

BANKRUPTCY OVERVIEW

Bankruptcy

Bankruptcy is the legal procedure for dealing with personal insolvency. Bankruptcy collects the assets of the insolvent debtor and distributes them amongst his creditors proportionately. It also has the effect of protecting a debtor from legal enforcement by his creditors. Bankruptcy is the equivalent of liquidation in the case of an insolvent company and many of the rules are similar.

Bankruptcy legislation in England has been radically reformed in the last 25 years and is now significantly different to Irish Bankruptcy law. It was significantly modernised in 1986 and again in 2002. The Irish Bankruptcy Act, 1988 was based on the Budd Committee report on bankruptcy which dates from 1972.

The practical differences between the Irish and English bankruptcy laws is evident from the number of bankruptcies. In England, the number of bankruptcies per head of population annually is significant. In contrast, the Irish rate of bankruptcies has been almost negligible in the last 10 years. This reflects the harsh consequences of bankruptcy, the stigma and the perception by creditors that the cost of instituting bankruptcy is not worth the effort.

Insolvency law has two significant aspects. One aspect is for the benefit of creditors who seek to enforce their debts by winding up and realising all the debtors' assets. The other and equally significant aspect, is for the protection of the debtor by protecting him from his creditors.

A key aspect of bankruptcy is that all the debtor's assets vest in (i.e. are transferred) to an official who administers the bankrupt's assets. The creditors are treated equally and are paid proportionately. However, secured creditors and so called "preferential" creditors have priority in entitlement to payment of the proceeds of the bankrupt's assets.

The bankrupt person is subject to certain restrictions and disabilities on trading and obtaining credit for a period. In bankruptcy as in liquidation, the trustee in bankruptcy can challenge pre-bankruptcy transactions if they appear to be at an undervalue or to give a preference to a particular creditor.

Discharge

The vast majority of debts do not survive bankruptcy. In England, the bankrupt person is generally discharged after one year. "Discharge" means that the debtor will have legal capacity and can commence to trade and contract debts again. Under Irish law, the conditions for discharge from bankruptcy are very onerous. Discharge is only permissible after 12 years and even then, it is not automatic.

In contrast under England and Wales insolvency law, automatic discharge can happen after as little as one year. Commitments may have to be given to the trustee to allow income payments for periods of up to three years. Ultimately, however, there is an opportunity to start again under the English legislation which is not available under Irish insolvency law.

IVAs

There are a number of alternative procedures by which a debtor may avoid bankruptcy in England. They are more flexible and more attractive than the equivalent options available in Ireland. There is a simplified debt relief procedure for smaller non-trade debts. As in Ireland, there is the possibility of a Deed of Arrangement. This will not generally be attractive because it only works by the agreement of all creditors.

The most important alternative to bankruptcy in England and Wales is the Individual Voluntary Arrangement (or so called "IVA"). It enables relief against debts without resort to bankruptcy. An IVA is an agreement between a debtor and his creditors that is legally binding and enables the insolvent debtor to secure release from his debts.

Creditors may decide that IVA offers a better, more realistic prospect of return than bankruptcy. Once the arrangement is agreed with at least 75% in value of creditors, the creditor's claims will be settled in accordance with the terms of the arrangement and not the prior debt.

IVAs individual voluntary arrangements under English bankruptcy law are extremely flexible. They can be implemented outside of Court under the supervision of an insolvency practitioner. If the arrangement is accepted by 75% in value of creditors, it is binding on them all. Provided creditors accept that they will get a better deal out of the IVA than bankruptcy, they are likely to accept it.

In contrast, the Irish bankruptcy legislation provision for deeds of arrangement is cumbersome, regulative and requires court approval.

International Aspects

The EU Insolvency Regulation is law throughout the whole European Union except Denmark. The rules determine which EU member state has jurisdiction in insolvency proceedings concerning an insolvent debtor. It deals with mutual recognition of insolvency rules throughout the EU.

The key test is the debtor's centre of main interest. The COMI is the place where the debtor conducts the administration of his interests on a regular basis and where the focal point of economic interest is located. For most debtors, this will be the habitual place of residence where he has a settled permanent home.

The Regulation provides that the main insolvency proceedings should be before the Courts of the EU member state where the debtor's COMI is situated. Secondary insolvency proceedings may also be opened before the Courts of another EU state, if the debtor has an establishment in that state. This requires a place of business and the conduct of a business activity within that state. Such secondary proceedings are limited to the assets of the place of business within the jurisdiction.

The EU Regulation provides for recognition of the insolvency proceedings throughout the EU where the main or secondary that had been commenced. The law of the state in which proceedings are opened determines the conduct and closure of the proceedings.

This Guide is intended as an overview and broad outline of the matters covered in it. Its purpose is to inform and raise awareness. We are happy to offer specific legal advice on particular circumstances.

This Guide should not be relied on as a substitute for comprehensive legal advice with reference to the particular circumstances.

While we have taken due care in the preparation of this publication, we do not accept legal liability as a result of any reliance placed on anything in this Guide. The reader should rely only on specific legal or taxation advice.

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