

PERSONAL INSOLVENCY ACT 2012

Introduction:

The Personal Insolvency Act 2012 (the "Act") was signed into law by the President of Ireland on 26th December 2012.

The Act provides for the reform of personal insolvency law and will introduce three new forms of non-judicial debt settlement arrangements, subject to relevant conditions in each case.

The Act establishes an independent body known as the Insolvency Service which will be responsible for monitoring the operation of the debt settlement arrangements, considering applications for Debt Relief Notices, processing applications for protective certificates and maintaining registers of the arrangements granted or approved.

The Act also introduces reforms of the Bankruptcy Act 1988, begun in the Civil Law (Miscellaneous Provisions) Act 2011, to provide a less punitive and less costly approach to bankruptcy.

Major reforms

1. Bankruptcy reforms.
2. Three separate non-judicial debt settlement arrangements for dealing with personal insolvency:
 - (a) Debt Relief Notice
 - (b) Debt Settlement Arrangement
 - (c) Personal Insolvency Arrangement

1. BANKRUPTCY

The main changes which the Act will make are as follows:

- a) The automatic discharge period from bankruptcy (subject to certain conditions) has been reduced from 12 years to 3 years.
- b) A minimum debt amount of €20,000 in respect of a creditor petition for bankruptcy.
- c) Where the petition is presented by a debtor, the debtor must provide an affidavit that he has made reasonable efforts to reach an arrangement with his creditors by proposing a Debt Settlement Arrangement or a Personal Insolvency Arrangement and show that his debts exceed his assets by at least €20,000 and the court must be satisfied that he is unable to meet his engagements with creditors for him to be declared bankrupt
- d) Where the petition is presented by a creditor, the court shall consider whether a Debt Settlement Arrangement or a Personal Insolvency Arrangement would be a more appropriate solution
- e) Certain timeframes regarding fraudulent preference and avoidance of certain transactions have been extended to 3 years
- f) Where a debtor has been adjudicated bankrupt more than 3 years before the Act came into force, he shall be discharged 6 months later (subject to the rights of creditors to raise objections)
- g) The court may suspend an automatic discharge up to the eighth anniversary of the debtor being adjudicated bankrupt, e.g. for non-compliance, fraudulent or dishonest behaviour by the bankrupt during the process.
- h) Once a debtor is discharged from bankruptcy, he will remain under a duty to cooperate with the Official Assignee in the realisation and distribution of such property as is vested in the Official Assignee

2. NON-JUDICIAL DEBT SETTLEMENT ARRANGEMENTS

(a) Debt Relief Notice

This process is aimed at persons with no assets, no income, who are insolvent and have little or no realistic prospect of being able to pay their debts within the next 3 years. The intention is to create an efficient non-judicial process of allowing such persons to resolve unmanageable debt problems.

- 1) A Debt Relief Notice to allow for the write-off of qualifying unsecured debt **up to €20,000.00**, subject to a three year supervision period.
- 2) The eligibility criteria also includes:
 - the debtor having net disposable income of less than €60 per month,
 - assets or savings of less than €400 (Exempt from the asset test would be (1) one vehicle up to a value of €2,000.00 , (2) household items, tools or equipment up to a value of €6,000.00 and (3) one item of personal jewellery up to a value of €750.00)
 - Irish domicile or ordinary residence
- 3) This process does not apply to secured debt and this will remain unaffected
- 4) An application for a Debt Relief Notice to the Insolvency Service must be submitted and managed on behalf of the debtor by an authorised Approved Intermediary.
- 5) If the Insolvency Service is satisfied that the application is in order, they will issue a Certificate to that effect and will refer the matter to the appropriate court for approval. The court will then issue the Debt Relief Notice and notify the Insolvency Service. This is then registered by the Insolvency Service in the Register of Debt Relief Notices and then takes affect.
- 6) A Debt Relief Notice will remain in place for a 3 year period.
- 7) Where a debtor's income increases by €400.00 or more per month during the 3 year supervision period, he / she must surrender at least 50% of that increase to the Insolvency Service.
- 8) At the end of the 3 year supervision period the debtor's qualifying unsecured debts are written off

(b) Debt Settlement Arrangement

This process relates to unsecured debts which are **greater than €20,000.00**. The procedure will not affect secured debts or the right of a secured creditor to enforce or otherwise deal with security.

- 1) A Debt Settlement Arrangement may be proposed by a debtor to one or more creditors. The debtor must
 - (i) be Insolvent and unable to pay his / her debts as they fall due;
 - (ii) be Domiciled in the State, or within 1 year before the application date, be ordinarily resident in the State or have a place of business in the State;
 - (iii) meet certain other eligibility criteria set out in the Act.
- 2) A debtor will be required to make detailed financial disclosure to the Insolvency Practitioner. The Insolvency Practitioner will make the application to the Insolvency Service on the debtor's behalf. If the application is accepted by the Insolvency Service on the basis of prescribed criteria, the matter will be transferred to the appropriate court which can issue a "*protective certificate*".
- 3) The Protective Certificate imposes a 70 day moratorium on the enforcement of the relevant debts (which period may be extended by a further 40 days by the court in limited circumstances).
- 4) During that moratorium, the Insolvency Practitioner must notify the creditors and invite submissions as to how the debts might be settled.
- 5) While secured debt cannot form part of a Debt Settlement Arrangement, the Insolvency Practitioner may share information with secured creditors. The Insolvency Practitioner must arrange a creditors' meeting at which creditors representing not less than 65% in value of the debts due to creditors participating in the meeting must approve the Debt Settlement Arrangement for it to move forward. If approved, the Insolvency Practitioner must notify the Insolvency Service, which must provide a copy of the Debt Settlement Arrangement to the appropriate court. If approved by the court (and no creditor objection is entered within 14 days

or where any creditor objection has been dismissed) the Debt Settlement Arrangement will take effect once registered by the Insolvency Service in the Register of Debt Settlement Arrangements.

- 6) The payment options under a Debt Settlement Arrangement are flexible and may involve the transfer of assets to creditors, the sale of assets, lump-sum payment or periodic payments by the debtor. Insofar as practicable, the Insolvency Practitioner must formulate the arrangement on terms that avoid the debtor being required to sell or vacate the debtor's principal private residence
- 7) A Debt Settlement Arrangement will last over any period up to a maximum of five years (with a possible 1 year extension).
- 8) At the end of the Debt Settlement Arrangement period and provided the arrangement is performed in accordance with its terms, the debtor will be discharged fully from those debts.

(c) Personal Insolvency Arrangements

Personal Insolvency Arrangement for the agreed settlement of secured debt and unsecured debt up to €3 million over a 6 year period, i.e. **between €20,001.00 and €3 million**. This process would assist those persons who have difficulty in the repayment of both secured debt (e.g. mortgage arrears) and unsecured debt (e.g. term loans, credit card debt etc). The amount of secured debt is capped at €3 million, however this cap can be increased where all of the secured creditors consent in writing.

An Insolvency Practitioner may propose a Personal Insolvency Arrangement in the following circumstances. The debtor must:

- a) have secured debts up to €3 million in aggregate (but without limit if every secured creditor agrees);
- b) be domiciled in the State or, within 1 year before the application date, has ordinarily resided in the State or had a place of business in the State;
- c) owe a debt to at least one secured creditor (such as a mortgage lender) with security over property of the debtor situated in the State;
- d) be unable to pay his or her debts in full as they fall due;
- e) have on his / her behalf, a completed report prepared by the Insolvency Practitioner confirming, amongst other things, that there is no likelihood of the person becoming solvent within 5 years;
- f) have declared in writing that he / she has co-operated for a period of at least 6 months with secured creditor(s) with regard to the debtor's principal private residence in accordance with, for example the Mortgage Arrears Resolution Process (MARP), or any process relating to mortgage arrears approved or required by the Central Bank of Ireland (such as the process required under the Code of Conduct on Mortgage Arrears); and
- g) satisfy certain other eligibility criteria set out in the Act.

The **steps** leading to a Personal Insolvency Arrangement are similar to those required in a Debt Settlement Arrangement, referred to at 1) to 8) above and further summarized as follows:

- 1) The debtor will be required to make detailed financial disclosure to the Insolvency Practitioner.
- 2) If the application is accepted by the Insolvency Service, the matter will be transferred to the appropriate court which may then issue a 70-day protective certificate (extended by 40 days in certain circumstances) which imposes a moratorium on the enforcement of the relevant debts, including secured debts.
- 3) The payment options under a personal insolvency arrangement are flexible and may involve a lump-sum payment or periodic payments over any period up to a maximum of 6 years (subject to extension for 1 further year), this is 1 year longer than the maximum period permitted under a Debt Settlement Arrangement. Insofar as practicable, the Insolvency Practitioner must formulate

the arrangement on terms that avoid the debtor being required to sell or vacate the debtor's principal private residence

- 4) Dealing with secured debt under a Personal Insolvency Arrangement is likely to include:
 - a. *sale of the property* the subject of the security and write-down of any shortfall balance;
 - b. *restructuring of the secured debt* to make it more affordable; and
 - c. *write-down* of some or all of the negative equity but without sale of the property the subject of the security.
- 5) The Act imposes a variety of conditions and limits on the manner in which secured debt and security can be modified under a Personal Insolvency Arrangement. These include a 'clawback' mechanism which, in certain circumstances, will require a debtor who has benefited from a write-down of negative equity to repay the secured creditor some or all of that written-down amount where the debtor sells the property the subject of the security within 20 years of the Personal Insolvency Arrangement coming into effect. The Act prescribes a valuation mechanism for the valuation of security and provides for the appointment of an independent expert in certain circumstances.
- 6) For a Personal Insolvency Arrangement to be approved at creditors' meeting it must be approved by:
 - i. a majority of creditors representing not less than 65% in value of the total of the debtor's debts due to the creditors participating in and voting at the meeting,
 - ii. creditors representing more than 50% of the value of the secured debts due to creditors participating in and voting at the meeting, and
 - iii. creditors representing more than 50% of value of the unsecured debts due to creditors participating in and voting at the meeting.
- 7) If the Personal Insolvency Arrangement is approved, the Insolvency Practitioner must notify the Insolvency Service, which must then notify the appropriate court. If approved by the court (and no creditor objection is entered within 14 days) the Personal Insolvency Arrangement will take effect once registered by the Insolvency Service in the Register of Personal Insolvency Arrangements.
- 8) When the Personal Insolvency Arrangement reaches its conclusion the debtor will be discharged from the unsecured debts specified in the PIA and secured debts to the extent provided for under the terms of the arrangement.
- 9) If the Personal Insolvency Arrangement is not agreed at the creditors' meeting or approved at the appropriate court, the process terminates and the debtor will be open to bankruptcy and other enforcement proceedings.

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If you have any questions in relation to any of the above, please contact McCullagh Higgins & Co. Solicitors.

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