets in question or the relevant "*proceeds of the sale or development*" thereof "*to deliver it or them, or pay a sum in respect thereof, to the liquidator on such terms or conditions as the court thinks fit*."[55]

Also, receivers (Section 443(1)) and examiners (Section 557(1)) have the prerogative to employ Section 608 to challenge the transfer of assets. In assessing if it would be "just and equitable" to issue a Section 608 order, the Court is bound to "*have regard to the rights of persons who have bona fide and for value acquired an interest in the property the subject of*

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[48] *See also* Stephen Atherton & Rizwaan Jameel Mokal, *Charges over Chattels – Issues in the Fixed/Floating Jurisprudence,* 26(1) The Company Lawyer 2005, at 10, 21.

[49] Orion Finance Limited v. Crown Financial Management Limited, [1996] 2 BCLC 78 (CA) 83 (Millett LJ) (Eng.).

[50] See Hitch v Stone (Inspector of Taxes) [2001] EWCA (Civ) 63 [79], [2001] STC 214 [230] (Eng.), for examples of tests for establishing a sham.

[51] Judith Lawless & Roy Parker, *Ireland*, *in* CROSS BORDER COLLATERAL: LEGAL RISK AND THE CONFLICT OF LAWS 335 (Richard Potok ed., Butterworths 2002).

[52] Danske Bank A/S v. Crowe [2015] IEHC 567 (Ir.).

[53] Danske Bank A/S v. Crowe and Crowe [2015] IEHC 567 (IR.).

[54] Mark Raines & Gabrielle Wong, *Aspects of Securitization of Future Cash Flows Under English and New York Law*, 12 DUKE J. OF COMP. AND INT' LAW 453, 458 (2002) https://perma.cc/4MC7-RR9X.

[55] Dillon Eustace et al., *Ireland*, *in* THE INTERNATIONAL COMPARATIVE LEGAL GUIDE TO: SECURITISATION, (Kravitt ed., 2006).

the application." To date, there has been no decision of the Irish courts handed down in relation to the scope and application of Section 608 (or of its predecessor).

In any event, The circumstances envisaged by Section 608 are, however, easily avoided in a securitisation transaction by ensuring that the transfer has been made at a fair value, at arms' length, and there was no intention of giving any creditor an unfair preference (pursuant to Section 604 of the Companies Act).

2. Fraudulent Preference

While it seems unlikely that Section 604 of the Companies Act will be invoked in respect of a securitisation transaction structured and documented by expert advisors, some of the key points arising out of it would require some elaboration in this context. This Section operates more harshly where the persons involved are connected persons than where there is no such connection. If the securitisation transaction remained on the balance sheet and under a degree of control of the Originator's group, the Originator and the issuer probably would be connected persons (however, whether such connection exists, would depend on the particular terms and circumstances of each securitisation transaction) for the purpose of Section 604.[56] The latter provides that "*any conveyance, mortgage, delivery of goods, payment, execution or other act relating to property made or done by or against a company, which is unable to pay its debts as they become due in favour of any creditor*" of such a company, within a six months period from the beginning of a winding up procedure with the intent of granting such creditor or "*any surety or guarantor for the debt due to such creditor, a preference over the other creditors of the company, shall be deemed an unfair preference of its creditors and be invalid accordingly*."[57] Case law relevant to the predecessor of Section 604 (being Section 286 of the Companies Act 1990) indicates that:

> *in order to prove that a transaction is a preference it is not sufficient to show that the effect of the transaction was to give a preference, as is the situation in this case. The transaction has to be entered into with the dominant intention to prefer, and that intention must have existed at the time of the transaction. Where there is no direct evidence of intention the court can draw an inference of an intention to prefer in a case where some other possible explanation is open*.[58]

Furthermore, Section 604 is only applicable if at the time of the conveyance, mortgage or other relevant act, the company was not able to settle its outstanding obligations. Generally, the directors of the Originator would be asked to certify that the Originator is able to pay its debts at the time of the transfer, therefore, assuming the correctness of such certification, the transfer should not be caught by Section 604.

Where the payment, delivery of goods, charge, conveyance, mortgage, or the performance of any other act is for a "connected person"[59] the above-mentioned six-month

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[56] Eilís Ferran, Mortgage Securitisation: Legal Aspects 200 (Butterworths Law ed., 1992).

[57] 2 Christian Campbell, International Liability of Corporate Directors 48 (Lulu.com ed., 2007).

[58] O'Connors Nenagh Shopping Centre (in liquidation) v. Companies Acts [2011] IEHC 508 (Ir.) at 15. *See also* Corran Construction Co Ltd v. Bank of Ireland [1976-7] ILRM 175 (Ir.), Station Motors Ltd v. Allied Irish Banks p.l.c. [1985] 756 (Ir.).

[59] Pursuant to Section 286(5) a 'connected person' is a person who, at the time of the transaction, was: (a) a director of the company; (b) a shadow director of the company (being a person in accordance with whose directions or instructions directors of the company are accustomed to act); (c) a director's spouse, parent, brother, sister or child; (d) a related company; or (e) a trustee of, or surety or guarantor for the debt due to, any person described in the foregoing sub-paragraphs. A relevant body is a 'related company' with respect to another relevant body in, among others, the following circumstances:

period is deemed to extend to two years. Additionally, unless proven otherwise (with the burden and onus of proof resting on the connected person) any such act for a connected person is deemed to be made with the intention of granting a preference over the other creditors and as such treated as an invalid fraudulent preference.

In the context of a securitisation transaction one should consider the application of Section 604 to the purchase by the SPV of the underlying assets from the Originator. Generally, provided that it could be shown that neither the SPV nor the Originator was insolvent within the requisite period, the transfer of the underlying assets should not be capable of being held by a Court to be invalid under Section 604. Moreover, in a typical securitisation transaction, if the relevant purchase prices payable by the SPV to the Originator reflect the value of the assets purchased, such sales would not place either the Originator or the issuing vehicle in a better position than either such company would have been in the absence of the relevant asset transfer, and, accordingly, there should not be a preference. Similarly, the security granted by the SPV to the Trustee under the charging instrument should not be capable of being held by a Court to be invalid under Section 604.

It should also be noted that during the life of the securitisation transaction, some assets may have to be released from the trustee's security and transferred back to the Originator (i.e. when an underlying borrower would like to redeem his loan or mortgage). Such assets may be sold back to the Originator for cash and/or specified eligible investments or, when this is permitted, in exchange for new assets. These transactions could also be vulnerable too as undervalue transactions if the Originator were to become insolvent. While it is not generally feasible for the securitisation documentation to restrict such transfers, once again it would be quite unlikely that the price paid for such transfer did not reflect the value of the assets purchased.

3. *Invalidity of Floating Charge*

One of the principal concerns of a secured creditor to an insolvent entity is that its security should remain valid notwithstanding the entity's financial difficulties. Section 597 of the Companies Act, except for "*money actually advanced or paid, or the actual price or value of goods or services sold or supplied*" and "*interest on that amount at the appropriate rate*," renders invalid "*a floating charge on the undertaking or property of the company created within 12 months before the date of commencement of the winding up shall, unless it is proved that the company immediately after the creation of the charge was solvent*." Provided that it can be shown that an SPV was not insolvent at the time of or as a result of the creation of the relevant floating charge,[60] that floating charge would not be invalidated under Section 597.

(a)if more than half the nominal value of a relevant body's 'equity share capital' (being its issued share capital excluding any part which, neither as respect dividends nor capital, carries any right to participate beyond a specified amount in a distribution) is held by another relevant body, and relevant bodies related to that other relevant body; or

(b)if more than half the nominal value of the equity share capital of two relevant bodies are held by members of the other; or

(c)if that other relevant body or a relevant body or relevant bodies related to that other relevant body or that other relevant body together with a relevant body or relevant bodies related to it are entitled to exercise or control more than one half of the voting power at any general meeting of the relevant body; or

(d). if the business of the relevant bodies has been so carried on that the separate business of each relevant body, or substantial part thereof, is not readily identifiable. http://www.bailii.org/ie/cases/IEHC/2011/H508.html, archived at https://perma.cc/W246-BJBC.

[60] It is standard practice for the SPV's to provide a 'solvency certificate', certifying that it was solvent on the date in which the transaction was entered into. Furthermore company searches will be carried out to confirm the content of such certificate.

Should a floating charge be created for a "connected person," the period of twelve months may be extended to two years. In this respect, it is standard practice in a securitisation transaction that, upon executing the transaction documents prior to issuance of the Notes, an SPV would represent and warrant that it is solvent.

4. Disclaimer of Onerous Contracts by Liquidator

Section 615 of the Companies Act (as supplemented by the provisions of Section 616) confers power on a liquidator, with leave of the Court, within the 12 months period "*after the date of the commencement of the winding up of the company or such extended period as may be allowed by the court*," to avoid performance by the company of any onerous property transactions in respect of:

> *(a) land of whatsoever kind burdened with onerous covenants; (b) shares or stock in any company or undertaking; (c) an unprofitable contract; (d) any other property which is unsaleable or not readily saleable by reason of its binding the possessor of it to the performance of any onerous act or to the payment of any sum of money.*

The liquidator may decide to act upon application of a person with an interest in such onerous assets and in such circumstances, should the liquidator wish to disclaim, he must give notice, within a period of 28 days from such an event, of his intention to apply to court in this respect.[61]

Where an application to disclaim is allowed by the High Court, the company is relieved of the continuous and onerous obligations (and any future benefits) in their entirety, but the other party to the contract obtains the right to prove in the liquidation for the losses sustained by it as a result of the disclaimer. A liquidator will have to disclaim the entire property; he may not keep part and disclaim part. The company's rights and liabilities in the contract or in the property will be terminated from the date of the disclaimer. However, the disclaimer will impact on any other third party's rights or liabilities, other than where it would be necessary to release the company from liability.[62]

In the case of the liquidation of the Originator, certain provisions that are used frequently in securitisation transactions, requiring the Originator to repurchase certain assets that no longer respond to certain criteria in certain circumstances may be capable of being regarded as an "unprofitable contract." Also, the hedging agreements, such as contract hedging against the fluctuation of interest rate or against currency risk - a common feature in securitisation transactions, (especially to the extent that they may not be in the money) - could also constitute unprofitable contracts under Section 615.

5. Receivers/Liquidators

Section 445(1) of the Companies Act provides that on "*the application of the liquidator of a company that is being wound up (other than by means of a members' voluntary winding up) and in respect of the property of which a receiver has been appointed (whether before or after the commencement of the winding up)*" the Court may either order:

> *(a) that the receiver shall cease to act as such from a date specified by the court, and prohibiting the appointment of any other receiver,*

[61] Patrick D. Dolan, *Securitisations: Legal & Regulatory Issues*, §21.02, LexisNexis (database updated October 2018).
[62] *Id.*

> *or (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.*

A Section 442 order may be issued on such terms as the High Court determines to be appropriate. Where a receiver is so removed, the liquidator shall realise any secured assets in place of the receiver and his costs and expenses in connection therewith would rank ahead of the secured creditors.

A receiver is a person duly appointed to take control of all or part of another's assets for the benefit of that other's creditor(s). Receivers may be appointed by the courts in circumstances provided by statute or equity or (most commonly) by a secured creditor, without any resort to the courts, where his security agreement provides for such appointment. In a securitisation transaction, a receiver will be appointed by the Trustee when an event of default under the transaction's documents occurs. Such events of default generally include the following:

- Non-payment of any principal or interest due on the Notes in accordance with its terms which is not remedied within the agreed timeframe;
- The Issuer fails to perform or comply with any one or more of its other obligations set out by the transaction documents and such failure is not remedied within a certain period;
- The Issuer ceases to carry on business or it is unable to settle its payment obligations as they fall due;
- A resolution is passed or an order is made for the winding-up of the issuing vehicle or proceedings are brought against the SPV in respect of liquidation, insolvency, composition, reorganisation or other equivalent provision affecting creditor's rights.

The function of the receiver will depend upon the terms of his appointment; they may encompass managing and disposing of the debtor's entire assets and passing proceeds thereof to his appointor, in discharge of the debtor indebtedness to it. Unless specified to be the agent of the company to whom it is appointed, the receiver will generally be considered an agent of his appointor. Indeed, the agency of a receiver is not an ordinary agency. It is primarily a device to protect the mortgagee or debenture holder. "Thus, the receiver acts as agent for the mortgagor in that he has power to affect the mortgagor's position by acts which, though done for the benefit of the debenture holder, are treated as if they were the acts of the mortgagor."[63]

It should be noted that even when acting as an agent for the appointor, at common law, a receiver will owe a duty of care in relation to the sale of the property charged under the indenture by virtue of which he received his/her appointment, to any persons interested in the property. That common law duty was given statutory force by Section 439(1) of the Companies Act, which provides that a receiver in the exercise of his powers is under a duty to the debtor company to attempt to obtain the best price reasonably possible at the time of sale.

> *However, as the receiver in exercising his power of sale is in a position analogous to that of the mortgagee, he is not obliged to postpone sale in order to obtain a better price or to adopt a piecemeal method of sale*.[64]

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[63] Bula Ltd., [2003] IESC 10 (Ir.) (citing Gomba Holdings v Minories Finance [1989] BCLC 115 (UK).

[64] Gower, *Principles of Modern Company Law*, (London: Sweet & Maxwell: 1992).

In this respect, one should note that a "*mortgagee is entitled to sell the mortgaged property as it is. He is under no obligation to improve it or increase its value. There is no obligation to take any such pre-marketing steps to increase the value as is suggested by the claimants*."[65]

6. Avoidance of Property Dispositions

Section 602 of the Companies Act stipulates that if a disposition of assets were to be made after the commencement of the winding up procedure has been sanctioned by the Court, it is void unless otherwise provided by the Court itself. Accordingly, if any further advance transfer or substitution of the underlying assets in a securitisation transaction were to be made after the date on which a petition for the winding up of the Originator has been filed,[66] and a winding up order is subsequently made, then such sale would be void. It seems clear that the underlying purpose of Section 602 is to ensure that the interests of those parties, who might be affected by a disposition which takes place after the commencement of a winding up, are not materially altered by any such disposition. In the case of a company which will be unable to meet its debts, then the persons who will be affected by a disposition of the insolvent entity's property are likely to be the creditors and most especially the unsecured creditors.[67] Therefore, given that the structure of a securitisation transaction would normally include an agreement between all parties to the transaction, the possibility that Section 602 is invoked as to their claims as creditors would seem quite remote. Furthermore, since the purpose of Section 602 is to preserve the assets of the insolvent entity for the creditors, and to ensure that no creditor is given preference in the payment of his debts over other creditors in the same class,[68] its operation should not prevent the completion of the assets' sale to the SPV (where such a transfer was effected by way of equitable assignment) and the perfection of the Trustee's title, and, if necessary, the Trustee should be able to use the powers of attorney to obtain these results.

7. Creditors' Voluntary Liquidation

Pursuant to Section 581(1)(a) of the Companies Act, a creditors' voluntary liquidation is commenced in most cases by special resolution of the shareholders but, in limited circumstances provided by Section 580(1), it may also be an ordinary resolution to the effect that the company should be wound up voluntarily.

It should be noted, however, that a creditors voluntary liquidation should be a remote possibility in a securitisation transaction. This is because almost all the secured creditors in a securitisation transaction would sign a non-petition clause. However, as discussed above, the SPV would not generally bind itself to a non-petition provision, in order to avoid fettering the discretion of its directors. Thus, the directors of the SPV, if they have the required majority, could start the process by convening an extraordinary general meeting to consider the issue. This would especially be the case if a director feels that liquidation is in the best interest of the issuing vehicle and would otherwise be in breach of its fiduciary duty should it refuse to sign such a petition.

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[65] National Assets Loan Management Ltd [2015] IEHC 169 (Ir.) (citing *Silven Properties Ltd.v Royal Bank of Scotland plc* [2004] 4 AER 484 (Scot.)).

[66] Patrick D. Dolan, Securitisations: Legal & Regulatory Issues, §21.02, LexisNexis (database updated October 2018). More specifically, a voluntary winding up is deemed to commence in the immediate wake of the passage of a winding up resolution, a winding up by the High Court takes effect on presentation of the petition or, if the petition has been foreshadowed by a voluntary winding up resolution, the passing of that resolution.

[67] Wellingford Construction Limited v. Companies Act [2005] IEHC 392 (Ir.).

[68] *Re Industrial Services Company (Dublin) Ltd. (in liquidation)* [2002] IEHC 57 (Ir.).

III. CONCLUSION

In conclusion, the analysis of the insolvency's framework relating to securitisation SPVs, has proven useful in determining how existing financial structures can be improved. Such an analysis is particularly relevant to the securitisation conduit. The SPV, aside from ensuring that, at all times, it will be operated independently from the originator in order to avoid consolidation with the latter (Irish courts are, however, reluctant to order consolidation), also needs to ensure that it itself is "bankruptcy remote." This expression means that the SPV should not be threatened by bankruptcy. This is achieved through careful structuring, documentation and operation. An appropriate set of documentation is fundamental to structuring transactions. While the specifics may vary from transaction to transaction there is a generic body of arrangements that is normally applicable in most Irish securitisations. Such a contractual framework has proven over time to be flexible enough to accommodate most transactions in the jurisdiction. In this respect, general principles of law have proven effective in allowing financial structures to perform efficiently and in enabling efficient enforcement procedures. Case law has shown that Ireland can rely on an adaptable legal fabric, which generally delivers predictable outcomes in enforcing property rights.

However, while a clear contractual framework may increase the bankruptcy remoteness of the SPV and thus the market efficiency of securitisation arrangements, it cannot provide a definitive solution in insulating a securitisation transaction from the reach of the Irish courts.[69] The SPV, although created to serve a purpose with limited operational parameters, is nevertheless a limited liability company which is subject to the provisions of insolvency law. Careful construction and operation of the SPV can substantially reduce threats of insolvency posed by creditors; one should not be complacent in the belief that a SPV will be insolvency proof. Thus, this paper has provided an important analysis of the implications of insolvency on a securitisation structure. An analysis of the key insolvency concerns connected with Irish securitisation transactions should provide a useful guidance in producing a framework which would reduce the liabilities of the SPV, and it would enable investors to effectively price the risks connected with an Irish securitisation vehicle and relating to the efficient enforcement of security.

Finally, this work has highlighted that the Irish insolvency framework is still imbued with a limited level of uncertainty. While these minor inconsistencies do not substantially affect the success of securitisation, these interpretative doubts and discrepancies, should be promptly reviewed by the legislator in order to increase market efficiency.

[69] Slaughter and May, Model guide to securitization techniques, Practical Law Company, May 2010, https://www.slaughterandmay.com/media/1429118/model_guide_to_securitisation_techniques.pdf. It is submitted that well-drafted securitisation transaction documents should contain provisions enabling the swift substitution of parties that are insolvent or that are about to become insolvent.