

**IAIR**



**The International Association of  
Insolvency Regulators**

## **Mutual Recognition of Sanctions Report**

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The Collective Responses of IAIR Members  
to a Survey on the  
Mutual Recognition of Sanctions imposed in relation to  
Personal Bankruptcies and Insolvent Companies

## **PREFACE**

As convenor, I wish to record formally my appreciation of all those IAIR Members who contributed to this study. I also wish to pay tribute in particular to my colleagues, Adrian Brennan and Conor O'Mahony, who undertook the vast majority of the work associated with this survey and Report.

I am accordingly delighted to present the IAIR with the results of the survey relating to Mutual Recognition of Sanctions in relation to Personal Bankruptcies and Insolvent Companies. I hope that this Report will prove beneficial in assisting IAIR members and observers in fostering cooperation with one another and in improving the integrity of business and social enterprise nationally and internationally.

**Paul Appleby**

**Director of Corporate Enforcement**

**ODCE – Ireland**

**11 June 2008**

## CHAPTER 1

### INTRODUCTION

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The 2007 IAIR Conference in Bangkok approved a proposal from the Office of the Director of Corporate Enforcement (Ireland) designed to help improve cooperation among IAIR Members in the face of increasing globalisation. Business and personal transactions on a cross-border basis are increasing. Regulation needs to recognise this phenomenon and to keep pace with it.

As insolvency regulators, part of our role is to identify and sanction those who have acted contrary to law or duty and thereby maintain and promote responsible market conduct in our home jurisdictions. However from time to time, some misconduct may take place in our home jurisdictions due to the actions of individuals who have previously been sanctioned abroad. We are all aware that some individuals will actually relocate with the specific intention of avoiding the consequences of past misconduct. Recidivism in such cases is common. The risk of this type of misconduct occurring can be mitigated if those past actions are, at a minimum, known in the market and, to the extent possible and appropriate, that sanctions imposed in other jurisdictions are recognised by us.

The approved ODCE paper (a copy of which is set out in **Appendix 1** to this Report) urged that, as a first step, a comparative study should be conducted to establish the extent to which declarations of bankruptcy and sanctions (like disqualification), that are made or imposed in one IAIR Member State, are legally recognised in another IAIR Member State.

Pursuant to our mandate to undertake this study, we commenced work in early 2008 seeking IAIR members' views on the issues and questions that should comprise the survey. Having finalised the questionnaire, we requested each IAIR Member in late February 2008 to complete it and return it to the ODCE.

In all, a total of thirteen IAIR members replied with valuable material that has been incorporated into this Report. These were:

- the BVI Financial Services Commission (British Virgin Islands),
- the Office of the Superintendent of Bankruptcy (OSB Canada),
- the Office of the Bankruptcy Ombudsman (Finland),
- the Official Receiver's Office (Hong Kong),
- the Office of the Director of Corporate Enforcement (Ireland),
- the Royal Court of Jersey, Viscount's Department (Jersey),
- the Insolvency and Trustee Service New Zealand,
- the Insolvency Service of Northern Ireland,
- INDECOPI -Tribunal for the Defence of Competition (Peru),
- the Ministry of Economic Development and Trade (Russian Federation),
- the Bankruptcy Supervision Agency (Serbia),
- the Insolvency Service (England and Wales), and
- the Administrative Office of the United States Court.

The results of this survey have identified the various approaches adopted by IAIR members to bankrupts and others subject to sanctions in respect of previous misconduct within their own jurisdictions as well as their approaches to foreign bankrupts and those subject to sanctions in respect of previous misconduct in other jurisdictions.

The results are summarised in Chapter 2 of this Report while the individual country responses to the Surveys on the Mutual Recognition of Sanctions imposed in relation to Personal Bankruptcies and in relation to Insolvent Companies are included at Appendices 2 and 3 respectively.

## CHAPTER 2

### SUMMARY OF THE RESULTS OF THE SURVEYS

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#### Qualifications

Before summarising the results, it is necessary to record a number of qualifications. Firstly, every effort has been made to transcribe accurately the results of the survey replies, but there is a possibility that an occasional error may be present which we have not yet identified. We would be glad to be advised of any such errors so that they can be corrected. Secondly, some of the elaborations provided give rise to some apparent ambiguity in the replies.

For all these reasons, members should check both the answers that they have given in respect of their jurisdictions and our interpretation of those replies in order to ensure that our recording of them is accurate and internally consistent.

#### The Results in Summary Form

In order to facilitate easy comparison between the practices applying with respect to personal bankruptcies and insolvent companies in liquidation, it has been decided to summarise the results of the survey in tabular form. A preliminary commentary on the results follows this tabular statement.

<b>Personal Bankruptcies</b>	<b>Insolvent Companies</b>
In 10 out of 12 jurisdictions, bankrupts (domestic) are not permitted to act as directors. Only the USA and Russian Federation allow bankrupts to act as directors (though the Courts may impose disqualifications in the Russian Federation).  In addition, 4 jurisdictions provide that bankrupts may apply to the Courts to be	In 8 out of 13 jurisdictions, individuals who are subject to sanctions for past misconduct (domestic) are not permitted to act as directors. However, it would appear that in a number of these jurisdictions, this would follow proceedings for the imposition of a disqualification order.

allowed act as a director.	
There are no restrictions on foreign bankrupts acting as directors in 9 out of 12 jurisdictions. The jurisdictions that recognise foreign bankruptcies for this purpose are Canada, Ireland and Peru.	There are no restrictions on directors, who are subject to a foreign sanction, acting as directors in 11 out of 13 jurisdictions. The jurisdictions that do recognise foreign sanctions for this purpose are New Zealand and Peru.
With the exception of Jersey, none of the jurisdictions that permit foreign bankrupts to act as a director require disclosure of the bankruptcy.	Of the 11 jurisdictions that do not restrict directors from acting on foot of a foreign sanction, only 3 (Ireland, Jersey and USA) require disclosure of the sanction.
Only 5 out of 12 jurisdictions recognise foreign bankruptcies.	Only 5 out of 12 jurisdictions recognise foreign sanctions on a company director.
The existence of a foreign bankruptcy can be used as evidence in 7 out of 12 jurisdictions. In addition, the existence of a foreign bankruptcy can be put before the Court in the UK as part of proceedings for a Bankruptcy Restrictions Order.	The existence of a foreign sanction can be used as evidence in 9 out of 12 jurisdictions. In addition, evidence of conduct in a foreign company can be put before the Court in the UK as part of proceedings for disqualification.
While most jurisdictions automatically provide that bankrupts cannot act as a director while they remain undischarged, a number of jurisdictions have provisions for the imposition of additional restrictions in the case of misconduct, mainly involving varying periods of disqualification but also including other forms of restriction such as minimum levels of capitalisation in the new company.	10 jurisdictions provide for the imposition of some form of disqualification, ranging from 6 months to 15 years. In addition, directors of insolvent companies can be held personally liable for company debts in some jurisdictions. Directors in Ireland can be made subject to Restriction Orders that limit them to being directors of companies that meet minimum capitalisation levels. Finally, a number of

	countries can impose criminal sanctions for more extreme cases of misconduct and fraud.
<p>Additional comments on mutual recognition provided included:</p> <ul style="list-style-type: none"> <li>- BVI indicated that it had not considered the issue but was open to doing so;</li> <li>- Canada already recognises foreign bankruptcies and has specific legislation governing cross-border insolvencies;</li> <li>- Ireland would support broader mutual recognition of sanctions;</li> <li>- New Zealand and Australia have recently reached agreement on the mutual recognition of director disqualifications;</li> <li>- The Russian Federation has arrangements for the recognition of criminal sanctions within the CIS and on a bilateral basis with some countries;</li> <li>- UK can take foreign bankruptcies into account.</li> </ul>	<p>Additional comments on mutual recognition provided included:</p> <ul style="list-style-type: none"> <li>- BVI indicated that it had not considered the issue but was open to doing so;</li> <li>- Canada does not impose restrictions on the basis of misconduct, whether domestic or foreign. However, personal liability for company debts can be imposed in some circumstances;</li> <li>- The names of disqualified persons (Business Prohibition) in Finland is available (for a fee);</li> <li>- Ireland would support broader mutual recognition of sanctions;</li> <li>- The mutual recognition of sanctions by Jersey is conditional on an equivalent order being made by the Jersey Courts;</li> <li>- New Zealand and Australia have recently reached agreement on the mutual recognition of director disqualifications;</li> <li>- There is mutual recognition of sanctions between Northern Ireland and England and Wales;</li> <li>- The Russian Federation has arrangements for the recognition of criminal sanctions within the CIS and on a bilateral basis with some countries;</li> <li>- UK can take foreign bankruptcies into</li> </ul>

	<p>account in domestic disqualification proceedings. In addition, regulations, expected to come into effect in 2009, will provide for mutual recognition of foreign restrictions.</p>
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### **Preliminary Commentary on the Results**

It would appear that most, but not all, jurisdictions take the view that personal bankruptcy or sanctions imposed for past misconduct in an insolvent company should act to debar a person from acting as a director for a period. Clearly, there will always be some tension between the desire to facilitate a strong culture of entrepreneurship and the wish to prevent individuals taking advantage of creditors, particularly in the context of limited liability corporate structures. Presumably, the different approaches adopted in the member jurisdictions reflect varying views on where the balance of advantage rests between these two objectives.

The period of restriction imposed on an individual can be for so long as the person remains undischarged as a bankrupt or for a period fixed as part of Court proceedings. The period of disqualification or restriction can vary considerably, ranging from 6 months up to 15 years. While it is assumed that this would primarily be determined by reference to the severity of the misconduct considered to have been involved, it may also be a factor of the disposition of society, the legislature and the courts in each jurisdiction towards commercial failure.

Notwithstanding the majority view that bankruptcy and/or misconduct warrants the imposition of restrictions on individuals' rights to act as directors, few jurisdictions recognise foreign bankruptcies or sanctions for misconduct. Similarly, few jurisdictions require disclosure of foreign bankruptcies or sanctions for misconduct. While the practical difficulties in recognising sanctions imposed in another jurisdiction are appreciated, it is perhaps somewhat surprising that more jurisdictions do not place greater reliance on the experiences of other jurisdictions in dealing with individuals who

may wish to be involved in running companies in their jurisdiction, particularly as the survey results point towards an openness to such approaches.

Against this background, it might be useful for the IAIR to consider:

1. Whether improved arrangements for the mutual recognition of bankruptcies and sanctions imposed for past misconduct in an insolvent company or otherwise could contribute to an appropriate strengthening of our regulatory regimes?
2. If it is considered that mutual recognition can be beneficial, how best can we ensure:
  - a. the disclosure by persons in our home jurisdictions of certain sanctions which may have been imposed on them in other jurisdictions;
  - b. that relevant sanctions which may have been imposed in a foreign jurisdiction are legally recognised in our home jurisdiction;
  - c. that the foreign sanction can be a cause of legal action in our home jurisdiction if such action is necessary in the public interest?
3. Can the IAIR contribute to this process by developing, for example, model legal clauses and/or other arrangements that would enable IAIR members to recognise another jurisdiction's bankruptcies and disqualifications?

### **Further Information**

The individual IAIR Member survey replies are contained in Appendices 2 and 3, viz:

- **Appendix 2** - IAIR Member Survey Replies – Personal Bankruptcies;
- **Appendix 3** - IAIR Member Survey Replies – Insolvent Companies in Liquidation

## Appendix 1

### Mutual Recognition of Personal Bankruptcies and Disqualifications

#### Introduction

Business and personal transactions on a cross-border basis are increasing. Regulation needs to recognise this phenomenon and to keep pace with it.

As insolvency regulators, part of our role is to identify and sanction those who have acted contrary to law or duty and thereby maintain and promote responsible market conduct in our home jurisdictions.

However from time to time, some misconduct may take place in our home jurisdictions due to the actions of individuals who have previously been sanctioned abroad. These risks can be mitigated if those past actions are known in the market.

#### Possible Preventative Measures

How can we prevent or curb the incidence of this type of event? One possibility is that we provide:

- 1) for the disclosure by persons in our home jurisdictions of certain sanctions which may have been imposed on them in other jurisdictions;
- 2) that relevant sanctions which may have been imposed in a foreign jurisdiction are legally recognised in our home jurisdiction;
- 3) that the foreign sanction can be a cause of legal action in our home jurisdiction if such action is necessary in the public interest.

#### Irish Provisions

Undischarged bankrupts are generally precluded from acting as company directors in Ireland, so that they cannot evade their obligation to account for all monies received by them. Moreover, the prohibition applies to persons who have been declared bankrupt either within or outside of the State.

Also, any person who is disqualified from acting as a director in another jurisdiction is required to disclose that disqualification on appointment as a director in the State. Once that disqualification is disclosed, the person can act as a director, subject to the ODCE being entitled to seek to have the person disqualified in Ireland also.

We have successfully prosecuted/disqualified persons breaching Irish law in this area.

#### Issues for Possible Examination by IAIR Members in 2007/2008

Similar provisions exist in the UK, but other IAIR members may have alternative measures in place or in contemplation. There would be value in sharing our collective experiences and ideas in the area with a view to recommending measures which are effective and compatible across IAIR member jurisdictions.

We suggest therefore that the IAIR might undertake a study which would seek to:

- establish the extent to which each jurisdiction already has legal or other provisions in this area, including those described at 1), 2) and 3) above;
- develop model legal clauses and/or other arrangements which would enable IAIR members to recognise another jurisdiction's bankruptcies and disqualifications.

**Office of the Director of Corporate Enforcement**  
**22 August 2007**