

# We need the freedom to fail

Bankruptcy in Ireland is unwieldy and expensive, and the procedure urgently needs to be changed to support enterprise, writes Gabriel Daly

To ensure Ireland's economic regeneration, our bankruptcy laws must be revised because our present legislation is anti-entrepreneurial, outdated and unwieldy.

Business leaders take risks on new ideas. Without these people to stimulate business and provide employment, our economy could suffocate. The freedom to fail in business is essential.

Revising our laws may encourage the entrepreneurship that could lead the economy out of recession. This isn't simply a case of allowing people to walk away from their debts, should they fail. However, their limited means could be distributed and dealt with in a controlled fashion. Reform is needed to ensure these people are not kept in limbo for the rest of their business lives.

A 2007 European Commission paper, 'Overcoming the stigma of business failure – the second chance policy', examined bankruptcy practice across various EU countries. In its review of insolvency law, Ireland scored only two out of ten for the number of insolvency measures either in existence or proposed. Marks were allocated on several criteria, such as better legal treatment for bankrupts, reduced restrictions, streamlined procedures and shorter discharge periods. The countries that ranked highest were Austria and the UK.

Ireland's bankruptcy law has stagnated because there has been a failure to update the relevant legislation. This has now come into sharp focus as distressed debt becomes an important issue and the existing procedures cannot cope with the masses of individuals in this situation.

The Irish approach to bankruptcy is penal. If you are declared a bankrupt, the restrictions applied become a millstone around your neck for the next 12 years. The contrast with various flexible and debtor-friendly procedures available in England and Wales could not be starker. In England and Wales, you may face being in bankruptcy for only 12 months. If Alan Sugar or Donald Trump had gone bankrupt in Ireland, they would not have been in a position to create new businesses, take new risks and succeed on a larger scale.

In order to be declared bankrupt in Ireland, an individual must commit what is known as an "act of bankruptcy". It has been defined as "an act or default, voluntary or involuntary, committed by a debtor, which is either evidence of an intent to deprive creditors of their rights through fraudulent assignment or as an implication of insolvency".

In successful proceedings, the debtor's property is transferred to a trustee who distributes it among the creditors. Discharge from the debts happens either when all monies are paid or 12 years elapses; all the property is disposed of; any property acquired since bankruptcy has been disclosed and it would be reasonable to discharge the individual. As there is no automatic right to discharge, people may remain bankrupt even after death without a High Court discharge.

Irish legislation does not have a formal individual voluntary arrangement (IVA) such as exists across the water in both the English and Welsh systems. This flexible cost-effective procedure allows individuals to try and reach agreement with creditors under the supervision of an insolvency practitioner.

One alternative to bankruptcy available to a debtor in Ireland involves an arrangement with creditors under the control of the court but it is a cumbersome and expensive procedure. Private 'schemes of arrangement' are another alternative.

According to Courts Service statistics, 25 schemes of arrangement were ongoing at the end of 2008. There are no official tallies on ongoing private schemes of arrangement.

A non-court-based scheme is more user-friendly, easier to access and cheaper than a court application. Moreover, it may encourage people to deal with their bankruptcy earlier.

The downturn and credit crunch have resulted in a serious lack of access to finance, which is causing companies nationwide to shut down. However, banks are aware that our existing bankruptcy law is costly and outdated and so they are likely to consider other options first.

Individuals should be able to restructure and move forward again in the same way that a company can. After all, on a basic level, companies are made up of individuals.

In September 2009, the Law Reform Commission produced a consultation paper on personal debt management and debt enforcement that makes 122 provisional recommendations for reform. With bankruptcy, it recommends the creation of a new system of personal insolvency law in Ireland; in particular, that a statutory non-court-based debt settlement scheme should be introduced, which would supplement (though not necessarily replace completely) the current court-based scheme in the Bankruptcy Act 1988.

This is a positive development, which will make a radical difference to the current system, and hopefully will be implemented as soon as possible. Under personal guarantees given to financial institutions, many company directors have personal liability for the debts of their companies, posing a threat of personal bankruptcies in the near future. After all, at the end of last year there were 450 bankruptcies on hand in the courts.

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