



**BILLE NA gCUIDEACHTAÍ (LEASÚ), 1990
COMPANIES (AMENDMENT) BILL, 1990**

*Mar a ritheadh ag dhá Theach an Oireachtais
As passed by both Houses of the Oireachtas*

ARRANGEMENT OF SECTIONS

Section

1. Definitions.
2. Power of court to appoint examiner.
3. Petition for protection of the court.
4. Related companies.
5. Effect of petition to appoint examiner on creditors and others.
6. Effect on receiver or provisional liquidator of order appointing examiner.
7. Powers of an examiner.
8. Production of documents and evidence.
9. Further powers of court.
10. Incurring of certain liabilities by examiner.
11. Power to deal with charged property, etc.
12. Notification of appointment of examiner.
13. General provisions as to examiners.
14. Information to be given when examiner appointed.
15. Examination of affairs of company.
16. Examiner's report.
17. Hearing of matters arising from examiner's report.
18. Further report by examiner.
19. Examiner's report under *section 18*.
20. Repudiation of certain contracts.

Section

21. Appointment of creditors' committee.
22. Contents of proposals.
23. Consideration by members and creditors of proposals.
24. Confirmation of proposals.
25. Objection to confirmation by court of proposals.
26. Cessation of protection of company and termination of appointment of examiner.
27. Revocation.
28. Disqualification of examiners.
29. Costs and remuneration of examiners.
30. Publicity.
31. Hearing of proceedings otherwise than in public.
32. No lien over company's books, records etc.
33. Civil liability of persons concerned for fraudulent trading of company.
34. Criminal liability of persons concerned for fraudulent trading of company.
35. Power of court to order the return of assets which have been improperly transferred.
36. Enforcement of reconstruction orders made by courts outside the State.
37. Short title, collective citation and construction.

ACTS REFERRED TO

Central Bank Act, 1971
Companies Act, 1963

1971, No. 24
1963, No. 33



BILLE NA gCUIDEACHTAÍ (LEASÚ), 1990
COMPANIES (AMENDMENT) BILL, 1990

BILL

entitled

AN ACT TO AMEND THE LAW RELATING TO COMPANIES
AND TO PROVIDE FOR RELATED MATTERS.

BE IT ENACTED BY THE OIREACHTAS AS FOLLOWS:

10 1.—In this Act, unless the context otherwise requires— Definitions.

“the Companies Acts” means the Principal Act, and every enactment
(including this Act) which is to be construed as one with that Act;

“examiner” means an examiner appointed under *section 2*;

15 “interested party”, in relation to a company to which *section 2 (1)*
relates, means—

(a) a creditor of the company,

(b) a member of the company;

“the Minister” means the Minister for Industry and Commerce;

“the Principal Act” means the Companies Act, 1963.

20 2.—(1) Where it appears to the court that— Power of court to
appoint examiner.

(a) a company is or is likely to be unable to pay its debts, and

(b) no notice of a resolution for the winding-up of the company
has been given under *section 252* of the Principal Act more
than 7 days before the application hereinafter referred to,
25 and

(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
30 be imposed by or under this Act.

(2) Without prejudice to the general power of the court under
subsection (1), it may, in particular, make an order under this section
if it considers that such order would be likely to facilitate the survival
of the company, and the whole or any part of its undertaking, as a
35 going concern.

(3) For the purposes of this section, 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) section 214 (a) or (b) of the Principal Act applies to the company. 5

(4) In deciding whether to make an order under this section 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. 10

Petition for protection of the court.

3.—(1) Subject to *subsection (2)*, a petition under *section 2* may be presented by—

- (a) the company, or
- (b) the directors of the company, or 15
- (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, 20

or by all or any of those parties, together or separately.

(2) (a) Where the company referred to in *section 2* is an insurer, a petition under that section may be presented only by the Minister, and *subsection (1)* of this section shall not apply to the company. 25

(b) Where the company referred to in *section 2* is the holder of a licence under section 9 of the Central Bank Act, 1971, or any other company supervised by the Central Bank under any enactment, a petition under *section 2* may be presented only by the Central Bank, and *subsection (1)* of this section shall not apply to the company. 30

(3) A petition presented under *section 2* shall—

- (a) nominate a person to be appointed as examiner, and 35
- (b) be supported by such evidence as the court may require for the purpose of showing that the petitioner has good reason for requiring the appointment of an examiner, and
- (c) where the petition is presented by any person or persons referred to in *subsection (1) (a)* or *(b)*, include a statement of the assets and liabilities of the company (in so far as they are known to them) as they stand on a date not earlier than 7 days before the presentation of the petition. 40

(4) A petition presented under *section 2* shall be accompanied—

- (a) by a consent signed by the person nominated to be examiner, and 45
- (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. 50

5 (5) The court shall not give a hearing to a petition under *section 2* presented by a contingent or prospective creditor until such security for costs has been given as the court thinks reasonable, and until a *prima facie* case for the protection of the court has been established to the satisfaction of the court.

(6) The court shall not give a hearing to a petition under *section 2* 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 14 days prior to the presentation of the petition.

10 (7) On hearing a petition under this section, the court may dismiss it, or adjourn the hearing conditionally or unconditionally, or make any interim order, or any other order it thinks fit.

15 (8) Without prejudice to the generality of *subsection (7)*, an interim order under that subsection 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).

20 (9) (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 £250,000, 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.

25 (b) Where an order is made by the court under this subsection the Circuit Court shall have full jurisdiction to exercise all the powers of the court conferred by this Act in relation to the company and every reference to the court in this Act shall be construed accordingly.

30 (c) Where, in any proceedings under this Act which have been remitted to the Circuit Court by virtue of this subsection, it appears to the Circuit Court that the total liabilities of the company exceed £250,000, it shall make, after making such interim orders as it thinks fit, an order transferring the matter to the court.

35 4.—(1) Where the court appoints an examiner to a company, it may, at the same or any time thereafter, make an order— Related companies.

(a) appointing the examiner to be examiner for the purposes of this Act to a related company, or

40 (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.

45 (2) In deciding whether to make an order under *subsection (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.

50 (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 section 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.

55 (5) For the purposes of this Act, a company is related to another company if—

- (a) that other company is its holding company or subsidiary; or
- (b) more than half in nominal value of its equity share capital (as defined in section 155 (5) of the Principal Act) 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 section 155 (5) of the Principal Act) of each of them is held by members of the other (whether directly or indirectly, but other than in a fiduciary capacity); or 10
- (d) 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; 15 or
- (e) 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 company to which both companies are 20 related;

and "related company" has a corresponding meaning.

(6) For the purposes of this section "company" includes any body which is liable to be wound up under the Companies Acts.

Effect of petition to appoint examiner on creditors and others.

5.—(1) During the period beginning with the presentation of a 25 petition for the appointment of an examiner to a company and (subject to section 18 (3) or (4)) ending on the expiry of three months 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. 30

(2) For so long as a company is under the protection of the court in a case under this Act, 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 35 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 section 2, shall, subject to section 6, be able to act; 40
- (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 charge on the whole or any part of the property, effects or income 45 of the company, no action may be taken to realise the whole or any part of such 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 (within the 50 meaning of section 11 (8)), 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—

5 (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.

10 (3) Subject to *subsection (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.

15 (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 section 205 of the Principal Act.

20 6.—(1) Where the court appoints an examiner to a company and 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—

Effect on receiver or provisional liquidator of order appointing examiner.

(a) that the receiver shall cease to act as such from a date specified by the court,

25 (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,

30 (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,

35 (d) directing the receiver to give the examiner full particulars of all his dealings with the property or undertaking of the company.

(2) Where the court appoints an examiner to a company and 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—

40 (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,

45 (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. 5

(3) In deciding whether to make an order under *subsection (1) (a)* or *(b)*, or *subsection (2) (c)*, the court shall have regard to whether the making of the order would be likely to facilitate the survival of the company, and the whole or any part of its undertaking, as a going concern. 10

(4) Where the court makes an order under *subsection (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 *section 2* 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. 15

Powers of an examiner.

7.—(1) Any provision of the Companies Acts 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. 20

(2) Notwithstanding any provision of the Companies Acts 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. 25

(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. 30

(4) For the purpose of *subsection (3)* “reasonable notice” shall be deemed to include a description of the business to be transacted at any such meeting. 35

(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. 40 45

(6) 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 Act, upon the application to it of any member, contributory, creditor or director of a company. 50

(7) 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.

5 8.—(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. Production of documents and evidence.

10 (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
15 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, or past director, of any such company maintains or has
20 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
25 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
30 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
35 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.

(4) An examiner may examine on oath, either by word of mouth or on written interrogatories, the officers and agents of such company
40 or other person as is mentioned in *subsection (1) or (2)* in relation to its affairs and may—

(a) administer an oath accordingly,

(b) reduce the answers of such person to writing and require him to sign them.

45 (5) If any officer or agent of such company or other person refuses to produce to the examiner any book or document which it is his duty under this section so to produce, refuses to attend before the examiner when required so to do or refuses to answer any question which is put to him by the examiner with respect to the affairs of the company,
50 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 alleged offender and any statement which may be offered in defence, punish

the offender in like manner as if he had been guilty of contempt of court.

(6) In this section, any reference to 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. 5

Further powers of court.

9.—(1) Where it appears to the court, on the application of the examiner, that, having regard to the matters referred to in *subsection (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. 10 15

(2) The matters to which the court is to have regard for the purpose of *subsection (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 20

(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 25

(c) that the company, or its directors, have resolved that such an order should be sought, or 30

(d) any other matter in relation to the company the court thinks relevant.

(3) Where the court makes an order under *subsection (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. 35

(4) Without prejudice to the generality of *subsections (1)* and (3), an order under this section 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. 40

Incurring of certain liabilities by examiner.

10.—(1) Where an order is made under this Act for the winding-up of the company or a receiver is appointed, any liabilities incurred by the company during the protection period which are referred to in *subsection (2)* shall be treated as expenses properly incurred, for the purpose of *section 29*, by the examiner. 45

(2) The liabilities referred to in *subsection (1)* are those certified by the examiner at the time they are incurred, to have been incurred in circumstances where, in the opinion of the examiner, the survival 50

of the company as a going concern during the protection period would otherwise be seriously prejudiced.

5 (3) In this section, "protection period" means the period, beginning with the appointment of an examiner, during which the company is under the protection of the court.

10 11.—(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.

Power to deal with charged property, etc.

15 (2) Where, on an application by the examiner, the court is satisfied that the disposal (with or without other assets) of—

(a) any property of the company subject to a security other than a security to which *subsection (1)* applies, or

20 (b) any goods in the possession of the company under a hire-purchase agreement,

25 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.

30 (3) Where property is disposed of under *subsection (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 *subsection (2)* that—

(a) the net proceeds of the disposal, and

35 (b) 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.

40 (5) Where a condition imposed in pursuance of *subsection (4)* relates to two or more securities, that condition requires the net proceeds of the disposal and, where *paragraph (b)* of that subsection applies, the sums mentioned in that paragraph to be applied towards the sums secured by those securities in the order of their priorities.

45 (6) An office copy of an order under *subsection (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 of companies.

(7) If the examiner without reasonable excuse fails to comply with *subsection (6)*, he shall be liable to a fine not exceeding £1,000.

(8) References in this section 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.

Notification of
appointment of
examiner.

12.—(1) Where a petition is presented under *section 2*, notice of the petition in the prescribed form shall, within 3 days after its presentation, be delivered by the petitioner to the registrar of companies. 5

(2) (a) An examiner shall, within the time limits specified in *paragraph (b)*, cause to be published in *Iris Oifigiúil* 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 situate a notice of— 10

(i) his appointment and the date thereof, and

(ii) the date, if any, set for the hearing of the matters arising out of the report to be prepared by the examiner under *section 15*. 15

(b) The time limits referred to in *paragraph (a)* are—

(i) twenty-one days after his appointment in the case of *Iris Oifigiúil*, and 20

(ii) three 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 of companies a copy of the order appointing him. 25

(4) Where a company is, by virtue of *section 5*, 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 contain the statement “under the protection of the court”. 30

(5) A person who fails to comply with the provisions of this section shall be guilty of an offence and shall be liable, on summary conviction, to a fine not exceeding £1,000 and, on conviction on indictment, to a fine not exceeding £10,000.

General provisions
as to examiners.

13.—(1) An examiner may resign or, on cause shown, be removed by the court. 35

(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 *subsection (2)* may be made by— 40

(a) any committee of creditors established under *section 21*, 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. 45

(5) The acts of an examiner shall be valid notwithstanding any defects that may afterwards be discovered in his appointment or qualification.

5 (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
10 this subsection shall be taken as limiting any right to indemnity which he would have apart from this subsection, or as limiting his liability on contracts entered into without authority or as conferring any right to indemnity in respect of that liability.

15 (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.

20 14.—(1) The directors of a company to which an examiner has been appointed shall, within 7 days of the appointment, cause to be made out, verified by affidavit and submitted to the examiner a statement in accordance with this section as to the affairs of the company.

Information to be given when examiner appointed.

25 (2) The statement shall, in so far as is reasonably possible to do so, show as at the date of the examiner's appointment particulars of the company's assets, debts and liabilities (including contingent and prospective liabilities), the names and addresses of its creditors, the securities held by them respectively, the dates when the securities were respectively given and such further information as may be prescribed or as the court may direct.

30 (3) A person to whom *subsection (1)* applies who makes default in complying with the requirements of this section shall be guilty of an offence and shall be liable, on summary conviction, to a fine not exceeding £1,000 and, on conviction on indictment, to a fine not exceeding £10,000.

35 15.—(1) It shall be the duty of an examiner to conduct an examination of the affairs of the company to which he is appointed and report to the court, within 21 days of his appointment or such longer period as the court may allow, the results of his examination in accordance with *section 16*.

Examination of affairs of company.

40 (2) Notwithstanding any other provision of this Act the court may impose on the examiner such other duties as it deems appropriate.

(3) The examiner shall deliver a copy of his report under this section to the company on the same day as his delivery of such report to the court.

45 (4) The examiner shall also supply a copy of his report under this section to any interested party on written application, provided that such supply may, if the court so directs, be subject to the omission of such parts of the report as the court thinks fit.

50 (5) The court may, in particular, give a direction under *subsection (4)* if it considers that the inclusion of certain information in the report

to be supplied under that subsection would be likely to prejudice the survival of the company, or the whole or any part of its undertaking.

Examiner's report.

16.—The examiner's report under *section 15* shall comprise the following—

- (a) the names and permanent addresses of the officers of the company and, in so far as the examiner can establish, any person in accordance with whose directions or instructions the directors of the company are accustomed to act, 5
- (b) the names of any other bodies corporate of which the directors of the company are also directors, 10
- (c) a statement as to the affairs of the company, showing, insofar as is reasonably possible to do so, particulars of the company's assets, debts 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, 15
- (d) whether in the opinion of the examiner any deficiency between the assets and the 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, 20
- (e) a statement of opinion by the examiner as to whether the company, and the whole or any part of its undertaking, would be capable of survival as a going concern and a statement of the conditions which he feels are essential to ensure such survival, whether as regards the internal management and controls of the company or otherwise, 25
- (f) his opinion as to whether the formulation, acceptance and confirmation of proposals for a compromise or scheme of arrangement would facilitate such survival, 30
- (g) whether, in his opinion, an attempt to continue the whole or any part of the undertaking of the company 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, 35
- (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 enquiries under *sections 33* and *34*, 40
- (j) such other matters as the examiner thinks relevant or the court directs, and
- (k) his opinion as to whether his work would be assisted by a direction of the court extending the role or membership of any creditors' committee referred to in *section 21*. 45

Hearing of matters arising from examiner's report.

17.—(1) Where, in a report made under *section 15*, the examiner expresses the opinion that—

- (a) the whole or any part of the undertaking of the company to which he has been appointed would not be capable of survival as a going concern, or 50
- (b) the formulation, acceptance, or confirmation of proposals

for a compromise or scheme of arrangement would not facilitate such survival, or

5 (c) an attempt to continue the whole or part of the undertaking of the company would not be likely to be more advantageous to the members as a whole, or the creditors as a whole, than a winding-up of the company, or

(d) there is evidence of a substantial disappearance of property that is not adequately accounted for, or of other serious irregularities in relation to the company's affairs,

10 the court shall, as soon as may be after the receipt of the examiner's report, hold a hearing to consider matters arising out of the report.

(2) The following parties shall be entitled to appear and be heard at a hearing under *subsection (1)*—

(a) the examiner,

15 (b) the company,

(c) any interested party,

(d) any person who is referred to in the report in relation to the matters mentioned in *subsection (1) (d)*.

20 (3) Following a hearing under this section, the court may make such order or orders as it deems fit.

(4) Without prejudice to the generality of *subsection (3)*, an order under that subsection may include an order for—

(a) the discharge from the protection of the court of the whole or any part of the assets of the company,

25 (b) the imposition of such terms and conditions as it sees fit for the continuance of the protection of the court,

(c) the winding-up of the company,

30 (d) the sale of the whole or any part of the undertaking of the company on such terms and conditions, including terms and conditions relating to the distribution of the proceeds of such sale, as the court sees fit, and, if necessary for that purpose, the appointment of a receiver,

(e) the formulation by the examiner of proposals for a compromise or scheme of arrangement,

35 (f) the summoning of the meetings mentioned in this Act for the purpose of considering proposals for a compromise or scheme of arrangement,

40 (g) the calling, holding and conduct of a meeting of the board of directors, or a general meeting of the company, to consider such matters as the court shall direct.

(5) On the making of an order under this section, the examiner or such other person as the court may direct shall deliver an office copy of the order to the registrar of companies for registration.

(6) Where the court makes an order for the winding-up of a

company under this Act, such a winding-up shall be deemed to have commenced on the date of the making of the order, unless the court otherwise orders.

Further report by
examiner.

18.—(1) Where, in the opinion of the examiner—

- (a) the whole or any part of the undertaking of the company would be capable of survival as a going concern, and 5
- (b) an attempt to continue the whole or any part of the undertaking of the company would be likely to be more advantageous to the members as a whole, and to the creditors as a whole, than a winding-up of the company, and 10
- (c) the formulation, acceptance and confirmation of proposals for a compromise or scheme of arrangement would facilitate such survival,

the examiner shall formulate proposals for a compromise or scheme of arrangement. 15

(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, to consider such proposals and report thereon to the court within 42 days of his appointment or such longer period as the court may allow, in accordance with *section 19*. 20

(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 three months referred to in *section 5 (1)* 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. 25

(4) Where the examiner has submitted a report under this section to the court and, but for this subsection, the period mentioned in *section 5 (1)* (and any extended period allowed under *subsection (3)* of this section) 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 *section 24*. 30 35

(5) The examiner shall deliver a copy of his report under this section—

- (a) to the company on the same day as his delivery of such report to the court, and
- (b) to any interested party on written application, 40

provided that such delivery under *paragraph (b)* may, if the court so directs, be subject to the omission of such parts of the report as the court thinks fit.

(6) The court may, in particular, give a direction under *subsection (5) (b)* if it considers that the inclusion of certain information in the report to be delivered under that paragraph would be likely to prejudice the survival of the company, or the whole or any part of its undertaking. 45

Examiner's report
under *section 18*.

19.—An examiner's report under *section 18* shall include—

- (a) the proposals placed before the required meetings, 50
- (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 section 285 of the Principal Act 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.

15 **20.**—(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.

Repudiation of certain contracts.

(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.

25 (3) In order to facilitate the formulation, consideration or confirmation of a compromise or scheme of arrangement, the court may hold 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 judgement debt.

30 (4) Where the examiner is not a party to an application to the court for the purposes of *subsection (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.

35 (5) Where the court approves the affirmation or repudiation of a contract under this section, 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.

40 **21.**—(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.

Appointment of creditors' committee.

(2) Save as otherwise directed by the court, a committee appointed under *subsection (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.

45 (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 *subsection (1)* the examiner shall meet with the committee to transact such business as may be necessary. 5

Contents of proposals.

22.—(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, 10

(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 holder of a particular claim or interest agrees to less favourable treatment, 15

(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, 20

(g) if the examiner considers it necessary or desirable as aforesaid, specify any changes he considers should be made in the memorandum or articles of the company, whether as regards the management or direction of the company or otherwise, 25

(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 *section 23*. 30

(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. 35

(4) The court may direct that the proposals include whatever other provisions it deems fit.

(5) For the purposes of this section and *sections 24* and *25*, 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. 40

(6) For the purposes of this section and *sections 24* and *25*, the interest of a member of a company in a company is impaired if—

(a) the nominal value of his shareholding in the company is reduced, 45

- (b) where he is entitled to a fixed dividend in respect of his shareholding in the company, the amount of that dividend is reduced,
- 5 (c) he is deprived of all or any part of the rights accruing to him by virtue of his shareholding in 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 the company.

10 23.—(1) This section 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. Consideration by members and creditors of proposals.

(2) At a meeting to which this section applies a modification of the proposals may be put to the meeting but may only be accepted with the consent of the examiner.

15 (3) Proposals shall be deemed to have been accepted by a meeting of members or of a class of members if a majority of the votes validly cast at that meeting, whether in person or by proxy, are cast in favour of the resolution for the proposals.

20 (4) 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.

25 (5) (a) Where a State authority is a creditor of the company, such authority shall be entitled to accept proposals under this section notwithstanding—

(i) that any claim of such authority as a creditor would be impaired under the proposals, or

(ii) any other enactment.

30 (b) In this subsection, “State authority” means the State, a Minister of the Government or the Revenue Commissioners.

35 (6) Section 144 of the Principal Act shall apply to any resolution to which *subsection (3) or (4)* relates which is passed at any adjourned meeting.

(7) Section 202, subsections (2) to (6), of the Principal Act shall, with the necessary modifications, apply to meetings held under this section.

40 (8) With every notice summoning a meeting to which this section 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.

45

24.—(1) The report of the examiner under *section 18* 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 *subsection (1)*— 5

(a) the company,

(b) the examiner,

(c) any creditor or member whose claim or interest would be impaired if the proposals were implemented.

(3) At a hearing under *subsection (1)* the court may, as it thinks proper, subject to the provisions of this section and *section 25*, confirm, confirm subject to modifications, or refuse to confirm the proposals. 10

(4) The court shall not confirm any proposals—

(a) unless at least one class of members and one class of creditors whose interests or claims would be impaired by implementation of the proposals have accepted the proposals, or 15

(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 20

(ii) the proposals are not unfairly prejudicial to the interests of any interested party. 25

(5) 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.

(6) 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. 30 35

(7) Any alterations in, additions to or deletions from the memorandum and articles 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. 40

(8) Where the court confirms proposals under this section it may make such orders for the implementation of its decision as it deems fit.

(9) A compromise or scheme of arrangement, proposals for which have been confirmed under this section shall come into effect from a 45

date fixed by the court, which date shall be not later than 21 days from the date of their confirmation.

5 (10) On the confirmation of proposals a copy of any order made by the court under this section shall be delivered by the examiner, or by such person as the court may direct, to the registrar of companies for registration.

(11) Where—

- (a) the court refuses to confirm proposals under this section, or
- 10 (b) the report of an examiner under *section 18* concludes that, following the required meetings of members and creditors of a company under this Act, it has not been possible to reach agreement on a compromise or scheme of arrangement,

15 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.

20 25.—(1) At a hearing under *section 24* 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—

Objection to confirmation by court of proposals.

- (a) that there was some material irregularity at or in relation to a meeting to which *section 23* applies,
- (b) that acceptance of the proposals by the meeting was obtained by improper means,
- 25 (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—

- 30 (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.

35 (3) Where the court upholds an objection under this section, 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.

40 26.—(1) Subject to *section 5*, the protection deemed to be granted to a company under that section shall cease—

Cessation of protection of company and termination of appointment of examiner.

(a) on the coming into effect of a compromise or scheme of arrangement under this Act, 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.

Revocation. 27.—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. 5
10

Disqualification of examiners. 28.—(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. 15
(2) A person who acts as examiner of a company while disqualified under this section shall be guilty of an offence, and shall be liable, on summary conviction, to a fine not exceeding £1,000 and, on conviction on indictment, to a fine not exceeding £10,000. 15

Costs and remuneration of examiners. 29.—(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. 20

(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). 25

(3) The remuneration, costs and expenses of an examiner which have been sanctioned by order of the court 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. 30

(4) 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. 35

(5) In considering any matter relating to the costs, expenses and remuneration of an examiner the court shall have particular regard to the proviso to *subsection (4)*.

Publicity. 30.—(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 companies of every order made under *section 17* or *24*, cause to be published in *Iris Oifigiúil* notice of such delivery. 40

(2) Where a person fails to comply with this section, 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 an offence and shall be liable to a fine not exceeding £1,000. 45

(3) Proceedings in relation to an offence under this section may be brought and prosecuted by the registrar of companies.

5 31.—The whole or part of any proceedings under this Act 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. Hearing of proceedings otherwise than in public.

10 32.—Where the court has appointed an examiner, 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— No lien over company's books, records etc.

15 (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 examiner by the person shall be without prejudice to the person's rights under the mortgage or charge (other than any right to possession of the document or paper),

20 (b) where by virtue of this section an examiner has possession of any document or papers of a receiver or that a receiver is entitled to examine, the examiner shall, unless the court otherwise orders, make the document or papers available for inspection by the receiver at all reasonable times.

25 33.—(1) If in the course of proceedings under this Act it appears that— Civil liability of persons concerned for fraudulent trading of company.

(a) any person was, while an officer of the company, knowingly a party to the carrying on of any business of the company in a reckless manner; or

30 (b) any person was knowingly a party to the carrying on of any business of the company with intent to defraud creditors of the company, or creditors of any other person or for any fraudulent purpose;

35 the court, on the application of the examiner, or any creditor or contributory of the company, may, if it thinks it 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.

40 (2) Without prejudice to the generality of *subsection (1) (a)*, an officer of a company shall be deemed to have been knowingly a party to the carrying on of any business of the company in a reckless manner if—

45 (a) he was a party to the carrying on of such business and, having regard to the general knowledge, skill and experience that may reasonably be expected of a person in his position, he ought to have known that his actions or those of the company would cause loss to the creditors of the company, or any of them, or

50 (b) he was a party to the contracting of a debt by the company and did not honestly believe on reasonable grounds that the company would be able to pay the debt when it fell

due for payment as well as all its other debts (taking into account the contingent and prospective liabilities).

(3) Notwithstanding anything contained in *subsection (1)* the court may grant a declaration on the grounds set out in *paragraph (a)* of that subsection only if— 5

(a) paragraph (a), (b) or (c) of section 214 of the Principal Act applies to the company concerned, and

(b) an applicant for such a declaration, being a creditor or contributory of the company, or any person on whose behalf such application is made, suffered loss or damage as a consequence of any behaviour mentioned in *subsection (1)*. 10

(4) In deciding whether it is proper to make an order on the ground set out in *subsection (2) (b)*, the court shall have regard to whether the creditor in question was, at the time the debt was incurred, aware of the company's financial state of affairs and, notwithstanding such awareness, nevertheless assented to the incurring of the debt. 15

(5) On the hearing of an application under this section, the applicant may himself give evidence or call witnesses.

(6) Where it appears to the court that any person in respect of whom a declaration has been sought under *subsection (1) (a)* has acted honestly and responsibly in relation to the conduct of the affairs of the company or any matter or matters on the ground of which such declaration is sought to be made, the court may, having regard to all the circumstances of the case, relieve him either wholly or in part, from personal liability on such terms as it may think fit. 20 25

(7) Where the court makes any such declaration, it may—

(a) give such further directions as it thinks proper for the purpose of giving effect to the declaration and in particular make provision for making the liability of any such person under the declaration a charge on any debt or obligation due from the company to him, or on any mortgage or charge or any interest in any mortgage or charge on any assets of the company held by or vested in him or any company or person on his behalf, or any person claiming as assignee from or through the person liable or any company or person acting on his behalf, and may from time to time make such further orders as may be necessary for the purpose of enforcing any charge imposed under this subsection; 30 35 40

(b) provide that sums recovered under this section shall be paid to such person or classes of persons, for such purposes, in such amounts or proportions at such time or times and in such respective priorities among themselves as such declaration may specify. 45

(8) This section shall have effect notwithstanding that—

(a) the person in respect of whom the declaration has been sought under *subsection (1)* may be criminally liable in respect of the matters on the ground of which such declaration is to be made; or 50

(b) any matter or matters on the ground of which the declaration

under *subsection (1)* is to be made have occurred outside the State.

(9) *Subsection (1) (a)* shall not apply during a period when the company is under the protection of the court.

5 (10) For the purposes of this section—

“assignee” includes any person to whom or in whose favour, by the directions of the person liable, the debt, obligation, mortgage or charge was created, issued or transferred or the interest created, but does not include an assignee for valuable consideration (not including consideration by way of marriage) given in good faith and without notice of any of the matters on the ground of which the declaration is made;

“company” includes any body which may be wound up under the Companies Acts; and

15 “officer” includes any auditor, liquidator, receiver, or any person in accordance with whose directions or instructions the directors of the company are accustomed to act.

20 34.—(1) If any person is knowingly a party to the carrying on of the business of the company with intent to defraud creditors of the company or creditors of any other person or for any fraudulent purpose, that person shall be guilty of an offence. Criminal liability of persons concerned for fraudulent trading of company.

(2) Any person who is convicted of an offence under this section shall be liable—

25 (a) on summary conviction, to imprisonment for a term not exceeding 12 months or to a fine not exceeding £1,000 or to both, or

(b) on conviction on indictment, to imprisonment for a term not exceeding 7 years or to a fine not exceeding £50,000 or to both.

30 35.—(1) Where, on the application of an examiner of a company, it can be shown to the satisfaction of the court that— Power of court to order the return of assets which have been improperly transferred.

35 (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,

40 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 examiner on such terms or conditions as the court sees fit.

45 (2) *Subsection (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 section 286 (1) of the Principal Act applies.

(3) In deciding whether it is just and equitable to make an order under this section, 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.

Enforcement of reconstruction orders made by courts outside the State.

36.—(1) Any order made by a court of any country recognised for the purposes of this section 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. 5

(2) When an application is made to the High Court under this section, an office copy of any order sought to be enforced shall be sufficient evidence of the order. 10

(3) In this section, “company” means a body corporate incorporated outside the State, and “recognised” means recognised by order made by the Minister. 15

Short title, collective citation and construction.

37.—(1) This Act may be cited as the Companies (Amendment) Act, 1990.

(2) This Act and the Companies Acts, 1963 to 1986, may be cited together as the Companies Acts, 1963 to 1990.

(3) The Companies Acts, 1963 to 1986, and this Act shall be construed together as one Act. 20

BILLE

dá ngairtear

Acht do leasú an dlí a bhaineann le cuideachtaí agus do dhéanamh socrú i dtaobh nithe gaolmhara.

BILL

entitled

An Act to amend the law relating to companies and to provide for related matters.

*Ritheadh ag dhá Theach an Oireachtais,
29 Lúnasa, 1990*

*Passed by both Houses of the Oireachtas,
29th August, 1990*

BAILE ÁTHA CLIATH:
ARNA FHOILSIÚ AG OIFIG AN tSOLÁTHAIR

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