Kluwer Mediation Blog

Ireland’s New Personal Insolvency Arrangements – Mediation by Another Name?

Sabine Walsh (Sabine Walsh Mediation) · Thursday, September 5th, 2013

From next Monday, 9th September, the brand new Insolvency Service of Ireland (ISI) (www.isi.gov.ie) will begin accepting applications for recourse to new debt resolution mechanisms which have been created by the Personal Insolvency Act, 2012 which became law on 26th December 2012. This long overdue response to the increasing levels of personal and property-related debt in Ireland amends the law in relation to bankruptcy – previously the only mechanism available to insolvent citizens – and introduces three new mechanisms for resolving debt, all of which operate with the assistance of a third party.

The Act was the subject of much debate as it passed through the houses of parliament, with many arguing it does not go far enough to protect the rights of those in debt, many through no fault of their own. While personal debt in Ireland has declined from its peak in 2008, it still stands close to the top of the world tables, at about €37,500 per capita. Much of this relates to mortgage debt, which, frankly, isn’t going to go away any time soon due to the length of many mortgages (some in excess of 30 years) and the continued slump in property prices, which are unlikely ever to recover to what they were 5-6 years ago.

The new Act was therefore drafted to address this situation, thereby also meeting the requirements of the EU-IMF-ECB Programme for Ireland. There are many interesting aspects to the legislation, not least the mandate for the ISI to draw up guidelines in relation to reasonable living expenses that would be allowed a debtor. From a mediation perspective, the three new debt resolution mechanisms are of most interest. These are set out in Part 3 of the Act, and differ according to the level and type of debt which is owed, and the income and assets of the debtor. All three procedures require the input of an intermediary of some kind.

The first, a Debt Relief Notice (DRN), enables eligible insolvent debtors to write off their debts if they cannot repay them and this is not likely to change over the next three years. This procedure only applies to debts of up to €20,000, where the debtor has €60 or less net income per month (after deduction of reasonable living expenses) and assets of not more than €400. In this case an “Approved Intermediary” (AI) will assist the applicant in the process. The AI must study for and pass an exam, after which they will be entitled to act. Their function is to assist the debtor with all matters relating to the application for a DRN, including gathering the relevant financial information and engaging with the ISI.

The next mechanism is the Debt Settlement Arrangement (DSA) which applies only to unsecured debts. This mechanisms permits the debtor to enter into an settlement arrangement over 5 years with his or her creditors where the debtor agrees and the settlement is approved by 65% of the creditors (in value). It must also be approved by the Circuit Court. Where the debtor successfully complies with the arrangement, he or she will be discharged from debts specified in the DSA at the end of the 5 years. Various restrictions apply.

Finally, then, the Act provides for Personal Insolvency Arrangements (PIA's). These differ from DSAs in that they can include secured debt up to a limit of €3 million unless all creditors agree to a higher amount. Under this arrangement, a debtor's unsecured debts will be settled over a period of 6 years after which the debtor will be released from those debts. The secured debts can be restructured and, at the end of the arrangement period, either written off or continued, but, e.g., on restructured terms.

Both of these mechanisms require the services of a Personal Insolvency Practitioner (PIP). The PIP is a specially qualified professional, regulated by and registered with the ISI who, in the words of the Guide to the Service "liaises between the debtor and the creditors in relation to a PIA or DSA; is authorised and regulated by the Insolvency Service of Ireland and has functions under the Act with respect to a PIA or DSA. The PIP will be the person who advises the debtor directly and negotiates the arrangement on his/her behalf." In essence the PIP acts as liaison / intermediary between the debtor and the creditor(s).

The question I ask myself therefore is to what extent both Authorised Intermediaries and Personal Insolvency Practitioners will be fulfilling at least some of the functions of a mediator. The legislation itself is not particularly enlightening in this regard. One the one hand, it seems to envisage the PIP being advisor to and negotiator for the debtor, but on the other it puts fairly onerous requirements in the PIP in relation to independence, avoidance of conflicts of interest, being accountable to the Insolvency Service and similar. While both AIs and PIPs are authorised to assist debtors, their mandate seems to fall short of advocating on their behalf in the same way a lawyer or financial representative might.

The qualification and training requirements for such practitioners do not make the picture any clearer. The legislation requires both to have relevant professional experience, and undertake specific training, along with having obligations to carry out their work honestly and ethically and have sufficient management and organisational skills to fulfil their function, but looking at the information on some of the training courses available, there is little insight into what practical skills these practitioners will be taught in order to fulfil these functions.
From what I know about the intention behind the legislation and the new debt resolution mechanisms specifically, I would have thought that mediation and negotiations skills would be essential for such practitioners, given that the aim of these mechanisms is to produce satisfactory outcomes for both parties. At the very least, such practitioners will be having difficult conversations, with both creditors and debtors, and will require the skills to do this effectively. Understanding the mechanics of bargaining and negotiation, as well as managing expectations and being able to assist parties in reality checking would, surely, also be helpful. High levels of emotions will very likely be present, in many cases on both sides (bearing in mind creditors are not all banks, but often small business owners who are also under severe pressure) and PIPs will require additional skills to deal with this which, as far as I can see, many of the currently advertised trainings do not provide for. A PIP might be a skilled accountant, e.g., with an excellent understanding of finance and budgeting, but lacking in what are essentially mediation skills which might make the difference between a successful and an unsuccessful outcome for the parties under

one of these mechanisms.
It appears to me therefore that the opportunity exists under this new regime to bring mediation and all its advantages – self-determination, mutual respect, flexibility and win-win solutions – into play in resolving Irish citizens debt problems but, at least on paper, this opportunity has not been fully realised. It will therefore be up to the practitioners to make full use of their mandate and ensure that Ireland leads the way in relation to creative debt management.

The government has estimated that 18,000 people will apply under the new regime in its first year of operation, but industry puts this figure at more like 25,000 – 40,000. (Source: The Irish Times, 4 September 2013) If these estimates are accurate, it should be possible to assess how the service is working in practice before too long. So watch this space!

To make sure you do not miss out on regular updates from the Kluwer Mediation Blog, please subscribe here.

This entry was posted on Thursday, September 5th, 2013 at 6:59 pm and is filed under Developing the Field, Growth of the Field (Challenges, New Sectors, etc.), Ireland, Particular Sectors (e.g. Construction, Banking, etc.), Skills