

**INSOL EUROPE SURVEY**

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## **1. INTRODUCTION**

Following on from the receipt of an invitation from Mr. Daniel Fritz, the co-chair of the Insolvency Office Holders (“IOH”) Forum of INSOL Europe, we have prepared this response to the Survey of Certain Regulation for Insolvency Officeholders.

## **2. TYPES OF INSOLVENCY OFFICE HOLDER (IOH)**

### **2.1 Corporate**

#### ***Members’ Voluntary Liquidation (“MVL”)***

An MVL is a solvent liquidation, where the affairs of a solvent company are wound up of its own accord by the appointment of a Liquidator who realises the company’s assets and pays creditors in the required priority. The Liquidator distributes remaining funds to the company’s shareholders / members and following the filing of the final liquidation returns in the Companies Registration Office, the company is dissolved.

#### ***Examinership***

Examinership is a process whereby a company can be placed under the “protection” of the Court while its affairs are restructured. This process is suitable where there is a viable business which has a reasonable prospect of survival and there are investors ready to invest. A petition, including an Independent Expert’s Report, must be submitted to the Circuit or High Court which will, if it deems it appropriate, appoint an Examiner.

Protection means that no winding up proceedings can be initiated, no Receiver can be appointed, goods cannot be repossessed and no other proceedings can be brought except by leave of the court etc. The Examiner may attract investment and must formulate a Scheme of Arrangement under which creditors must generally receive more than if the company were to be liquidated. If the creditors and the Court approve the Scheme, the investment is made, the company is restructured and the company exits Examinership.

#### ***Receivership***

A receivership is a process whereby a creditor who holds security over assets of a company is given the right under the security documents to appoint a Receiver to those assets in order to sell them and pay the proceeds of sale to the preferential creditors and / or the secured creditor in an attempt to recover the outstanding borrowings.

A Receiver can be appointed over specific assets under a fixed charge or a Receiver and Manager can be appointed over all of a company's assets (fixed and floating) usually with the power to manage and trade the company's business.

#### ***Court Liquidation***

A Court Liquidation is the process by which an insolvent company is wound up under the supervision of the High Court. The company’s affairs are investigated, its assets are realised, creditors are paid in the required priority and the company is dissolved. A Petition must be presented to the High Court and is usually presented by a creditor who is seeking to wind up a debtor in the hope of recovering some or all of a debt owed.

The Companies Act 2014 removed the role of the High Court Examiner who previously oversaw the conduct of Court Liquidations and was an intermediary between the Official Liquidator and the Court. All documentation which was to be presented to the Court was first reviewed by the High Court Examiner who was also required to countersign all payments, contracts, adjudicate on creditor claims etc. The removal of this requirement should reduce the administration involved in a Court Liquidation and should streamline the process.

### ***Provisional Liquidation***

In certain circumstances, such as where there is urgency in making the appointment in order to protect assets which may be at risk, the Court can appoint a Provisional Liquidator in advance of hearing the petition in full.

### ***Creditors' Voluntary Liquidation ("CVL")***

A CVL is similar to Court Liquidation but there is no Court involvement. The company's shareholders must resolve to wind the company up and call a meeting of creditors at which, either the company's nominee or the creditors' nominee can be appointed as the Liquidator.

The Liquidator will investigate the company's affairs, realise its assets, pay the creditors in the required priority and make the necessary Companies Registration Office filings for the company to be dissolved.

A committee of inspection consisting of shareholder and creditor representatives may be appointed to oversee the liquidation, approve Liquidator's fees etc.

## **2.2 Personal**

### ***Debt Relief Notice ("DRN")***

A DRN can be issued in circumstances where a person has little or no disposable income or assets which they could use to repay what they owe. The qualifying debts cannot exceed €35,000. The DRN process enables eligible insolvent debtors to write off their debts where they can prove they are not in a position to repay them and it is unlikely their financial situation will improve in the next 3 years.

### ***Debt Settlement Arrangement ("DSA")***

A DSA can be entered into between a debtor and his/her unsecured creditors. A DSA only includes unsecured debts without a limit on the amount of debt. However, certain unsecured debts cannot be included and certain other unsecured debts require the consent of the creditor prior to being included. Secured debts cannot be covered in a DSA. A DSA must be agreed by the debtor and approved at a creditor's meeting by 65% of creditors (in value). In addition it must be processed by the Insolvency Service of Ireland and approved by the Court. Under a DSA, a debtor's unsecured debts subject to the DSA will be settled over a period of up to 5 years (extendable to 6 years in certain circumstances).

### ***Personal Insolvency Arrangement ("PIA")***

A PIA can be entered into between a debtor and one or more of his/her creditors. A PIA can include secured and unsecured debts, but certain debts cannot be included in a PIA and certain other debts require the consent of the creditor prior to being included. A limit of €3m applies to the amount of secured debt that can be included in a PIA, unless all secured creditors consent to the inclusion of a higher amount.

A PIA must be agreed by the debtor and approved at a creditors' meeting by a qualified majority of creditors. It must be processed by the Insolvency Service of Ireland and approved by the Court. Under a PIA, a debtor's unsecured debts will be settled over a period of up to 6 years (extendable to 7 years in certain circumstances) and the debtor will be released from those unsecured debts at the end of that period.

Secured debts can be restructured under a PIA (e.g. to provide for payments for a certain period or a write-down of a portion of negative equity). Depending on the terms of the PIA, the debtor may be released from a secured debt at the end of PIA period or the secured debt can continue to be payable by the debtor (although perhaps on restructured terms).

### ***Bankruptcy***

Bankruptcy is a process where the ownership of an insolvent person's property transfers to the Official Assignee in Bankruptcy to be sold by him / her for the benefit of the individual's creditors. The debtor has a duty to contribute from surplus income (income less reasonable living expenses) towards the debts for up to 5 years.

Bankruptcy proceedings are brought in the High Court. The application for a Bankruptcy Order is filed in the Office of the Examiner of the High Court. When the debtor's property is sold, the Official Assignee will make sure that the proceeds are shared out fairly among creditors and any outstanding debt will be written off.

Bankruptcy normally lasts for 3 years.

Legislation is due to be introduced shortly which will reduce the bankruptcy period to 1 year (and to 18 months for persons already in the process) and will reduce the period during which debtors are obliged to contribute towards the debt to 3 years if there is full co-operation.

## **3. SIZE OF THE PROFESSION**

There is no mandatory organisation of IOHs in Ireland. IOHs are typically accountants, either partners in accounting firms or sole practitioners, ranging from the global accountancy firms to specialist independent firms. Some firms specialise in insolvency work while others provide it as part of a range of services.

The website of the Irish Society of Insolvency Practitioners contains a list of practising IOHs and solicitors specialising in insolvency. It lists a total of 656 members as at 22 January 2016.

## **4. PRACTICING NORMS**

As outlined above, there is no mandatory organisation of IOHs in Ireland. IOHs are typically accountants, either partners in accounting firms or sole practitioners.

## **5. QUALIFICATION, TRAINING AND ENTRY INTO THE PROFESSION**

In order to be appointed as a Liquidator or Examiner, there is now a statutory obligation for a person to have certain qualifications, such as:

1. A member of a prescribed accountancy body and hold a practicing certificate issued by that body;
2. A solicitor who holds a practicing certificate issued by the Law Society of Ireland;
3. A member of a professional body recognised by a supervisory authority;
4. A person qualified under the laws of another EEA state; and
5. A person with practical experience of winding ups and knowledge of relevant law.

There are no prescribed qualifications for a Receiver.

The following may not act as a Liquidator, Examiner or Receiver;

- A body corporate;
- An un-discharged bankrupt;
- A person who has been an officer of the company in the last 12 months;
- A relative of an officer of the company; and
- An employee of the company.

IOHs are supervised by the Courts, creditors or committees of creditors.

Members of accountancy bodies are subject to the supervision of those bodies.

The Office of the Director of Corporate Enforcement also supervises the work of IOHs in insolvent liquidations and has wider regulatory and investigative powers which to date have not been often used.

To be appointed in a personal insolvency, a Personal Insolvency Practitioner (“PIP”) must at a minimum (i) hold an ordinary degree in law, business or other relevant discipline, (ii) have experience and knowledge of insolvency practice in Ireland and (iii) have completed a course in relation to the Personal Insolvency Act 2012.

## **6. PROFESSIONAL BODIES**

IOHs are usually accountants and members of either Chartered Accountants Ireland or the Association of Chartered Certified Accountants.

## **7. CONTINUING PROFESSIONAL EDUCATION**

IOHs who are members of a professional accounting body are subject to its continuing professional development (“CPD”) regulations such as 20 hours of structured and 50 hours of unstructured CPD for members of Chartered Accountants Ireland.

## **8. BODY CORPORATE OR INDIVIDUAL**

IOHs are in all cases individuals and take appointments either singly or jointly in a personal capacity. They may be employees or partners of a corporate entity or partnership.

## **9. SANCTION FOR ACTING AS AN IOH WITHOUT PROPER AUTHORISATION**

Persons who act as IOHs in breach of the requirements set out in the Companies Act 2014 shall be liable:

- on summary conviction, to a fine not exceeding €5,000 or imprisonment for a term not exceeding 12 months or both, or
- on conviction on indictment, to a fine not exceeding €500,000 or imprisonment for a term not exceeding 10 years or both.

Such persons if they were members of a professional body may also face sanctions from that body.

## **10. BONDING AND INSURANCE**

In order to qualify to act as a Liquidator or Examiner a person must have professional indemnity insurance in place.

## **11. APPOINTMENT OF IOHS**

The choice of IOH to be selected will depend upon the case and industry profile, the experience of the IOH and the resources available.

Where a company is being wound up by way of a CVL, the debtor / company (acting through the directors) or the creditors select the Liquidator. The majority in value of creditors at the creditors meeting may replace the debtor's nominee.

In a Court Liquidation the petitioner nominates the Liquidator and the Court makes the appointment. The Court will take into account the experience, qualifications and resources of the IOH and a recommendation from a solicitor that the person is fit and proper. Any creditor can appear in Court and nominate an alternate IOH.

In an Examinership, the petitioner nominates the Examiner who is appointed by the Court.

In a Receivership, the Receiver is chosen by the appointing secured creditor.

Personal debtors can choose a PIP to act for them and a list is available from the Insolvency Service of Ireland.

## **12. REMUNERATION**

In CVLs and Court Liquidations, fees may be charged by way of a relevant percentage (e.g. of realisations), by reference to the time spent or otherwise. In practice, fees are usually charged on the basis of time. The method of charging and the amount of fees are reviewed and approved by the Committee of Inspection or by the creditors if there is no committee. If agreement cannot be reached, the Liquidator may apply to Court to fix the fees.

In an Examinership, fees are also usually charged on the basis of time and are often agreed with the Investor. If agreement is not reached, the fees are approved by the Court.

In a Receivership, fees are agreed between the appointing secured creditor and the Receiver.

In a personal insolvency case the PIP must set out his fee prior to being appointed.

## **13. PERSONAL LIABILITY OF IOHS**

IOHs act in a personal capacity and, subject to the comments below, have personal liability for their actions.

The IOH is entitled to indemnification from the assets of the insolvent company.

In general, IOHs will protect themselves by excluding personal liability in any contract, and specifying that they act as agent of the insolvent company where appropriate.

The IOH can be found personally liable in the case of negligence or, for example, in pursuing litigation without having taken appropriate legal advice.

Increasingly, IOHs will obtain legal advice regarding potential exposure under general legislation affecting businesses.

## **14. RELEASE OF IOHS FROM LIABILITY**

IOHs are usually discharged either by deed of discharge in the case of a Receivership or by filing their final returns in a liquidation. Once discharged, they are released from liability.

## **15. INDEPENDENCE**

In general, IOHs are bound by the ethics regulations of their professional body which will likely include the need to avoid or manage threats to objectivity and due care etc. which may arise as a result of a conflict of interest or professional or personal relationship.

If there is a threat to objectivity etc, and sufficient protections cannot be put in place, the appointment should not be accepted.

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