INSOL INTERNATIONAL

CONSUMER DEBT REPORT II

REPORT OF FINDINGS AND RECOMMENDATIONS

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International Association of Restructuring, Insolvency & Bankruptcy Professionals

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Copies of this report are available from:

INSOL International
6-7 Queen Street, London EC4N 1SP, UK
Tel: (+44) (0)20 7248 3333 Fax: (+44) (0)20 7248 3384

Email: jelena@insol.ision.co.uk
www.insol.org

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There is something of an epidemic of consumer debt problems in developed economies. As other countries develop and more people become consumers so the virus spreads. And consumer bankruptcy is only part of the wider topic of personal insolvency – the bankruptcy of individuals. The vast majority of businesses across the world are run by sole traders and the insolvency of that business means the personal insolvency of the individual.

As businesses become ever better at persuading people to buy their products – and society, generally speaking, admires businesses which are successful at doing that – so consumerism is encouraged. Also, it is an almost universal phenomenon to hear governments encouraging their citizens to be entrepreneurial. Almost by definition not everyone is going to be successful, and so with entrepreneurialism – with *trying* – must inevitably come failure and, in its wake, insolvency.

Many countries have a dark history of the debtor's prison. Those jurisdictions which have moved away from that, tend to see this as progress. Along the same continuum, it is generally thought to be progress when a jurisdiction ceases to be censorious about failure – be it a business collapse or excessive consumerism – but becomes inclined to give people a second chance. Many jurisdictions come to the conclusion that it is only *fair* for people to be given a second chance rather than have a millstone debt around their neck for the rest of their lives. Some studies suggest, in fact, that traders do better – are more profitable, employ more people – the second time round after an earlier failure. The World Bank currently has a Working Group for the Treatment of the Insolvency of Natural Persons and INSOL is honoured to be a member.

This publication is concerned particularly with consumer debt. It looks at: the availability of bankruptcy procedures, release and discharge of the bankrupt, the assets involved, whether creditor claims survive the discharge, clawbacks, compromises outside of a formal bankruptcy, and cross-border questions. It also looks at the serial bankrupt.

Since its World Congress in 1997 in New Orleans, INSOL International has focussed on the issue of consumer debt. We have sought to obtain global information on jurisdictions' laws and practices and to seek to derive general principles underlying approaches to the issue across the world.

We are pleased therefore to publish this latest contribution to the debate. We hope and trust that you will find it of interest and useful and we would also be pleased to hear from you with your comments and thoughts.

Gordon Stewart
President
INSOL International

Foreword

Consumer debt problems were for the first time on the agenda of the INSOL International World Congress in New Orleans in 1997. Thereafter this issue was discussed in INSOL conferences in New Zealand and in Bermuda both in 1999, and in the INSOL International World Congress in London. In 2001 INSOL International published the Consumer Debt Report, a report of findings and recommendations for legal solutions to debt problems for natural persons arising in today's credit society.

The second edition of the Consumer Debt Report can be seen as a further expansion and clarification of the 2001 report, which, as far as the principles and recommendations are concerned, has been kept partly unchanged. This is because these principles and recommendations have been widely embraced by the European Union, the Council of Europe, the World Bank and UNCITRAL.

This report is supplemented by 17 country reports and is concluded by a general survey of some 40 countries. From this survey it is clear all these countries have abolished the idea that consumer insolvency is a criminal offence and have introduced consumer debtor legislation, although not all these countries have the possibility of discharge for consumers. Following the UNCITRAL Legislative Guide and in order to clarify certain aspects of consumer debtor law, some references are made to the European Human Rights Convention ("EHRC") as well as the International Covenant of Civil and Political Rights ("ICCPR"). The objective is to assist the establishment of efficient and effective legal frameworks to address consumer debt problems for national authorities and legislative bodies when preparing new consumer debt laws and regulations or when reviewing the adequacy of existing laws and regulations. The Council of Europe has recommended that the governments of member states, when formulating their internal legislation and practice and when seeking legal solutions to debt problems and to over - indebtedness, take the appropriate measures and those suggested measures will be discussed in this report.

I would like to thank the large number of professionals who have contributed to this research by providing the national reports regarding the position of consumer debtors in their country, and by giving a broader insight into the consumer debt laws around the world.

Jan C. van Apeldoorn
Deputy Judge
Court of Appeal
The Hague

Contributors

Country	*Contributor(s)*
Argentina	Javier Lorente *NTMALL (Naveira, Truffat, Martínez, Anido, Lorente & López) Abogados*
Australia	Sally Nash *Sally Nash & Co.*
Brazil	Thomas Benes Felsberg *Paulo Fernanda Campana Filho* *Felsberg, Pedretti e Mannrich, Advogados e Consultores Legais*
Canada	Sonya M. Mount
Cayman Islands	Andrea Harris-Kellow *KRyS Global* & Michael Mulligan *Harney Westwood & Riegels*
China	Kennic Lui *KLC Kennic Lui & Co.*
England & Wales	Peter Sargent *Begbies Traynor*
Estonia	Signe Viimsalu & Olga Harlamova *GLIMSTEDT*
France	Marc André *Maître Marc André*
Germany	Bernd Klose *Kanzlei Bernd H. Klose*
India	Sumant Batra *Kesar Dass B & Associates (KDB)*

Country	*Contributor*
Japan	Koichiro Ohashi Erick Marcks Kazunori Fuse & Hiroe Kajiwara *White & Case LLP*
Mexico	Thomas S. Heather *Heather & Heather*
Netherlands	Arnoud J. Noordam *Noordam Advocatuur*
Nigeria	Okorie Kalu *Punuka Attorneys & Solicitors*
Singapore	Beng Chua Chye *Rajah & Tann LLP*
South Africa	Paul Winer *Eric Levenstein* & Nastascha van Vuuren *Werksmans Attorneys*
USA	Prof. Jason Kilborn *The John Marshall Law School*

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Consumer debt

Because of the ever - existing volatility of the financial markets, for almost all working groups in most parts of the world, consumer debt has grown rapidly. Periods of strongly expanding economies and low unemployment figures, which increase the incomes of consumers, giving consumers access to proportionately larger amounts of credit, are interspersed by periods of global economic crises, resulting in credit becoming almost unavailable. Whether or not as a result of the economic conditions and whether credit is not or freely available there is a trend that, consumer indebtedness is rising. Possibly due to the increasing availability of consumer credit, an increase in the number of credit cards in use and in private home mortgages. Consumer debts however are no problem per se: they are one of the great dynamic factors in our economies. A high level of domestic consumer consumption is required for both economic stability and growth. This is why consumers are encouraged by governments to consume. One of the ways to boost this consumption is to facilitate and expand credit facilities for consumers. Consumer debts become a problem when debtors are unable to find solutions for repayment without professional help and that is why society as a whole bears a collective responsibility.

Consumer debt has lead to several new reports and surveys from national and international organizations, like the Recommendation Rec. (2007) 8 and an explanatory memorandum, adopted by the Committee of Ministers of the Council of Europe in 2007.[1] The European Commission presented the Consumer Credit Directive (COM (2004) 747(final).[2] A reference to this phenomenon can also be found in the UNCITRAL Legislative Guide[3] and (new) legislation in many countries. Further attention is also given to the World Bank 'Best Practices in the insolvency of natural persons'.[4]

Solving consumer debt problems can be very complex. They are often caused by or in relation to socio - psychological factors, such as divorce, redundancy, addiction, disability etc. These situations interfere with the quality of life and in many respects may have serious consequences for the health of the debtor and his or her family and the way they live. They may become socially isolated or retreat from life altogether.

In this regard, various types of consumer debts can be distinguished.

- *Survival debts*

  Survival debts occur as a matter of a survival strategy, when there is an accumulation of recurrent debts for the necessities of life, such as household debts (food, rent, electricity, education, clothing, health care). They occur when families or single persons, often with growing children, have to live at a social minimum for any length of time.

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1 Based on a report on legal solutions to debt problems in credit societies, by Johanna Niemi and Ann-Sofie Henrikson.

2 Based on a report by N. Huls, U. Reifner and T. Bourgoine, Over - indebtedness of Consumers in the EC member states: Facts and search for solutions. In both reports references were made to the 2001 Consumer Debt Report.

3 UNCITRAL Legislative Guide, Part two: VI. Conclusion of proceedings, p. 281-285.

4 The World Bank Insolvency and Creditor / Debtor regimes task Force Meetings. Rapporteur's Synopsis, by Susan Block-Lieb.

- *Over - consumption debts*

  These debts are caused through over - consumption by a debtor who initially has a surplus in their budget, but who finances their extravagant life-style with borrowed money. Typically, the debtor has entered into more than one loan, (unconsciously) causing an increased extension of debt. The cause is often a lack of financial management skills, inadequate monitoring or insufficient knowledge of credit facilities and the conditions under which they are offered.

- *Compensation debts*

  These debts result from over - consumption by a debtor who typically suffers deprivation or social exclusion. It is triggered by advertising, and establishing social class, power, status or as compensation for other loss. This behaviour may result in illness - related debts, gambling debts, alcoholism and mental illness. They occur at all levels of society.

- *Relational debts*

  These debts are acquired through connection with others because of marriage, other relationship or death. In some states, they arise by operation of law as a result of liabilities being incurred by a spouse.

- *Accommodation debts*

  Accommodation debts are caused by the inability to adapt to misfortune, a sudden drop in income (redundancy or disability) or unforeseen expenses (increase of uninsured medical expenses or rise in housing costs). They also arise where the debtor anticipates prosperity that does not materialize. The debts are usually considered temporary, but they can become problematic if the debtor decides to try to preserve his way of life and is unwilling to dispose of any of his assets.

- *Fraudulent debts*

  These debts occur when a debtor wilfully over - commits himself financially. At the least, the debtor failed to act in good faith or deliberately attempted to defraud his creditors, either whilst incurring the debt or in his representations of his ability to repay. Although these kinds of debts can be a problem, they are not part of this study. There is usually no special relief for these kinds of debts and / or these debtors are frequently excluded from a discharge altogether.

There are many ways for a consumer to get into financial difficulties. The reasons are not always directly connected to credit facilities offered by lenders. In many instances, they may occur due to factors beyond the control of the debtor or they may be caused deliberately. In all situations, however the debtor's legal position is weak. When the situation becomes so oppressive that there is no prospect of satisfaction of the debts and, as a result of judgment enforcements, executions, garnishment of wages, coercion and creditor harassment, eviction from homes or disconnection from basic facilities (water, gas and electricity), the effective social functioning of the debtor is disturbed or, in some jurisdictions, prevented. In these cases, there is clearly a task for the legislator. There is a general acknowledgement that the consumer debtor should not be penalised, but offered some form of protection.

Consumer debtor

The term consumer debtor in this publication mainly refers to a debtor whose liabilities are incurred primarily for private, family or household purposes and not as a result of carrying on a business, either on the debtor's own account or in partnership with others, or arising from guarantees given on behalf of limited liability entities. Although the consumer debtor's problems arise primarily from incurring domestic liabilities; debtors may also have problems that arise from businesses with which they are connected. Consumer credit is often used to finance small businesses either as start - up capital or for operating funds and many forms of business are legally identifiable with the natural person operating the business when, for example, the debtor acts as a sole trader.

Many countries have insolvency laws that seek to distinguish between the simple consumer debtors, those, whose liabilities arise from small businesses. They may differ considerably and this is not only due to the fundamental differences between the common law and civil law philosophy but for a variety of social and historical reasons. This report also recognizes that many countries currently do not have a fully developed consumer insolvency system.

From the perspective of a consumer debtor, it makes no difference whether the debts the debtor is facing are commercial or private debts. To this extent, the term "consumer debtor" can be a misnomer. This report is about individuals, natural persons, men and women, whose debts for which they are personally liable, however caused, (private or commercial) exceed their capacity to repay within a reasonable period of time.

In this respect it should be noted that the UNCITRAL Legislative Guide state:[5]

> "To preserve what are regarded in some States as fundamental rights of the debtor and to ensure its fair and impartial treatment, and perhaps more importantly to encourage debtor's confidence in Insolvency Proceedings, it is desirable that the role of the debtor in the Proceedings and the rights it will have with respect to the conduct of the Proceedings be clearly enumerated in the Insolvency law. In many States, the rights of a natural person debtor in Insolvency Proceedings may be affected by obligations under international and regional treaties such as the International Covenant on Civil and Political Rights (CCPR)[6] and the European Convention on Human Rights (EHRC).[7]"

Both the European Convention as the UN Covenant has provisions to respect of the privacy, the home and the correspondence of the debtor or for the protection of property of both the debtor and creditor. The debtor's rights and human dignity should be respected at all stages of the enforcement proceedings without infringement of the rights of creditors. It should introduce enforcement alleviation procedures, including the protection of the essential assets of the debtor and garnishment of part of their revenue, which take into account the need to strike a balance between the protection of at least the basic living needs of the debtor and their family and the efficiency of debt recovery.

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5 UNCITRAL Legislative Guide, Part two: chap. III A, para. 19.
6 United Nations, *Treaty Series*, vol. 999, no. 14668.
7 Ibid, vol. 213, no. 2889.

Protection of the property of the debtor

The provisions identifying exempt assets should be clear and comprehensive in order to ensure transparency and predictability for both the debtor and the creditors. The UNCITRAL Legislative Guide states:

> "In the case of insolvency of a natural person, the insolvency law may exclude certain assets from the estate, such as post-application earnings from the provision of personal services by the debtor or monies received for public works by the debtor, assets that are necessary for the debtor to earn a living and personal and household assets, such as furniture, household equipment, bedding, clothing and other assets necessary to satisfy the basic domestic needs of the debtor and his or her family. Some jurisdictions also exclude torts of a personal nature such as defamation, injury to credit or reputation or personal bodily injury. The debtor remains personally entitled to sue and to retain what is recovered in such actions on the basis that the incentive to vindicate wrongdoing otherwise would be diminished, but the debtor may not be entitled to sue for any loss of earnings associated with those causes of action.[8]"

Respect for the home

The protection of the home is focused on the respect for personal liberty and human welfare.[9] It inevitably involves some overlap with the private life and family life. This fundamental right extends to the protection of the peaceful use of the home and it therefore does not protect the property or rental thereof.[10] It protects the privacy of domestic life in the home and establishes in most jurisdictions detailed rules for the entry by public officials, including the insolvency representative. Usually the Insolvency law will allow the insolvency representative access to every place, to the extent reasonably required to perform his duties. This also means that the insolvency representative may, under circumstances, enforce entry. He cannot perform his duties if his access to the home or the office of the debtor can be denied. If the debtor is a legal entity, the insolvency representative is not entitled to access to the home of the director of the insolvent entity and not to those of creditors or other parties in interest. The court can usually issue an authorization. In some jurisdictions the insolvency representative may require the assistance of the police in actually providing access and aid to effectively enforcement of the law.

Home is an autonomous concept, and whether or not a particular habitation constitutes a home will depend on factual circumstances, notably the existence of sufficient and continuous links with a specific place.[11] The European Court applies a "sufficient and continuous links test". In the case of *Mabey v. the United Kingdom* the European Commission stated:

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8 UNCITRAL Legislative Guide, Part two: Chap. A, para. 18.

9 ECHR 24 November 1986, application no. 9063/80 (*Gillow v. the United Kingdom*), para. 55; ECHR 25 September 1996 application no. 20348/92, (*June Buckley v. United Kingdom*), para. 76.

10 ECHR 18 December 1996, application no.15318/89 (*Loizidou v. Turkye*).

11 ECHR 18 November 2004, application no. 58255/00, (*Prokopovich v. Russia*), para 36.

> "Whether or not a particular habitation constitutes a 'home' for the purpose of Article 8 (1) will depend on the factual circumstances, of the particular case, namely the existence of sufficient and continuous links. It is not limited necessarily to those homes which have been lawfully occupied or lawfully established.[12]"

The term 'home' in both the European Convention and the UN Covenant has a broad meaning. The term 'home' in English, "*manze"* in Arabic, "*zhuzhai"* in Chinese, 'domicile' in French, "*zhilische"* in Russian and "*domicilio"* in Spanish, as used in Article 17 CCPR, is to be understood to indicate the place where a person resides or carries out his usual occupation. It comprises caravans and other non-fixed abodes.[13] It may also cover second homes or holiday homes[14], and therefore not only the actual home, but also the surrounding area: the garden and garage, including the premises where a debtor exercises business activities or a profession.[15] This is because in respect of individuals who manage a company (sole proprietorship or a trade or business) their personal and other professional activities cannot easily be separated.[16] A strict, restrictive interpretation would then lead to unequal treatment.[17] As a result the European Court decided that the locations in which certain professional and business activities are employed, can be brought within the scope of both the right to protection of privacy as of the home, but this view does not impede that on such (private) premises and operations further limitations of the rights of Article 8 ECHR may be possible than for other areas and activities.[18] The French treaty term 'domicile' in Article 8 ECHR is therefore a broader concept than the English word 'home'. 'Domicile' can also refer to the office or agency of an individual with a profession. It covers occupation of a house belonging to another person if this is for significant periods on an annual basis.[19]

Competing interests between private life, family life and the home

There are often competing interests between the protection of private - and family life and the home. In the case that a home is present in the Insolvency Estate, it is often the first target of the insolvency representative. It is usually also the most valuable and certainly the most visible asset. It is conceivable that the insolvency representative or a creditor with a security interest wishes to sell it, even if is occupied by the debtor and his family. This can certainly be disproportionate if, for instance, half of the house belongs to the one spouse and the other half to the other spouse whilst the spouses are married out of community of property and not both the spouses are insolvent. Many countries, seeks to prevent the sale of the property in order to keep the family together, or at least, offer them, during a certain period, the opportunity, to develop alternatives. The court should then balance the interests of the creditors, the conduct of the spouses in the period before the Insolvency, the financial position of both spouses, the needs of the children and all other circumstances. When an innocent partner and their children are evicted from their home this may violate Convention rights (Article 8 of the European Convention). Generally a waiting period (of one year) is taken into account, unless the

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12 ECHR 15 May 1996, application no. 28370/95 (*Mabey v. The United Kingdom*).
13 ECHR 25 September 1996, application no. 20348-92, (Buckley v. the United Kingdom) (Commission report), par. 64; ECHR 18 January 2001, application no. 27238-95, (*Chapman v. the United Kingdom*), paras. 71-74.
14 ECHR 31 July 2004, application no. 16219-90, (*Demades v. Turkey*), paras. 32-34.
15 ECHR 30 March 1989, (*Chappell v. United Kingdom*), application no. 10461/83; ECHR 16 December 1992, (*Niemietz v. Germany*) application no. 13710/88; ECHR 25 February 1993, (*Funke v. France*), application no. 10828/84; ECHR 16 April 2002, (*Société Colas Est. v. France*), application no. 37971/97, para. 41.
16 ECHR 5 September 1995, (*Reiss v. Austria*), application no. 23953/94.
17 ECHR 16 December 1992, (*Niemietz v. Germany*), application no. 13710/88, para. 30.
18 (*Niemietz v. Germany*), para. 31.
19 ECHR 28 November 1997, application no. 23186-94 (*Mente and Others v. Turkey*), para. 73).

circumstances of the case are exceptional or the interests of the creditors outweigh all other considerations. The first year is generally the most difficult period, during which the family is offered the opportunity to adapt to the new situation. In the legislation of many countries the natural person is offered various possibilities to keep the family home.

Respect for the correspondence

The UNCITRAL Legislative Guide recognizes the possibility that the insolvency representative receives and reads the debtor's correspondence.[20]

> "Some insolvency laws specify these obligations as automatically applicable, whilst others provide that they may be ordered at the discretion of the court where they are determined to be necessary for the administration of the estate. Some laws also distinguish between natural and legal person debtors; where the debtor is a natural person, limitations will only apply by order of the court, but where the debtor is a legal person, some limitations may apply automatically, such as the requirement to disclose correspondence.[21]"

The right to respect for one's correspondence aims to protect the confidentiality of private communications.[22] It covers letters between individuals[23], telephone conversations[24], electronic messages (e-mails) and information derived from monitoring of personal Internet use[25] and correspondence in the course of business activities.[26] The content of correspondence is irrelevant to the question of interference.[27] There is no *de minimis* principle for interference to occur: opening of one letter is enough.[28]

In the judgment declaring the debtor insolvent (either in bankruptcy or in some form of a debt - relieve or 'fresh start' Proceeding) the court may mandate the insolvency representative to open and read the correspondence addressed to the debtor. During insolvency proceedings the respect for the correspondence of the debtor is almost always and continuously violated. In many jurisdictions the court will issue an imperative ruling for the Insolvency Representative to open and read letters and telegrams of the debtor. It goes without saying that this postal block violates the respect of correspondence. This right covers both the right to privacy as to the freedom of communication.[29] The justification for the existence of this right consists of (at least) two parts. First, the 'State free domain' in which every individual is protected from unwanted cognizance of his communication by the State and secondly as pendant to the prohibition of censorship: free participation in the public debate is only possible when participants can freely communicate with each other.

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20 UNCITRAL Legislative Guide, Part III, para. 30, p.170. The Guide states that a number of insolvency laws impose additional obligations that are ancillary to the debtor's obligation to cooperate and assist. These may include an obligation (applying either to a natural person debtor or the managers and directors of a legal person debtor) to disclose all correspondence to the insolvency representative or the court.

21 UNCITRAL Legislative Guide, Part III, para. 30, p.170.

22 ECHR 27 February 1995, application no. 21353/93 (*B.C. v. Switzerland*).

23 ECHR 25 March 1983, application no. 5947/72 (*Silver and Others v. the United Kingdom*), para. 84.

24 ECHR 6 September 1978, application no. 5029/71 (*Klass and Others v. Germany*), para, 41; EHRM 2 August 1984, application no. 8691/78 (*Malone v. the United Kingdom*)), para. 64.

25 ECHR 3 April 2007, application no. 62617/00 (*Copland v. the United Kingdom*), paras. 41-42.

26 ECHR 25 March 1998, application no. 23224/94 (*Kopp v. Switzerland*), par. 50; ECHR 25 June 1997, application no. 20605/92 (*Halford v. the United Kingdom*), paras. 44-46.

27 ECHR 23 November 1993, application no. (A. v. France), paras. 35-37; EHRM 12 June 2007, application no. 70204/01 (*Frérot v. France*), para. 54.

28 ECHR 1 June 2004, application no. 45027/98, (*Narinen v. Finland*), para. 32.

29 ECHR 6 September 1978, application no. 5029/71 (*Klass and Others v. Germany*).

There are positive obligations in relation to correspondence.[30] In the case *Foxley v. United Kingdom* the ECHR ruled that the opening of correspondence for the Debtor from his legal counsel was a breach of Article 8 EHRC:

> "The court recalls that the notion of necessity implies that the interference corresponds to a pressing social need and, in particular, that it is proportionate to the legitimate aim pursued (….) that in the field under consideration - the concealment of a bankrupt's assets to the detriment of his creditors - the authorities may consider it necessary to have recourse to the interception of a bankrupt's correspondence in order to identify and trace the sources of his income. Nevertheless, adequate and effective safeguards must accompany the implication of the measures, which ensures minimum impairment of the right to respect for his correspondence. This is particular so where, as in the case at issue, correspondence with the bankrupt's legal advisors may be intercepted.[31]"

The insolvency representative may therefore not read, copy, and then store in file the correspondence of the debtor with his legal adviser. This violation is not necessary in a democratic society. The postal block is allowed for asset- tracing, but this must be based on clear rules and should be surrounded by 'adequate and effective safeguards.' In this context is referred to the case *Narinen v. Finland* in which the ECHR ruled that the postal blockade of Finland was in breach of Article 8 EHRC because such a guarantee was there not available:

> "(…) even if there could be said to be a general legal basis for the measure provided for in Finnish law, the absence of applicable regulations specifying with any degree of precision as to the circumstances in which correspondence will be redirected or opened or as to the categories of correspondence concerned, deprived the applicant of a minimum degree of protection to which he was entitled under the rule of law in a democratic society (see, *mutatis mutandis*, Ollila v. Finland, no. 18969/91, Commission Report of 30 June 1993). The court finds that in these circumstances it cannot be said that the interference with the applicants right to respect for his correspondence was 'in accordance with the law.[32]"

The protection of property of the creditors

In case the debtor is discharged from previous debts, the creditor as an interference with his property right may consider this. He can no longer execute his rights that are protected by Article 1 of the First Protocol of the European Convention.[33]

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30 ECHR 17 July 2004, application no. 25337/94,(*Craxi v. Italy* (no. 2), paras. 68-76.
31 ECHR 20 June 2000, (*Foxley v. United Kingdom*), application no. 33274/96.
32 ECHR 1 June 2004, (*Narinen v. Finland*), application no. 45027/98.
33 A corresponding provision is not incorporated in the UN Covenant.

In the case *Bäck v. Finland* the ECHR said:

> "The debt - adjustment legislation clearly serves legitimate social and economic policies and is not ipso facto an infringement of Article 1 of Protocol No. 1. The court must, however, also satisfy itself that the application of the debt relief Act in the case before it did not impose an excessive burden on the creditor who can no longer enforce its claim. Bearing in mind also that, when the debtor's state of insolvency led him to seek a debt adjustment, he had effectively not repaid his debt during four years, apart from a small sum, the court concludes that the creditor's claim had already been rendered highly precarious before the debt adjustment for reasons not attributable to the State under the Convention. In these circumstances, the burden imposed on the applicant by the Debt Relief Act cannot be regarded as excessive. Accordingly, there has been no violation of Article 1 of Protocol No. 1.[34]"

Although the privacy should be respected many national laws do allow the storage of economic data, which is believed to have a direct positive effect on the prevention of over - indebtedness.[35]

Over - indebtedness

Over- indebtedness means, but is not limited to, the situation where the debt burden of an individual debtor or a family manifestly and / or in a long - term perspective exceeds its repayment capacity. Unfortunately, these liabilities frequently arise because of job loss or interruption in earnings, particularly where the debtor has taken advantage of the opportunity to raise a (second) mortgage on domestic property, but also due to irresponsible overspending, sickness or divorce, bank overdrafts, loans from banks and other financial institutions, personal credit cards, and hire purchase or credit sales agreements, relating to purchases of capital items such as automobiles and household goods. It may also be caused by circumstances over which the debtor has no control whatsoever. The recent financial (banking) crises, the collapse of the real estate markets and irresponsible behavior by financial institutions has caused such disruption of the consumer debtor's private life so that Governments are forced to set rules and to give relief in one way or the other, in order to offer consumers and their families a way - out or to protect their human dignity. Over - indebtedness may lead to social and health problems, social exclusion and puts basic needs at risk. Preventing or solving these problems effectively requires political, legal and practical measures. These measures should strike a balance between the legitimate interests of creditors and the basic rights of consumer debtors.

This report examines the principles on which consumer insolvency laws should be based. It is important that these principles should be equally applicable in all jurisdictions. The recommendations are intended to help all those groups involved in establishing due processes for the reduction and avoidance of consumer insolvencies and the social and psychological implications thereof.

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34 EHRM 20 juli 2004, no. 37598/97 (*Bäck v. Finland*).

35 Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data ETS 108 (1981); European Union Directive 95/46/EC on the protection of individuals with regard to the processing of personal data and on the free movement of such data, and The right to respect for privacy (Article 8 EHRC and Article 17 CCPR).

Solving Consumer Debt Problems

Solutions to over - indebtedness are often sought by way of the following measures.

Prevention

Prevention could include curbing the access to credit, which is usually seen as a last resort. Consumer spending is an essential element in a countries' economy. Access and effects thereof can be restricted by consumer credit legislation or providing consumers with the means to protect them from the need of too much credit, like adequate unemployment and health care programs, financial education and debt advice, but also the effective access to impartial financial, social and legal advice, counselling to those who have problems with and questions about their debts the use and registration of data about individual debtors.[36] In this respect there is a demand for harmonized legislation, which has come into effect in many parts of Europe.[37]

Rehabilitation

The way a debtor is rehabilitated differs from country to country. Many countries adopted the concept of the American bankruptcy law, allowing ordinary debtors to file for bankruptcy and get relief for their debts ("Fresh start"). Other countries have entered precautious conditions and require a considerable effort on the part of the debtor before relief is awarded.

Depending on the domicile of the debtor, failure to discharge debts may ultimately end in the debtor being declared bankrupt or subject to some other form of insolvency procedure in which the debtor's assets are being sold and the proceeds are divided amongst the creditors. The socio - psychological consequences on consumers facing financial difficulties have long been underestimated. Although some countries have legal systems in which the debts of consumers can be legally discharged, many countries have, mainly for historical reasons, regimes where, unless the bankruptcy is terminated by way of a scheme of arrangement or composition, creditors may seek recourse against the person's assets almost indefinitely. Insolvency laws providing for a discharge of the consumer debtor will generally be regarded as a solution for their financial difficulties. Discharge is the release from the payment of liabilities resulting from the filing of a bankruptcy or insolvency proceeding. A law offering a discharge should however not be seen as an easy way out. For the law to be respected, the legislators should seek to avoid a dichotomy between the debtor and society. The barriers to obtain a discharge should on the one hand not be so high that the debtor is discouraged from using the procedure. On the other hand, sufficient recognition of the system should be created so that society is willing to forgive and permit a fresh start.

Discharge

Insolvency laws adopt a variety of different approaches to the question of discharge of a debtor who is a natural person. Under some laws an insolvent debtor cannot be discharged until all its debts are paid. Under other laws, the debtor remains liable for unsatisfied claims, subject to a limitation period (which in some cases might be quite

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36 Consumer Credit Directive (87/102/EEC Council Directive of 22 December 1986 for the approximation of laws, regulations and administrative provisions of the Member States concerning consumer credit).

37 See Credit for Consumers: harmonization of the laws of the member states COD/2002/0222, Commission / Council: initial legislative document COM (2002)0443 and Commission: modified legislative proposal COM(2004)0747.

long, for example, 10 years), after which a discharge might be given. Some of those laws may also impose on the debtor a number of conditions and restrictions relating to professional, commercial and personal activities, for example, acting as the director of a corporation. This type of rule emphasizes the value of a debtor - creditor relationship. The continued responsibility of the debtor following liquidation is intended to both moderate a debtor's financial behaviour and encourage a creditor to provide financing. At the same time, it may work to inhibit opportunity, innovation and entrepreneurial activity, because the sanctions for failure are severe and deter debtors from applying for commencement of insolvency proceedings.

Other insolvency laws provide for a complete discharge of an honest, nonfraudulent debtor immediately following distribution in liquidation. This approach emphasizes the benefit of the "fresh start" that discharge brings and is often designed to encourage the development of an entrepreneurial class. It is also recognition that over - indebtedness is a current economic reality and should be addressed by an insolvency law. A third approach attempts to strike a compromise whereby discharge is granted after a period following distribution, during which period the debtor is expected to make a good faith effort to satisfy its outstanding obligations

Irrespective of the approach adopted, in some circumstances all laws restrict the availability of a discharge. These circumstances vary from law to law but may include where the debtor has acted fraudulently; engaged in criminal activity; violated employment or environmental laws; failed to keep appropriate records; failed to participate in the insolvency proceedings in good faith or to cooperate with the insolvency representative; failed to provide or actively withheld or concealed information; continued trading at a time when it knew it was insolvent; incurred debts with no reasonable expectation of being able to pay them; and concealed or destroyed assets or records after the application for commencement.

Certain types of debts may be excluded from the discharge, such as those arising from tort claims; maintenance agreements (payments to a divorced spouse or to support children of the debtor); fraud; penalties, where the alternative is a term of imprisonment; and taxes.[38]

A simple discharge may not be the solution to the problem in the end. After all, a consumer debtor is not helped when a discharge is obtained without the underlying causes being solved or taken away. The debtor is likely to continue to incur further debts and there is a risk of recidivism. The debtor is not helped either when earnings and expenditure are balanced, but he still faces debts that cannot be paid within a reasonable period.

Therefore, for effective help to be made available to the consumer debtor, it should not be structured solely by way of a discharge through bankruptcy proceedings, which will be mainly court - driven procedures requiring the involvement of a insolvency representative or administrator. An insolvency representative or administrator in this respect is an individual or organisation appointed to administer the assets of the debtor and distribute the proceeds to creditors.

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[38] UNCITRAL Legislative Guide, part two: VI. Conclusion of Proceedings, paras. 4-7.

Help should also be directed at both finding a solution for the adverse financial situation and, as far as possible, preventing the debtor from getting into debt again. This may also require an out of court or extra - judicial approach and the involvement of a debt counsellor, a consumer advisory bureau or a social worker.

Within the extra - judicial approach (apart from various kinds of socio - psychological aid aimed at improving the debtor's living conditions, re - integration in the work process and immaterial factors), a distinction is made between aid to consumer debtors to solve debt problems (Debt - aid) and aid at prevention (Budgeting - aid).

Debt - aid consists of 'debt or financial - counselling' and debt restructuring based on the debtor's redemption capacity.

Redemption capacity

This is the amount of the debtor's income above a certain amount, being the minimum allowed to cover necessary living expenses. The redemption capacity is established by establishing the debtor's reasonable needs and is the amount available to creditors. To determine the redemption capacity the debtor may have to sell or to surrender non - exempted goods, that is property that the consumer may keep to prevent the debtor from becoming destitute (a certain amount of equity, equipment and personal belongings).

Debt counselling

This is a form of pre-bankruptcy mediation between the debtor and the creditors aimed at solving debt problems. The debtor in this situation may surrender his redemption capacity for a certain period, typically from three to seven years, to the creditors, in consideration for the balance of debts being waived.

Debt restructuring

This is based on one or more payments to creditors for a discharge. These payments could be made from third parties or from newly obtained credit facilities, of which the size, term and repayment instalments are based upon the redemption capacity. In this way, all outstanding debts are replaced by one debt that the debtor can service, with or without further professional assistance. Some countries have municipal credit banks or departments of social security services providing such credit facilities.

Insolvency laws providing for a discharge of the consumer debtor usually contain elements of both redemption capacity, debt - counselling and debt - restructuring, and are structured, either in the form of an asset liquidation procedure, a rehabilitation procedure or a combination of the two.

Asset liquidation procedure

In this type of procedure, the debtor's non-exempted goods and everything in excess of the redemption capacity will be realized and distributed among the creditors, whereupon a discharge is obtained for any balances unpaid. The types of good that are exempted or the period of time during which the redemption capacity is available for the creditors differ from country to country. In some instances, the insolvency procedures are extended over a longer period (up to seven years) and discharge is only obtained thereafter.

Rehabilitation procedure

A rehabilitation procedure is designed to give the consumer debtor time to recover from temporary or more permanent liquidity difficulties and provide a way, through debt counselling or debt - restructuring, to reorganize his financial affairs. After a successful completion of a rehabilitation procedure, as well as an asset liquidation procedure, the debtor will obtain discharge or prepare a rehabilitation plan, composition or scheme of arrangement which is typically required to be approved by a majority of the creditors (possibly voting in classes) and / or by the court. Creditors who refuse to co - operate in a scheme of arrangement may be forced to agree when the scheme is rejected as a result of the negative vote of one or more creditors who could not reasonably execute their vote, considering all circumstances and in particular the percentage that the creditor may expect, in relation to what they will otherwise receive if the estate would be liquidated.

This report neither distinguishes between the various procedures nor expresses any preference. General principles, which apply to all consumer debtor procedures, are set out below.

Budgeting aid consists of budgeting - advice, budgeting support and budgeting administration.

Budgeting advice is the providing of information to the debtor on all subjects involving the management of the debtor's financial affairs, including the procurement of social benefits, etc.

Budgeting support is aimed at acquiring budgeting skills and handling the exempted income.

Budgeting administration will take place when the debtor's income is paid to a trustee or administrator who manages the earnings and pays all (fixed) expenses. The debtor will only be allowed limited living expenses to ensure that recurrent debts (rent, gas, electricity and medical expenses) are met.

Often multiple forms of aid are required to assist a debtor with his debt problems. Countries apply different standards and other ways to handle such situations and the above analysis cannot be exhaustive.

There needs to be control as to who provides these services to unsophisticated purchasers, monitors them and ensures that they are of the highest quality to prevent financially unsophisticated debtors being taken advantage of.

Summary of Principles and Recommendations

The principles that underlie the resolution of consumer debt problems are as follows:

- ***Principle 1*** ***Fair and equitable allocation of consumer credit risks***
- ***Principle 2*** ***Provision of some form of discharge of indebtedness, rehabilitation or "fresh start" for the debtor***
- ***Principle 3*** ***Extra - judicial rather than judicial proceedings where there are equally effective options available***
- ***Principle 4*** ***Prevention to reduce the need for intervention***

In order to achieve these principles, it is necessary to take the following actions.

Legislators should:

- Enact laws to provide for a fair and equitable, efficient and cost effective, accessible and transparent settlement and discharge of consumer and small business debts.
- Allow partial or total discharge of the debts of individuals and, where applicable, families in cases of over - indebtedness where other measures have proved to be ineffective, with a view to providing them with a new opportunity for engaging in economic and social activities.
- Provide for appropriate alternative proceedings depending on the circumstances of the consumer debtor.
- Consider providing for more appropriate separate or alternative proceedings for consumer debtors.
- Ensure that consumer debtor insolvency laws are mutually recognised in other jurisdictions and aim at standardization and uniformity.
- Offer the consumer debtor a discharge from indebtedness as a method of concluding a bankruptcy or rehabilitation procedure.
- Effectively limit the means of creditors to hinder debt settlements unreasonably.
- Ensure that payment plans in debt adjustment are reasonable, in accordance with national practices, both in repayment obligations and in duration; ensuring that debt adjustment covers all debts, excluding only those covered by special waivers provided under national law.
- Establish mechanisms for extra - judicial settlements and encouraging such settlements between the debtor and creditor.

Governments, semi - governmental or private organisations should:

- Ensure the availability of accessible, sufficient, competent and independent pre and post bankruptcy debt - counselling.

- Set up voluntary educational programmes to improve information and advice on the risks attached to consumer credits.

- Encourage the development of extra - judicial or out - of - court proceedings in order to resolve the problems of consumer debts.

- Set up policies relating to debt management and to treatment of over - indebted individuals and families and ensuring uniformity of such policies.

- Collect information and statistics on debt problems and analyse the situation of over-indebted individuals and families in their countries.

- Encourage effective financial and social inclusion of over - indebted individuals and families, in particular by promoting their access to the labour market.

- Encourage the active participation of the debtor in debt settlement and, where necessary, counselling and advice following the debt settlement.

- Set up debt advice, counselling and mediation mechanisms, as well as ensuring, or at least encouraging, effective participation of lending institutions and other public and private creditors in implementing national policies for debt management.

- Ensure appropriate quality standards and impartiality of the services provided by the responsible bodies and professionals as well as effective mechanisms for controlling these standards.

Lenders should:

- Review the way credit is made available to consumers and small businesses, information is presented and the way these debts are collected.

Organisations of lenders and consumers should:

- Set up methodologies to monitor consumer loan delinquencies and to make recommendations on such matters including the need for safeguards on privacy.

- Make reliably accurate credit reporting and scoring information available to individuals.

- Ensure effective co - operation between the competent bodies and professionals involved in the prevention of over - indebtedness, the alleviation of the effects of the recovery of debts and the rehabilitation of over - indebted individuals and families.

- Provide easy access to information about consumer rights, which should be readily understood by the general public.

Principles

The First Principle: Fair and equitable allocation of consumer credit risks

Society should accept that a consumer debtor who cannot repay his debts, for reasons beyond his control, is not always at fault and that the creditors that consequently receive no payment, are not necessarily the victims. Such an approach will have to provide for provision dealing with exemptions as to the property of the debtor that will be excluded from recourse by the creditors, avoiding powers to nullify certain acts and to redress the damage which were detrimental to the interest of all the creditors and an automatic stay which prohibits the creditors to pursue actions against the debtor whilst a solution is being reached. A fair and equitable allocation of the risks should also provide for anti - discrimination provisions safeguarding a humane approach of the debtor and his entitlement to maintain, both during and after proceedings, a decent way of living, even so at the costs of his creditors. On the other hand the benefits of the provisions may be limited to the debtor, who acted in good faith, both as to the way the debt arose, as to the reasons the debt could not be repaid.

The Second Principle: Discharge of indebtedness, rehabilitation or a "Fresh start"

Providing a fresh start to a debtor who could not reasonably repay all of his pre - existing debts is the recognition by society that over - indebtedness is excusable. It is the key - element in any consumer debtor insolvency law or rehabilitation procedure and based on the principle that the debtor should be able to begin afresh, free from past financial obligations and should not suffer indefinitely.

The Third Principle: Extra - judicial rather than judicial proceedings

There are obvious advantages. Extra - judicial or out - of - court proceeding take less of the courts' time and of the judiciary, are less expensive and can be better designed for a more integrated approach of the problems the consumer debtor is facing, which are more often of a non - legal than of a legal nature. More in general there should be delegalization and dejuridification of the consumer debtor problem.

The Forth Principle: Prevention rather than intervention

Although there has been a changing attitude towards insolvency over the last decade, especially among young people, insolvency still has a stigmatic character, which can be avoided. It requires the intention to co - operate of both legislator, (local) government, (group of) creditors and debtors in setting up educational programmes, in critically reviewing how, to whom and under which conditions credit is made available, monitoring the debt collection process and in general improving the social environment. This includes data collection and statistics to insure transparency and an understanding between all the stakeholders.

Recommendations

The four principles that were discussed are the basis of the recommendations in this report.

The First Principle: Fair and equitable allocation of consumer credit risks

> *Recommendation 1*
>
> *Legislators should enact laws to provide for a fair and equitable, efficient and cost-effective, accessible and transparent settlement and discharge of consumer and small business debts of a problematic nature.*

The objective of the law is to provide for a discharge or fresh start for the consumer debtor that cannot reasonably repay its creditors, provided that the debtor acted in good faith both as to the way the debts arose and as to the reason the debts cannot be repaid. In this respect it means that the following elements must be clearly seen:

Fair and equitable

There should be a fair allocation of risk amongst debtors and creditors in a predictable and equitable way. The system should not be abusive to debtors and not necessarily designed to protect and maximise value for all the creditors. It contains a balanced approach in order to give the debtor the possibility of a second chance. Apart from the property that will remain with the debtor and that is excluded, the entire estate should be available for the creditors. The law should therefore provide the trustee or administrator with sufficient powers to nullify avoidable actions. This report recognises that there are differences between creditors and that they may have no equal rights, but will not enter into a discussion about priorities, secured and unsecured or preferred and non - preferred creditors.

*Efficien*t

Although consumer debtors will come from all income groups they are in general not likely to have very sizable estates. Complicated and time - consuming procedures should therefore be avoided. The administration of the estate has to be performed by a skilled, efficient trustee or administrator.

Cost effective

A decision may have to be made as to who pays for the process, the trustee or administrator and the other costs involved. Where a fair and equitable liquidation or rehabilitation process is for the benefit for the society as a whole, costs may have to be shared by all the stakeholders. In many jurisdictions the costs are paid by the government.

Accessible

The debtor should have easy access to the procedure at no further costs and without too many or complicated formalities, with being free to choose between a liquidation or rehabilitation procedure, provided both systems are available to a consumer debtor. Since debtors will sometimes only initiate insolvency proceedings as a last resort, powers to initiate such proceedings are sometimes given to creditors or (semi) - governmental authorities, like social security agencies.

Transparent

Debtor and creditors alike must be able to monitor the process, have the opportunity to be heard, to receive notices and to exercise their rights.

Further attention should be given to the following issues:

Size of the estate

The law will set rules as to which assets of the debtor will be available for distribution among the creditors and consequently which assets will be excluded. The debtor should be able to maintain a reasonable living. In case the law provides for a redemption capacity, the excluded income of the debtor is set according to a standard that the necessary living expenses (such as food, housing, public facilities, medical care, etc) of the debtor and of those the debtor is responsible for, can be met. Since the high costs of housing (either rent or mortgage) are often the main causes of (other) debts becoming problematic, special attention should be given to the specific problems connected to housing.

Duration of proceedings

In some jurisdictions the redemption capacity is saved over a period of years before the funds so accumulated are distributed among the creditors in exchange for a discharge. The amount of income available to the debtor in such situations is usually minimal and often below the minimum standards that apply to the debtor in question. The underlying philosophy is that the debtor should endure some financial hardship, whereupon the discharge is considered as the reward. This period is sometimes up to seven or eight years. This period however should not be over - extended. Debtors already quite often experience long periods of financial hardship even before proceedings start. The risk that the debtor will not be able to cope with the limited budget available, especially in times of misfortune, unexpected costs, etc and that he will relapse into the old situation, is realistic.

Avoiding powers

Creditors should not be able to retain transfers received from the debtor within a certain period prior to insolvency procedures and which interferes with the collectivity of the creditors.

Automatic stay of actions

Creditors should be prohibited from pursuing the debtor during the insolvency process. If this were otherwise, creditors who chose not to be bound by the process would prevail over those utilizing the collective mechanism.

In addition the law should take into account the issues that are generally provided for in any insolvency law. In this respect reference is made to provisions regarding the handling of encumbered assets and the position of secured creditors, treatment of contracts (where special attention should be given to contracts related to the basic necessities of life) and the priority of distribution.

Recommendation 2

Legislators may consider providing for separate proceedings, depending on the specific circumstances of the consumer debtor.

The law may provide for different routes to a discharge depending on the specific situation of the debtor and the nature of the problematic debts.

A debtor who has no redemption capacity, who suffers from survival debts and who has no prospects of improvement of his financial situation within a reasonable period, i.e. due to prolonged dependence upon minimal social security benefits, permanent unemployment or disability, will require a different approach than a debtor with accommodation debts, where the problematic situation will only be temporary, provided that the debtor is given breathing space to recover from his difficulties, is allowed an opportunity to restructure earnings and spending and to improve the relation with his creditors.

In the first situation it is of no use to extend insolvency procedures for a longer period of time, thus extending the agony of a hopeless situation. A debtor with accommodation debts however may be able to offer his creditors a pro - rata payment of their claims or even a composition or scheme of arrangement. In respect of the first situation liquidation procedure seems more appropriate, and in some jurisdictions a consumer debtor may apply for a discharge even after a very short period, whilst for the second situation a rehabilitation procedure could be the answer. Many countries with well developed consumer debtor and small business insolvency laws have chosen for either system or a combination thereof. The choice usually depends on the way insolvency laws are structured in general and is often determined historically.

A debtor should be free to choose and either procedure should lead to both a discharge and a solution for the underlying causes of the problematic debt situation. Again a debtor is not helped when a discharge is easily obtained without the underlying causes being solved or taken away. A balance between earnings and spending is a prerequisite of discharge.

Recommendation 3

Legislators should consider providing for separate or alternative proceedings for consumer debtors and small businesses.

Consumer insolvency laws are about the position of natural persons in a problematic debt situation. This situation may arise from consumer debts or may be related to the participation in the economic process by way of conducting a small business.

The extent to which a natural person will be held liable for debts which arise from its participation in the economic process will largely depend upon the national system adopted both with regard to the distinction between natural and legal persons, and to the legal and organizational forms in which a business may be conducted. A legal entity conducting a business, whether large or small, may cease to exist after the termination of insolvency proceedings, together with the remainder of any unpaid

debt. However, in case the business is in any way identifiable with the natural person and the natural person remains responsible for the debts of the business after insolvency, the person's situation may not be different from any other consumer debtor facing a problematic debt situation.

Nevertheless the specific circumstances of a small business and the type of debt may be quite different. The business may have personnel and different types of creditors, may be engaged in all kinds of commercial transactions, etc. Solving these specific situations could require a different approach; both to the way the business should be dealt with and possibly be saved (within the national system), as to the specific skills of the trustee or administrator.

Recommendation 4

Legislators should ensure that consumer and small business insolvency laws are mutually recognised in other jurisdictions and should aim at standardization and uniformity.

Although the majority of consumer debtors and small businesses will only have assets and creditors within their own jurisdictions, a number of them may have assets and/or creditors in another jurisdiction. This is likely to happen when people do not live and work in the same country or in areas with intensive cross - border transactions between connecting states or jurisdictions. In areas where trade barriers have disappeared and there is free movement of people, goods and services, these goods and services (credits) from abroad will be easily available. The Internet brings the world at one's doorstep.

Various treaties regarding the recognition of insolvency procedures between various countries do include the recognition of consumer debtor insolvency laws. The UNCITRAL Model Law ensures judicial co - operation, access and recognition, but the Guide to Enactment leaves room for enacting States to exclude those insolvencies that relate to natural persons residing in the enacting State from the scope of application of the Model Law and whose debts were incurred predominantly for personal or household purposes, rather than for commercial or business purposes. Still, the possibilities offered by the Model Law could be beneficial for both consumer debtor and creditors in case the debtor has assets and / or creditors in another jurisdiction.

Under the EU - Insolvency Regulation natural persons / consumer debtors are not excluded as such, but it is left to the laws of the contracting States as to whether they fall within the scope of the application.

Recognition may not be sufficient. The conditions under which a discharge can be obtained may considerably differ from jurisdiction to jurisdiction. Some jurisdictions require minimum pay - outs to creditors, in others even a zero pay - out qualifies for discharge. If these differences are too great a foreign discharge may be considered contrary to public policy and therefore of no consequence. Overall uniformity of consumer insolvency laws may not be realistic, but it would assist if certain standardization could be achieved. This is particularly the case when a debtor move from one jurisdiction to the other in order to benefit from the most easy and quick way to get rid of his debts.[35]

[35] This is often called 'bankruptcy tourism'.

The Second Principle: Discharge of indebtedness, rehabilitation or a "fresh start"

> *Recommendation 5*
>
> *Legislators should offer consumer debtors a discharge of indebtedness as a tailpiece of a liquidation or rehabilitation procedure.*

In whatever form a discharge ultimately takes, debtors should have an opportunity to obtain relief from pre-existing indebtedness and to have a fresh start, free from their past financial obligations.

In this respect attention should be given to the following issues.

Contributions to the estate

A debtor may have to contribute part of his income to the estate or his creditors either during the insolvency proceedings, which in some jurisdiction may take a considerable time, or after these proceeding have been terminated, by way of an imposed condition on the debtor. Ideally, the debtor's ability to obtain a discharge should not be linked to a debtor's future income, after termination of proceedings.

Extent of discharge

Discharge should cover as many debts as possible that exist either at the beginning of the proceedings or at the time discharge is obtained. In many jurisdictions however certain debts are excluded from a discharge such as certain debts arising from maintenance agreements, fraud, court fines, taxes and student loans. Although there can be a justification for such exceptions they should be kept to a minimum. A discharge with too many restrictions and still outstanding old debts may not sufficiently assist the debtor in making a fresh start. The test whether the debtor acted in good faith could in some circumstances be more appropriate.

Waiting period

The waiting period is the period between two subsequent discharges. In some jurisdictions a discharge is an opportunity of once in a lifetime, in other jurisdictions there is a minimum waiting period, for example ten years, before a debtor will qualify for a new discharge, or even to enter insolvency proceedings which may lead to a new discharge. This period has to be considered.

Restrictions imposed

Conditions may be imposed upon the debtor both during the proceedings or as a condition for a discharge, either by way of recommendation by the trustee or administrator or by the court, like the inability to obtain new credits, to leave the country or to carry on a business for certain period of time. Although these restrictions may be for the good of the debtor they should not restrict the debtor in his fresh start altogether.

Bad actor provisions

A number of debtors or debts may be excluded from the benefits of a discharge, although these should be limited and well defined. In general these are defined as fraudulent debts.

Reaffirmation of debt

A debtor and a creditor may reaffirm the debtor's obligation previously discharged. In some jurisdictions these contracts are not enforceable. In other jurisdiction the debt is not discharged at all, but will remain in existence as a "natural obligation".

It should be noted that discharge of a natural person debtor does not generally affect the liability of a third party that has guaranteed the obligations of that debtor.

To ensure that the reorganized debtor has the best chance of succeeding, an insolvency law can provide for a discharge or alteration of debts and claims that have been discharged or otherwise altered under the plan. This approach supports the goal of commercial certainty by giving binding effect to the forgiveness, cancellation or alteration of debts in accordance with the approved plan. The principle is particularly important to ensure that the provisions of the plan will be complied with by creditors that rejected the plan and by creditors that did not participate in the proceedings. It also gives certainty to other lenders and investors that they will not be involved in unanticipated liquidation or have to compete with hidden or undisclosed claims. Thus the discharge establishes unequivocally that the plan fully addresses the legal rights of creditors.

Discharge in reorganization might be effective from the time the plan becomes effective under the insolvency law or from the time it is fully implemented. In the event that the plan is not fully implemented or implementation fails, many insolvency laws provide that the discharge can be set aside.

The purpose of provisions on discharge is to enable a natural person debtor to be finally discharged from liabilities for pre - commencement debts, thus providing a fresh start.

The Third Principle: Extra-judicial approach

Recommendation 6

Legislators should encourage extra judicial or out - of - court proceedings for solving consumer and small business debts of a problematic nature.

Extra - judicial proceedings should have clear advantages for both debtors and creditors. In these proceedings a creditor should have a fair assurance that it will receive all the entitlements under the circumstances and that its rights are protected and dealt with in an effective and efficient manner. For a debtor it should be clear which sacrifices they are required to make, but also that by doing so, they are entitled to a discharge and that the creditors will accept this.

This may require facilitating out - of - court schemes of arrangement or rehabilitation procedures, in which case court approval of such schemes or procedures can be given in case creditors have to vote in favour unanimously and such vote is not obtained. A dissenting creditor should be able to be overruled if its position in and the outcome of extra - judicial proceedings are not materially different from judicial proceedings. This is likely to be the case when extra judicial proceedings have incentives for both parties. These procedures will be less expensive and less time - consuming.

In some jurisdictions it is compulsory that efforts are being made to effect an out - of - court settlement. A consumer debtor is not allowed to enter into an insolvency procedure leading to discharge, unless he shows to the satisfaction of the court that an out - of - court settlement could not be obtained. The same result could be obtained by introducing a "cooling - off" period, allowing the parties, through mediation or another form of alternative dispute resolution, to reach a settlement or rehabilitation plan. Special attention should be given to the costs involved and the necessity of debtor's representation. Costs should never be an obstacle for a debtor to solve his problematic debts through an extra - judicial procedure.

Recommendation 7

Governments, semi - governmental or private organisations should ensure the availability of sufficient competent and independent debt counselling.

The problems a consumer debtor faces are often complex and usually not only of a legal but also of a socio - psychological nature. This requires the input of professional independent debt counsellors, specialised in negotiating arrangements with creditors and knowledgeable about the specific problems of consumer debtors. Their work requires expertise in the legal, financial and social aspects of problematic consumer debts and they should be able to give information and advice on all aspects of budgeting - aid, debt settlement and welfare laws.

Governments, semi - governmental or private organisations should create bodies to train, finance and supervise these professionals, to develop standardized norms and practices and codes of conduct, against which the assistance is tested. This requires licensing and supervision by the court or an independent body. Special attention should be given to the remuneration of trustees, administrators and / or debt counsellors to ensure that sufficient time is available to assist the debtor in a proper manner.

Since consumer debtors are often in a weak and vulnerable social position, they easily become victims of unprofessional or even malafide debt counsellors.

The Forth Principle: Prevention

Recommendation 8

Governments, semi - governmental or private organisations should set up educational programs and improve information and advice on the risks attached to consumer credit.

Based on the principle that it is better to prevent than to cure honest advice on the loop - holes of credit instalments, credit cards, large expenditures, etc is essential. Educational programs may be a compulsory element of a discharge or be offered on a voluntary basis, either pre - or post - insolvency. Educational programs are in many forms and shapes. They may range from budgeting-advice, budgeting - support or budgeting - administration. With respect to educational programs special attention should be given to vulnerable groups of society, like very young, the elderly and minorities.

Financial literacy can be taught, it is essential for successfully functioning in our world's economy, where money is the key factor and lack of money is regarded as failure. Education is therefore an integral part of a real fresh start; it enables the debtor to function more effectively in society.

Recommendation 9

Lenders should observe the way credit is made available to consumers and small businesses, information is presented and the way these credits are collected.

Lenders should be very much aware that they are in a position to influence the risks taken by consumers. By using accurate scoring models lenders are capable of controlling their risks and reducing their costs. But through aggressive marketing and sophisticated solicitation techniques they reach less and less credit worthy debtors and higher charge - off rates. These charge - off rates are just part of the business of the lender and are taken into account in the condition under which credit is made available. For the consumer debtor who cannot repay his debts it may result in a personal tragedy.

Lenders should therefore be clear about the conditions subject to which credit is made available. Tightening standards will result in a slower consumer debt growth for consumers in the danger - zone and will consequently reduce consumer loan delinquencies.

Lenders should however also regularly review their own behaviour on several levels, such as the way credit is marketed and their collection tactics.

Recommendation 10

Organisations of lenders and consumers should set up joint programs to monitor consumer loan delinquencies.

Monitoring consumers with problematic debts by a body controlled by representatives of both lenders and consumer organisations that operates under strict condition and that guarantees privacy for consumers and which provide information to lenders about previous delinquencies will protect consumers and will ultimately be beneficial for all parties. Data collection will insure transparency and an understanding of how the system is operating and, recognizing privacy, data on debtors and creditors are therefore essential. Statistics will reveal important information that will assist the parties to the system and society as a whole.

CONSUMER DEBT REPORT II

Country Reports

ARGENTINA

QUESTION 1

1. What are the options or procedures available for a natural person / consumer regarding his or her over- indebtedness in your jurisdiction?

There are three (3) insolvency proceedings available in Argentina for a natural person / consumer regarding that persons over-indebtedness. In fact, all these insolvency proceedings are the only ones available for any kind of debtor, including corporations.

i Concurso preventivo
ii Acuerdo preventivo extrajudicial (APE)
iii Quiebra

1.1 The legal grounds for the opening of or access to those procedures

Concurso Preventivo

This a reorganization proceeding. It was brought into force in Argentina back in 1972 (Law 19.551). At present, this procedure is governed by Law 24.522 dated July 20, 1995, as amended in 2002 (Law 25.589) and 2006 (Law 26.086). Those 3 laws are referred, hereinafter, as the Argentine Insolvency Law (the "AIL").

A concurso preventivo is similar to a reorganization under Chapter 11 of the US Bankruptcy Code. Its main purposes are (a) the reorganization of a debtor's business in order to avoid liquidation, (b) the development of a plan for the payment of creditor claims and (c) the emergence of the company from the proceedings as a viable entity. Throughout a concurso preventivo, a debtor continues in the possession and maintenance of their properties and the operation of their business, under the supervision of a court-appointed supervisor or trustee (síndico) and a creditors' committee, while a plan of reorganization - acuerdo preventivo - (a plan) is developed.

In order to open a concurso preventivo, a natural person / consumer needs to be in cesación de pagos (insolvent). In Section 78 of the AIL the concept cesación de pagos (the literal translation would be "suspension of payments") is described as the state that shows that the debtor is unable to meet his obligations regularly as they become due, whatever their nature and the causes giving rise to them.

The triggering criterion for the cesación de pagos does not necessarily require the value of the debtor's assets to exceed his or her liabilities. The criteria relies both on present and future financial difficulties (cash shortage, delays…), but also in present and / or future non financial difficulties. It is a broad standard.

Acuerdo Preventivo Extrajudicial (APE)

An APE proceeding is a court-supervised procedure similar to a prepackaged chapter 11 case under the US Bankruptcy Code. The APE proceeding involves a restructuring agreement between a debtor and a certain percentage of their unsecured creditors affected by the restructuring which is submitted to a court of competent jurisdiction for its approval pursuant to the AIL.

On May 16, 2002, Argentine Law 25,589 (the "Amendment"), which amended the AIL, became effective. The amendment was issued in the midst of a severe economic and financial crisis affecting the Argentine economy, which produced an extended inability of the private sector companies to honor their debts in accordance with their original terms. The devaluation of the peso, the restrictions on the banking system and the default of the Argentine sovereign debt deeply affected the performance of the Argentine economy, resulting in a substantial decrease of the gross domestic product in the year 2002 and a substantial increase in inflation. Among other changes, the amendment modified the AIL provisions governing an APE.

Prior to the amendment, the "old" APE proceeding could bind only those creditors that consented to the APE. Such limited effect restricted the ability of the old APE proceeding to be used as an effective mechanism to overcome a situation of insolvency. The old APE proceeding could be submitted for court approval, but such judicial endorsement had the limited effect of shielding the APE against eventual clawback actions ("acciones revocatorias") on payments or any other act of disposition of assets made under such APE, if the debtor subsequently entered into a quiebra, or liquidation, situation. Under the old APE proceeding, the non - consenting creditors' rights under their original contractual instruments were unaffected by the APE. In light of these regulations and the relatively scarce benefit resulting from the judicial confirmation of the APE, the few APEs that were executed prior to the amendment were usually not submitted for court approval.

The amendment provided that the approval of an APE by a competent Court would make it binding on all unsecured creditors that (i) were creditors prior to the date of the filing of the APE petition and (ii) are included in the APE, whether those creditors consented to the APE or not. Such binding effect on all affected unsecured creditors subject to the terms of the restructuring agreement, while avoiding certain expenses and lengthy procedural stages usually involved in a concurso preventivo, converted the APE proceeding into a useful restructuring tool.

Pursuant to the amendment, the APE proceeding was transformed into a judicial proceeding similar to a US prepackaged chapter 11 case, in which the only out-of-court aspect of the proceeding is that prior to the filing of the APE with the Court, the debtor and their creditors negotiate and execute the restructuring agreement. In light of the requirement of court approval of an APE, and the many similarities with a concurso preventivo, the APE proceeding is considered a "judicial" proceeding under the Argentine Insolvency Law and has been characterized by many authors as a sub-type or an abbreviated version of the concurso preventivo.

According to Section 69 AIL, a debtor who is in a situation of cesación de pagos (insolvency) or who is to have economic or financial difficulties of a general nature, may reach an APE with their creditors and submit it for judicial homologation.

Quiebra

The quiebra is a typical liquidation proceeding, comparable in goals to Chapter 7 of the US Bankruptcy Code, performed under court control and supervision, seeking to liquidate the debtor's assets and distribute the proceeds among its creditors in proportion to their respective claims and / or credits.

As for the concurso preventivo, the suspension of payments (cesación de pagos) is the legal requirement for opening a quiebra. This triggering situation is described in Section 78 AIL as the state that shows that the debtor is unable to meet his obligations regularly as they become due, whatever their nature and the causes giving rise to them. In Section 79 of the AIL there is a list of sustaining events of such suspension of payment: Among others, the following events may be deemed to evidence the state of suspension of payments:

1) Judicial or extra - judicial acknowledgement made by the debtor.

2) Arrears in the performance of an obligation.

3) Concealment or absence of the debtor or of the managers of the company, if applicable, without there being a representative with sufficient powers and means to fulfill their obligations.

4) Closing down of the place of business or of the establishment where the debtor develops their activities.

5) Sale at an unreasonably low price, concealment or delivery of goods in payment.

6) Judicial revocation of fraudulent acts carried out to the creditors' detriment.

7) Any deceptive or fraudulent means to obtain funds.

1.2 How are these procedures made available?

To open a concurso preventivo the debtor must file a petition (legal assistance is mandatory) with the bankruptcy court of their domicile, which includes among other things the following:

(i) evidence of a domicile within the court's jurisdiction;

(ii) evidence of the corporate existence of the debtor;

(iii) a detailed statement of assets and liabilities;

(iv) a copy of the balance sheets corresponding to the last three financial years;

(v) a list of creditors, indicating amounts of their claims, the grounds (or basis) for the claims, the dates on which the obligations became due and whether there are mortgages or pledges (referred to as "privileges") relating to the claims (section 11 AIL);

(vi) a list of the commercial and accounting books kept by the debtor specifying the last page used; and

(vii) information about any other possible insolvency proceedings of the debtor. In the case of a natural person / consumer, the requirements listed above as (ii), (iv) and (vi) are not necessary.

To seek confirmation of an APE from a court, a debtor must satisfy the filing requirements set forth in Article 72 of the AIL. Among other things, the debtor must file a statement of assets and liabilities valued as of a cut - off date (the "Assets and Liabilities Statement") on or about the date of the APE, certified by a public accountant (preferably the debtor's independent auditors). Besides, the debtor must also submit: (i) a schedule listing of all the debtor's creditors, certified as to completeness, and (ii) a schedule listing pending lawsuits and administrative procedures against the debtor, indicating the courts where such proceedings are pending. Both of them should be certified by a public accountant (preferably the debtor's independent auditors).

Because of all these requirements related to information audited and certified by a CPA, the APE proceeding is not likely to be pursued by a natural person / consumer to deal with his or her over-indebtedness.

To open a quiebra the debtor must file a petition (legal assistance is mandatory) with the bankruptcy court of their domicile and satisfy all the requirements included in section 11 AIL (See paragraph (i).1.2. above), but the liquidation will be declared even though those requirements are not duly fulfilled (Section 86 AIL). Any creditor can also file a bankruptcy petition against the Debtor, and according to Section 83 of the AIL, such filing must summarily give evidence of the creditors claim, the events evidencing the state of suspension of payments (cesación de pagos), and the fact that the debtor falls within the scope of Section 2 of the AIL.

1.3 Who can commence the procedure?

The concurso preventivo is a voluntary proceeding, only the debtor can trigger such a proceeding.

The quiebra is both a voluntary and involuntary proceeding. The debtor can trigger such a proceeding but any creditor whose claims were enforceable, whatever its nature and preference, may also file an involuntary bankruptcy petition against the debtor (Section 80 AIL).

1.4 Who will supervise the procedure?

The concurso preventivo proceeding will be supervised by the Court (a Commercial Judge of First Instance).

The appointed Court can even reject the debtor's insolvency filing. The Court may reject the opening of the proceeding on any of the following grounds:

(i) the debtor does not fall within the types of persons who qualify to file a concurso preventivo (not applicable to natural persons);

(ii) the petition does not fulfill the legal requirements;

(iii) the debtor has been subject to a prior concurso preventivo and less than one year has elapsed from the date when the debtor was declared to have fulfilled the terms of their prior plan of reorganization (section. 59 AIL) or less than one year has elapsed from the date when their prior reorganization proceeding was dismissed, abandoned or not ratified and the debtor has pending involuntary petitions (section. 31 AIL); and

(iv) lack of jurisdiction.

The quiebra proceeding will also be supervised by the Court (a Commercial Judge of First Instance) with ample powers (within the AIL) to conduct the whole proceeding.

Besides, a bankruptcy trustee is appointed by the Court. The trustee has to make all the necessary petitions for the rapid prosecution of the case, the investigation of the debtor's financial condition, the events which might have had incidence on, and identification of those held liable.

To this end the debtor has, among others, the following powers:

1) To issue all written judicial notifications and court letters that have been ordered.

2) Directly request reports from public and private entities. In the event that the party to whom the request is made were to consider it unjustified, they must request the judge to dismiss it within five days after receipt thereof.

3) Require from the debtor or third parties the explanations they were to consider relevant. In the case of refusal or resistance of those questioned, they may request the judge the application of Sections 17, 103 and 274, Subsection 1.

4) Examine, without the need for any judicial authorization whatever, the judicial or extra-judicial files dealing with any monetary issues relating to the debtor or any party directly related to them.

In general, request all the measures stipulated by the AIL and others, which were appropriate for the ends indicated.

1.5 What are the criteria such a person has to satisfy?

The main requirements that a debtor must meet to seek protection under a concurso preventivo are to be in cesación de pagos and to file the concurso preventivo petition before a quiebra (liquidation) is declared against such debtor (Section 10, AIL). In the case of a quiebra, the only requirement is to be in cesación de pagos (insolvency).

1.6 What are the available alternatives?

As the aim of the concurso preventivo is the development of a plan for the payment of creditors claims, and such plan must be accepted by the majority of the creditors (more than 50% of all unsecured creditors, determined on a head count basis, regardless of the principal amount of unsecured debt held; and at least 2/3 of the aggregate principal amount - plus accrued but unpaid interest - of unsecured debt), the rejection of the plan leads to a quiebra proceeding, which basically means the liquidation of most of the assets of such debtor and the distribution of its proceeds among the creditors.

The aim of the quiebra is the liquidation of the debtors assets. But according to Section 96 of the AIL, the debtor can abort the liquidation proceeding with a deposit in payment, or through an attachment, of the amount of the claims that served as a basis to evidence the state of suspension of payments and accessories thereto. Sufficient amounts shall also be deposited to meet the remaining claims invoked in any bankruptcy petitions pending as of the time of the declaration, plus accessories, unless the illegitimacy of the claim can be "prima facie" demonstrated, in the opinion of the judge, and without detriment to the rights of the creditor whose claim was not an impediment to revoke the bankruptcy. A debtor must also deposit a certain sum fixed for payment of the legal expenses.

QUESTION 2

2. Position of the debtor and the spouse

2.1 Which assets and income are excluded from the procedure?

Section 108 of the AIL describes which assets are excluded. They are:

- Non-monetary rights.
- Non-attachable assets.
- The usufruct of the assets belonging to the bankrupt's minor children, but the related income corresponding to him / her falls into dispossession once the charges have been met.
- Management of non-community assets belonging to his / her spouse.
- The power to act at law in the defense of the assets and rights which do not fall within the dispossession, to the extent his / her personal participation is allowed by this law.
- The indemnity which corresponds to the bankrupt for physical injuries or moral damages.
- Other assets excluded by other laws.

Basically, those assets that the debtor needs to have a basic living and to carry out craftsman or professional tasks are incorporated under paragraphs 2 and 7. Under a non bankruptcy law which protects the homestead, if before his / her insolvency the debtor did register a real estate property under such protection (bien de familia), this property could not be affected by the liquidation.

Regarding the incomes, the debtor can keep for him or herself (and his family) 80% of what they earn either under an employment relationship or as payment for craftsman or professional tasks.

2.2 Does the debtor have restrictions on the disposition of his assets?

In a concurso preventivo (voluntary restructuring), the debtor retains the management of his estate under the supervision of the trustee (Section 15 AIL), but needs prior judicial authorization to carry out certain acts (for example, those related to registrable assets) and to perform any act other than in the ordinary course of business.

Instead, in a quiebra (liquidation), according to section 107 of the AIL, the debtor is automatically dispossessed of their assets existing on the date of the declaration of bankruptcy, and of any other assets acquired by them until their discharge. The dispossession precludes the exercise of any disposition and / or management rights over such assets.

2.3 Which assets and income are included in the procedure?

All those assets and income existing on the date of the declaration of bankruptcy, and of any other acquired by them until their discharge, except those expressly excluded according to Section 108 of the AIL. (See answer 2.1. above)

2.4 Are pension schemes included?

Only if the pension payment is attachable (in whole or in part) (Section 108, paragraph 2, AIL). Usually, a pension is only attachable in part (20%).

2.5 Does the debtor donate to the estate a part of his income for the benefit of the creditors?

The debtor must donate part of his regular income (the attachable part) to the estate for a period of time that is usually one (1) year, until their discharge. The attachable part of an income (for example, salaries) is usually 20%.

2.6 Is there a means test?

There is no means test under Argentina law.

2.7 Is there a garnishment of regular income?

There is a garnishment of up to 20% of the debtor's regular income (See answer 2.5. above), only until the debtor's discharge.

2.8 Is there protection for the debtor's privacy, his mail and his home?

The debtor's privacy and their home are protected under our National Constitution. According to Section 114 of the AIL, the mail and communications addressed to the debtor must be delivered to the Insolvency Trustee. The latter is to open them in the presence of the debtor, or of the Judge in case of their absence, surrendering to the interested party those which were strictly personal.

2.9 Is there protection of the spouse's interests in the home?

There is no protection of the spouse's interest in the home unless the spouse is the co-owner of the real estate.

2.10 Is the debtor restricted to receive information?

There is no restriction on the debtor receiving information.

2.11 Does the debtor have the liberty to move freely and to leave any State, including his own?

The debtor can move freely as it is a constitutional right recognized in Section 14 of our National Constitution. But according to Section 103 of the AIL, for a limited period of time (6 to 9 months from the bankruptcy declaration), the debtor may not travel abroad without the Bankruptcy Court authorization given for each specific case, which shall be issued when his or her presence is not required for the purposes of Section 102 (supplying all the cooperation which the judge or the Insolvency Trustee may require in order to assess his / her financial condition and determine the claims), or in cases of evident need and urgency.

2.12 Is the debtor entitled to cost-free legal assistance?

There is no legal aid available for debtors unless provided by a Bar Association or a School of Law cost - free legal assistance service.

2.13 Are there restrictions on the debtor after the procedure?

While the debtor is not discharged (usually one year), Section 238 of the AIL states that the debtor may not do business, either per se or through third parties, nor act as administrator, manager, trustee, liquidator or incorporator of companies, associations, mutual partnerships or foundations. Nor may the debtor take part in companies or act as agent or attorney - in - fact with general powers for them.

2.14 Is the spouse (automatically) included in the procedure?

The debtor's spouse is not automatically included in the prodecure. But if the spouse is also a warrantor or is co-responsible for debtors claims, they can voluntarily file a "jointly" administrated insolvency proceeding, according to Section 68 of the AIL.

2.15 In which way do the International or European Convention and Covenants play a role?

There is no such role.

QUESTION 3

3. Position of the creditor

3.1 Can a creditor force the debtor to commence a procedure or oppose the debtor from doing so?

A creditor can only file an involuntary liquidation (quiebra) petition against the debtor but cannot force the debtor into a restructuring proceeding (concurso preventivo). No creditor can oppose the opening of any insolvency proceeding (concurso preventivo or quiebra) filed by the debtor.

3.2 Which creditors' claims can be excluded from a discharge?

No creditors' claims can be excluded from a discharge but certain claims are barely affected by the insolvency proceeding, as those with special preference (Section 241 AIL). For example, mortgage or pledge claims with collateral in real estate or registrable assets, or claims owed by the debtor to their employees.

3.3 Does a creditor have to accept a curtailment of his claim?

In a voluntary restructuring proceeding (a concurso preventivo or an Acuerdo Preventivo Extrajudicial), a creditor must accept a curtailment of his claim if the plan accepted by the majority of the creditors (more than 50% of all unsecured creditors, determined on a headcount basis, regardless of principal amount of unsecured debt held; and at least 2/3 of the aggregate principal amount - plus accrued but unpaid interest - of unsecured debt) provides any haircut and / or extension on the claims. While in a liquidation (quiebra) proceeding, which basically means the liquidation of all the assets of the debtor, the claims that have not been satisfied (in total or in part) after the final distribution of its proceeds among the creditors are discharged.

3.4 Do certain creditors receive more protection than others?

Secured creditors receive more protection than unsecured creditors. In addition, among secured creditors, those with special preferences (Section 241 AIL[1]), are entitled to the maximum protection, provided that the collateral assets are enough to satisfy their claims.

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[1] Section 241. Claims with special preference. These have a special preference over the proceeds of the specific assets shown in each case:

1) The expenses incurred in the construction, improvement or preservation of a thing, over such thing, while it remains in the possession of the debtor for whose account the expenses were incurred.
2) The claims for salaries owed to the workers for six (6) months and those arising from indemnities payable due to occupational accidents, seniority or dismissal, compensation in lieu of notice and unemployment fund, over the goods, raw materials and machinery which, being owned by the debtor, are located in the establishments where they have supplied their services or which are used for exploitation thereof.
3) The taxes and rates which are specifically applicable to certain assets, over these.
4) The claims secured by mortgage, pledge, warrant and those corresponding to debentures and negotiable obligations with special or floating guarantees.
5) The sums owed to the withholder on account of the thing withheld at the date of the bankruptcy decree. The preference is extended to the guarantee established in Section 3943 of the Civil Code.
6) The claims shown under Title III, Chapter IV of Law No. 20,094 and Title IV, Chapter VII of the Aeronautical Code (Law 17,285), those of Section 53 of Law 21,526, those of Sections 118 and 160 of Law 17,418.

QUESTION 4

4. Avoidance actions

4.1 What are the legal proceedings to protect / realize the debtor's assets?

Once the bankruptcy and liquidation are ordered, the Bankruptcy Court has the power to avoid all fraudulent dispositions of property that prejudice the debtor's estate. Section 119 of the AIL provides that every disposition of property made, whether before or after the commencement of the proceedings, with the intent to defraud creditors, shall be voided upon motion by any person thereby prejudiced.

On the liquidation proceeding, preferential dispositions of the property of the debtor can be struck down under section 120 of the AIL upon the application of the Insolvency Trustee or other parties-in-interest. The transaction must have taken place within the "period of suspicion" (período de sospecha) (not longer than 24 months before the opening of the bankruptcy proceeding). Before a transaction can be deemed a fraudulent preference, it must be established that the payment was made by a person unable to satisfy, from his or her own resources, his or her debts as they became due, that the transaction in fact preferred one creditor over another, and that the intent of the payment was to prefer the creditor to whom payment was made. The burden of establishing that a fraudulent payment was made is on the party making such allegation.

Additionally, even before a quiebra scenario, any fraudulent disposition of assets could also theoretically be challenged by another civil action filed by creditors regulated by the Argentine Civil code, such as the "accion pauliana." The accion pauliana has stricter requirements than the accion revocatoria (insolvency "clawback" action) because it not only requires: (i) that the debtor was in a cesacion de pagos situation at the time of performing the challenged disposition of assets, (ii) that the challenged actions were prejudicial to creditors, and (iii) that the claim of the creditor that is filing the accion pauliana arose prior to the challenged actions, but also, (iv) that there was a fraudulent intent of both the debtor and the creditors that received the assets (to deceive other creditors).

QUESTION 5

5. Good faith

5.1 Does the principle of "good faith" play a role and in which way?

The "good faith" principle is a key principle in the Argentine legal system, recognized both in bankruptcy and non-bankruptcy legislation. This principle is established in several sections of our Civil Code (Sections 954, 1071, 1198 among others) and is reaffirmed in Section 52, paragraph 4, AIL.

In a voluntary restructuring proceeding (a concurso preventivo or an Acuerdo Preventivo Extrajudicial), no plan would be confirmed by the Court, pursuant to Article 52.4 of the AIL, if such plan exceeded limits imposed by good faith, ethics and moral.

QUESTION 6

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6. Re-payment plan

6.1 Is the debtor submitted to a payment plan?

Only in a voluntary restructuring proceeding (a concurso preventivo or an Acuerdo Preventivo Extrajudicial) is a payment plan pursued as an outcome of such proceeding. As stated in answers (i).1.3. and (ii).1.3., only the debtor can open such restructuring proceedings; therefore, no debtor can be submitted to a payment plan unless voluntarily.

There is no payment plan in a liquidation proceeding (quiebra).

6.2 How long is the duration of such a plan?

When applicable, there is no statutory limit for the duration of a payment plan, but such duration will depend on the terms of the plan proposed by the debtor and accepted by the majority of the creditors (more than 50% of all unsecured creditors, determined on a headcount basis, regardless of the principal amount of unsecured debt held; and at least 2/3 of the aggregate of the principal amount plus accrued but unpaid interest of unsecured debt).

6.3 Does the plan have an educational purpose?

There is no formal educational purpose in the re-payment plan.

QUESTION 7

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7. Voluntary settlement

7.1 What are the possibilities for a voluntary settlement?

A voluntary settlement is the pursued outcome in the restructuring proceedings (concurso preventivo or Acuerdo Preventivo Extrajudicial), but such plan depends on two requeriments: 1) the approval by the majority of the creditors (more than 50% of all unsecured creditors, determined on a headcount basis, regardless of principal amount of unsecured debt held; and at least 2/3 of the aggregate principal amount - plus accrued but unpaid interest- of unsecured debt); and 2) the confirmation of the Court.

Because of the need of the creditors' acceptance, a voluntary settlement is not the most common answer for a natural person / consumer over-indebtedness.

QUESTION 8

8. Discharge

8.1 In which way is a discharge granted?

According to sections 107 and 234 of the AIL, the discharge of all debts is automatically granted after one (1) year from the bankruptcy declaration.

8.2 Can a discharge, after it has been granted be revoked?

According to Section 236 of the AIL, the discharge can be revoked if the debtor is made subject to a criminal action related to their insolvency situation.

QUESTION 9

9. Remuneration / costs

9.1 How are the costs of the procedure dealt with?

The costs of the procedure must be paid by the debtor upon the conclusion of the voluntary restructuring proceeding (a concurso preventivo or an Acuerdo Preventivo Extrajudicial), and in case of a liquidation proceeding (quiebra) the remuneration of the Insolvency Trustee and other professionals is afforded with the amounts coming from the liquidated assets. In the vast majority of natural persons' quiebra cases, the liquidation proceeds are not enough to cover the costs of such procedures, which means that the Insolvency Trustees and his legal counsel are not paid for their services.

9.2 Is the court the correct forum to scrutinize fees?

The Court has always been the forum to scrutinize insolvency fees, since our earliest insolvency legislations dating back to the 19th century.

9.3 What is the appropriate method of calculation of fees when dealing with compositions or voluntary arrangements?

According to Section 266 AIL, in case of a voluntary arrangement (a concurso preventivo or an Acuerdo Preventivo Extrajudicial), the total fees of the Insolvency Trustee and legal counsel to the trustee and debtor are assessed according to the amount of assets prudently estimated by the judge or Court, in a proportion of not less than one percent (1%) and not more than four percent (4%) thereof, taking into account the duties performed and the time of service.

The amount thus assessed may neither exceed four percent (4%) of the total verified claims nor be less than the amount equivalent to two (2) salaries of the clerk of First Instance in the jurisdiction where the insolvency proceedings take place.

9.4 What is the method of calculation of fees when dealing with bankruptcy proceedings?

In the case of a liquidation proceeding (quiebra), the determination of the fees of the Insolvency Trustee and other professionals is made on the basis of the realized assets, and may neither be in total less than four percent (4%) thereof or three (3) salaries of a clerk of First Instance of the jurisdiction where the proceedings take place, whichever were higher, nor exceed twelve percent (12%) of the realized assets (Section 267 AIL).

9.5 Can IPs charge fees based on the value they created for the creditors during an assignment?

Exceptionally, according to Section 269 of the AIL, in the cases of continuation of the exploitation of the debtors ongoing concern, in addition to the fees which may correspond according to other Sections of the AIL, the Insolvency Trustee and the co-manager shall be entitled to a maximum of ten percent (10%) of the net profits obtained from such exploitation, to which effect the sales price of the assets of the inventory shall not be computed.

QUESTION 10

10. Cross-border considerations in consumer insolvency

10.1 Are overseas assets included?

Overseas assets are included. An insolvency proceeding includes all the debtors assets, regardless of the place where they are, be it in Argentina or in a foreign country.

10.2 Is forum shopping by the debtor for more favourable personal insolvency laws possible?

The forum shopping for a foreign jurisdiction is theoretically possible (and in fact is usual among the different jurisdiction within Argentina) but is not common because according to Section 3 of the AIL, the competent court to hear the insolvency proceeding of an individual shall be that with jurisdiction over the location of the debtor's business offices, otherwise, that of his place of domicile. If the debtor has several business offices, the court of the location of his main business will be the competent one.

QUESTION 11

11. What is the result of subsequent insolvencies?

In case of a voluntary restructuring (a concurso preventivo or an Acuerdo Preventivo Extrajudicial), subsequent insolvencies are not likely (although not impossible) because, according to the last part of Section 59 of the AIL, the debtor may not submit a new petition for a voluntary insolvency proceeding until the period of one (1) year has elapsed as from the date of the judicial decision declaring the fulfillment of the plan confirmed in the previous case, nor may they convert the declaration of bankruptcy (quiebra) into a concurso preventivo proceeding. Therefore, if it is difficult for a consumer to gather the majorities required for his or her plan approval, it would be almost impossible to obtain new consensus for a new arrangement in a subsequent voluntary restructuring.

On the other hand, in case of a liquidation proceeding (quiebra), it is more probable that a certain debtor would be placed in subsequent insolvency cases.

As seen in answer 8.1. above, according to sections 107 and 234 of the AIL, the discharge of all debts is automatically granted after one (1) year of the bankruptcy declaration; for that reason, after such period, the debtor can act freely going into new debts and acquiring new assets, both of which could be subject to a subsequent insolvency case.

If a subsequent insolvency case happens, as seen in answer 2.3. above, all those assets and income existing at the date of the declaration of the first bankruptcy, and any other assets acquired by the debtor until their discharge (usually 1 year) will be part of the estate committed to satisfy all the claims and liabilities raised before such first quiebra declaration. All the assets and income acquired by the debtor after their discharge, will be part of the estate of the second liquidation proceeding, and cannot be affected by the previous insolvency proceeding. In fact, it is theoretically possible that such subsequent insolvency cases would be partially overlapped in time, i.e. simultaneous insolvency cases.

QUESTION 12

12. Recommendations?

Our legal system is in urgent need for specific provisions dedicated to consumer insolvency and / or consumer over-indebtedness. The existing rules in the AIL are insufficient. This topic could be addressed in a special consumer insolvency regulation or in an amendment of our general insolvency system.

From my point of view, the new regulation should avoid the “administrative” way of dealing with consumer insolvency and / or consumer over- indebtedness as, for example, the French model. Instead, our framework should be amended (or modeled) akin to the US system, i.e. a “judicial” case with ample powers given to the bankruptcy court.

Over-indebted consumers (provided they are “good faith” debtors) should be granted a quick proceeding through which they can reach a fresh start by wiping out their debts.

Both in a liquidation proceeding or in a voluntary restructuring proceeding, the Chapters 7 and 13 of the US Bankruptcy Code should be followed as examples (modifying them taking into account our systemic differences and, moreover, our idiosyncratic diversity), leaving aside the amendments introduced by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005.

The keynote of any successful consumer insolvency regulation, at least in Argentina, should be the bankruptcy court. With ample powers and a proper procedural framework, such court could provide a quick, effective and non-cumbersome answer to the consumer insolvency problem.

AUSTRALIA

Australia is a Federation. Each State has its own civil Court Rules. They are similar but not identical with each other. There is also Commonwealth legislation which often adopts the procedures from each relevant State Court. Of necessity the material referred to in this summary is general in nature.

QUESTION 1

1. What are the options or procedures available for a natural person / consumer regarding their over - indebtedness in your jurisdiction?

1.1 The legal grounds for the opening of or access to those procedures

A natural person or consumer may adopt one of the following options:

- A private arrangement with the creditor for repayment of the debt.
- If judgment is entered, a formal Application to Pay By Installments in the Court in which judgment has been entered. As a general convention the judgment debt should be paid within 2 years, including interest. Interest is calculated on the judgment at 4% higher than the Australian Reserve Bank rate.
- Entering into a Part IX arrangement under the Bankruptcy Act, 1966 (Cth), as amended ("The Bankruptcy Act"). This is a formal debt agreement arrangement between the consumer and creditors. It is managed by an independent third party who need not be a registered Trustee in Bankruptcy. Not every consumer will be able to apply for a Part IX arrangement under the Bankruptcy Act.
- A debtors petition's whereby the consumer voluntarily declares bankruptcy which is governed by the Bankruptcy Act.
- A Part X arrangement under the Bankruptcy Act which is an arrangement in insolvency but enabling the debtor to make an immediate arrangement and avoid the minimum 3 year compulsory bankruptcy period. There is no limitation on the form of the arrangement. The creditors meet and vote to accept the arrangement by special resolution, i.e. 75% of the value of those present and voting and 50% in number.
- Arrangements through debt councillors for payment of debts without a formal arrangement under a State law or the Bankruptcy Act.

1.2 How are these procedures made available?

The procedures are available to all consumers, except Part IX which is limited to consumer debtors who have debts not exceeding the indexed amount at the date of publication for total unsecured debts not exceeding $94,530.80.

1.3 Who can commence the procedure?

All the procedures can be opened by the consumer who is a debtor. If a creditor wishes to have the consumer made bankrupt this can be at the option of the creditor by filing and serving a Bankruptcy Notice and then filing and serving a Creditors Petition.

1.4 Who will supervise the procedure?

The debt councillor supervises the procedure under Part IX of the Bankruptcy Act. The Official Trustee in Bankruptcy through the Insolvency Trustee Service of Australia ("ITSA"), a Commonwealth Government department or private registered Trustees in Bankruptcy supervise Debtors Petitions and Part X arrangements and Sequestration Orders by a Federal Court. The individual creditors supervise private arrangements.

1.5 What are the criteria such a person has to satisfy?

There are no set requirements except under Part IX of the Bankruptcy Act.

1.6 What are the available alternatives?

See 1.1

QUESTION 2

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2. Position of the debtor and the spouse

2.1 Which assets and income are excluded from the procedure?

All assets are available to pay creditors except if there is a bankruptcy. In bankruptcy, household and domestic assets do not vest in the Trustee in Bankruptcy. Income is not property for the purpose of the Bankruptcy Act and does not vest in the Trustee in Bankruptcy. Income can be the subject of a garnishee order but not all of the income is capable of being paid to the creditor. Each State has a basic wage and only the amount above the State basic wage can be garnisheed.

In bankruptcy income is excluded and income of the consumer is protected. However a consumer can either voluntarily make payments from income or if bankrupt, is required to make income contributions above a threshold amount which is varied by the number of dependents. Income contributions are calculated on the formula – *Assessed income minus actual income threshold.*

The indexed amount at the time of publication is $70,898.10.

Assessed income is the income which is the salary or wages or other financial benefits received from other sources less tax, medicare levy, child support. The income can be deemed by a Trustee in Bankruptcy, including benefit of rent and travel or other assistance.

Assets which are exempt and do not vest in a Trustee are stated below.

- Personal items and ordinary household items.
- Tools of trade up to a limit. The indexed amount at the date of publication is $3,500.00.
- Motor vehicles or motorbikes up to a limit. The indexed amount at the date of publication is $7,050.00.
- Superannuation funds, subject to voidable transfer provisions.
- Life insurance policies.
- Compensation for personal injury loss or damage or defamation.
- Property held on trust for another person.

2.2 Does the debtor have restrictions on the disposition of his assets?

The debtor can dispose of all of his assets which are not vested in the Trustee but assets vested in the Trustee cannot be disposed of by the debtor. The Trustee is obliged to realize the debtors assets. Examples of the assets which are vested in the Trustee and which must be sold for the benefit of the unsecured creditors are listed below.

- Real estate, shares, apartments, farms, businesses.
- Motor vehicles above an exempt threshold level.
- Investments.
- Tax refunds on income earned before becoming bankrupt.
- Proceeds of a deceased estate.
- Gifts, winnings, lottery and competition prizes.

2.3 Which assets and income are included in the procedure?

See 2.1 and 2.3

2.4 Are pension schemes included?

Pension schemes are excluded in that the monthly payments do not vest but income from superannuation or a pension scheme is taken into account in calculating income contribution assessments.

2.5 Does the debtor donate to the estate a part of his income for the benefit of the creditors?

The debtor is not required to donate any part of his income for the benefit of creditors, other than as agreed under Part IX, or as part of the contract that the debtor makes with his unsecured creditors.

2.6 Is there a means test?

There is no means test but there is a statutory threshold amount of income above which the bankrupt is required to make income contributions to his unsecured creditors.

If hardship grounds are made out, the Trustee has a discretion to amend the income contribution assessment. Grounds of hardship include supporting other members of the family, medical and illness grounds.

2.7 Is there a garnishment of regular income?

Section 139ZL of the Bankruptcy Act enables a Trustee to give a statutory garnishee notice to the employer for payment of monies due under an income contribution determination.

2.8 Is there protection for the debtor's privacy, his mail and his home?

Yes.

2.9 Is there protection of the spouse's interests in the home?

The interest of the spouse in the matrimonial home is protected, although if the property is jointly owned the Trustee has the right to apply for an order for sale to realize the bankrupts former interest in the property. The effect of this is that the matrimonial home will probably be sold in an insolvency. If there are Family Law disputes then the Trustee in Bankruptcy stands in the shoes of the bankrupt spouse and is required to attend and deal with property orders in the Family Court under the Family Law Act, 1975 (Cth) (Aus) ("The Family Law Act"). Determination of property interests between a divorced spouse and the Trustee in Bankruptcy are only dealt with under the Family Law Act. Determination of property interests between a spouse and a Trustee in Bankruptcy may otherwise be determined as voidable dispositions or declarations of trust at general law.

2.10 Is the debtor restricted to receive information?

The debtor usually receives copies of all Reports to Creditors and is obliged to attend most meetings of the creditors.

2.11 Does the debtor have the liberty to move freely and to leave any State, including his own?

The debtor may move freely between each State in Australia but is required to immediately advise his Trustee of a change of address. The debtor has no automatic right to leave Australia as his passport is to be held by his Trustee in Bankruptcy. Consent can be given by the Trustee to overseas travel, usually for the purpose of earning an income or work related travel.

2.12 Is the debtor entitled to cost-free legal assistance?

Australia has a comprehensive legal aid system but bankruptcy related matters are regarded as commercial matters for which legal aid is not allocated.

2.13 Are there restrictions on the debtor after the procedure?

After the procedure the debtor / bankrupt is still required to make the following payments.

- Penalties and fines imposed by a Court.
- Student assistance and supplementary loans for the purpose of tertiary education.
- Any new debts after bankruptcy or debt agreement or Part X.
- Child maintenance debts including child support.

The debtor is also barred from:

- incurring any debts without disclosing that the person is insolvent and
- being appointed as a director of a corporation as an insolvent person.

2.14 Is the spouse (automatically) included in the procedure?

No, the spouse is not affected by the insolvency procedure although the Trustee has rights to examine the spouse, issue statutory demands for provision of books and records on the spouse and to take into account the conduct of the spouse prior to the insolvency.

2.15 In which way do the International or European Convention and Covenants play a role?

Australia has adopted the Model Law but also recognizes “Letters of Requests” for assistance outside of the jurisdiction. A Judge of the Federal Court of Australia may also issue a Letter of Request to another country for assistance of the Trustee in tracing assets and books and records of the bankrupt. Such a process is not available under Part IX but would also be available under Part X depending on the terms of the personal insolvency agreement.

QUESTION 3

3. Position of the creditor

3.1 Can a creditor force the debtor to commence a procedure or oppose the debtor from doing so?

A creditor cannot oppose the debtor filing a Debtors Petition, which is genuinely made and not an abuse of the process. The creditor can vote against the Part IX or Part X procedure but in doing so the alternative is the filing of a Debtors Petition. A creditor can file a Bankruptcy Notice and a Creditors Petition asking a Federal Court to sequestrate the debtor's property.

Once any of these steps are entered into the creditor can only lodge a Proof of Debt in the insolvency process. The creditor cannot continue with enforcement of any of its debt. However secured creditors are unaffected by any of the insolvency procedures and have their own rights and remedies against the secured property of the bankrupt. Secured creditors have priority over the Trustee in Bankruptcy and unsecured creditors.

3.2 Which creditors' claims can be excluded from a discharge?

The creditor may have no choice in relation to the curtailment of his claim if any of the insolvency procedures under the Australian Bankruptcy Act are entered into. An exception is recovery of fines and penalties, child maintenance and tertiary education liabilities due to the Australian Government. Debts which are incurred by fraud or criminal conduct are also not protected in a bankruptcy.

3.3 Does a creditor have to accept a curtailment of his claim?

An unsecured creditor is bound by operation of the Bankruptcy Act and the debt is no longer enforceable. The creditor only has the right to lodge a Proof of Debt in the bankruptcy or Part X or Part IX.

3.4 Do certain creditors receive more protection than others?

All unsecured creditors are treated equally except some employees may have a statutory priority but this statutory priority is at a lower level than the Trustees remuneration costs, expenses and charges under the Bankruptcy Act. Only creditors who are secured have full protection as against their secured property.

QUESTION 4

4. Avoidance actions

4.1 What are the legal proceedings to protect / realize the debtor's assets?

There are extensive avoidance provisions in the Bankruptcy Act dealing with the following transactions.

- Transfers of property within 5 years of bankruptcy without consideration or for consideration of less than market value.
- Transfers of property with the intent to defeat creditors. There is no time limit on these provisions and there are presumptions of insolvency and intention based on the facts.
- Preference recovery actions for debts paid to creditors within 6 months of the commencement of the bankruptcy.
- Transfers of money into superannuation funds outside usual superannuation guidelines and the Australian statutory scheme for payment of compulsory superannuation contributions.

A statutory notice may be issued by the Official Receiver in Bankruptcy at the request of a Trustee for payment or transfer of the bankrupt's former property which is regarded as a void transfer of property. The statutory notice enables a Trustee to apply for an order for the sale of the real estate to be enforced as a debt in a State Court for recovery of monies paid as a void transfer of property. The recipient of the statutory notice has the right to apply to set aside the notice in a Federal Court.

The Trustee may commence legal proceedings in a Federal Court to declare the transfer of property void and require orders for repayment or re-transfer.

Fraudulent transfers are dealt with under s120 and 121 of the Bankruptcy Act with the latter section generally being regarded to the transfer relating to a fraud but the word "fraud" is not used in the section. The State Courts also have similar provisions whereby a creditor, without the intervention of bankruptcy can apply to set aside a fraudulent conveyance designed to defeat the creditor's interest.

QUESTION 5

5. Good faith

5.1 Does the principle of "good faith" play a role and in which way?

Certain transfers of property are protected where:

- the transfer was for market value; and
- the transfer was in good faith and in the ordinary course of business.

An element of good faith is shown by the payment of the market value for the transferred property and without notice of the insolvency.

QUESTION 6

6. Re - payment plan

6.1 Is the debtor submitted to a payment plan?

There is no payment plan or procedure other than to pay part of an income as an income contribution assessment set out in question 2.1.

6.2 How long is the duration of such a plan?

The obligation to make income contributions is for the term of the bankruptcy. Bankruptcy is 3 years from the date of filing the Statement of Affairs.

6.3 Does the plan have an educational purpose?

No.

QUESTION 7

7. Voluntary settlement

7.1 What are the possibilities for a voluntary settlement?

After bankruptcy, a debtor can enter into a section 73 Bankruptcy Act composition or arrangement with the creditors. Creditors by special resolution may vote on whether or not to accept such an offer. The offer may involve assets already in the bankruptcy but usually includes other money or other

assets not usually available to creditors and usually provided by third parties, often the spouse or parent of the bankrupt.

The offer must be lodged with the Trustee, setting out the terms and providing payment of the Trustees fees and expenses. A full Statement of Affairs must accompany the proposal. The proposal can be in any form and for any length of time. By way of example, it can be a once only payment and the bankruptcy is thereby annulled at the meeting of the creditors voting in favour of the payment. It can be a payment over a number of years, often 3 or 5 years from income contributions or from a third party.

An annulment of the bankruptcy occurs at the meeting of creditors who vote by special resolution. A special resolution is three quarters in value and one half in number of creditors present and voting either personally or by proxy.

It is a flexible arrangement and there is no pro - forma requirement to be met as to the minimum offer upon which creditors vote.

QUESTION 8

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8. Discharge

8.1 In which way is a discharge granted?

Discharge occurs when the consumer is no longer bankrupt. No application can be made to the Court for discharge. It occurs by operation of the Bankruptcy Act, automatically, 3 years after the filing of the Statement of Affairs with the Official Receiver in Bankruptcy. The record of the filing of the Statement of Affairs with the Official Receiver is noted on the National Personal Insolvency Index. Unless a Trustee in Bankruptcy lodges an objection to discharge within the 3 years, the discharge automatically occurs and a Certificate of Discharge can be obtained from the Official Receiver in Bankruptcy.

8.2 Can a discharge after it has been granted be revoked?

The discharge cannot be either granted or revoked. It occurs by operation of the Bankruptcy Act and not by any act of the Trustee or the Official Receiver in Bankruptcy.

There are no pre - conditions for a discharge, other than the period of 3 years that operates from the filing of the Statement of Affairs. Therefore unless the Statement of Affairs is filed the discharge can never occur as the period of 3 years does not occur.

QUESTION 9

9. Remuneration / costs

9.1 How are the costs of the procedure dealt with?

Remuneration is at the Trustee's firm rate. Notice of the Trustees charge rates must be given to the creditors and the bankrupt. If the Trustee consents to being appointed Trustee in Bankruptcy by Court order upon the making of a Sequestration Order in a Federal Court, then the fee rates are attached to the Trustee's consent.

The creditors and the bankrupt each have a right to require taxation of the Trustees remuneration and also costs of third party providers to the Trustee, i.e. other solicitors and accountants. The taxation is not a Court process but is performed by a delegate of the Inspector General in Bankruptcy under the Bankruptcy Act Regulations.

9.2 Is the court the correct forum to scrutinize fees?

The Court does not scrutinize fees. It is dealt with administratively by a delegate of the Inspector General in Bankruptcy.

9.3 What is the appropriate method of calculation of fees when dealing with compositions or voluntary arrangements?

The rate is in accordance with the firm rate disclosed by the Trustee at the meeting of creditors dealing with the composition or voluntary arrangement. Sometimes the fee is fixed but usually it is at the hourly rates of the relevant Trustee and his employees.

9.4 What is the method of calculation of fees when dealing with bankruptcy proceedings?

Legal costs of bankruptcy proceedings are dealt with on the solicitors firm rates although the Federal Courts have a scale which also reflects the legal practitioners firm rates for conducting litigation. It is not a fixed fee. The Trustee's remuneration is at his firm's rates.

9.5 Can IPs charge fees based on the value they created for the creditors during an assignment?

No.

QUESTION 10

10. Cross - border considerations in consumer insolvency

10.1 Are overseas assets included?

Yes.

10.2 Is forum shopping by the debtor for more favourable personal insolvency laws possible?

In theory, yes but in practice, no. Australia is geographically removed from any other alternate insolvency jurisdiction where there is likely to be a forum.

QUESTION 11

11. What is the result of subsequent insolvencies?

There can be subsequent insolvencies and there is no penalty. The Trustee in Bankruptcy of the first bankruptcy becomes an unsecured creditor in the second bankruptcy.

QUESTION 12

12. Recommendations?

Australia has a vibrant insolvency regime which is regularly reviewed. Compulsory continuing professional development exists for all Trustees and legal practitioners. The Australian Government regularly reviews the insolvency legislation. The Australian Government through the Insolvency Trustee Service of Australia in its website www.itsa.gov.au sets out information, statistics, research and publications to assist debtors, creditors and Trustees. The Insolvency Trustee Service of Australia has a wide ranging education programme as well as an assistance programme for insolvency practitioners.

BRAZIL

QUESTION 1

1. What are the options or procedures available for a natural person / consumer regarding their over-indebtedness in your jurisdiction?

1.1 The legal grounds for the opening of or access to those procedures

Brazilian law (similar to other legal systems which follow the Roman tradition) provides a special legal regime for the insolvency of individuals and entities engaged in business activities. A businessman who becomes insolvent in Brazil may file for a court-supervised reorganization (*recuperação judicial*) or an expedited reorganization (*recuperação extrajudicial*) under Law 11,101, of 2005, in order to restructure its indebtedness. These proceedings, however, are rarely used by natural persons.

The insolvency of consumers (as well as entities not engaged in business activities) is regulated by the provisions of the Code of Civil Procedure. The civil insolvency proceeding (*insolvência civil*) established by the Code of Civil Procedure is a simplified collective liquidation proceeding, under which the assets of the debtor are sold and the proceeds are distributed among the unsecured creditors.

1.2 How are these procedures made available?

The insolvency proceeding is regulated by the Code of Civil Procedure and is available whenever the total liabilities exceed the value of the assets (negative net worth) of the debtor, according to article 748.

1.3 Who can commence the procedure?

The debtor or any of its creditors may file in court for the commencement of a civil insolvency proceeding.

1.4 Who will supervise the procedure?

The procedure will be supervised by the court, which will appoint a trustee among all the largest creditors. The role of the trustee is to collect and sell the assets of the debtor, perform the acts necessary for the preservation of the assets, represent the estate before the court, and distribute the proceeds of the sale among the creditors, pursuant to the priority rule established by law.

1.5 What are the criteria such a person has to satisfy?

An insolvency petition filed by the debtor must be accompanied by a list of creditors and claims, a list of all their property and its estimated value, and a report on its financial situation, informing the causes of the insolvency. The court will dismiss the petition should the debtor fail to provide such information. The only requirement for a creditor to file for insolvency is to submit an enforcement title (*título executivo*) to court with the petition.

The law in force does not require that the trustee satisfies any criteria to be appointed by the court (other than being one of the largest creditors).

1.6 What are the available alternatives?

There is no other proceeding under Brazilian law, either judicial or administrative, aimed at dealing with the over-indebtedness of consumers. The alternative for the debtor would be to individually renegotiate its debts with each of the creditors.

QUESTION 2

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2. Position of the debtor and the spouse

2.1 Which assets and income are excluded from the procedure?

The law protects some of the assets of the debtor and their family from being attached (either under an insolvency proceeding and any enforcement proceeding), in order to allow the debtor to maintain a minimum standard of living. Property which is exempt from attachment includes the real estate where the home of the debtor and their family is situated, and its furnishings; domestic goods and personal belongings (except for those of high value); amounts necessary for the maintenance of the debtor and their family; assets which are necessary or useful for the debtor's professional practice; life insurance; materials required for construction in progress (except for those used for buildings which are already attached); and small country properties used by the family; amounts deposited in savings accounts up to the limit of 40 minimum wages.

2.2 Does the debtor have restrictions on the disposition of his assets?

From the court decision which declares the civil insolvency, the debtor loses the right to manage and dispose of his assets until the full liquidation of the estate, pursuant to the provisions of article 752 of the Code of Civil Procedure. In the same decision, the court will appoint the trustee who will be responsible for managing those assets.

2.3 Which assets and income are included in the procedure?

All assets of the debtor, except for those not subject to attachment, are sold for the payment of the claims.

2.4 Are pension schemes included?

As described above, the maintenance of the debtor's survival must be ensured. In this sense, article 649, IV, of the Code of Civil Procedure provides that pension schemes can not be affected by an enforcement action (including an insolvency proceeding).

2.5 Does the debtor donate to the estate a part of his income for the benefit of the creditors?

The income of the debtor may not be attached for the satisfaction of the creditors under an insolvency proceeding.

2.6 Is there a means test?

No.

2.7 Is there a garnishment of regular income?

The regular income of the debtor is exempt from attachment, pursuant to article 649, IV, of the Code of Civil Procedure.

2.8 Is there protection for the debtor's privacy, his mail and his home?

Yes. The debtor may not have his mail or his home violated. The insolvency of the debtor does not deprive him of any human rights guaranteed by the Constitution.

2.9 Is there protection of the spouse's interests in the home?

If the spouse is not a party in the insolvency proceeding, their assets (including their interests in the home) may not be seized for the satisfaction of the creditors.

2.10 Is the debtor restricted to receive information?

No. The right to receive information is a fundamental right of the debtor guaranteed by the Constitution, and which may not be restricted under an insolvency proceeding.

2.11 Does the debtor have the liberty to move freely and to leave any State, including his own?

Yes. The right of the debtor to move freely and leave any State is not affected by the commencement of an insolvency proceeding.

2.12 Is the debtor entitled to cost-free legal assistance?

Yes. Cost-free legal assistance in Brazil is regulated by the Law 1,060 of 1950 and is available to any person whose economic situation does not allow the payment of the court costs and attorney's fees without prejudice to himself and his family.

2.13 Are there restrictions on the debtor after the procedure?

After all the assets are sold and the proceeds are distributed among the creditors, the court will terminate the insolvency proceeding. The debtor will only be discharged of their obligations after five (5) years counting from the termination of the insolvency proceeding. Any asset acquired by the debtor during this period will be seized and sold to the benefit of the creditors.

2.14 Is the spouse automatically included in the procedure?

If the debtor is married and their spouse is also responsible for the payment of the claims and all the assets of the couple are not sufficient to cover the total liabilities, the court will commence the insolvency proceeding against both of them, pursuant to article 749 of the Code of Civil Procedure.

2.15 In which way do the International or European Convention and Covenants play a role?

Not applicable.

QUESTION 3

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3. Position of the creditor

3.1 Can a creditor force the debtor to commence a procedure or oppose the debtor from doing so?

A creditor can file before the court for the commencement of a civil insolvency proceeding whenever the total liabilities exceed the value of the assets of the debtor (negative net worth). There is no legal provision allowing a creditor to oppose an insolvency petition filed by the debtor (it is, thought, theoretically possible under Brazilian law).

3.2 Which creditors' claims can be excluded from a discharge?

Only unsecured creditors are subject to a civil insolvency proceeding. Secured creditors are allowed to enforce their claims separately, by seizing the relevant asset to pay its claim. Tax claims are also not subject to civil insolvency proceeding and may be enforced by the Tax Authority, pursuant to article 187 of the Brazilian Tax Code.

3.3 Does a creditor have to accept a curtailment of his claim?

If the amounts derived from the sale of assets are not sufficient for the full satisfaction of all claims, creditors are paid *pari passu*. The debtor is discharged from their obligations five (5) years after termination of the insolvency proceeding, and any remaining claims will no longer be enforceable against the debtor.

3.4 Do certain creditors receive more protection than others?

Yes. The distribution of proceeds must obey the priority rules stated in the law.

QUESTION 4

4. Avoidance actions

4.1 What are the legal proceedings to protect / realize the debtor's assets

Unsecured creditors may file an Actio Pauliana under articles 158 to 165 of the Civil Code in order to void fraudulent transactions entered into by insolvent debtors.

QUESTION 5

5. Good faith

5.1 Does the principle of "good faith" play a role and in which way?

The Code of Civil Procedure provides, in article 785, that the debtor who becomes insolvent in good faith may request the court to receive a pension (if the estate bears the payment of such pension).

In addition, a debtor in good faith may not suffer the consequences of an Actio Pauliana.

QUESTION 6

6. Re-payment plan

6.1 Is the debtor submitted to a payment plan?

6.2 How long is the duration of such a plan?

6.3 Does the plan have an educational purpose?

In Brazil re-payment plans are not used therefore it is not possible to answer the above questions.

QUESTION 7

7. Voluntary settlement

7.1 What are the possibilities for a voluntary settlement?

The debtor may submit a payment plan to their creditors. This provision, however, is pretty much ineffective, since agreement of all creditors is a requirement for such payment plan to become binding. There is no mechanism under an insolvency proceeding to bind dissenting creditors to agree to a payment plan.

QUESTION 8

8. Discharge

8.1 In which way is a discharge granted?

The debtor may request to the court for an order to discharge their obligations after 5 years from termination of the insolvency proceeding, pursuant to article 777 of the Code of Civil Procedure. Creditors may only oppose this request if they show evidence that the debtor acquired assets subject to attachment or that the court decision terminating the insolvency poceeding was rendered less than five years earlier. The court decision declaring the debtor discharged from their obligations is published by a public notice.

8.2 Can a discharge, after it has been granted be revoked?

No, if the court decision granting the discharge is final and not subject to appeal.

QUESTION 9

9. Remuneration / costs

9.1 How are the costs of the procedure dealt with?

A court decision will determine the remuneration for the trustee, pursuant to article 767 of the Code of Civil Procedure, taking into consideration the work performed, his responsibility and the assets of the estate.

9.2 Is the court the correct forum to scrutinize fees?

Yes.

9.3 What is the appropriate method of calculation of fees when dealing with compositions or voluntary arrangements?

Not applicable.

9.4 What is the method of calculation of fees when dealing with bankruptcy proceedings?

The court will decide the fees of the trustee.

9.5 Can IPs charge fees based on the value they created for the creditors during an assignment?

Not applicable.

QUESTION 10

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10. Cross-border considerations in consumer insolvency

10.1 Are overseas assets included?

Brazil has no specific rules on cross-border insolvency. However, the trustee could seek the attachment of assets of the debtor located overseas.

10.2 Is forum shopping by the debtor for more favourable personal insolvency laws possible?

No. A foreign insolvency proceeding will only have effect in Brazil after given exequatur by the Superior Court of Justice. In practice, the requirements provided by Brazilian law for recognition of a foreign judgment prevent insolvent debtors to seek relief abroad.

QUESTION 11

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11. What is the result of subsequent insolvencies?

There are no rules on subsequent insolvencies (which, due to the time consumed by an insolvency proceeding, are unlikely to happen).

QUESTION 12

12. Recommendations?

A new Code of Civil Procedure is on course for enactment, having already been passed in one of the two houses of the Brazilian Congress. The draft Code does not provide for a complete renewed civil insolvency regime. Instead, it establishes, on article 970, that the provisions of the current Code of Civil Procedure shall remain in force and that new rules should be enacted to provide adequate treatment to debtors not engaged in business activities. Until such rules are enacted, however, the draft Code provides some scarce rules on the insolvency of non-merchants which shall be applicable in addition to the ones found in the current Code. It establishes, for instance, that consumers (and other non-merchants) may propose a plan of payments to their creditors, and such plan will be submitted to approval by a meeting of creditors. The draft Code, however, fails to establish a procedure for such approval. Instead, it provides that the relevant provisions of Law 11,101 of 2005 shall be applicable to the meeting of creditors under a civil insolvency proceeding. Such provisions of Law 11,101, albeit useful for dealing with the insolvency of entities not engaged in business activities, seem largely inadequate to the over-indebtedness of consumers.

CANADA

QUESTION 1

1. What are the options or procedures available for a natural person / consumer regarding his or her over-indebtedness in your jurisdiction

1.1 The legal grounds for the opening of or access to those procedures

In Canada there are formal consumer insolvency processes available pursuant to the provisions of the Federal Bankruptcy and Insolvency Act ("BIA"). The most widely used provisions under this statute are for summary administration bankruptcies and consumer proposals. In Part X of the BIA there are provisions for Orderly Payment of Debts which are used in four provinces. There is also an unregulated non-statutory credit counselling industry that attempts to provide services to financially challenged consumers. Their efforts are supported by some major creditor groups.

The Bankruptcy and Insolvency Act is a federal statute provided for under the Constitution Act, 1867 which operates under the doctrine of paramountcy and is applied by the courts within the different provinces. The Constitution Act also provides that the provinces shall enact laws regarding "property and rights". Therefore, references will be made to provincial differences and the reader should determine which provincial guidelines apply to specific situations.

In order for a person to access the protection of the BIA they must meet the definition of an insolvent person as set out in S.2 of the BIA:

"*a person who is not bankrupt and who resides, carries on business or has property in Canada, whose liabilities to creditors provable as claims under this Act amount to one thousand dollars, and*

(a) who is for any reason unable to meet his obligations as they generally become due,

(b) who has ceased paying his current obligations in the ordinary course of business as they generally become due, or

(c) the aggregate of whose property is not, at a fair valuation, sufficient, or, if disposed of at a fairly conducted sale under legal process, would not be sufficient to enable payment of all his obligations, due and accruing due;"

The summary bankruptcy process is a streamlined process available to individual consumer debtors who have less than $15,000.00 in seizeable assets (after deducting secured claims from asset values and excluding goods which cannot be seized as a result of statutory protections) available to creditors.

Consumer proposals which are also streamlined allow insolvent debtors to retain assets and negotiate a settlement of debt with creditors. A consumer debtor is defined in S.66.11 of the BIA as:

"an individual who is bankrupt or insolvent and whose aggregate debts, excluding any debts secured by the individual's principal residence, are not more than $250,000 or any other prescribed amount;"

Natural persons who are not defined as consumers, either by virtue of the value of assets available to their creditors or by the sum of their aggregate debts, may avail themselves of other provisions of the BIA by way of an ordinary bankruptcy or Division 1 proposal.

Orderly payment of debts provide for the payment in full of a consumer's debts with interest at 5%. Payments are generally adapted to the circumstances of the debtor. The procedure is not widely used, principally due to the increase in the amounts owed by consumers and the availability of the consumer proposal provisions of the BIA.

Summary Bankruptcies and Consumer Proposals are the provisions of the statute most widely used by consumer debtors. The primary focus will be on these two applications of the BIA.

1.2 How are these procedures made available?

Proceedings under the BIA are made available in the market place by Trustees in Bankruptcy. Trustees in Bankruptcy are individuals licensed under the BIA who are in the business of providing insolvency services. The debtor usually contacts a professional and meets them for an assessment of their situation prior to filing an assignment in bankruptcy or making a proposal.

1.3 Who can commence these procedures?

One or more creditors may file in court an application for a Bankruptcy order if the debt(s) owing to the applicant(s) amount to one thousand dollars and the debtor has committed any one of 10 listed acts of bankruptcy. The cost to the creditor of such an application to the court is cost prohibitive within the context of most consumer bankruptcies.

An overburdened debtor will generally file a voluntary assignment in bankruptcy. This voluntary assignment is available to both consumer and non consumer debtors and is the route taken in the majority of bankruptcy proceedings.

Proposals are filed on a voluntary basis by the debtor. A creditor can not apply to the court for an order for a proposal.

A consumer debtor does not require legal representation to file an assignment in bankruptcy or to file a proposal.

1.4 Who will supervise the procedure?

A trustee in bankruptcy is responsible for the administration of all insolvency proceedings with the exception of consumer proposal whereby an "administrator" is responsible for the filing. With a few exceptions administrators are trustees in bankruptcy.

The trustee's appointment is that of an "officer of the court" whereby the trustee acts as a referee in the process who balances the needs of debtors and creditors and the integrity of the process. Access to the courts is possible to resolve disputes between the trustee, debtor and / or creditors, or to approve certain actions if required. The vast majority of consumer insolvency proceedings occur without any court appearances.

1.5 What are the criteria such a person has to satisfy?

Trustees in bankruptcy are licensed pursuant to the provisions of the BIA. There is a course of study available that is open to appropriately qualified individuals (either, experience, a university degree or accounting designation) and involves several years of study, level examinations, a two day final examination and a panel examination involving an experienced trustee, a lawyer and representatives of the regulator.

Regulation is provided by the Office of the Superintendent of Bankruptcy and by the trustee's professional association, the Canadian Association of Insolvency and Restructuring Professionals.

1.6 What are the available alternatives?

There are a variety of credit counsellors active in the Canadian consumer debt field. Most operate as not-for-profit entities which state their objectives to be education, credit counselling and assisting financially challenged debtors. They also offer debt management plans that provide for payment in full of debts, often at no interest over a period not to exceed five years. Monies are handled by the agencies under an exemption in the provincial collections agencies acts. The administration of the debt management plans is lucrative for the agencies due to a negotiated donation back to the agencies from financial institutions which is paid in addition to the payment made to the agency, usually a percentage of funds collected, by the debtor.

There are also private "for profit" counsellors who offer a range of services including negotiation with creditors, advice on dealing with creditors and referral to trustees.

The credit counselling industry is not regulated. While some of the agencies belong to an association that provides access to the donations from financial institutions, they are not regulated and are very active in marketing their services. Generally debtors are better served by accessing services through insolvency professionals however the stigma of bankruptcy and aggressive advertising has made the agencies an active participant in the marketplace.

QUESTION 2

2. Position of the debtor and the spouse

The assets and liabilities of the debtor and their spouse are treated separately unless they are held jointly or, by virtue of timing, the assets are part of a matrimonial proceeding. If there is a matrimonial proceeding that occurred prior to the insolvency filing then provincial statutes' and property rights arising from the matrimonial proceeding would be considered by the trustee in determining ownership of the property.

Unless evidence to the contrary is proven, the debtor is considered to own 50% of joint assets for valuation and realization purposes.

Joint debts are treated by creditors as joint and several and the actions of one partner will impact the requirement of the other partner to pay. Should a debtor be discharged from an obligation to pay a debt through a bankruptcy or only pay part of the debt through a proposal the joint debtor, if they are not also in an insolvency proceeding, will be responsible to the creditor for all of the remaining debt.

Persons who are cohabitating in a conjugal relationship, and have cohabited for a period of at least one year, meet the definition of "common-law partner" and any references to spouse within the BIA would be applied to these partners.

Where the debts of individuals are considered to be substantively the same the debtors may file a joint consumer proposal or summary assignment in bankruptcy. There are no joint filing provisions for non consumer insolvency proceedings.

2.1 Which assets and income are excluded from the procedure?

All assets of the debtor are excluded from a proposal proceeding. The debtor retains ownership of their property. However, in considering the return to creditors, the practitioner will value what property would be available to creditors in a bankruptcy. The return to creditors in a proposal must be calculated to be better than in a bankruptcy.

Assets that cannot be seized by a trustee in bankruptcy include property held in trust by the debtor for another person, property that is exempt from seizure under provincial or federal laws, certain tax credits, Registered Retirement Savings Plans and other prescribed retirement plans except for contributions made within the 12 months before the date of bankruptcy. Provincial exemptions differ in the type of property and the amount of exemption. Most provinces provide exemptions for personal effects, household goods, some value for a vehicle as well as the principal of pension plans and specified life insurance assets.

Income below a standard, an income amount set by the Office of the Superintendent of Bankruptcy based on family size, is not available to creditors in a bankruptcy. Once income reaches the standard a calculation is applied to determine what income must be remitted to the trustee.

2.2 Does the debtor have restrictions on the disposition of his assets?

Debtors in a proposal have no restrictions on the disposition of their assets. It may be possible to encumber a personal residence by having the administrator file a certificate against title of the home. This must be provided for in the terms of the consumer proposal.

Bankrupts may dispose of those assets that are exempt from seizure by the trustee. Exempt assets that are replaced with another exempt asset retain their character and will remain under the control of the debtor.

2.3 Which assets and income are included in the procedure?

All other assets, except excluded assets as mentioned in 2.1 above, vest in the trustee in a bankruptcy and the trustee will realize on those assets for the benefit of the creditors. Further, assets received during the period of bankruptcy prior to discharge by way of gift or inheritance are property and will be seized by the trustee.

In a consumer proposal a debtor may include proceeds from the disposition of an asset in their proposal as an alternate method of funding the consumer proposal. The assets will be included in the calculation of the return to creditors. This may occur where the debtor would lose the asset in any event if they were to go bankrupt, but by surrendering the asset they can avoid bankruptcy and ensure their creditors receive an appropriate return. There is no vesting of property in the trustee in a proposal.

Bankrupts are required to pay a portion of their income to their estate for the benefit of their creditors. This is referred to as surplus income. Surplus income payments are calculated by the trustee in accordance to a directive and standards issued by the Superintendent of Bankruptcy. Available monthly income is a family unit's income from all sources, less statutory remittances and self-employed expenses, less a deduction for specific non discretionary expenses. When compared to the standard payments to the estate are determined.

As with assets, surplus available to creditors in a bankruptcy must be considered in the calculation for return to creditors in a proposal.

2.4 Are pension schemes included?

The income stream from a pension is included in the determination of surplus income. The principal portion of a pension plan is exempt from seizure by the trustee.

2.5 Does the debtor donate to the estate a part of his income for the benefit of the creditors?

Income contribution to the estate of a bankrupt is accomplished through the surplus income provisions as discussed in 2.3 above.

A proposal debtor will generally make monthly payments to their estate for the purpose of creating a pool of funds for payment to their creditors.

2.6 Is there a means test?

There is no means test. The surplus income provisions do provide a base line protection for debtors with modest incomes. Debtors with any level of income can access the provisions of the BIA. However the surplus income provisions do encourage debtors to file consumer proposals instead of bankruptcies.

2.7 Is there a garnishment of regular income?

Garnishment of income would only occur if a debtor failed to make the required surplus income payments to the estate and the trustee made application to the court to garnishee.

2.8 Is there protection for the debtor's privacy, his mail and his home?

The Personal Information Protection and Electronic Documents Act does apply to proceedings under the BIA. However, the debtor must consent to the collection, use and disclosure of their personal information in order for the proceedings to commence or else the trustee is unable to perform their duties. This information includes assets, liabilities, income, expenses and personal information required by the trustee in order to carry out their duties.

The debtor retains control of their mail and only by order of the court can a trustee arrange for mail to be redirected from a personal residence.

Home equity available to a trustee is subject to provincial exemptions that vary from nil to $40,000.00. Actions of mortgage holders, as secured creditors, and landlords are restricted. No contract can be terminated simply because a debtor has filed an insolvency proceeding. A landlord is unable to terminate a residential tenancy even if the debtor owes rent as of the date of filing.

2.9 Is there protection of the spouse's interests in the home?

Yes there is protection of the non-filing spouse's interest in the home. Upon filing an assignment in bankruptcy the joint tenancy is severed and becomes a tenancy in common. The trustee has no more rights than the debtor spouse. The courts may grant an order of partition and sale to allow the trustee to sell the debtor's interest in the home but will consider the situation of the spouse and children when making such an order. It is unusual for a titled spouse to be forced from their home.

2.10 Is the debtor restricted to receive information?

No, there are no restrictions on information received by the debtor.

2.11 Does the debtor have the liberty to move freely and to leave any State, including his own?

The debtor may travel and move freely anywhere they wishe to go. Should they change residence or address they must inform the trustee of the new residence or address until their application for discharge has been disposed of and the administration of the estate complete.

2.12 Is the debtor entitled to cost-free legal assistance?

No, the debtor is not entitled to cost-free legal assistance. Generally, consumer debtors do not require legal assistance to undertake an insolvency proceeding in Canada.

2.13 Are there restrictions on the debtor after the procedure?

There are no legal restrictions on the debtor after discharge from bankruptcy or issuance of a certificate of completion of a proposal. They may encounter difficulties in obtaining new credit after a procedure as insolvency will have an adverse effect on their credit rating and subsequent access to new credit.

2.14 Is the spouse (automatically) included in the procedure?

The spouse is not automatically included in the procedure.

2.15 In which way do the International or European Convention and Covenants play a role?

There is no explicit recognition of them within the Canadian system as we have our own Charter of Rights and Freedoms.

QUESTION 3

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3. Position of the creditor

Upon the filing of an assignment in bankruptcy or a consumer proposal, as well as the issuance of a bankruptcy order or the filing of a notice of intention to make a proposal or a proposal under Division I of the BIA, a stay of proceedings becomes effective. The stay prevents any creditor from taking any action to collect a debt, continuing with legal proceedings or execution against the debtor or the debtor's property. The stay can be lifted on application to the court and is not effective in respect of the collection of family support payments.

3.1 Can a creditor force the debtor to commence a procedure or oppose the debtor from doing so?

A creditor can initiate proceedings to have a debtor adjudged bankrupt. This is not generally done in relation to consumer debtors due to the cost of initiating the process.

To initiate a bankruptcy a creditor must bring an application for a Bankruptcy Order. This application is made in the Bankruptcy Court, a part of the Superior Court in the province of residence of the debtor. The application must be supported by an affidavit that sets out the debt owed to the creditor by the debtor and the "act of bankruptcy" which the debtor has committed within the six month period before the application is made. The creditor must prove the amount of the debt, which must be greater than $1,000.00. The BIA lists the acts of bankruptcy which include a fraudulent transfer of property, treating a creditor with preference, leaving the country with intent to defeat, hinder or delay creditors, allowing an execution against his property to remain unsatisfied for 5 days, exhibiting to a meeting of his creditors that he is unable to pay his debts, attempting to remove property with intent to defraud, defeat or delay creditors, notifying creditors that he intends to suspend payments of debts or ceasing to meet liabilities generally when they are due.

If the application is not opposed by the debtor, the bankruptcy order can be made by a registrar of the court. If the application is opposed then the debtor is put to a strict proof of the allegations made in the application at a hearing before the court.

A creditor cannot oppose the initiation of a voluntary bankruptcy filing by a debtor. If a debtor owes at least $1,000.00 and is unable to pay debts when due the debtor can file a bankruptcy. In rare circumstances creditors have applied to have the bankruptcy annulled and been successful, but the fact situations are so specific as to be generally not relevant.

Creditors are able to oppose the debtor's discharge from bankruptcy. An opposition to discharge by a creditor, the Superintendent of Bankruptcy or the Trustee will result in a Court appearance for the hearing of the application for discharge.

There is no process whereby a creditor can force a debtor to make a consumer proposal. There is however a basis for opposing a discharge where a debtor had the ability to make a viable proposal, and chose to make an assignment in bankruptcy instead.

3.2 Which creditors' claims can be excluded from a discharge?

Generally specific creditors' claims are not excluded from a discharge. The non-dischargeable debts are determined by the character of the debt. Debts that are not dischargeable include criminal debts, such as fines imposed as a penalty by a court, restitution orders or bail bonds, debts for support or maintenance of children or a spouse pursuant to an agreement or as ordered by a court, debts incurred through fraud where the fraudulent conduct is established by a court, debts for damages arising out of sexual assault or death intentionally caused, debts incurred as a result of defalcation while acting as a fiduciary and student loans where the debtor was a student within the seven years prior to the filing date.

In addition, if a creditor is excluded from the proceedings – that is the debtor does not list the creditor on the statement of affairs and the creditor does not become aware of the proceeding prior to a final distribution being made, the amount that the creditor would have been entitled to receive had they participated in the insolvency proceeding is a non-dischargeable debt.

3.3 Does a creditor have to accept a curtailment of his claim?

In a bankruptcy proceeding a creditor receives what is available. A first-time bankrupt is entitled to a discharge from bankruptcy, if they have performed their duties and there is no opposition, as a matter of right after nine months. Creditors receive whatever is available in the proceeding and while technically they are able to oppose the discharge if the value of assets do not amount to fifty cents on the dollar of the value of the liabilities, in this age of consumer credit this provision is observed more in the breach.

In a consumer proposal the process involves negotiation at the start of the process. The BIA provides for a 45 day period after filing in which creditors can request a meeting. If 25% of creditors with proven claims at the end of 45 days ask for a meeting, the administrator is required to call the meeting. The actual determination of whether the consumer proposal is to be accepted is determined at the meeting. The requirement for approval of a consumer proposal is that a majority of creditors voting on the consumer proposal accept it. Once the consumer proposal is approved by a majority of creditors the minority dissenting creditors are forced to accept the payment under the proposal.

3.4 Do certain creditors receive more protection than others?

The BIA provides for certain preferred creditors to receive payment of their claims in priority to the claims of other creditors. Priorities exist for family creditors as well as wage earners and, where the debtor was also an employer, the government in respect of statutory withholdings from employee pay cheques.

When combined with the non-dischargeability provisions relating to family debts, it is clear that the Canadian system attempts to protect a former spouse or children of the debtor.

QUESTION 4

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4. Avoidance actions

4.1 What are the legal proceedings to protect / realize the debtor's assets?

The BIA addresses two concepts that are designed to combat avoidance by debtors and ensure that all available assets are recoverable for creditors. In addition there are provincial statutes that may be used by creditors or the trustee if they are more appropriate.

The BIA addresses "Preferences" and "Transfers at Under Value" ("TUVs").

A preference is a transaction that has the effect of preferring, or paying one creditor when other creditors remain unpaid. The preference can take the form of a payment to a creditor, or the granting of security to secure the obligation

after the date of the original transaction. Preferences are void if made to an arms-length party within three months before the commencement of an insolvency proceeding or to a non-arms-length party within one year. The payment can be recovered by the trustee.

When a transaction occurs that has the effect of giving a preference intent need not be proved. Further, a diligent creditor does not have a defence of applying pressure for payment if the effect of the payment is to give a preference. The essential part of recovery of a preference is the existence of a debtor – creditor relationship and the effect of paying a creditor who would otherwise not enjoy a priority or advantage.

A TUV is a transaction where the value of consideration given for the transfer of property is conspicuously different than the value of the property. For example a debtor with financial difficulties decides to sell his motorcycle to his friend for $1.00.

Where the TUV occurs between parties acting at arms-length the trustee can recover the difference in value from the recipient of the property if the transaction occurred within one year prior to the insolvency date, the debtor was insolvent at the time of the transfer or rendered insolvent by the transfer, and intended to defraud, defeat or delay a creditor.

Where the TUV occurs between parties who are not at arms-length the trustee is entitled to recover the difference in value if the transfer occurred within one year prior to the insolvency date, or if the transfer occurred within five years if the debtor was insolvent at the time of the transfer or rendered insolvent by the transfer, and intended to defraud, defeat or delay a creditor.

In addition to the BIA provisions, most provinces have Fraudulent Conveyances and Assignments and Preferences statutes that operate without the time limitations of the BIA, but may be subject to a limitations statute which requires that actions be brought within a certain amount of time.

QUESTION 5

5. Good faith

5.1 Does the principle of "good faith" play a role and in which way?

The BIA is structured as a rehabilitative statute. One of the key aims of the BIA is to allow a honest but unfortunate debtor to be protected from the actions of his creditors, to receive a discharge of his debts and to once again become a productive member of society.

This is accomplished through a number of provisions. The discharge of a bankrupt can be opposed by the creditors, the trustee or the Superintendent of Bankruptcy for a number of reasons including a significant excess of debts over assets, insolvent trading, unjustifiable extravagance or rash or hazardous

speculation, frivolous or vexatious actions involving creditors, the commission of fraud, a previous bankruptcy or failure to perform duties.

The BIA also provides that where a debtor is able to make a viable proposal to his creditors and chooses bankruptcy instead the discharge can be opposed.

A second time bankrupt will remain bankrupt for 24 to 36 months unless they convince the Court of the need for an early discharge. A discharge application for a third time or subsequent bankrupt must be brought after at least 24 or 36 months.

Duties are imposed on the bankrupt ensuring that they behave appropriately during the period of bankruptcy and there are sections in the BIA that address improper conduct.

QUESTION 6

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6. Re-payment plan

6.1 Is the debtor submitted to a payment plan?

In a bankruptcy, a debtor will often be required to make payments to the trustee if for no other purpose than to ensure that there are funds in the estate to pay the costs of administering the bankruptcy. The requirement to pay surplus income as discussed in Section 2 above is a requirement to pay a portion of income, after payment of the debtor's (and the debtor's family) living expenses. There is no minimum amount that creditors must receive in a bankruptcy before a debtor receives his discharge.

Consumer proposals are, by their nature, repayment plans that a debtor submits to voluntarily. The statute does not determine the amount of repayment that is required; the repayment is negotiated with creditors. If creditors insist on too high a repayment in a consumer proposal, a debtor may withdraw the consumer proposal and decide to file an assignment in bankruptcy instead. In that case the debtor's assets may be available to creditors and there will be a requirement to pay surplus income. Generally however consumer proposals are calculated to provide a greater recovery to creditors than a bankruptcy so the creditors know that they cannot ask for too much. Creditors are provided with full details of the debtor's situation and are aware of the limitations of the debtor's ability to pay.

6.2 How long is the duration of such a plan?

Consumer proposals have a maximum term of 5 years. For monthly payment plans, generally the terms are in the 3 to 5 year range. Some consumer proposals are based on a debtor liquidating or surrendering assets voluntarily and surrendering proceeds to the process for distribution to creditors. If these assets would have otherwise yielded less money to creditors than in a bankruptcy scenario, and the debtor has no funds to make monthly payments, this type of consumer proposal can be completed in less than 6 months.

6.3 Does the plan have an educational purpose?

Whether a debtor files an assignment in bankruptcy or a consumer proposal they are required to attend two credit counselling sessions. The counselling is the same regardless of the process undertaken by the debtor and addresses the educational component of the rehabilitation objective of the BIA. The bankruptcy process and the consumer proposal process are the two mechanisms provided in the BIA to provide funds for payment of amounts owed to creditors.

QUESTION 7

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7. Voluntary settlement

7.1 What are the possibilities for a voluntary settlement?

The consumer proposal process is the statutory process for a voluntary settlement with creditors. There are other informal processes that are administered by a range of "credit counsellors" that are truly voluntary processes in that there is no statutory basis for their existence. Credit counsellors assist debtors in negotiating repayment with creditors on terms that may include a reduction of principal or a reduction of or elimination of interest on the debt. As these procedures are completely voluntary there are no set rules for them. Actions of creditors against the debtor for collection of a debt are not stayed by these non-statutory proceedings.

A consumer proposal made pursuant to the provisions of the BIA is available to debtors who owe less than $250,000 and are insolvent. The consumer proposal must be filed with an administrator licensed under the BIA who is in most cases a trustee in bankruptcy.

As in a bankruptcy, a debtor receives immediate protection, a stay of proceedings, upon the filing of a consumer proposal. Creditors are prevented from taking action to recover debts owed, and all legal proceedings stop. The exception to this stay of proceedings is the collection of spousal and child support payments which continue notwithstanding.

The consumer proposal is made to unsecured creditors. A debtor is able to decide whether or not to retain assets, including assets subject to security interests. There is no procedure in the BIA for compromising claims of secured creditors in a consumer proposal. If a debtor decides to surrender a secured asset to a secured creditor any deficiency in realization can be an unsecured claim in the consumer proposal. The BIA specifically prevents a contract, including a security agreement, from being terminated solely for the reason of the filing of a consumer proposal and accordingly if a debtor wishes to continue payments on a house mortgage or secured loan on a car they may do so.

The debtor, assisted by the administrator, prepares the consumer proposal, statement of affairs and other necessary documents for filing with the Office of the Superintendent of Bankruptcy. The administrator prepares a report on the consumer proposal and provides a comparison to an expected recovery in a bankruptcy scenario. The information is provided to creditors who have a 45 day period to request a meeting. If 25% of the creditors who respond within the 45 day period request a meeting the trustee must call a meeting. The Official Receiver may call a meeting if he believes it is appropriate to do so.

If less than 25% of the claims filed at the end of 45 days after the date of filing have requested a meeting of creditors the consumer proposal is deemed to have been accepted by the creditors.

If a meeting is required, the meeting must be held within 21 days after the expiration of the 45 day period. At the meeting the creditors can indicate whether they vote in favour of the consumer proposal as filed or oppose it. Creditors are not required to attend in person; they are able to indicate assent or dissent by a voting letter delivered to the administrator. Often when creditors request a meeting they will indicate what terms would be acceptable in the consumer proposal to them. At or before the meeting there can be negotiation of terms. It is possible to adjourn the meeting for further investigation into the affairs of the debtor and for consideration of the terms of the consumer proposal.

The threshold for the approval of the consumer proposal is a majority of creditors voting in favour. Dissenting creditors must abide by the decision of the majority.

There is also a provision for a court review of the consumer proposal and this occurs at the request of the Official Receiver or any interested party. These reviews are rare. The court shall not approve a consumer proposal where the terms of the consumer proposal are not reasonable or are not fair to the debtor and the creditors, or when certain other technical requirements are not met by the consumer proposal. The court may decide that the consumer proposal should not be approved if it can be established that the debtor committed and offense under the BIA or that the debtor was not eligible to make a consumer proposal at the time that it was filed.

If no court review is requested, as is the norm, then the consumer proposal is deemed to be accepted by the court. At this point a debtor has a new contract with his creditors made pursuant to a statute, approved, or deemed to be approved by creditors and approved, or deemed to be approved by the court. When the debtor makes all payments required under the consumer proposal they receive a certificate of full performance and all unpaid debts are discharged.

If a debtor falls more than three months behind, cumulatively, on payments under the consumer proposal, or is more than three months late on a payment where payments are made other than monthly, it is deemed to be annulled. The annulment results in the termination of the stay, and the reinstatement of all debts, plus accumulated interest less any payments made under the proposal.

It is possible for an annulled consumer proposal to be reinstated by the administrator on notice to creditors, or by the court if a creditor has objected to the reinstatement by the administrator.

For consumers who do not qualify as “consumer debtors” as set out above, usually due to larger amounts of debt, there is access to the proposal process under Division I of the BIA. This is the same as a commercial proceeding. This process is much more complex and expensive than the relatively streamlined consumer proposal process.

QUESTION 8

8. Discharge

8.1 In which way is a discharge granted?

In most cases the discharge of debt is automatic. The trustee in bankruptcy executes a certificate of discharge to end the period of bankruptcy for most bankrupts. The effect of the certificate of discharge is that the individual is no longer bankrupt and that all debts, except those that are non-dischargeable are released. Non-dischargeable debts are set out above in 3.2.

A discharge is available for a first time bankrupt after nine months, or after 21 months if they were required to make surplus income payments. A second time bankrupt is eligible for a discharge after 24 months of bankruptcy or after 36 months if they were required to make surplus income payments.
If a creditor, the trustee or the Superintendent of Bankruptcy objects to the discharge of a bankrupt the matter is referred to a registrar of the bankruptcy court for a discharge hearing. The registrar can decide, based on the evidence presented to him, to grant an absolute discharge, to suspend the discharge for a period of time, to make the discharge conditional on the bankrupt completing certain duties or the registrar may refuse a discharge altogether.

Discharge hearings for the third time or subsequent bankrupts are heard by the registrar. The application for discharge is brought after a minimum of 24 months, or 36 months where the bankrupt was required to make surplus income payments.

Where a consumer proposal has been filed a certificate of full performance in respect of the consumer proposal is issued by the administrator after the terms of the consumer proposal have been completed. The effect of the certificate of full performance is to release the debtor from all remaining debts except for non-dischargeable debts.

8.2 Can a discharge, after it has been granted be revoked?

A discharge from bankruptcy can be revoked on application to the court. There are no similar provisions for revoking the certificate of full performance in respect of a consumer proposal.

The court can annul the discharge of a bankrupt if they fail to perform duties imposed on them by the BIA or if it appears to the court that the discharge was obtained by fraud. The discharge does not release a bankrupt from the duties

imposed on them by the BIA and, if it can be shown that a bankrupt did not perform those duties, the discharge can be annulled and the bankrupt put back into bankruptcy.

Further, if a bankrupt was not truthful with the trustee or creditors during the administration of the bankruptcy, or for example failed to report all income so that the trustee could calculate required payments from surplus income, the discharge can be annulled.

While not widely used these provisions ensure that a balance is maintained between debtors and creditors.

QUESTION 9

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9. Remuneration / costs

9.1 How are the costs of the procedure dealt with?

The costs of administration, including remuneration for the Trustee, are paid from the estate of the debtor in priority to claims of unsecured creditors.

9.2 Is the court the correct forum to scrutinize fees?

The final statement of receipts and disbursements of an estate is reviewed by the Office of the Superintendent of Bankruptcy who determines if it is necessary for the fees to be taxed by the court. This is an administrative review and generally consumer files are not subject to the scrutiny of the court unless an interested person objects to the final statement which would result in the court approval of fees.

Consumer proceedings not of a summary nature have all fees taxed by the court.

9.3 What is the appropriate method of calculation of fees when dealing with compositions or voluntary arrangements?

Fees are calculated pursuant to a tariff. Tariff is calculated on total receipts in the estate less certain prescribed costs.

9.4 What is the method of calculation of fees when dealing with bankruptcy proceedings?

Fees are calculated pursuant to the tariff. The tariff is calculated on total receipts in the estate less certain prescribed costs.

9.5 Can IPs charge fees based on the value they created for the creditors during an assignment?

No, an IP cannot charge fees based on the value created for the creditors although in effect the tariff has this effect by calculating a greater fee for a greater recovery in the proceeding. It is possible, in situations where fees are not calculated based on a tariff, for an insolvency practitioner to be allowed an increase in fees based on an exemplary result in the proceeding although this is rare.

QUESTION 10

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10. Cross-border considerations in consumer insolvency

10.1 Are overseas assets included?

Yes, all assets of the debtor, no matter the location are included in bankruptcy and proposal proceedings.

10.2 Is forum shopping by the debtor for more favourable personal insolvency laws possible?

It is possible for a consumer debtor to move within the country to take advantage of more favourable provincial asset exemptions. The largest exemption would apply in those provinces where a portion of house equity is exempt. The costs to the debtor of changing their principle residence would probably outweigh the benefits.

QUESTION 11

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11. What is the result of subsequent insolvencies?

A second time bankrupt is eligible for an automatic discharge after 24 months if there is no surplus income payment required. If there is surplus income they are eligible for automatic discharge after 36 months.

Debtors who file for bankruptcy for a third or even a fourth time have the conditions of their discharge set by the court. The court will set rigid and lengthy conditions for discharge and may refuse discharge of a multi time bankrupt.

CAYMAN ISLANDS

QUESTION 1

1. What are the options or procedures available for a natural person / consumer regarding his or her over- indebtedness in your jurisdiction?

1.1 The legal grounds for the opening of or access to those procedures

The law and procedure governing personal bankruptcy in the Cayman Islands are contained in the Bankruptcy Law (1997 Revision) ("the Law") and the Grand Court (Bankruptcy) Rules ("the Rules")[1]. The procedure is supervised by the Grand Court of the Cayman Islands ("the Court").

A bankruptcy petition can be presented either by a creditor or a debtor. A creditor must show that he is owed at least CI$40 (s.14)[2], and allege in the petition any one or more of the defined "acts of bankruptcy" as set out in s.14(a) to (l). A debtor does not have to demonstrate an act of bankruptcy (s.15), but must produce financial statements which set out his assets and liabilities (s.17).

A creditor's petition is usually presented *ex parte*. At the first hearing, if the Court is satisfied of one or more acts of bankruptcy (most often, a failure by the debtor to pay a debt within 7 days of being notified of it), the Court will make a provisional bankruptcy order (s.29).

Upon a provisional order being made, the Court will also typically appoint a Trustee in Bankruptcy as Receiver of the debtor's property ("the Trustee") (s.18). There is no Official Receiver in the Cayman Islands, so the Trustee will typically be the Clerk of the Court. The Trustee can apply to the Court for an order appointing an agent to undertake his duties (s.13(1)). Such an agent is usually an insolvency practitioner practising in the Cayman Islands. The debtor's property automatically vests in the Trustee, without conveyance or transfer, upon a provisional order being made (s.37). The debtor can apply to revoke a provisional order, on the grounds that there was no act of bankruptcy or that it is otherwise inequitable for the provisional order to stand (s.31). If the provisional order is not revoked, the debtor will be ordered to file a statement of his assets and liabilities, failing which the provisional order will be made absolute (s.32).

1.2 How are these procedures made available?

The procedures are made available by the Law and the Rules.

1.3 Who can commence the procedure?

The procedure can be opened either by a creditor or a debtor.

A creditor presents a petition, which must be accompanied by a verifying affidavit (ss.14, 16). If the creditor is a corporation, an authorised agent of that corporation can present a petition (s.19).

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1 As amended by the Grand Court (Bankruptcy) Amendment Rules 2005.

2 All section references are to the Bankruptcy Law (1997 Revision) unless otherwisestated.

A debtor may also present a petition, accompanied by a verifying affidavit in relation to his liabilities and creditors, together with a general statement of profits, losses and expenses of any business in which he was engaged within the 12 months prior to presentation of the petition. The statement must include an explanation as to the cause(s) of insolvency, and the affidavit and petition must be served on the Trustee (s.17).

1.4 Who will supervise the procedure?

The procedure is ultimately supervised by the Court, which is the Chief Court of Bankruptcy (s.3(1)). However, the administration of the bankruptcy will be undertaken by the Trustee (s.12), who is typically the Clerk of the Court, or an agent pursuant to s.13(1).

1.5 What are the criteria such a person has to satisfy?

A creditor must prove that he is owed at least CI$40 and, as set out in the petition, one or more acts of bankruptcy has occurred (or have been committed). A debtor does not have to demonstrate any grounds of bankruptcy.

1.6 What are the available alternatives?

There are no alternatives to bankruptcy in this jurisdiction.

QUESTION 2

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2. Position of the debtor and the spouse

If a husband is adjudged bankrupt, any money or other property given over to the husband by his wife for the purposes of his business activities, will be treated as assets of the estate, and the wife will not be entitled to claim as a creditor in respect of such money or property until all other creditors' claims have been satisfied. The same rule applies, *mutatis mutandis*, in the case of a bankrupt wife (s.124).

2.1 Which assets and income are excluded from the procedure?

Any property held by the debtor in trust for any person is excluded from the debtor's estate and does not vest in the Trustee (s.100(c)(i)). Also excluded are the tools of his trade, and his clothing and bedding, and those of his spouse and children, up to the total value of CI$60 (s.100(c)(ii)).

2.2 Does the debtor have restrictions on the disposition of his assets?

The assets and income included in the procedure are set out below in response to question 2.3. There are no provisions which allow a debtor to dispose of their assets without the permission of the Trustee (with the exception of excluded assets set out above in 2.2), as all assets vest in the Trustee.

The answer to question 4.1 below discusses transactions which are void against the Trustee.

2.3 Which assets and income are included in the procedure?

Such assets and income are set out in s.100(c) and include:

- any property belonging to or vested in the debtor at the commencement of the bankruptcy, or which may be acquired by or devolved on him at any time prior to his discharge; and

- the power to bring proceedings in respect of such property as might have been exercised by the Debtor at the commencement of the bankruptcy or at any time prior to his discharge.

2.4 Are pension schemes included?

There are no specific provisions made in relation to private pensions, but such pensions would constitute the debtor's property, and would vest in the Trustee; and the Court has power, on the application of the Trustee, to permit such distribution of pension proceeds as it deems fit (s.102). Specific provision is made in respect of Government pensions. Upon the application of the Trustee, the Court will order such amount of the pension proceeds to be received by the Trustee for distribution to creditors as it considers reasonable (s.101).

2.5 Does the debtor donate to the estate a part of his income for the benefit of the creditors?

Potentially, yes. The Law provides that, if the debtor is in receipt of a Government salary, the Court can order such part of that salary as it considers reasonable to be received by the Trustee for distribution to creditors (s.101). In respect of all other income, the Trustee can apply to the Court for an amount of that income to be paid to him, and the Court may order payment of an amount which it considers just (s.102).

2.6 Is there a means test?

In a sense, yes, because the Court will only order payment of an amount which it considers reasonable, which will necessarily involve an investigation into the debtor's financial obligations. Unlike other jurisdictions, there is no quantitative test / threshold amount applied as a standard rule in this jurisdiction.

2.7 Is there a garnishment of regular income?

Only if the Court so orders (ss.101, 102; set out in response to question 2.5, above).

2.8 Is there protection for the debtor's privacy, his mail and his home?

No such protection is provided for under the Law or the Rules. Such protection, however, is enshrined in the European Convention on Human Rights, which has been extended to the Cayman Islands. Article 8 provides the right to respect private and family life and states:

- everyone has a right to respect for his private and family life, his home and his correspondence; and

- there shall be no interference by a public authority with the exercise of this right, except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedom of others.

2.9 Is there protection of the spouse's interests in the home?

Interests arising by way of conveyance, gift or transfer to the wife by the debtor husband made prior to and in consideration of marriage, or property settled by him on the wife or children after marriage, are not voidable against the Trustee (s.107(1)) and are therefore protected. In any event, and as a matter of common law, any legal or beneficial interest of the spouse would not vest in the Trustee, since only the debtor's interest in the home would vest in the Trustee.

2.10 Is the debtor restricted to receive information?

No restriction is provided for the in the Law or the Rules.

2.11 Does the debtor have the liberty to move freely and to leave any State, including his own?

This is not addressed by the Law or the Rules.

2.12 Is the debtor entitled to cost-free legal assistance?

The Trustee may, from time to time, make such allowances as he thinks just to the debtor out of his property for the support of the debtor and his family, or in consideration of his services. This allowance may be revised by the Court, and where no allowance has been made, the Court may make an allowance on cause shown by the debtor (s.137).

2.13 Are there restrictions on the debtor after the procedure?

Conditional discharge is discussed below in response to question 8, below.

2.14 Is the spouse (automatically) included in the procedure?

There are no provisions which automatically include the spouse in the procedure.

2.15 In which way do the International or European Convention and Covenant play a role?

The European Convention on Human Rights applies in the Cayman Islands, and is relevant to the extent set out in response to question 2.8, above.

QUESTION 3

3. Position of the creditor

3.1 Can a creditor force the debtor to commence a procedure or oppose the debtor from doing so?

The requirements for a creditor to commence the procedure are set out in the response to questions 1.1 and 1.5, above. There do not appear to be any provisions which allow a creditor to oppose the debtor commencing a procedure pursuant to the Law.

3.2 Which creditors' claims can be excluded from a discharge?

Discharge releases the debtor from all debts provable under the bankruptcy, save for those arising from fraud or breach of trust, or debts due to the Crown or the Government. A debtor cannot be released from Crown or Government debts without the written consent of the Financial Secretary (s.71). An order for discharge does not release a partner of the debtor, or a party who was jointly bound with the debtor (s.72).

3.3 Does a creditor have to accept a curtailment of his claim?

Where there have been mutual dealings between the debtor and any person with a provable debt, accounting is required to set off the sum due from one party against the sum due from the other party, and the balance shall be proved or paid to either side respectively (s.127).

See also s.124, referred to above at question 2, where a dividend to ordinary creditors may be payable, but a dividend to a spouse who has loaned money in respect of trade of business may not be payable.

3.4 Do certain creditors receive more protection than others?

In accordance with s.125(1), secured creditors are required to either:

- give up their security for the benefit of the estate and prove for the entire debt; or
- realise / give credit for the value of the security and then prove for the balance.

Should a secured creditor not comply with the conditions set out above, they shall be excluded from claiming in the estate (s.125(2)).

S.135(1) provides that the following debts receive a priority in the administration of a bankrupt estate:

- public taxes imposed by law due from the debtor at the date of the provisional order, not exceeding in the whole one year's taxes;

- all wages or salary of any clerk or servant in respect of services rendered by the debtor during the 4 months prior to the date of the provisional order (not exceeding $100); and

- all wages of any labourer or workman in respect of services rendered to the debtor during the 4 months prior to the date of the provisional order.

Apart from the above, all provable debts rank *pari pasu*.

QUESTION 4

4. Avoidance actions

4.1 What are the legal proceedings to protect / realize the debtor's assets?

Unless the parties claiming under the transactions can prove that the bankrupt was, at the time of making the transaction, able to pay his debts without the aid of the property comprised in the transaction and that the bankrupt's interest in such property passed to the trustee of such a settlement upon the execution of the settlement, s.107(1) states that the following transactions are void against the Trustee:

- any conveyance, gift or transfer of property effected within 2 years of a provisional or absolute bankruptcy order, which is not:

  - a settlement made before marriage and in consideration of the same; or

  - made in favour of a purchaser or encumbrancer in good faith and for valuable consideration; or

  - made on or for a wife or children in respect of property which accrued to the bankrupt after marriage.

Transactions entered into by a person within 6 months of a provisional bankruptcy order being made against him and where the transaction was made with a creditor with a view to giving that creditor a preference over the other creditors, is deemed fraudulent and voidable by the Trustee (s.111(1)). Any transaction made by a person unable to pay his debts to any other person in trust for a creditor, is absolutely void, unless such a transaction was made with the agreement of 75% in number and value of the creditors (s.112(2)).

Further, s.112 sets out that any conveyance, assignment, transfer, sale or disposition by a person unable to pay his debts of his stock-in-trade, debts or things in action which relate to his business, is deemed fraudulent and void if made within 6 months after the date of a provisional or absolute bankruptcy order, unless the same:

- was made with the agreement of 75% in number and value of that person's creditors;

- or was executed not less than 21 days after that person's intention to do so was published in the Cayman Islands Gazette and in a Cayman Islands newspaper.

The Law has specific provisions in s.118 to protect certain *bona fide* transactions with the bankrupt which were entered into with persons who had no notice of any act of bankruptcy committed by the debtor.

Under s.107(2), an incomplete transaction in favour of a wife or children, made in consideration of marriage, is void against the Trustee if a provisional or absolute order for bankruptcy is made.

S.108 also gives the Court power to avoid transactions entered into by a person who subsequently dies, if those transactions would have been void under s.107 or void as preferences (see s.111 discussed below), and provided:

- a petition is presented within 6 months of death;
- the claim against the estate would have been sufficient to support a petition against that person, had he not died; and
- it is proved that the assets of that person were not, at the time of death, sufficient to pay his debts in full.

QUESTION 5

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5. Good faith

5.1 Does the principle of "good faith" play a role and in which way?

If, at any time after the confirmation of a Deed of Arrangement ("DoA"; discussed in further detail at question 7 below), it appears to the Court that the debtor has not:

> Acted in good faith in relation to the bankruptcy proceedings before or pursuant to the Deed;
>
> Is not assisting the Trustee to the debtor's utmost power to administer the Estate in accordance with the terms of the Deed; or
>
> For any other reason it is expedient or just;

the Court may declare the DoA void, and the Court may, without further condition, make an absolute order for bankruptcy against the debtor (s.56).

In relation to transactions which are void against the Trustee, s.107(1) includes a reference to good faith in that "*any settlement of property not being a settlement made……in favour of a purchaser or incumbrancer in good faith and for valuable consideration……shall be void against the Trustee….*"

Good faith is also relevant to the administration of a deceased debtor's estate. No payments made after an administration order by a personal representative will be invalidated if such payments are made in good faith (s.66(10); s.108).

The Law also provides that good faith is relevant in relation to dispositions in the context of partnerships. If a provisional bankruptcy order is made against all the members of a partnership, and that order is then made to apply to the separate debts and properties of the partners, any disposition of such separate property which is subject to a provisional order will be unaffected if made in good faith and for valuable consideration (s.145).

QUESTION 6

6. Re-payment plan

6.1 Is the debtor submitted to a payment plan?

6.2 How long is the duration of such a plan?

6.3 Does the plan have an educational purpose?

Issues relating to re-payment plans do not arise in this jurisdiction and therefore are not applicable.

QUESTION 7

7. Voluntary settlement

7.1 What are the possibilities for a voluntary settlement?

A DoA may be entered into between a debtor and its creditors at a meeting of creditors of the estate. S.44(a) provides that the creditors may resolve, by the votes of a majority in value of the creditors present, that the:

- proceedings pursuant to the petition be stayed;
- affairs of the debtor be wound up; and
- debtor's property be administered under a DoA.

The nature of the DoA need not be specified in the resolution. The DoA may be based on full payment of the proven debts, or on a "cents in the dollar" satisfaction of debts.

Where an order is made for the stay of proceedings for such time as may be necessary to obtain the confirmation of a DoA, s.48 sets out that a DoA may be entered into so long as:

the DoA is approved by a majority in number of creditors representing 75% of the value of creditors of the debtor who have lodged a Proof of Debt with the Trustee;

the DoA shall be acknowledged or proved in the manner provided by the Property (Miscellaneous Provision) Law, 1994; and

a certified copy of the executed DoA is filed with the Court, together with:

- a list of liabilities of the debtor, dates incurred, contact information of the creditors, and consideration provided or any securities given;

- a detailed statement of debts and property of the debtor, and an estimated value of same; and

- an affidavit of the debtor, or some other person able to depose thereto, verifying the list and statement.

The debtor is required to attend a public examination by the Court, and the Trustee is required to make a report to the Court regarding the DoA (s.67). Once the Court has considered the report from the Trustee, and is satisfied that DoA is in the best interests of creditors generally, the Court should grant an order pursuant to s.50 to confirm the DoA.

The Court will order that the proceedings in bankruptcy shall continue from the point at which they were stayed, or may order the adjournment of the consideration to allow time for the execution of the DoA or another DoA, if:

- there is no application to the Court to consider the DoA;

- no DoA has been filed; or

- Court does not confirm the DoA (s.51).

If the Court is satisfied that the requirements of the Law have been complied with, it may make an order to confirm the DoA, together with any such order regarding the further stay or any proceedings, or annulling any provision order under the petition (s.52). Once confirmed, the DoA shall be binding on all creditors and any priority creditors maintain their priority status (s.54).

The Court, at any time after the confirmation of the DoA, can make an order for the discharge of the debtor in accordance with the terms of the DoA (s.55). If there are no terms relating to discharge in the DoA, then the Court can make an order for same once the Trustee has reported that the arrangements in the DoA have been fully carried out.

A DoA can be declared void by order of the Court in accordance with s.56 on the following grounds:

- the debtor has not acted in good faith;

- the debtor is not assisting the Trustee to the utmost of his power to administer the estate in accordance with the terms of the DoA; or any other reason it considers is expedient or just.

Upon an order declaring the DoA void, the Court may make an absolute order for bankruptcy against the debtor, which will take effect from the date of the order of the void DoA.

QUESTION 8

8. Discharge

8.1 In which way is a discharge granted?

A report by the Trustee pursuant to s.67 must set out the state of the debtor's affairs and his conduct before and during the bankruptcy, and must identify any offences under the Law which would justify the Court in refusing, suspending or qualifying an order for discharge of the debtor. Once the Trustee has lodged this report with the Court, a debtor may apply to a Judge for an order of discharge. The Trustee or any creditor may oppose the discharge and may show cause as to why it should be refused, postponed, or made subject to conditions.

According to (Section 68(4) there are 17 grounds where the Court can:

- refuse the discharge;
- suspend the discharge for a period of not less than two years;
- suspend the discharge until a dividend of not less than fifty cents in the dollar has been paid to the creditors; or
- require the debtor, as a condition of discharge, to consent to judgment being entered against him by the Trustee for any balance of provable debts which are not satisfied at the date of discharge.

This is provided that, if at any time after the expiration of two years from the date of any order for discharge, the debtor satisfies the Court that there is no reasonable probability of his being in a position to comply with such an order. The Court may modify the terms of the order as it sees fit.

Pursuant to s.70, the Court has discretion to grant an order for discharge which is conditional on a number of factors, including garnishing salary, pay, profits, wages, earnings or income which subsequently become due to the debtor. The Court can also garnishee any 'after acquired' property of the debtor pursuant to s.70.

8.2 Can a discharge, after it has been granted be revoked?

It does not appear that there are any provisions in this jurisdiction which allow the discharge to be revoked once granted.

QUESTION 9

9. Remuneration / costs

9.1 How are the costs of the procedure dealt with?

Unlike other jurisdictions with a more active personal insolvency regime, the Cayman Islands do not have a specific professional insolvency organisation with standards to which remuneration is subjected. Rather, the matter of Trustee's remuneration is set out in s.13.

9.2 Is the court the correct forum to scrutinize fees?

A Trustee is entitled to recover out of pocket expenses out of the proceeds or asset realizations, but only after having them duly taxed by the Court (s.13(7)).

9.3 What is the appropriate method of calculation of fees when dealing with compositions or voluntary arrangements?

Pursuant to s.13(4), a Trustee is entitled to a commission of 5% on all dividends of any estate or trust paid by him in the administration of a debtor's estate under an absolute order for bankruptcy. Likewise, pursuant to a DoA, a Trustee is also entitled to 5% of all dividends paid.

9.4 What is the method of calculation of fees when dealing with bankruptcy proceedings?

See the response to question 9.3, above.

9.5 Can IPs charge fees based on the value they created for the creditors during an assignment?

Not applicable in this jurisdiction.

QUESTION 10

10. Cross-border considerations in consumer insolvency

10.1 Are overseas assets included?

As set out above, the Trustee is required to take possession of all real and personal property of the debtor (s.75). By way of its definition in s.2, "property" does not appear to be subject to any limitation on jurisdiction and includes money, goods, things in action, land and every description of real or personal property. This definition also includes obligations, easements and every description of estate, interest and profit, present or future, bested or contingent.

If the Trustee wished to assert his rights in respect of property in another jurisdiction, he would likely have to seek recognition in that jurisdiction.

10.2 Is forum shopping by the debtor for more favourable personal insolvency laws possible?

Not applicable in this jurisdiction.

QUESTION 11

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11. What is the result of subsequent insolvencies?

Subsequent insolvencies are not addressed in the Law or the Rules.

QUESTION 12

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12. Recommendations?

The Law and procedure governing consumer insolvency in the Cayman Islands is outdated, and serious consideration should be given to a wholesale redrafting of the Law which is prolix, lacking in clarity and contains outdated language. Although the recommendations below are seen as relevant to modernise the Law, it is noted that the bankruptcy regime is not often utilised in the Cayman Islands. Some of these suggested amendments are:

- The amount to petition for bankruptcy should be increased. CI$40 is a low amount and does not reflect a consumer's ability to obtain substantial credit in respect of trade, credit cards and other forms of unsecured debt. Once an increased amount is set, this amount should be indexed at a rate which reflects the inflation rate in this jurisdiction.

- The amounts afforded to a priority creditor in s.135(1) of CI$100 is also very low and should be increased to reflect that such parties will likely be owed substantially more than CI$100. Again, once the increased amount it set, it should be indexed in accordance with the inflation rate.

- It may be useful to introduce an income threshold over which a debtor is required to remit contributions to their estate. This amount could be scaled, depending on the amount of dependants the debtor has, and also be subject to inflation rate increases / decreases.

- The remuneration practices are outdated in that they are based on a percentage of realisations only. There are no provisions to be remunerated on an hourly basis for work performed, or to fix an amount of remuneration as agreed by the creditors of the estate, which is commonplace in other jurisdictions. The Law could be amended to reflect the Companies Law in Cayman which affords the creditors (by way of the Liquidation Committee Representatives) the right to approve the appointee's fees.

- The requirement to have all out of pocket expenses taxed by the Court prior to remitting payment is somewhat archaic and time consuming. In other jurisdictions, a Trustee is recognized as having the knowledge and experience to incur only the out of pocket expenses necessary to administer the estate. The Law should be amended to reflect that of other jurisdictions, so that out of pocket expenses can be paid as incurred.

- S.92 requires that a Trustee pay all estate funds into a government bank account. This is impractical and should be amended so that the Trustee has control of the day to day dealings of the bankrupt's bank account, utilizing the same principle set out above in that the Trustee has the knowledge and experience to conduct the estate's bank account.

- The office of Official Receiver should be established to oversee the bankruptcy process.

CHINA

QUESTION 1

1. What are the options or procedures available for a natural person / consumer regarding his or her over-indebtedness in your jurisdiction?

Currently, under the legal system of the People's Republic of China (the "PRC", for the purpose of this chapter, excluding Hong Kong SAR and Macao SAR), there is not an officially promulgated personal bankruptcy law or statute, and from the legal view, the concept of "personal bankruptcy" or "personal over - indebtedness" is not recognized.

Under the PRC laws, an individual, i.e. natural person, shall have the equal position in terms of the civil law, with the legal person, such as a limited liability company, joint venture or non-profit institution. However, unlike some of these entities, an individual shall take "unlimited" and life-term liability for its obligations and indebtedness. Under the PRC laws, an individual may be regarded with full capacity to take "indebtedness" at their own discretion, if that person is 18 years or over, or is 16 years or over and is able to live on their own.

Indebtedness arising from or in connection with the action by a person with limited or no capacity (minors) may be or will be held void if such action is beyond their capability.

Other than these exceptions, there is no such regular or statutory process / procedure for an individual with over - indebtedness who could claim to have their debts waived or exempted. In the case of a debtor who is deceased, their debt shall be paid off from the estate. Also according to Inheritance law, the beneficiary of the inheritance has a continual responsibility to repay their outstanding debt up to the amount of the inheritance.

From the perspective of a creditor, of course, that person could file civil action with the competent court of the PRC (or with the arbitration body as agreed by both parties where applicable) against the persons if such a person is in breach of the relevant contract or agreements. Whether the debtor has the financial capacity to satisfy their liability or not i.e. solvent or otherwise, the right of a creditor to claim for the debt owed and to enforce against the debtor is not limited.

Personal debt dispute procedures, including recovery actions are however covered in PRC laws and relevant by laws. In the absence of any "personal bankruptcy" or "personal over-indebtedness", this Chapter will look at aspects of debt recovery through enforcement procedure that may have comparable general implications in the case of a personal bankruptcy.

1.1 The legal grounds for the opening of or access to those procedures

See above.

1.2 How are these procedures made available?

Property preservation

A creditor may apply to the court for property preservation measures before filing or during a lawsuit on the basis that their lawful right and interests would, due to urgent circumstances, suffer irreversable damage. However, the creditor is required to provide a surety of not less than the value of property preserved, and the court has to order the preservation within 48 hours after the application with surety. If the creditor fails to do so, the preservation application shall be rejected by the court. This requirement can be quite prohibitive for the creditor to go for this remedial protection.

It should be noted that this preservation procedure will only protect the applicant (creditor) and not to all the creditors as a whole.

1.3 Who can commence the procedure?

See above.

1.4 Who will supervise the procedure?

Jurisdiction of a court

The lawsuit shall be under the jurisdiction of the court in the place where the debtor has their domicile. If the debtor's domicile is different from their habitual residence; the court in the place of their habitual residence prevails.

The courts shall exercise the judicial authority with respect to consumer debt disputes independently in accordance with the law, and shall not be subject to interference by an administrative department, public organization or individual.

1.5 What are the criteria such a person has to satisfy?

Not applicable.

1.6 What are the available alternatives?

Payment warrant

A creditor may apply to the court with jurisdiction for the summary procedure of a payment warrant for payment of money or negotiable instrument from a debtor with the supporting facts and evidence provided, and meets the following requirement:

i. the creditor and the debtor are not involved in other obligation disputes; and

ii. the payment warrant can be served on the debtor.

This is not normaly used as the payment warrant can easily be invalidated by a simple written objection filed by the debtor within 15 days and the whole recovery process will go back to the beginning with a lawsuit. This summary procedure is more often applicable in an urgent payment for smaller claims only e.g. alimony.

QUESTION 2

2. Position of the debtor and the spouse

The debtor's position under debt recovery / enforcement actions will be considered in this section.

2.1 Which assets and income are excluded from the procedure?

A creditor who has initiated an enforcement procedure for debt recovery could apply to preserve any property / assets owned by the debtor. The property and asset under preservation shall be grossly equivalent to and not exceeding the indebted amount owed to the creditor.

The PRC laws do not limit the kind and nature of property / assets to be preserved, provided that such preservation of property / assets cannot affect the normal living of the debtor, and according to the Supreme Court's Provisions on Seal up, Distrain and Freeze Properties in Civil Enforcement stipulates that the following properties and assets cannot be sealed up, distrained or frozen:

- clothes, furniture, cooking instruments, dinner instruments and other items necessary for daily living of the debtor and their dependent family members;
- amount necessary for the living expenses for the debtor and their dependent family members. This is determined according to the lowest local rate for security of living where available (currently RMB505 per month for urban residents and RMB360 per month for rural residents in Shanghai);
- articles necessary for completion of statutory education of the debtor and their dependent family members;
- unpublished invention or creation;
- auxiliary devices and medical articles necessary for the physical disability of the debtor and their dependent family members;
- medals or articles granted as a honour or commendation
- property / asset which exemption rules under PRC / international law apply.

It is interesting to note that the court may seal up the dwelling necessary for the life of the debtor and his dependent family members, but shall not auction, sell off it or use it to pay a debt.

2.2 Does the debtor have restrictions on the disposition of his assets?

A debtor is prohibited to conceal, transfer, sell or destroy property that has been sealed or distrained. If the assets are not frozen, the debtor is free to dispose of such property.

If the circumstance of a breach which is minor and does not constitute a crime, the debtor shall be fined or detained. Otherwise, the court shall investigate for criminal responsibility.

2.3 Which assets and income are included in the procedure?

Creditor to provide asset leads

During various stages of the asset recovery action, it is the creditor who shall provide the clues or information of the debtor's assets to the court for any preservation application or enforcement procedures.

Debtor to provide asset list

The Article 271 of PRC Civil Procedure Law requires the person being enforced (debtor) to submit a report of their assets summary, including current and one year before the enforcement notice received, which would include the income position as well. In practice, we seldom see the debtor provide such report or summary, and as long as the applicant provide the clues or information of the person's existing assets / property, the court will serve the notice to the bank for wire the fund, or call for the auctions / selling of property.

2.4 Are pension schemes included?

If the debtor's property or income is less than their debts, the court may require the social Security Institutions to assist in deducting the pension of the debtor to repay the debt.

However, it must leave out the necessary living expenses for the debtor and their dependant family members.

2.5 Does the debtor donate to the estate a part of his income for the benefit of the creditors?

Yes, see section 2.7 below.

2.6 Is there a means test?

There is no "means testing" in the PRC.

Living expenses necessary for the debtor and their dependent family members

If there is a lowest local rate for security of living for one person (e.g. RMB505 per month for urban residents and RMB360 per month for rural residents in Shanghai), the necessary living expenses shall be determined according to such rate.

2.7 Is there a garnishment of regular income?

Under an enforcement procedure, the court shall have the power to withhold or withdraw the income of the debtor. There is no restriction on this other than leaving the necessary living expenses for the person and their dependent family members.

2.8 Is there protection for the debtor's privacy, his mail and his home?

Not applicable.

2.9 Is there protection of the spouse's interests in the home?.

It depends on if the borrowing or loan is an individual's "personal debt" or "common debt" for the spouses. If the credit is a "personal debt", such enforcement cannot extend to the spouse's interests in the common assets.

Under the "marriage law of China", all assets accumulated by either husband or wife individually or jointly after marriage are assumed owned jointly by the spouses unless otherwise agreed in writing. If one of the spouses borrowed money in their own personal name, the repaying of the debt will be responsible jointly by the husband and wife from the post marriage assets unless a prior agreement has been entered with the creditor clearly defining that the debt is the personal responsibility of the debtor. This joint responsibility by the spouses on their post marriage assets can also be avoided had there been a prior agreement between the spouses for separate financial responsibility between each spouses and that this agreement is known to the creditor.

The following property shall be owned by either the husband or the wife individually:

- the pre-marital property that is owned by one party;
- the subsidies for medical treatment or disability from bodily injury on either party;
- the personal articles specially used by either party;
- other personal property that are used by either party.

The following properties arisen during the existence of marriage shall be jointly owned by both husband and wife:

- wages and bonuses;
- any income earned from production or management;
- any income derived from intellectual property;
- any property inherited or bestowed, with the exception of those as mentioned in Article (c) of this law;
- other property that shall be jointly owned.

2.10 Is the debtor restricted to receive information?

Not applicable.

2.11 Does the debtor have the liberty to move freely and to leave any State, including his own?

In accordance with the "Civil Procedure Law", if the debtor has failed to fulfil the obligations specified in the Judgment document, the court may issue a restriction order for the debtor to leave China. There is no specific restriction to move between provinces.

2.12 Is the debtor entitled to cost-free legal assistance?

In accordance with the "Civil Procedure Law", if the debtor has a genuine difficulty in paying the court fee, the debtor may in accordance with relevant regulations, apply to the court for the suspension or the reduction of or exemption from the payment of the court fees.

There is cost-free legal assistance available in PRC, but this does not apply to commercial debt.

2.13 Are there restrictions on the debtor after the procedure?

Notwithstanding the comments on Para 1 above, on 1 July 2010, the Supreme Court of the PRC promulgated the Supreme Court's Provisions on Restrictions on "High Consumption" by Persons under Enforcement, which became effective on 1 October 2010 ("Provisions"). The Provisions stipulates that, upon the application by the creditor, the persons who are under the process of enforcement (person being enforced) are prohibited to make high consumption.

The prohibited consumption include:

- taking flight, soft berth on train, class II or above in ship;
- consuming in starred hotels, restaurants, night clubs or golf course;
- purchasing, constructing, developing or decorating in luxurious real property;
- renting high-class offices, hotels or apartment for office use;
- purchasing vehicles not necessary to business operation;
- going for travelling or vacations;
- supporting their children to high-cost private schools;
- purchasing high-cost insurance or financial products;
- any other high-consumption activities which in not necessary for living and work.

Any serious breach of the above can be considered as a criminal offense.

2.14 Is the spouse (automatically) included in the procedure?

Please refer to section 2.9 above.

2.15 In which way do the International or European Convention and Covenants play a role?

Not applicable.

QUESTION 3

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3. Position of the creditor

3.1 Can a creditor force the debtor to commence a procedure or oppose the debtor from doing so?

A creditor can recover the debt owed by filing an enforcement procedure against the debtor after a favoring judgment or arbitration award is rendered.

3.2 Which creditors' claims can be excluded from a discharge?

As mentioned earlier, there is no discharge of any debts in China.

3.3 Does a creditor have to accept a curtailment of his claim?

Under the PRC laws, the creditor and debtor may enter into a settlement with respect to the relevant debt, before the civil action is raised, in the process of action, or even after the judgment is given and in the process of enforcement. The creditor is not obliged to accept a curtailment or settlement plan in all circumstances, and such a creditor may insist to enforce the full amount of credit against an individual if they wish.

3.4 Do certain creditors receive more protection than others?

Under the PRC laws, the priority among creditors against a certain debtor is:

- tax authority;
- salary if such individuals hires employees;
- secured creditor with security such as mortgage or pledge;
- unsecured credit.

QUESTION 4

4. Avoidance actions

4.1 What are the legal proceedings to protect / realize the debtor's assets?

Article 74 of PRC contract law provides a general principle for the creditor to apply to the court to reverse fraudulent transfer / conveyance of the debtor's assets including gifts, waiver of debts and sale of assets at unreasonably low consideration. Such action shall be raised within one year as from when the applicant was aware of such malicious disposal, provided in any case, within 5 years as of the disposal. In the PRC according to the Enterprise Bankruptcy Law, the creditor may claim to revoke the improper disposal of assets which occurred within six months prior to the court files the bankruptcy case upon the creditor's application, but this rule does not apply to to a natural person.

In practice, it is difficult for applicant (creditor) to discover / find out such transaction assuming that he can prove such transaction is unreasonable to claim for its revocation. In this regard, asset preservation in advance is very important.

It should be emphasized here that the right to claim for the revocation of the disposal at unreasonably low price could be lodged only when the "transferee is aware of such malicious disposal". In practice, it could be difficult for the creditor to prove that the transferee was aware of this. Therefore, the reliance on this article to protect the creditors against a natural person's malicious disposal of assets is comparatively weak.

QUESTION 5

5. Good faith

5.1 Does the principle of "good faith" play a role and in which way?

The concept of "good faith" is not dealt with under PRC law.

QUESTION 6

6. Re-payment plan

There is no provision for a repayment plan in PRC. However, voluntary conciliation is encouraged as evidence by the general practice and the law which require the court to lead a conciliation meeting before the trial / hearing and before the execution order.

6.1 Is the debtor submitted to a payment plan?

The PRC laws do not require a payment plan or stipulate similar processes for any conciliation agreement.

6.2 How long is the duration of such a plan?

Not applicable.

6.3 Does the plan have an educational purpose?

Not applicable.

QUESTION 7

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7. Voluntary settlement

7.1 What are the possibilities for a voluntary settlement?

Please see section 3.3

Practical recovery approach

As Chinese people generally still consider a failure to repay debts is a great shame, most creditors would in practice discuss with the debtor in private first and try to resolve the dispute and get paid in full or in part. When a debtor appears to have a genuine problem of not being able to pay and the creditor is important to him, it is often that the debtor would offer or the creditor would request the debtor to find a guarantor for the debt in order to hold off any public recovery action.

QUESTION 8

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8. Discharge

8.1 In which way is a discharge granted?

As mentioned at the beginning, under the PRC laws, an individual shall take "unlimited" and life - term liability for its obligations and indebtedness.

A time limitation of action taken by the creditors to the court for recovery of the debt shall be two years. A time limitation of action shall begin when the creditor knows or should know that his rights have been infringed upon.

As for enforcement procedures, the favoring party shall initiate enforcement procedures within two years after a judgment is delivered and becomes effective before the performance expiry with the competent court.

8.2 Can a discharge, after it has been granted be revoked?

Not applicable.

QUESTION 9

9. Remuneration / costs

9.1 How are the costs of the procedure dealt with?

For a compulsory debt recovery action in PRC, the court will charge court fee and enforcement fee, the court will also charge fees for property preservation. These fees are calculated and accrued on a pro rata basis on the amount of the debt / credit enforcement / valuation of property / assets preserved. There are reduced fee provisions for simpler procedures e.g. conciliatory procedure.

Details are set out by the court as below:

Relevant cost	Charge rate
Court fee	A reducing % on the claim amount from 2.5% to the lowest 0.5%
Application fee Legal documents	A reducing % on the execution amount from 1.5% to the lowest 0.1%
Application fee for property preservation 财产保全申请費	A reducing % on the property amount from 1% to the lowest 0.5% subject to a upper ceiling of RMB5,000
Application fee for Enforcement by the Court 强制执行申请費	A reducing % on the execution amount from1.5% to the lowest 0.1%
Application for payment warrant fee 支付令申请费	Refer to 1/3 of the above Court fee paid
Auction fee	A reducing % on the transaction amount from 1% to the lowest 0.2%
Surveillance cost 保全财产监管费	As actually occurred

9.2 Is the Court the correct forum to scrutinize fees?

Not applicable. See section 9.1.

9.3 What is the appropriate method of calculation of fees when dealing with compositions or voluntary arrangements?

Not applicable.

9.4 What is the method of calculation of fees when dealing with bankruptcy proceedings?

Not applicable.

9.5 Can IPs charge fees based on the value they created for the creditors during an assignment?

Not applicable.

QUESTION 10

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10. Cross-border considerations in consumer insolvency

10.1 Are overseas assets included?

Yes, overseas assets of the debtor are included in the procedure.

10.2 Is forum shopping by the debtor for more favourable personal insolvency laws possible?

Not applicable. For details please refer to section 1.

QUESTION 11

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11. What is the result of subsequent insolvencies?

Not applicable.

QUESTION 12

12. Recommendations

In the absence of any “personal bankruptcy” or “personal over-indebtedness”, this Chapter has been looking at various aspects of debt recovery through enforcement procedure that may have comparable general implications in the case of a personal bankruptcy. It must be emphasised here that it is difficult to draw a direct comparison as personal bankruptcy was never preached nor accepted as part of its culture nor custom in China’s 5,000 years of history.

Perhaps the rapidly developing internal consumer market in China as part of her modernisation and fast paced development will necessitate some innovative laws and regulations on consumer debt to deal with the impacts from the inevitable consumer debts or personal over-indebtedness that follows and to act as a bridge / buffer between the new growing consumer debt market and the old Chinese tradition.

ENGLAND & WALES

QUESTION 1

1. What are the options or procedures available for a natural person / consumer regarding their over-indebtedness in your jurisdiction?

Introduction

The personal insolvency landscape of England and Wales is made up of a patchwork of procedures which deal with both business and consumer personal insolvency.

There are four procedures which are commonly used; these can be divided into statutory and non statutory procedures. The three principal statutory procedures are bankruptcy, Individual Voluntary Arrangements (IVAs) and Debt Relief Orders (DROs). The current legislation which governs these procedures is the Insolvency Act 1986 (IA86), the Enterprise Act 2002 (EA02) and the Insolvency Rules 1986 with 2010 amendments (IR86).

This chapter will refer to the insolvent individual as the debtor, this being the most widely used acceptable term available.

These three procedures are administered either by the Insolvency Service (IS) through the office of the Official Receiver (OR) or by an insolvency practitioner (IP).

The IP is regulated either directly by the IS, the Insolvency Practitioners Association (IPA) or by one of the recognised legal or accounting bodies of the UK.

The only non statutory procedure which is generally recognised is the Debt Management Plan (DMP) which is considered to be less regulated than the statutory procedures mentioned above and does not require an IP to administer the process.

In respect of the statutory procedures there is a varying element of debt forgiveness depending on the assets and income of the debtor which can be made available for creditors.

As regards the non statutory procedure of a DMP, there is likely to be little or no debt forgiveness and some see such procedures simply as a debt stretching mechanism.

1.1 The legal grounds for the opening of or access to those procedures

The insolvency procedure is usually opened when the debtor realises that they are insolvent or advised of their insolvency and is usually opened by the debtor. Alternatively in the case of Bankruptcy, a creditor may petition the court for the bankruptcy of the debtor (IA S267). A petition for bankruptcy can also be issued against the debtor by the supervisor where they have failed to comply with the terms of an IVA (IA S276) or where the court issues a criminal bankruptcy order (IA S277).

The different procedures are appropriate for debtors in varying levels of financial distress.

In general terms those who are in the least financial distress may opt for a DMP in which their debts are paid off over a longer period of time than the terms of the original borrowings, this is likely to be supervised by a debt management company. Those whose debt problems are worse and require some level of debt forgiveness but still have assets and a regular income are likely to turn to an IVA which will be supervised by an IP either working in a firm of IPs or with in a specialist bulk IVA provider. Those who are further down the distress curve are likely to opt for bankruptcy by way of a debtors petition (IA S272) and those with negligible assets, less than £50 surplus income per month and debts of less than £15,000 can opt for the DRO.

1.2 How are these procedures made available?

It is usual for the debtor to take advice either from an IP or a debt advisor in the public / charitable (not for profit) sector or from one in the private (for profit) sector.

If the advice given is for the debtor to declare themselves bankrupt, the debtor will be referred to the county court in which the debtor resides to obtain the necessary forms to petition for their own bankruptcy. If the advice is to apply for a DRO the debtor will be referred to an approved intermediary. In the case of a DMP the matter will be handled by a debt management company, whilst an IVA will be dealt with by the IP.

1.3 Who can commence the procedure?

Only in the case of Bankruptcy can the personal insolvency procedure be opened by someone other than the debtor. IA S264 allows the following to present a bankruptcy petition: the debtor; a creditor; the supervisor of an IVA; and the official petitioner in criminal bankruptcy cases. The conditions which need to be satisfied for the presentation of a petition are as follows: The debtor must be domiciled in England and Wales and present on the day the petition is presented, and at anytime in the last 3 years be ordinarily resident, have a place of residence or carried on business in England and Wales.

In the case of a DMP, IVA and DRO the procedure is opened by the debtor with the assistance of a DMP provider, an IP or an approved intermediary respectively.

1.4 Who will supervise the procedure?

In respect of both bankruptcy and DROs the procedure will be supervised by the Insolvency Service. After the debtor is declared bankrupt by the court, the matter is passed to the regional ORs office to which the court is allocated. DROs are processed centrally when submitted by the approved intermediary. Only in the case of bankruptcies may an independent IP be appointed who is known as the Trustee in Bankruptcy (TinB). This is done in one of three ways: Firstly where the OR calls a creditors meeting; secondly where a majority creditor requests an appointment be made; and thirdly where the OR decides to make what is known as a 'rota appointment'. Both the latter two methods of

appointment are known as SOS (Secretary of State) appointments, as the appointment is made directly by the Secretary of State acting through the IS. Rota cases are allocated in turn to IPs who agree to participate in a regionally based panel.

DMPs are supervised by the debt management company and an IP is not required to be appointed. Whilst in the case of an IVA, an IP is appointed, he is initially known as the Nominee (nominated to supervise the plan) and once the plan is approved he becomes the Supervisor.

In both IVAs and in bankruptcies where the OR calls a creditors meeting the creditors have the right to vote for the appointment of a particular IP and in the case of IVAs modifications can be made and voted upon. Voting is by majority of creditors, in the case of an IVA for the plan to be accepted in excess of 75% of creditors who are entitled to vote and who vote, must vote in favour.

1.5 What are the criteria such a person has to satisfy?

The OR and his staff dealing with bankruptcy and DROs are civil servants and as such are authorised to act by law. IPs are authorised to act by the various legal and accountancy bodies of the UK, the IPA and directly by the Insolvency Service, who also has an overarching regulatory function to supervise the other authorising bodies. DMPs are supervised by debt management companies which are regulated by the Office of Fair Trading and must hold a consumer credit licence.

1.6 What are the available alternatives?

This chapter has outlined briefly the alternative procedures available to the debtor. It is not uncommon for a debtor to graduate from one process to another. From DMP to IVA to bankruptcy to seek a fresh start financially and a debt free life. Controversially DMPs are considered by some to be keeping debtors in a holding pattern of debt payment wherever possible, rather than opt for debt forgiveness in an IVA or even bankruptcy.

There is one procedure which hasn't been mentioned above and that is the Administration Order (AO). However this has very limited use as it can only be used where the debts are no more than £5000 and there is a judgement against the debtor. The best analogy is that it is similar to an IVA but supervised by the local county court.

QUESTION 2

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2. Position of the debtor and the spouse

The debtor and their spouse are treated as two separate individuals. However the terms of any DMP and IVA may take into account the non-insolvents income if a repayment plan is proposed and accepted. For example, in some cases the non-insolvent spouse may offer to realise some of their assets to secure an IVA.

2.1 Which assets and income are excluded from the procedure?

In determining any level of income contribution in any of the procedures and thereby determining the level of income excluded, the debtor will be required to submit an income and expenditure account which is usually in a common format known as the Common Financial Statement (CFS) In the case of the DMP, the debtor through his advisor will negotiate a payment plan. In the case of an IVA the nominee will assess what the debtor can afford and put that offer to creditors for consideration. In bankruptcy either the OR or the TinB will assess the debtor's income and expenditure account and determine what level of contribution is appropriate. If agreement can be reached an Income Payments Agreement (ipa) will be concluded, if agreement cannot be reached the OR or TinB can apply to court for an Income Payments Order (ipo). In the case of the DMP and the IVA the length of the payment plan will determine the length of the contribution period. Whilst in bankruptcy it is usual for the ipa or ipo to continue for 3 years from the date of bankruptcy.

By definition there is no income contribution in a DRO as the debtor has no spare income.

If the debtor's circumstances change they can request a change in the level of contribution, as can the supervisor of the payment plan or TinB. It is usual in IVAs for there to be a clause in the plan which requires the income and expenditure account to be reassessed at least annually which could result in contributions increasing.

In the case of an IVA the debtor may propose that certain assets are excluded but this will be determined by the creditors voting on the plan. However it is usually the case that the assets which are excluded in bankruptcy are also excluded in an IVA (see below). In bankruptcy the following assets are excluded:

Firstly: Tools, books, vehicles, and other items of equipment which the debtor needs to use personally in his job, business or vocation.

Secondly: Clothing, bedding, furniture, household equipment and other basic items the debtor and their family need in the home.

However this is subject to the proviso that a cheaper alternative can not be found.

In addition, a pension scheme approved by HM Revenue and Customs remains outside the bankrupt's estate, but can be taken into account in determining any income contribution.

2.2 Does the debtor have restrictions on the disposition of his assets?

If the debtor is subject to a DRO they will have little or no assets, accordingly no restrictions need to apply. In respect of a DMP and an IVA, the terms of the plan will determine which assets can and cannot be disposed of.

In bankruptcy the debtor's assets vest in the OR or the TinB who will deal with their realisation.

2.3 Which assets and income are included in the procedure?

In an IVA, there is often a clause that deals with the realisation of the equity in the domestic property sometime in the fourth or fifth year of the arrangement. The arrangement will also set out the plan to realise any other assets for the benefit of the creditors of the arrangement.

In bankruptcy, the OR and any subsequent TinB will take control of all assets, which are not excluded and realise them to meet the costs of the bankruptcy and repay creditors in the priority laid down by law. In most domestic bankruptcies, the debtor's principal asset is their equity in their domestic property. Special rules apply to dealing with the debtor's home. If the debtor occupies their home with their family, they have 12 months from the date of the bankruptcy to either find alternative accommodation or find the funds to purchase the debtors interest. It is not uncommon for either the spouse or another family member to find the funds to buy the debtors interest. After the 12-month period has elapsed, the creditors' interests take priority and the TinB can force a sale by taking possession proceedings or may opt to take a charge over the property for the value of the debtor's interest in the property thus securing the value for creditors when it is sold in the future. If the TinB has not taken any action by the third anniversary of the bankruptcy, the interest in the property will revert to the debtor.

As regards the debtors income contribution this is determined in the method outlined in section 2.1

2.4 Are pension schemes included?

Approved pensions schemes (see 2.1) are excluded in bankruptcy, but the income received will be considered when determining an ipo or ipa. In IVAs and DMPs again the terms of the arrangement will determine what is and is not included, again it would be usual for the income from the pension to be taken into account in determining the level of contribution.

2.5 Does the debtor donate to the estate a part of his income for the benefit of the creditors?

See section 2.1

2.6 Is there a means test?

There is no formal means test laid down by law but it is generally accepted that the Common Financial Statement used by many DMP and IPA bulk providers is the standard to follow.

2.7 Is there a garnishment of regular income?

In DROs no income payment plan is required and therefore no income contribution. The same applies in both DMPs and IVAs, any contribution paid is done on a voluntary basis and is for the length of the agreement. In IVAs this is often for 5 years, in DMPs it can vary and is dependant on the length of the plan, 5 to 10 years is not uncommon.

In bankruptcy the debtor can be subject to either an ipa or an ipo, the former is an agreement reached between the debtor and his TinB or OR, whilst the latter is a formal court order made on the application of the TinB or OR. It is usual for these agreements or orders to last for three years from the date of bankruptcy.

2.8 Is there protection of the debtors' privacy, his mail and his home?

The debtor retains the general rights of privacy any private citizen enjoys in England and Wales. In respect of the debtors mail this is not generally redirected to the supervisor of any repayment plan, whilst in Bankruptcy the debtor's mail can only be redirected with an order of the court and for a maximum of three months without further renewal (IA S371).

It is usual in IVAs and bankruptcy for any equity in the debtors home to be realised for the benefit of creditors, this is either done by remortgaging the property if funds are available or from monies raised by family and friends.

In some cases the property is sold and the debtor's equity is made available for creditors. In bankruptcy it maybe the case that the house is repossessed and sold to pay creditors, the debtor and family having to find alternative accommodation.

The debtor will be unaffected by the bankruptcy if he resides in rented accommodation and continues to pay the rent under the terms of the tenancy agreement.

2.9 Is there protection of the spouse's interest in the home?

In bankruptcy only the debtor's interest can be realised for the benefit of creditors, the spouse's interest is protected. The law allows the debtor's family 12 months from the date of the bankruptcy to resolve the realisation of the equity before any legal action can be taken by a TinB or OR .

In an IVA the debtor's equity will be realised in accordance with the terms of the arrangement, in some cases a spouse may agree to some part of their equity being used to pay creditors, but this would be very much on a case by case basis.

The matter is not likely to be an issue in a DMP as such a plan is usually income based and in a DRO the debtor has little or no assets.

2.10 Is the debtor restricted to receiving information?

There is no restriction on the debtor receiving information, in order to make the procedures as transparent as possible for the debtor it is good practice to keep the debtor informed of progress in their debt repayment plan.

2.11 Does the debtor have the liberty to move freely and to leave any State, including his own?

There is no restriction on the freedom of movement of the debtor, on a historical note at one time it was considered as an act of bankruptcy to leave the country to avoid paying creditors.

2.12 Is the debtor entitled to cost free legal assistance?

There is no legal aid available for debtors, however the individual maybe able to obtain free debt advice from an IP, the CAB, and other debt charities. Many DMP and IVA providers do give free initial advice, but it is considered more to be the marketing and selling of a product rather than the giving of advice.

2.13 Are there restrictions on the debtor after the procedure?

After the debtor has finished the insolvency procedure of choice it is usually the case that the debtor is free of any restrictions to obtain credit. However the practicalities of the situation are likely to be that the debtor's credit rating is so poor that credit will be unavailable or prohibitively expensive. In respect of both Bankruptcy and DRO the debtor maybe subject to further restriction by way of a Bankruptcy Restriction Order (bro) or Bankruptcy Restriction Undertaking (bru), similar named orders apply for DROs.

Such orders and undertakings are obtained or given where the conduct of the debtor has been dishonest or where the debtor is otherwise to blame for their financial position. An order or undertaking operates for between 2 and 15 years depending on the dishonesty or culpability of the debtor.

2.14 Is the spouse (automatically) included in the procedure?

The debtor's spouse is not automatically included in the procedure, however they may find themselves drawn into the procedure because of the way it operates, there may also be debts which are jointly owed or where the non insolvent spouse has given guarantees.

2.15 In which way do the International or European Convention and Covenants play a role?

UK insolvency legislation is subject to both the EC Regulation on Insolvency Proceedings 2000 ("the EC Regulation") and the UNCITRAL Model Law. In addition, there is recognition of insolvency proceedings with other Commonwealth countries pursuant to section 426 of the Insolvency Act 1986.

The Cross-Border Insolvency Regulations 2006 set out how the above are to be applied in the UK. The UNCITRAL Model Law applies to foreign proceedings globally without reciprocation. The EC Regulation applies to dealings with EU countries, except for Denmark. If there is conflict with UK legislation, it is the international regulations that take precedence.

QUESTION 3

3. Position of the Creditor

In general terms creditors are classed as secured, preferential and non preferential.

In consumer insolvency procedures secured creditors are usually in respect of property loans and hire purchase agreements. It would not be unusual for a debtor's domestic property to have more than one loan secured against it. There are unlikely to be preferential creditors in consumer insolvency procedures as these relate to unpaid wages, salaries and holiday pay. Most creditors will fall into the class of non preferential unsecured creditors for example, credit card debts, loans and utility bills.

In bankruptcy, debts due to a spouse are paid after other creditors have been paid in full with statutory interest.

3.1 Can a creditor force the debtor to commence a procedure or oppose the debtor from doing so?

In respect of both DMPs and IVAs the creditor can refuse to accept the plan. For the IVA to be accepted over 75% of creditors who are entitled to vote and who do vote must vote in favour of the arrangement for it to be accepted. In addition the votes of connected parties as defined by the IA are excluded from the initial calculation.

A creditor can also petition the court for the bankruptcy of the debtor (IA S267).

3.2 Which creditors' claims can be excluded from a discharge?

In general the following debts are excluded from discharge in all procedures:

- Court fines.
- Obligations arising under family proceedings and maintenance assessments made under the Child Support Act 1991.
- Benefit overpayments, where the benefit is taken out of future benefits until discharged from bankruptcy.
- Student loans.

3.3 Does a creditor have to accept a curtailment of his claims?

In respect of both DMPs and IVAs once the debtor has complied with the terms of the arrangement the balance of any debt is written off. It is usual for any such arrangement to be made in full and final settlement of all debts.

In the case of both DRO and bankruptcy, the debtor is free of their debts once they have received their discharge, which is usually on the first anniversary of the insolvency.

In bankruptcy the creditors will receive payment of their debts from the realisation of the debtor's assets after the costs of bankruptcy have been met.

3.4 Do certain creditors receive more protection than others?

In general, domestic creditors are treated equally, and are considered to be unsecured non preferential creditors, the only type of creditor which has any protection are those which are secured and those which are excluded from bankruptcy. In that the secured debt remains secured on the asset to which the debt is attached and those excluded from the procedure are not written off.

QUESTION 4

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4. Avoidance actions

In general legal remedies to correct avoidance actions by the debtor only operate with in bankruptcy and DROs.

By their very nature DMPs and IVAs require the debtor to be open and honest about their affairs and how they found themselves in financial difficulty.

4.1 What are the legal proceedings to protect / realise the debtor's assets?

At the time of bankruptcy other than excluded assets the debtor's assets vest in the TinB. The debtor also has a duty to cooperate with and deliver up assets to the TinB. Who will take control of these assets and sell them to realise funds to meet the costs of the bankruptcy and pay creditors. The TinB will also investigate the debtor's affairs in an attempt to improve the return to creditors. In particular preferences (IA S340) and transactions at undervalue (IA S339) will be investigated and subject to application to court can be reversed or the debtor's estate compensated for the loss. It is common for these avoidance transactions to be between connected parties and as such it would be for the benefitting party to prove that there had not been a preference or transaction at undervalue. The TinB is also able to recover excessive pension contributions (IA S342A) for the benefit of the debtor's estate. The TinB can also recover after acquired property by serving the appropriate notice on the debtor whilst they are bankrupt and as such the asset will vest in the Trustee.

In addition there are a substantial number of IA offences which are listed in Chapter VI of the IA 1986, these deal with such things as concealment of assets and books and records, fraudulently dealing with and disposing of property, absconding and obtaining credit. Besides being criminal offences breaches of these provisions are likely to lead to a BRO.

QUESTION 5

5. Good faith

5.1 Does the principle of "good faith" play a role and in which way?

Good faith applies at all times in dealings with both the debtor and creditor. The debtor must honestly disclose not only their assets and liabilities but any dealings with assets in the lead up to the insolvency procedure. For example in the case of an IVA the debtor must state in their proposals that they have not committed any preferences or transactions at undervalue. If they have these must be disclosed and an explanation given of how they will be remedied. If the arrangement is approved and such transactions uncovered the arrangement could be terminated and the debtor declared bankrupt.

In bankruptcy the IA 1986 provides ample remedies for the Trustee to over turn the transaction and investigate the affairs of the debtor. If the debtor fails to co-operate the Trustee can request an examination in court and request that the debtor's automatic discharge from bankruptcy is suspended.

QUESTION 6

6. Re-payment plan

Differing types of repayment plan appear in all types of consumer insolvency procedure except DRO. In this excepted case the debtors must have less than £50 of surplus income per month, as well as having little or no assets (less than £300) and debts of no more than £15,000. In bankruptcy any such plan falls with in an ipa or ipo. It is usual for such payment plans to continue for a maximum of 3 years. If the debtor's circumstances change the debtor can apply to court for an amendment to the level of contribution.

In a consumer IVA it is usual for the debtor to make regular income contributions for 5 years. As part of the terms of the IVA the supervisor will be expected to monitor the debtor's income and expenditure on a regular basis and the contribution will be adjusted upward. If the debtor's circumstances change the debtor will need to request a modification to their IVA which will require creditor approval.

DMPs are much more flexible and controversially can continue for many years and offer no debt forgiveness. The debtor will be expected to make a regular contribution from their income which will usually be distributed on a pro-rata basis amongst the creditors after deducting the fee of the DMP provider. Again it is likely that the debtor's income will be monitored and the contribution reassessed.

It is considered best practice in determining whether or not a debtor can make a contribution that state benefits are excluded.

6.2 How long is the duration of such a plan?

This is best illustrated as follows:

- Bankruptcy 3 years.
- IVA 5 years.
- DMP Indeterminate.
- DRO No repayment.

6.3 Does the plan have an educational purpose?

None of the Insolvency procedures for individuals specifically provide for any formal debt education or counselling of the debtor. Some would say that going through the insolvency process should provide sufficient education and deterrent to the debtor to stop them repeating their financial mistakes.

QUESTION 7

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7. Voluntary Settlement

DMPs and IVAs are voluntary arrangements into which the debtor can enter into with the agreement of creditors.

DMPs usually rely on the repayment of debt from future income, whilst IVAs may do so but the IVA framework provides a method of making alternative arrangements.

The IVA legislation (IA Part VIII) is very flexible and within this framework many schemes of repayment can be offered.

Any scheme may offer to pay debts in full or in part, but always in full and final settlement. It may involve income payments, third party funds, the sale of assets or mixture of all three.

Bankruptcy and DROs are seen as the option of those who cannot or who will not pay. As such they are not seen as methods of agreeing a voluntary settlement with creditors especially as the period of Bankruptcy and the DRO is usually only 12 months. However if a debtor enjoys unexpected good fortune and is suddenly able to pay their debts, they may apply to the court for the annulment of their bankruptcy and as part of the application explain how they will provide funds to pay creditors.

QUESTION 8

8. Discharge

8.1 In which way is a discharge granted?

In both DMPs and IVAs discharge from the debts will be granted once the arrangement has been completed satisfactorily either by way of paying creditors in full or in accordance with the terms of the IVA so that full and final settlement of the debts has been achieved.

In bankruptcy, it would be normal for a first time bankrupt to receive their discharge on the first anniversary of the bankruptcy order. However if the debtor fails to co-operate the OR may apply for the discharge to be suspended. The debtor may also be subject to a BRO or BRU and as such the restrictions imposed on a bankrupt may continue.

8.2 Can a discharge after it has been granted be revoked?

In both DMP and IVA the debtor is not discharged until the arrangement is completed, as such this is not an issue. In respect of bankruptcy and DRO the IA provides detailed powers to the OR or TinB to properly investigate the debtors affairs whilst they are subject to the insolvency procedure. As such once a discharge is granted the debtor is released from their debts that are provable in their bankruptcy. The debtor still has a duty to co-operate with the OR or TinB in all matters relating to the realisation of assets and investigation of the debtors affairs. In addition, the debtor is not released from debts that are not provable in the bankruptcy and secured creditors are not prevented from realising their security.

QUESTION 9

9. Remuneration and Costs

In general terms the costs of the insolvency procedure are a first charge on the assets of the debtor and are paid in priority to creditors. In bankruptcy the order in which these costs are paid is laid down in law (IR6.224 (1)).

9.1 How are the costs of the procedure dealt with?

In DMPs the cost of administering the plan is either borne by the debtor or by the creditor and is usually calculated as an agreed percentage of the monthly contribution paid in to the plan. In IVAs the IP firstly acts as the nominee of the plan and subsequently if it is approved as the supervisor. The nominee's fee is agreed as a fixed sum and is not calculated by reference to time costs or a percentage of assets realised. Whilst the fees of the supervisor is usually

agreed as the time costs properly incurred in administering the case, but often the maximum fee is severely capped by creditors. The taking of the fee may also be dependent on the debtor complying with the terms of the arrangement and dividends being paid to creditors. Usually other costs are paid in priority to the IPs fees.

In bankruptcy the IS and ORs fees are laid down in law and are paid in priority to the remuneration and costs of the IP. The debtor's creditors determine the TinB's remuneration either by way of a general meeting or as a creditors committee. Traditionally the remuneration has been calculated by reference to the time costs properly incurred in the administration of the bankruptcy estate. In the past remuneration was also calculated as a percentage of assets realised and distributed to creditors. Now both the TinB and creditors can propose a range of methods to calculate fees that both properly reward the TinB for his efforts in realising assets and investigating the affairs of the debtor. For example, the TinB may be paid by way of a percentage for assets realised and time costs for investigating the affairs of the debtor. If the creditors and the TinB cannot agree a basis for the remuneration the matter can be referred to court by the TinB or the scale of fees used by the OR will be used to determine the fee.

9.2 Is the court the correct forum to scrutinise fees?

It is only in bankruptcy that the IPs fees are likely to be determined or scrutinised by the court. The TinB can refer the matter of his fees to court if he is unhappy with the fees approved by creditors and in contrast, if the creditors think the TinB's fees are excessive they can also refer the matter to the court. The costs of court procedures provide its own deterrent in helping to negotiate an acceptable fee for all sides. In a bankruptcy where creditors are paid in full with interest and funds are returned to the debtor it is not unusual for the debtor to take an interest in the level of fees charged and in some cases challenge the amount paid to the TinB.

9.3 What is the appropriate method of calculation of fees when dealing with compositions or voluntary arrangements?

As in all other types of personal insolvency procedure the two most popular methods of calculating fees is either by reference to the time costs incurred or as a percentage of realisations.

In most DMPs the fee will be calculated as a percentage of the monthly contribution, whilst in IVAs the fee is more likely to be the time costs incurred but this is likely to be severely limited to a low maximum amount by the creditors who have approved the IVA. In addition the ability to draw the fee may be restricted by certain conditions, such as the level of contributions paid and the timing of the payment of any dividend to creditors.

9.4 What is the method of calculation of fees when dealing with bankruptcy proceedings?

In bankruptcy the method of charging of fees is likely to depend on whether the case remained with the OR or was dealt with by an IP in the private sector.

The OR will apply a scale of fees which is set by law; the scale is subject to upward revision. The essential elements of the fee scale include, an administration fee, a percentage fee on the value of realisations achieved and dividends paid to creditors. There are numerous other fees charged by the OR for work done.

In contrast the IP is required by best practice to try and obtain a fee resolution from creditors based on the time costs properly incurred in administering the bankruptcy.

Creditors are in a position of being able to restrict the IPs fees, the alternative course of action for the IP is to either apply to court or rely on the scale of fees used by the OR.

9.5 Can IPs charge fees based on the value they create for creditors during an assignment?

In both IVAs and bankruptcy where an IP is appointed to deal with the assignment they must obtain the approval of creditors to charge fees. Traditionally time cost has been the bench mark used, but there is no reason why creditors could not approve a fee calculated by reference to realisations achieved, this could be done either as a percentage of realisations or some kind of success fee. Each assignment would be subject to separate negotiation and agreement.

QUESTION 10

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10. Cross-border considerations in consumer insolvency

10.1 Are overseas assets included?

In bankruptcy the debtors interest in all their assets (except assets excluded by law) vest in the TinB whether an IP or the OR. This includes assets in foreign jurisdictions, it is not uncommon to find that an individual may have an interest in land and buildings held overseas, other offshore assets are less common.

In an IVA it is expected that the debtor will make a full disclosure of all their assets and as such overseas assets would be included. If these assets had any realisable value creditors would expect that value to be made available.

10.2 Is forum shopping by the debtor for more favourable personal insolvency laws possible?

Forum shopping or bankruptcy tourism as it is known is a controversial subject with in the England and Wales personal insolvency system. There are stories in the popular press of many individuals coming from mainland Europe especially Germany to make themselves bankrupt, however the truth of the matter is that there are very few every year.

Any individual who complies with current legislative requirements can make themselves bankrupt in England and Wales.

QUESTION 11

11. What is the result of subsequent insolvencies?

There are no restrictions on the number of DMPs or IVAs which can be proposed by the debtor. However multiple applications over a period of time are likely to be rejected by creditors tired of the debtor's attempts to avoid paying their creditors.

The debtor cannot apply for a DRO if they are bankrupt, subject to an IVA or subject to a bro. In addition the debtor cannot apply for a DRO if they have had one in the last 6 years.

In bankruptcy the debtor usually receives their discharge from bankruptcy after 12 months. A second or subsequent bankruptcy would not prevent the debtor again receiving their discharge after 12 months, as it is dependant on the cause of the bankruptcy. However the likelihood of a bro or bru against the debtor is likely to increase.

QUESTION 12

12. Recommendations?

In England and Wales publicly available records are kept of the number of debtors who enter into IVAs, Bankruptcies and DROs. No such records are maintained for those in DMPs. Approximately 135,000 individuals entered into some form of formal personal insolvency procedure in 2010, the number of DMPs is not know but is probably between 400,000 and 750,000 at any one time.

Currently it is anticipated that these high numbers will continue. Overtime personal insolvency procedures have been used less by those in business and are now overwhelmingly used by individuals who find themselves unable to meet their domestic debts.

As stated at the start of this chapter the personal insolvency landscape of England and Wales is a patch work of procedures. The future of personal insolvency in England and Wales is currently subject to consultation.

The current system is confusing for the consumer and those who are looking for advice are unsure which way to turn. The debtor is bombarded with offers of help from advertisements on television, radio and the internet, as well as telephone cold calling and SMS messages.

IPs are regulated to one standard, whilst those providing DMPs to another.

There is a need for a single gateway procedure which provides protection for the debtor whilst the best solution for the debtor's financial problems is found. This advice must come from an independent impartial source.

The current procedures all have a place in the advisors tool box and also have their promoters and detractors, but an addition to the tool box maybe a standard IVA (SIVA) which is appropriate for many of those with domestic debt problems who can afford to repay the debts over an extended period of time. There is also criticism in some quarters of the cost of bankruptcy, some would like to make it cheaper whilst others at least maintain the current cost or even increase it so the debtor pays the full cost. One solution to lift the debtor out of bankruptcy would be to increase the debt limit on DRO from £15,000 to £25,000 and perhaps give a more generous asset allowance.

Missing in the system is any education programme and there is a need for debtors to receive counselling before going into any debt forgiveness procedure and education before they come out.

ESTONIA

QUESTION 1

1. What are the options or procedures available for a natural person / consumer regarding their over - indebtedness in your jurisdiction?

Introduction

The procedures available for a natural person (consumer) regarding over - indebtedness in Estonia are currently the following:

1) debt restructuring procedure stipulated in Debt Restructuring and Debt Protection Act (adopted 17 November 2010, in force since 5 April 2011); (hereinafter also: DRDPA) and

2) bankruptcy procedure stipulated in Bankruptcy Act (adopted 22 January 2003, entered into force 1 January 2004) (hereinafter also: BA).

The purpose of the debt restructuring procedure is to allow a natural person having solvency problems (a debtor) to restructure debts in order to overcome the solvency problems and to avoid a bankruptcy procedure, whereas the justified interests of both the debtor and creditors are taken into account.

In a bankruptcy procedure, the claims of the creditors are satisfied out of the assets of the debtor pursuant to the procedure prescribed in the Bankruptcy Act by selling the assets of the debtor. A debtor is insolvent if the debtor is unable to satisfy the claims of the creditors and such inability due to the debtor's financial situation is not temporary. A debtor is given the opportunity to be released from obligations through bankruptcy proceedings pursuant to the special procedure prescribed in Chapter XI of the Bankruptcy Act.

1.1 The legal grounds for the opening of or access to those procedures

The debtor shall be considered to have solvency problems if the debtor is unable or probably unable to perform obligations at the time of the monetary obligations becoming collectable. Both DRDPA and BA set requirements for the content of debt restructuring and bankruptcy petitions.

The debt restructuring petition of the debtor must state at least the following information:

- debtor's explanation about the solvency problems and the causes thereof;
- whether the debtor has taken measures to avoid or eliminate the solvency problems and which measures have been taken if any;
- debt restructuring measures the applying of which the debtor is petitioning for;
- the reasons why upon applying the debt restructuring measures the debtor will be able to perform obligations and will probably be able to avoid insolvency;

- the debtor's confirmation that he or she does not know of any circumstances that could exclude debt restructuring and that he or she undertakes to co - operate with the court and an adviser (if assigned);

- the debtor's opinion about the necessity of assigning an adviser;

- the data allowing verification of payment of the state fee.

The bankruptcy proceedings could be initiated if a debtor's inability to satisfy the claims of the creditors is permanent. The bankruptcy petition of a creditor shall substantiate the debtor's insolvency and prove the existence of a claim. If a bankruptcy petition is filed by the debtor, he or she shall substantiate the insolvency in the bankruptcy petition. A debtor shall substantiate the insolvency by annexing an explanation concerning the cause of the insolvency and a list of the debts to the bankruptcy petition.

1.2 How are these procedures made available?

Both procedures are made available by presenting a petition to the county court (see question 1.1).

DRDPA stipulates that before filing a debt restructuring petition with a court, the debtor shall take necessary measures for achieving an extra - judicial restructuring of the debt with creditors.

BA stipulates requirements both for debtor's and creditor's bankruptcy petitions. Pursuant to BA before presenting the bankruptcy petition the creditor *inter alia* has in writing to caution the debtor about creditor's intention to file a bankruptcy petition.

1.3 Who can commence the procedure?

Either a debtor or creditor may commence proceedings.

The debt restructuring procedure may be initiated only by the debtor. The debtor shall file the debt restructuring petition to the county court of place of residence.

A petition to commence a bankruptcy procedure may be filed by the debtor or a creditor in the county court of place of residence.

1.4 Who will supervise the procedure?

Both procedures are conducted as judicial and extra - judicial proceedings. Both procedures are opened and supervised by the court.

In a debt restructuring procedure, the court may on the basis of the debtor's petition or on the court's own initiative assign an adviser upon accepting a debt restructuring petition, in order to ensure conformant conducting of the procedure, if this is necessary for determining the debtor's financial situation or if this would clearly facilitate or hasten the conducting of the procedure or would ensure better protection of the interests of the debtor or the creditors.

In a bankruptcy procedure the court appoints a bankruptcy trustee to administer the bankruptcy procedure.

1.5 What are the criteria such a person has to satisfy?

In a debt restructuring procedure a person having the necessary knowledge and experience may be assigned as an adviser. Generally, a bankruptcy trustee shall not be assigned as an adviser in the debt restructuring procedure. Based on the current law in force the following persons shall not be advisers:

- an employee of the court;
- the debtor or a creditor or a person dependent on the debtor or on a creditor;
- persons with a criminal record for an intentionally committed criminal offence;
- persons who, during the preceding ten years, have been removed from the position of judge, notary, prosecutor or bailiff or disbarred, or whose professional activities as an auditor have been terminated except termination of professional activities on the basis of the application of the auditor;
- persons who have been released from public service for a disciplinary offence during the preceding five years;
- persons who are bankrupt;
- persons with regard to whom a prohibition on business applies;
- persons who have been deprived of the right to be trustees in bankruptcy or operate as an undertaking by a court judgment.

In bankruptcy proceedings the following members of the professional union of the Chamber of Bailiffs and Bankruptcy Trustees (hereinafter the Chamber) may be bankruptcy trustees:

- natural persons to whom the Chamber has granted the right to act as trustees;
- sworn advocates and the senior clerks of sworn advocates;
- auditors;
- bailiffs whose level of education complies with specific requirement laid down in the Courts Act.

A bankruptcy trustee must have the confidence of the court and the creditors. A trustee shall not be an employee of the court and he or she must be independent of the debtor and the creditors. When giving consent to the court to act as a trustee, the person shall confirm in writing that he or she is independent of the debtor and the creditors. A person connected with the judge or assistant judge hearing the matter or shall not be appointed as a bankruptcy trustee.

1.6 What are the available alternatives?

There are no other alternatives that are mentioned in the law that is in force.

QUESTION 2

2. Position of the debtor and the spouse

The consequences prescribed in the debt restructuring plan for the debtor and for persons whose rights are affected by the plan shall enter into force upon approval of the debt restructuring plan in the debt restructuring procedure. The debtor does not have restrictions as far as he or she fulfils the debt restructuring plan approved by the court. If the debtor is not able to fulfil the plan, the creditor will usually notify the court and the court most probably will annul the plan. The usual consequence of the annulment is that the debtor will probably end up being bankrupt and fall under the scope of the bankruptcy procedure stipulated in BA.

Once a bankruptcy declaration is given the following consequences follow:

- the debtor's assets become the bankruptcy estate;
- calculation of interest and fines for delay on claims against the debtor shall be terminated;
- the right to administer the debtor's assets and the right to be a participant in court proceedings in lieu of the debtor with regard to a dispute relating to the bankruptcy estate or the assets which may be included in the bankruptcy estate is transferred to the bankruptcy trustee;
- the debtor is deprived of the right to enter into transactions relating to the bankruptcy estate;
- the debtor's other rights are restricted pursuant to the bankruptcy procedure prescribed by the BA.

The provisions granting protection of the spouse's interests in the home during bankruptcy procedure are not stipulated by the law. A spouse is not automatically included in the bankruptcy procedure by law. If assets are in the joint ownership of a debtor and spouse, the bankruptcy trustee shall claim division of the joint property and the share of the debtor in the joint ownership. The debtor has the right to participate in the proceedings together with the bankruptcy trustee. A bankruptcy trustee may file an action for the division of joint property within one year as of the declaration of bankruptcy. In addition, a court shall revoke the marital property contract between a debtor and spouse or the agreement on the division of their joint property whereby the debtor assigned assets or share in the joint property to a material extent, if the marriage contract or the agreement on the division of joint property was entered into:

- within one year before the commencement of the bankruptcy proceedings or during the period from the commencement of the bankruptcy proceedings until declaration of bankruptcy;

- within five years before the commencement of the bankruptcy proceedings unless the debtor or spouse proves that the debtor was solvent at the time of dividing the property or assigning the assets and did not become insolvent due to division of the joint property or assignment of the assets.

If a debtor is deprived of means of support due to bankruptcy, the court shall order payment of necessary support to the debtor and dependants (which could include spouse) out of the bankruptcy estate for up to two months on the basis of an application of the debtor. The court may extend such term with good reason.

2.1 Which assets and income are excluded from the procedure?

DRDPA by the definition does not specify which debtor's income or assets are included / excluded. However the DRDPA stipulates the requirements for a debt restructuring petition and debt restructuring plan. The debtor has to present data about income and assets.

In a bankruptcy procedure, the debtor's assets which pursuant to law are not subject to a claim shall not be included in the bankruptcy estate. According to the Code of Enforcement Procedure various state benefits (i.e state family support, disabled person's, parental support benefits etc) shall be excluded from bankruptcy procedure.

The income shall not be arrested if it does not exceed one month minimum salary.

2.2 Does the debtor have restrictions on the disposition of his assets?

In restructuring procedures the debtor does not by default have any restrictions on the disposition of his assets. However the court can set some restrictions upon accepting a debt restructuring petition.

In bankruptcy proceedings the debtor is deprived of the right to enter into transactions relating to the bankruptcy estate.

2.3 Which assets and income are included in the procedure?

Generally all the debtor's assets are included in a bankruptcy procedure. The bankruptcy estate means the assets of the debtor at the time of the declaration of bankruptcy, assets reclaimed or recovered by the bankruptcy trustee and the assets acquired by the debtor during the bankruptcy proceedings.

2.4 Are pension schemes included?

Current legislation in force does not have specific regulation upon pension schemes. However by the definition of bankruptcy estate pension schemes (excluding state pension) should be the part of the bankruptcy estate.

2.5 Does the debtor donate to the estate a part of his income for the benefit of the creditors?

See answer to question 2.1

2.6 Is there a means test?

Current legislation in force does not stipulate any means test.

2.7 Is there a garnishment of regular income?

There is no garnishment of regular income as such in debt restructuring procedures. The debtor has to disclose in the debt restructuring petition presented to the court inter alia the list of income and assets and copies of debtor's tax declarations.

In a bankruptcy procedure the regular income of the debtor is part of the bankruptcy estate. See also answer to question 2.1

2.8 Is there protection for the debtor's privacy, his mail and his home?

Debtor's privacy and mail are protected.

Current legislation does not stipulate any protection for debtor's home. So it may be the case that the debtor's home is sold to satisfy the claims of the creditors.

2.9 Is there protection of the spouse's interests in the home?

If assets are in joint ownership of a debtor and spouse, the bankruptcy trustee shall claim division of the joint property and the share of the debtor in the joint ownership.

2.10 Is the debtor restricted to receive information?

In general, a debtor is not restricted from receiving information. A debtor has the right to examine the bankruptcy trustee's file and the court file of the bankruptcy matter. A bankruptcy trustee may, for justified reasons, deny a debtor's request to examine a document included in the trustee's file if this is detrimental to the conduct of bankruptcy proceedings.

2.11 Has the debtor the liberty to move freely and to leave any State, including his own?

In general the debtor keeps the liberty to move freely. However the court can by the ruling in bankruptcy procedure prohibit the debtor to depart from residence.

2.12 Is the debtor entitled to cost-free legal assistance?

A debtor is under certain circumstances entitled to cost - free legal assistance funded by the state. See also answer to question 9.

2.13 Are there restrictions on the debtor after the procedure?

During the procedure provided for in Chapter XI of the Bankruptcy Act the debtor is required to engage in reasonably profitable activity or seek such activity if he or she does not have it. A debtor shall notify the court and the trusted representative appointed by the court immediately if he or she changes residence or place of establishment, shall not conceal the income or assets received, and shall provide information at the request of the court or the trusted representative concerning activities or seeking for activity and concerning income and assets. A debtor is required to transfer the income received from an employment or service relationship, any other similar relationship or from business to the trusted representative each month. A debtor may keep 15 per cent of the income if one year has passed from the commencement of the proceedings for the release of the debtor from obligations, 20 per cent if two years, and 25 per cent if three years have passed from the commencement of the proceedings. A debtor need not transfer the income which cannot be subject to a claim pursuant to law. A debtor is required to transfer one half of the value of the assets received by succession.

2.14 Is the spouse (automatically) included in the procedure?

A spouse is not automatically included in the bankruptcy procedure by law. If assets are in the joint ownership of a debtor and spouse, the bankruptcy trustee shall claim division of the joint property and the share of the debtor in the joint ownership.

2.15 In which way do the International or European Convention and Covenants play a role?

The European Insolvency Regulation is applicable to bankruptcy procedures (in Estonian: *pankrotimenetlus*), which is listed in Annex A and B of the Regulation. The European Insolvency Regulation is not applicable to debt restructuring procedures.

QUESTION 3

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3. Position of the creditor

A creditor in bankruptcy proceedings (creditor) is a person who has a proprietary claim against the debtor which has arisen before the declaration of the bankruptcy. As a bankruptcy procedure is a joint procedure it refers to all creditors.

In a debt restructuring procedure there is no rule that all creditors should be involved in that procedure. The debt restructuring procedure refers to those creditors whose claims are restructured.

A bankruptcy petition regarding the claim for which a debt restructuring plan is in force cannot be filed during the validity of the debt restructuring plan.

Approval of a debt restructuring plan shall not limit the right of a creditor having a pledge or other item of security and having disagreed with the restructuring of claim to satisfy claim via such security. Approval of a debt restructuring plan shall not prohibit the creditors from filing a claim for recovery of assets and shall not prohibit deciding such a claim in an execution procedure. A bailiff shall release the yields to the creditors included in the debt restructuring plan only upon the court's order on the basis of the debt restructuring plan.

During the proceedings for the release of a debtor from obligations, the creditors in the bankruptcy proceedings, including the creditors in the bankruptcy proceedings who did not file their claims during the bankruptcy proceedings, shall not file claims for payment with regard to the debtor's assets. Creditors whose claim against the debtor has arisen after the declaration of bankruptcy shall, during the proceedings for the release of the debtor from obligations, not file claims for payment with regard to the amounts of money which are to be transferred to the trusted representative.

If a debtor is released from obligations which were not performed during the bankruptcy proceedings, the claims of the creditors against the debtor, including the claims of the creditors who did not file their claims during the bankruptcy proceedings, terminate. Release of a debtor from obligations which were not performed during the bankruptcy proceedings shall not terminate the obligations to compensate for damage intentionally caused by unlawful actions or the obligations to pay for the support of a child or parent. If a debtor satisfies a claim of a creditor after the debtor has been released from obligations which were not performed during the bankruptcy proceedings, the assets transferred in performance of the obligation shall not be reclaimed from the creditor.

3.1 Can a creditor force the debtor to commence a procedure or oppose the debtor from doing so?

A bankruptcy petition may be filed by a creditor (see answer to question 1.3), however the debt restructuring petition only by the debtor. Appeals against the court rules are applicable.

The petitioning creditor may file appeals against the bankruptcy ruling within 15 days after publication of the bankruptcy notice.

A creditor may file an appeal against the ruling approving the debt restructuring plan if he or she has previously filed an objection to it.

3.2 Which creditors' claims can be excluded from a discharge?

In restructuring procedure the debtor by himself / herself chooses which creditors' claims are included into the debt restructuring plan.

A debtor may be released from obligations which were not performed during the bankruptcy proceedings. During the proceedings for the release of a debtor from obligations, the creditors in the bankruptcy proceedings, including the creditors in the bankruptcy proceedings who did not file their claims during the bankruptcy proceedings, shall not file claims for payment with regard to the debtor's assets. Creditors whose claim against the debtor has arisen after the declaration of bankruptcy shall, during the proceedings for the release of

the debtor from obligations, not file claims for payment with regard to the amounts of money which are to be transferred to the trusted representative.

If a debtor is released from obligations which were not performed during the bankruptcy proceedings, the claims of the creditors against the debtor, including the claims of the creditors who did not file their claims during the bankruptcy proceedings, terminate. Release of a debtor from obligations which were not performed during the bankruptcy proceedings shall not terminate the obligations to compensate for damage intentionally caused by unlawful action or the obligations to pay support for a child or parent. If a debtor satisfies a claim of a creditor after the debtor has been released from obligations which were not performed during the bankruptcy proceedings, the assets transferred in performance of the obligation shall not be reclaimed from the creditor.

3.3 Does a creditor have to accept a curtailment of his claim?

In a debt restructuring procedure, a creditor can vote for or against the proposed debt restructuring plan.The court shall approve the debtor's proposed restructuring plan if no creditor or the debtor has argued against it within the relevant deadline. The court may approve a restructuring plan also if at least one half of the creditors of the claims not secured by a pledge with their claims representing at least one half of the claims not secured by a pledge have agreed with the debt restructuring and the restructuring plan does not treat the creditors having filed an objection to the restructuring significantly worse than other creditors, unless there is a justified reason to prefer a creditor. The court may also approve a restructuring plan with which the creditors do not agree or with which the creditors have agreed in smaller scope than prescribed, if the court has an opinion that:

- debt restructuring is justified considering the eligible interests and rights of the parties;

- the restructuring plan does not treat any creditor significantly worse than other creditors unless there is a justified reason to prefer a creditor.

The court shall assess, among other factors, the scope in which it would be possible to satisfy the claim of a creditor having filed an objection in a bankruptcy procedure when compared to the amount payable to that creditor on the basis of the restructuring plan. The comparison data of a bankruptcy procedure shall be compiled on the basis of a situation of conducting the procedure as of the time of initiating the debt restructuring procedure. The comparison shall also take into account the possibility of relieving a debtor being a natural person from debts on the basis of the income level of the debtor during the debt restructuring procedure. The circumstances stated in this subsection shall be recorded in the justification part of the ruling made about approving the restructuring plan.

A claim secured by a pledge may be restructured only with the consent of the creditor, even if the pledgor is a third party. Reduction of interest claims and fines for delayed claims to the amounts prescribed in the law shall not be considered an adverse treatment of a creditor. Before approving a restructuring plan, the court may hear the debtor and the creditors and may assign one or several experts to assess the justification of debt restructuring. Experts shall not be assigned without consent of the debtor.

In the bankruptcy proceedings, claims of the creditors shall be satisfied in the following order:

(i) accepted claims secured by pledge;

(ii) other accepted claims which were filed within the specified term and;

(iii) other accepted claims which were not filed within the specified term.

After the sale of bankruptcy estate and the meeting for acceptance of claims, a trustee shall file with a court a distribution proposal. In the distribution proposal, the trustee shall determine, inter alia, a distribution ratio that is the proportion of money received from the sale of the bankruptcy estate which a creditor has the right to receive on the basis of an accepted claim of the corresponding ranking.

3.4 Do certain creditors receive more protection than others?

Approval of a debt restructuring plan shall not limit the right of a creditor having a pledge or other item of security and having disagreed with the restructuring of the claim to satisfy the claim via such security. Approval of a restructuring plan shall not prohibit the creditors from filing a claim for recovery of assets and shall not prohibit deciding such a claim in an execution procedure. A bailiff shall release the yields to the creditors included in the debt restructuring plan only upon the court's order and on the basis of the debt restructuring plan.

The claims of pledgee's are satisfied in the first ranking position in the bankruptcy procedure.

QUESTION 4

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4. Avoidance actions

4.1 What are the legal proceedings to protect / realize the debtor's assets?

Approval of a debt restructuring plan shall not prohibit the creditors from filing a claim for recovery of assets and shall not prohibit deciding such a claim in an execution procedure. A bailiff shall release the yields to the creditors included in the debt restructuring plan only upon the court's order and on the basis of the debt restructuring plan.

As general grounds, in recovery, the court shall revoke transactions which were concluded or other acts which were performed by the debtor before the declaration of bankruptcy and which damage the interests of the creditors. If a transaction subject to recovery is concluded or any other act subject to recovery is performed between the appointment of an interim bankruptcy trustee and the declaration of bankruptcy, the transaction or act is deemed to damage the interests of the creditors. In general, a court shall revoke transactions concluded:

- during the period from the commencement of the bankruptcy proceedings until declaration of bankruptcy;

- within one year before the commencement of the bankruptcy proceedings if the other party knew or should have known that the transaction damages the interests of the creditors;

- before commencement of the bankruptcy proceedings if the transaction was concluded within three years before the commencement of the bankruptcy proceedings and the debtor intentionally damaged the interests of the creditors by the transaction and the other party to the transaction knew or should have known that the debtor damaged the interests of the creditors by the transaction;

- within five years before the commencement of the bankruptcy proceedings if the debtor intentionally damaged the interests of the creditors by the transaction and the other party to the transaction was a person connected with the debtor and knew or should have known of the damage.

If a transaction was concluded within six months before the appointment of an interim bankruptcy trustee, the other party to the transaction is presumed to have known that the debtor damaged the interests of the creditors by the transaction. A person related to the debtor is presumed to know that the debtor intentionally damaged the interests of the creditors by a transaction.

Specific provisions are available for bankruptcy procedure also in case of recovery of gratuitous contract, recovery of division of joint property, recovery of performance of financial obligations, recovery of security, recovery to transactions with immovables and recovery in respect of legal successors.

QUESTION 5

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5. Good faith

5.1 Does the principle of "good faith" play a role and in which way?

Principle of good faith is not *expressis verbis* stipulated in laws.

If a debtor does not fulfill the debt restructuring plan, then the plan will be annulled according to the DRDPA.

According to the BA the principle of good faith plays a role in such a way that a debtor is required to engage in reasonably profitable activity or seek such activity at least to get discharge eventually. A debtor shall not conceal the income or assets received, and shall provide information at the request of the court or the trusted representative appointed by the court concerning activities or seeking for activity and concerning income and assets. Thus, a debtor must be co-operative and show that he or she acts in good faith.

QUESTION 6

6. Re-payment plan

6.1 Is the debtor submitted to a payment plan?

During the procedure of releasing the debt after bankruptcy provided for in Chapter XI of the BA, a debtor is required to transfer the income received from an employment or service relationship, any other similar relationship or from business to the trusted representative each month. A debtor may keep 15 per cent of the income if one year has passed from the commencement of the proceedings for the release of the debtor from obligations, 20 per cent if two years, and 25 per cent if three years have passed from the commencement of the proceedings. A debtor is required to transfer one-half of the value of the assets received by succession.

6.2 How long is the duration of such a plan?

There is no fixed deadline or fixed duration for the debt restructuring plan stipulated in DRDPA, because it depends on certain circumstances and proposals made by the debtor to the creditors in each individual case. Thus, the term of the debt restructuring plan can be flexible.

6.3 Does the plan have an educational purpose?

Re - payment plans have an educational purpose.

QUESTION 7

7. Voluntary settlement

7.1 What are the possibilities for a voluntary settlement?

The debt restructuring procedure is aimed at voluntary settlement with creditors. It allows a natural person (consumer) having solvency problems to restructure debts in order to overcome the solvency problems and to avoid a bankruptcy procedure.

QUESTION 8

8. Discharge

8.1 In which way is a discharge granted?

At the request of a debtor, the court shall decide to release the debtor from obligations which were not performed during the bankruptcy proceedings by a ruling given from three to five years after commencement of the proceedings for the release of the debtor from obligations. The court shall hear the trusted representative, the debtor, and the creditors who have requested to be heard before taking a decision. The court can also on reasonable grounds extend the period up to seven years after commencement of the proceedings for the release of the debtor from obligations.

8.2 Can a discharge after it has been granted be revoked?

At the request of a creditor, the court may annul the ruling on the release of the debtor from obligations which were not performed during the bankruptcy proceedings within one year as of the making of the ruling if it becomes evident that the debtor has intentionally violated obligations during the proceedings for the release of the debtor from obligations and has thereby materially hindered satisfaction of the claims of the creditors. Before deciding on annulment of a ruling on the release of a debtor from obligations which were not performed during the bankruptcy proceedings, the court shall hear the debtor and the representative.

QUESTION 9

9. Remuneration / costs

9.1 How are the costs of the procedure dealt with?

A debtor shall cover the expenses of the debt restructuring procedure. In general, the procedure expenses of the creditors shall be covered by the creditors. The court may order the debtor to cover the procedure expenses of the creditors if the debtor has knowingly filed an unjustified petition for debt restructuring or has caused procedure expenses to creditors in other ways by knowingly submitting incorrect information or knowingly submitting an unjustified petition or objection. The debtor shall not be entitled to state procedural aid for covering the expenses in order to pay the state fee. If executing a debt restructuring plan, the debtor shall not have to compensate the expenses of state procedure aid. Upon assigning an adviser, the court shall prescribe the amount that the debtor must pay to the deposit account of the court in order to cover the adviser's remuneration and expenses and shall state the deadline for paying this amount.

In a bankruptcy procedure, a court may, by a ruling, require a petitioning creditor to pay an amount of money specified by the court into court in order to cover the remuneration and expenses of the interim bankruptcy trustee if there is reason to presume that the bankruptcy estate is not sufficient to cover the expenses. An interim bankruptcy trustee has the right to receive remuneration in the amount determined by the court for the performance of duties and demand reimbursement of the necessary expenses incurred in the performance of duties. The court determines the amount of the remuneration taking into consideration the volume and complexity of the duties of the interim bankruptcy trustee and professional skills. The court shall verify whether the expenses incurred in the performance of the duties of the interim bankruptcy trustee were justified and shall approve the amount of the necessary and justified expenses.

Bankruptcy trustees have the right to receive remuneration for the performance of their duties. The court shall determine the remuneration of a trustee in bankruptcy upon approval of the final report of the bankruptcy proceedings after having heard the opinions of the trustee, the debtor and the creditors' committee. The remuneration of a bankruptcy trustee shall be calculated on the basis of the money which has been received and included in the bankruptcy estate as a result of the sale and recovery of the bankruptcy estate and other activities of the bankruptcy trustee. The court shall determine the amount of the remuneration taking into account the volume and complexity of the work of the bankruptcy trustee and professional skills. In the calculation of the remuneration of a bankruptcy trustee, the assets of the debtor at the time of the declaration of bankruptcy or assets received independently of the activities of the trustee shall not be taken into account. In general, a court has wide discretion within limits stipulated in Section 65[1] of the BA in prescribing remuneration of the bankruptcy trustee. The amount of the remuneration shall not be less than 1 (one) per cent of the money which has been received and included in the bankruptcy estate as a result of the sale and recovery of the bankruptcy estate and other activities of the trustee. If a court finds upon approval of a final report that the bankruptcy trustee has incurred unnecessary expenses out of the bankruptcy estate in performing duties, the court shall deduct such expenses from the remuneration of the trustee. If bankruptcy proceedings are conducted by more than one trustee, the trustee's remuneration shall be divided between them. The court may give an order granting procedural assistance for covering the remuneration and the expenses of a trustee.

In addition to the remuneration of a bankruptcy trustee, he or she has the right to request the reimbursement of the necessary expenses incurred in the performance of obligations. For that purpose, a bankruptcy trustee shall, after each three months as of declaration of bankruptcy, submit a report on the expenses incurred during that period to the creditors' committee and the court. The creditors' committee and the court have the right to demand submission of expense receipts and additional information from the bankruptcy trustee. A court may refuse to approve reimbursement of the expenses, of which the bankruptcy committee and the court were not notified in due time.

There are no provisions laid down *expressis verbis* in laws in Estonia for the remuneration and reimbursement of the necessary expenses incurred in the performance of the trusted representative's (in Estonian: *usaldusisik*) obligations.

9.2 Is the court the correct forum to scrutinize fees?

The fees are scrutinized by court. The court shall determine the amount of the remuneration taking into account the volume and complexity of the work of the bankruptcy trustee and professional skills. In the calculation of the remuneration of a bankruptcy trustee, the assets of the debtor at the time of the declaration of bankruptcy or assets received independently of the activities of the trustee shall not be taken into account. In general, a court has wide discretion within limits stipulated in Section 65[1] of the BA in prescribing remuneration of the bankruptcy trustee.

9.3 What is the appropriate method of calculation of fees when dealing with compositions or voluntary arrangements?

In debt restructuring procedure the debtor shall cover the expenses of the debt restructuring procedure. Thus the law does not stipulate methods of calculation of fees. The methods may include calculating fees by reference to the times cost incurred or as a percentage of realization of assets.

9.4 What is the method of calculation of fees when dealing with bankruptcy proceedings?

The remuneration of a bankruptcy trustee shall be calculated on the basis of the money which has been received and included in the bankruptcy estate as a result of the sale and recovery of the bankruptcy estate and other activities of the bankruptcy trustee. The fee of the bankruptcy trustee varies from 1 per cent to 35 per cent of bankruptcy estate. The court shall determine the amount of the remuneration taking into account the volume and complexity of the work of the bankruptcy trustee and professional skills.

9.5 Can IPs charge fees based on the value they created for the creditors during an assignment?

As trustee fees are based on the money received from the sale of a bankruptcy estate and recovery. BA limits the remuneration and stipulates the maximum amount of the remuneration payable to a trustee on a bankruptcy estate exceeding 640 000 euro is up to 5 per cent of the bankruptcy estate.

QUESTION 10

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10. Cross-border considerations in consumer insolvency

10.1 Are overseas assets included?

All the assets (except assets exempted by law) wherever located are included in the both procedures. See also answer to the question 2.1

Any natural or legal person may be bankrupt according to BA unless otherwise provided by law.

10.2 Is forum shopping by the debtor for more favourable personal insolvency laws possible?

Forum shopping by the debtor for more favorable personal insolvency laws may be possible. Debt restructuring procedure can be petitioned for by a debtor whose place of residence is in Estonia and has been in Estonia for at least 2 (two) years before filing the debt restructuring petition.

QUESTION 11

11. What is the result of subsequent insolvencies?

There are no specific provisions provided by law about the result of subsequent insolvencies. In the bankruptcy procedure the debtor usually receives their discharge of debt after five years. The subsequent bankruptcy can be declared by the court after ten years a) before the appointment of an interim bankruptcy trustee, b) the court has decided to release the debtor from monetary obligations or d) dismissed the debtor's petition for release from monetary obligations due to a bankruptcy offence committed by the debtor.

QUESTION 12

12. Recommendations?

The debt restructuring procedure is rather new and a modern procedure in Estonia. Thus, it could be that the debt restructuring procedure is not well-known to the debtors and not frequently used. As for a creditor, in order to obtain information about the status of the insolvency procedure of natural persons (consumers), the public register (or publicly available information) providing the record on the status of the procedure is needed. In addition, educational programmes (even at primary school level) and proper debt counseling system could be useful to create awareness for both the creditors and the debtors.

FRANCE

QUESTION 1

1. What are the options or procedures available for a natural person / consumer regarding their over - indebtedness in your jurisdiction?

Under French regulations natural persons are subject to insolvency proceedings. Merchants, craftsmen, liberal professionals and farmers can be declared bankrupt under the French Commercial Code.

Non - merchant natural persons who are neither craftsmen nor farmers, nor liberal professionals, can qualify for the civil over - indebtedness procedure [*procédure de surendettement*] for the payment of a liability based solely on non professional debts.

The following sub sections deals with the two civil over - debtedness procedures.

1.1 The legal grounds for the opening of or access to those procedures

The procedure is covered by Articles L. 330-1 and L. 332-5 to L. 332-12 of the Consumer Code in their wording resulting from Act No. 2003-710 of 1 August 2003 covering guidance and scheduling for the city and urban renovation. The regulatory texts appear in Articles R. 332-11 to R. 332-37 forming section 3 of chapter II of part III of book III of the afore mentioned Code, created by Decree No. 2004-180 of 24 February 2004.

The legislation has also been updated by Law No. 2010-737 - July 1st 2010.

Pursuant to the new Article L. 330 -1 of France's Consumer Code [*Code de la Consommation*], persons eligible for the personal recovery procedure [*procédure de rétablissement personnel*] has to be natural and in good faith, who are in an irretrievably compromised situation. Accordingly, in order to be eligible for personal recovery, the debtor must satisfy two conditions, one concerning about the person, the other concerning the person's assets and liabilities.

1.2 How are these procedures made available?

The application of the procedure requires the referral of the matter to the enforcement judge [*juge de l'exécution*] (C. consom., Art. L. 330-1), who has the relevant jurisdiction to hear the case. The judge will hand down a judgment initiating the proceedings, if applicable.

Regardless of the circumstances, the matter cannot be referred to the enforcement judge for the purposes of initiating the personal recovery procedure without passing through the over - indebtedness commission [*commission de surendettement*], which is the mandatory entry point for all matters.

1.3 Who can commence the procedure?

Since Act No. 2010-737 of 1 July 2010, the over - indebtedness commission has had two options (C. consom., Art. L. 330-1, amended by L. No. 2010-737, 1 July. 2010, Art. 44, 3°) with respect to the handling of a debtor's assets and liabilities. It can recommend personal recovery without legal liquidation, or it can refer the matter to the enforcement judge for the purpose of initiating the personal recovery procedure with legal liquidation. This latter scenario requires that the debtor possess property other than movable property necessary for everyday activities, non professional property critical to engaging in the debtor's professional activity, and property without market value, or property where the selling expenses would clearly be disproportionate based on its fair market value. The referral of the matter to the enforcement judge is dependent on the obtaining of the debtor's property.

1.4 Who will supervise the procedure?

The judge, who is the judge of the district court [*tribunal d'instance*] is responsible to rule on this dispute. Art. L. 213-6 stipulates that a decree can designate, in the jurisdiction of each court of first instance [*tribunal de grande instance*], one or more district courts, the judges that shall have sole jurisdiction to rule on these measures, and on the relevant procedure (C. org. jud., Art. L. 221-8-1).

1.5 What are the criteria such a person has to satisfy?

The criteria are good faith of the debtor in an irretrievably compromised situation, or temporarily not being able to pay big creditors.

1.6 What are the available alternatives?

Triggering of the personal recovery procedure at the request of the over - indebtedness commission

This is possible if, during the investigative phase, it appears that the debtor's situation is irretrievably compromised (C. consom., Art. L. 331-3 and L. 331-7-2). In such an event, the commission can request the debtor to appear and obtain his consent. If the latter fails to reply to the invitations to appear, it shall be deemed a refusal (C. consom., Art. L. 331-3).

In these circumstances, the commission continues its mission to handle the over - indebted debtor's situation through measures running the gamut from the preparation of an agreed plan, to the laying down of recommendations, up to a moratorium, with, if applicable, a partial forgiveness of non professional and professional debts (C. consom., Art. L. 331-7-1). If the debtor consents, the commission shall send the report to the enforcement judge's registry, by letter, together with the decision as to which solution will be used to handle the dossier, and the debtor's written consent. Pursuant to Article L. 331-3 of the Consumer Code, the debtor shall be entitled to appeal the decision to pursue the personal recovery option. However, in accordance with Articles L. 332-6 and L. 332-12 of the Consumer Code, the decision as to which solution to pursue results in the matter being referred to the judge who must rule on whether or not the debtor's asset liability situation is irretrievably compromised.

Article L. 331-3-1 of the Consumer Code stipulates that the referral of the matter to the enforcement judge for the purposes of initiating the personal recovery procedure suspends the enforcement procedures, including measures to expel the debtor from his lodging. This suspension applies until the opening judgment. The purpose of this rule is to ensure equality between creditors by avoiding disorderly proceedings. This is because it is not unusual for certain creditors, once they become aware that the matter is being steered towards a personal recovery procedure, to hastily implement enforcement proceedings to obtain payment of their receivables prior to the announcement of the opening judgment, which is always characterised by a suspensive effect (C. consom., Art. L. 332-6, paragraph 2).

This effect is also attributed to the referral of the matter to the enforcement judge and continues after the opening judgment, pursuant to Article L. 332-6, paragraph 2 of the Consumer Code. The other purpose of the rule is to prohibit the tenant's expulsion, thereby enabling the tenant to remain on the leased premises, which in turn means that the debtor's situation will not become overly precarious. However, the suspensive effect does not prevent the lessor from bringing a petition for formal acknowledgment of the termination of the debtor's residential lease pursuant to Article 24 of Act No. 89-462 of 6 July 1989.

Triggering of the personal recovery procedure at the debtor's request

There are three scenarios that are possible:

(i) If requested by the debtor during an appeal brought before the enforcement judge contesting the decision, refusing to steer the matter towards the personal recovery solution (C. consom., Art. L. 331-1). Pursuant to Article R. 331-8 of the Consumer Code, the appeal is filed with the secretariat of the commission within 15 days calculated from the decision's notification.

(ii) If requested by the debtor who refers the matter to the over - indebtedness commission and, if it appears, during the implementation of an agreed plan or of recommendations, that the situation is irretrievably compromised. Legal representation is not mandatory (D. No. 92-755, 31 July. 1992, Art. 11). After having noted the debtor's good faith, the commission refers the matter to the enforcement judge (C. consom., Art. L. 331-7-2).

(iii) If directly requested by the debtor, in the event that the over-indebtedness commission has not decided which solution to pursue within nine months of its filing (C. consom., Art. L. 332-5). Legal representation is not mandatory (D. No. 92-755, 31 July, 1992, Art. 11). The date as of which the 9 - month period is calculated is mentioned in the letter in which the commission informs the debtor and the creditors that the matter has been referred to it (C. consom., Art. R. 331-7-3). The debtor refers the matter to the judge by a declaration submitted or sent to the registry, who informs the commission by letter, inviting it, moreover, to send in the dossier.

Triggering of the procedure by the enforcement judge

The personal recovery procedure can be triggered by the enforcement judge, subject to obtaining the debtor's consent, during appeals brought before the magistrate to contest the commission's decisions regarding the solution to be pursued, or pursuant to Articles L. 331-4 (verification of debts) and L. 332-2 of the Consumer Code (ordinary and extraordinary measures recommended by the commission) (C. consom., Art. L. 332-5). The debtor's consent must be obtained at the hearing. It can be given in writing or verbally, and the registrar shall take note of it.

Once the enforcement judge has been referred to the matter, the judge is required to hold an initial hearing of the personal recovery procedure. To do so, the judge has to invite the debtor and the known creditors to this meeting. Regardless of the circumstances, the judge is entitled to obtain, prior to the initial hearing, any information that would enable him to assess the debtor's situation and any future changes to the said situation (C. consom., Art. L. 332-6). This power of investigation facilitates the assessment of the debtor's asset and liabilities situation and the search for debt reduction solutions. Law of 1 November 2010 (C. consom., Art. L. 332-6, mod. by L. No. 2010-737, 1 July. 2010, Art. 45, 3º).

After having heard the debtor's presentation, as well as the creditors, in accordance with the rule that both parties must be heard, the enforcement judge is required to verify that the debtor is indeed in an irretrievably compromised situation, and to verify his good faith, which is assumed. If these two conditions are satisfied on the date of the hearing, the judge shall hand down a judgment announcing the initiation of the personal recovery procedure. From the perspective of private civil procedure, this judgment is always handed down after both parties have been heard (C. pr. civ., Art. 467 *et seq*.).

The judgment determines:

- the initiation of a personal recovery procedure; or

- acknowledges that in accordance with Article R. 332-14 of the Consumer Code, the actions previously bought before the enforcement judge have lost their validity.

Resulting from a parliamentary amendment, Article 6 of Act No. 2007-1787 of 20 December 2007 regarding the simplification of the law, inserts a new Article L. 332-6-1 in the Consumer Code, this text, which is intended to simplify the personal recovery mechanism, enables the enforcement judge, at the initial hearing, to initiate and close proceedings due to insufficient assets, via the same judgment**.** For this to be possible, the debtor must not have any more saleable property (C. consom., Art. L. 332-9, paragraph 1).

QUESTION 2

2. Position of the debtor and the spouse

2.1 Which assets and income are excluded from the procedure?

Excluded are the debtor's clothing and bedding, and those of the debtor's spouse and children, and money the debtor earns for his living.

2.2 Does the debtor have restrictions on the disposition of his assets?

Yes.

As of the opening judgment, the debtor is stripped of the right to alienate his property without the consent of the creditors' representative, if the debtor has appointed one, or else, of the enforcement judge (C. consom., Art. L. 332-7). This is not a genuine deprivation, rather, it is a measure intended to protect the creditors' pledge, as the consent of the creditors' representative or of the enforcement judge is required.

In practice, approval should only be given if the selling price is blocked in favour of the creditors. In addition, the alienation of a property prior to the legal liquidation judgment should remain exceptional, if only as a result of the problems that would arise regarding the distribution of funds between the listed creditors, the receivable of which, not yet confirmed, would then be declared inadmissible. However, the debtor is still able to perform the everyday acts alone; and the judge has the power to order the welfare monitoring, in order to assist the debtor to improve the management of his family budget.

2.3 Which assets and income are included in the procedure?

See 2.2 and 2.1 for details.

2.4 Are pension schemes included?

No.

2.5 Does the debtor donate to the estate a part of his income for the benefit of the creditors?

Only in situations where a paying back plan has been adopted.

A reasonable amount of distribution is determinated by reference to Art L 33162 et R 334-1 of the Consumer Code.

2.6 Is there a means test?

Yes, because, it will normally order a payment of an amount which must appear reasonable, and will necessarily involve investigations into the debtor's financial situation and obligations.

2.7 Is there a garnishment of regular income?

The purpose is to allow the debtor a certain amount of funds to bear the expenditure of daily life.

2.8 Is there protection for the debtor's privacy, his mail and his home?

Such protection is provided for in the European Convention on Human Rights to respect private and family life.

2.9 Is there protection of the spouse's interests in the home?

No. Rules of the Civil Code apply.

2.10 Is the debtor restricted to receive information?

No.

2.11 Has the debtor the liberty to move freely and to leave any State, including his own?

Yes.

2.12 Is the debtor entitled to cost-free legal assistance?

Yes considering his financial situation.

2.13 Are there restrictions on the debtor after the procedure?

This would depend on the order made by the judge.

Further registration takes place in a national file at the FICP [France's National Loan Repayment Incident File] is done in accordance with Article L. 333-4 of the Consumer Code. The registration entry is deleted five years from the date of the approval of the recommendation of personal recovery without legal liquidation or closing of the personal recovery procedure with legal liquidation (C. consom., Art. L. 333-4, mod. by L. No. 2010-737, 1 July. 2010, Art. 48).

2.14 Is the spouse (automatically) included in the procedure?

No.

2.15 In which way do the International or European Convention and Covenants play a role?

The European Convention on Human Rights applies.

QUESTION 3

3. Position of the creditor

3.1 Can a creditor force the debtor to commence a procedure or oppose the debtor from doing so?

No.

3.2 Which creditors' claims can be excluded from a discharge?

Those arising from fraud and alimony (for the benefit of the husband / wife, children or parents). In addition, those arising from a Judicial Order to pay damages, handed down by the judge ruling in civil proceedings is excluded.

3.3 Does a creditor have to accept a curtailment of his claim?

Only on a decision given by a judge. See 6-1.

3.4 Do certain creditors receive more protection than others?

Secured creditors in case of realization of assets or plan adopted, are protected.

QUESTION 4

4. Avoidance actions

4.1 What are the legal proceedings to protect / realize the debtor's assets?

The Civil Code applies to the realisation of assets.

QUESTION 5

5. Good faith

5.1 Does the principle of "good faith" play a role and in which way?

Yes. Good faith is presumed.

However, the over - indebtedness commission and the judge can reject a petition by the debtor if it is established that the debtor is not of good faith.

At any time if it appears that the debtor has not:

- acted without good faith in relation to the opening of the proceeding; and
- has not fairly assisted the commission to appoint a practitioner;

the procedure may end. This means creditors are allowed to get payment with no terms of their claims.

QUESTION 6

6. Re - payment plan

6.1 Is the debtor submitted to a payment plan?

Pursuant to Article R. 332-20 of the Consumer Code, the enforcement judge can draw up a recovery plan, or close the proceedings for insufficient assets without liquidation.

The debtor can own resources or an asset that could potentially convince the enforcement judge that legal liquidation is inappropriate. The same applies if the financial and social report drawn up by the creditors' representative shows sufficient repayment ability, or in the event that the debtor's financial situation recovers, for example, if the debtor has found a job. In these scenarios and by way of exception, the magistrate shall draw up a recovery plan containing the measures referred to in Article L. 331-7 of the Consumer Code, namely, a deferral, or a rescheduling of the payments of the debts, a reduction of the debts, a reduction or elimination of the interest rate, a consolidation, a creation, or a replacement of guarantee (C. consom., Art. L. 332-10).

The plan can be drawn up on the basis of the proposals made by the designated creditors' representative. In the absence of a creditors' representative, the judge will prepare the plan, the term of which cannot exceed 10 years and; the plan cannot be renewed. The judgment establishing it is communicated, with an indication of the time limit and the appeal period and is informed (C. consom., Art. R. 332-1-4), by registered mail with a request for the return of the receipt to the debtor and the creditors, as well as to the creditors' representative designated by letter. It is subject to appeal.

6.2 How long is the duration of such a plan?

Not more than 10 years.

6.3 Does the plan have an educational purpose?

In a sense yes; considering that the debtor must manage to make the plan a success.

QUESTION 7

7. Voluntary settlement

7.1 What are the possibilities for a voluntary settlement?

There is a difference between a plan drawn up based on the aegis of the over - indebtedness commission, agreed plan (plan conventionnel), and the measures recommended by the commission pursuant Articles L 331-7 and L 331-7-1 i.e. without referral to the judge and a plan with referral to the judge. The plan with referral to the judge is enforceable against all parties. This is not the case of the traditional agreed plan, which is only binding on the parties, nor is it the case of the recommended measures that, according to Article L. 331-8, are not enforceable against creditors whose existence has not been indicated by the debtor, and who have not been notified of this by the commission.

QUESTION 8

8. Discharge

8.1 In which way is a discharge granted?

The judgment enforcing the personal recovery without legal liquidation gives rise to the forgiveness of all of the debtor's non-professional debts, as well as the debts resulting from its guarantee commitment or its joint and several commitment to pay the debt of an individual contractor or a company. However, the following categories of debts are excluded from this forgiveness, namely:

- Non - professional debts (C. consom., Art. L. 333-1). Unless the creditor agrees to forgive, these are maintenance liabilities and pecuniary reparations awarded to the victims as part of a criminal conviction. The fines levied as part of a criminal conviction are excluded from any forgiveness.

- The debts resulting from loans secured by pledges taken out with municipal credit unions pursuant to Article L. 514-1 of France's Monetary and the Financial Code (C. consom., Art. L. 333-1-2, amended by L. No. 2010-737, 1 July 2010, Art. 41, 1º.

- Debts resulting from loans secured by pledges taken out with municipal credit unions pursuant to Article L. 514-1 of the Monetary and Financial Code (C. consom., Art. L. 333-1, amended by L. No. 2010-737, 1 July 2010, Art. 41, 1º.

- Debts, the price of which was paid in lieu of the debtor by the natural person guarantor or co-debtor.

The judgment also gives rise to the suspension and prohibition of the procedures for the execution and assignment of the remunerations, as well as the suspension of expulsion from the lodging (C. consom., Art. L. 332-6, para. 2, amended by L. No. 2010-737, 1 July 2010, Art. 45).

In case of liquidation, closing judgment of the procedure entails the forgiveness of all of the non professional debts. Regardless of the circumstances, and irrespective of whether or not there is a creditors' representative present, the closing judgment can define a contribution to be paid by the debtor with a view to reimbursing the advance on the publicity expenses, made by the French Treasury. Otherwise, it shall indicate that these costs shall be borne by the Treasury. Moreover, the closing judgment can order a welfare follow - up measure to help the debtor to manage his budget with a view to avoiding new debt.

8.2 Can a discharge, after it has been granted be revoked?

Not impossible, but not easy. Such a discharge can take place at the request of the creditors.

QUESTION 9

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9. Remuneration / costs

9.1 How are the costs of the procedure dealt with?

The cost of the procedure is advanced by the Treasury.

Remuneration for the appointed office holder is determined by law. If there is no plan and there are no assets available, the law provides that the IP can be paid an exclusive fee of €200.00. This remuneration is paid by the Public Treasury.

By contrast, in circumstances where there is a plan or in the case of a liquidation where there are assets, the law provides for remuneration to be paid according to a legal scale. This remuneration is deducted from distributions to the creditors after realization of assets in case of liquidation, or paid by the debtor in case of a plan.

9.2 Is the court the correct forum to scrutinize fees?

Yes, in a situation where the debtor and creditors do not agree.

9.3 What is the appropriate method of calculation of fees when dealing with compositions or voluntary arrangements?

Legal fees.

9.4 What is the method of calculation of fees when dealing with bankruptcy proceedings?

Legal fees.

9.5 Can IP's charge fees based on the value they created for the creditors during an assignment?

Yes, under the legal scale, paid on a commission basis in case of distributions to the creditors.

QUESTION 10

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10. Cross - border considerations in consumer insolvency

10.1 Are overseas assets included?

Not included.

10.2 Is forum shopping by the debtor for more favourable personal insolvency laws possible?

Under French Law overseas procedures are not recognised.

The civil over - indebtedness procedure [*procédure de surendettement*] is not possible to be used under the European Insolvency Regulations (1346 – May 2000).

QUESTION 11

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11. What is the result of subsequent insolvencies?

There is no limit for a debtor to get the benefit of subsequent civil over - indebtedness procedure *[procédure de surendettement*].

QUESTION 12

12. Recommendations

The civil over - indebtedness procedure [procédure de surendettement] is a very helpful tool for insolvent debtors and natural persons of good faith.

One of the good points is that this procedure saves the debtor from permanent removal from economical network, where it is seen that the debtor is not able to pay the creditors without delay or not pay at all.

This civil proceeding provides a lifebelt to the debtor who is in an irretrievably compromised situation, very often because the debtor has contracted too many big loans with lenders that have granted loans without checking the debtor's economic situation.

However it is essential that the principal of good faith is preserved.

GERMANY

QUESTION 1

1. What are the options or procedures available for a natural person / consumer regarding their over-indebtedness in your jurisdiction?

The Insolvency Ordinance enacted on Jan. 1, 1999 replaced the previously existing and formerly applicable Bankruptcy Ordinance. The primary goal of the legislator was to create a functioning insolvency law and to provide over-indebted natural persons with a procedure for debt discharge. The possibility of debt discharge and the opportunity for a fresh economic start is to be offered to all persons who fall into financial difficulties without any fault of their own.

The prerequisite for relief from residual debt in every case is the instatement of insolvency proceedings against the respective person's assets. Within the scope of the insolvency proceedings, the debtor's financial situation is to be determined, his assets used to satisfy creditors and the creditor's claims are to be determined and examined. The proceedings only transition into the actual residual debt discharge process after the insolvency proceedings have been completed. Both stages of the proceedings, the insolvency proceedings and the residual debt discharge, last a maximum of six years after instatement of the insolvency proceedings. It is insignificant in this case as it is the stage of the proceedings that lasts longest.

The Insolvency Ordinance distinguishes two types of proceedings provided for the debt discharge of natural persons. The "Consumer Insolvency Proceedings" as set out in §§ 304 ff. InsO are intended for natural persons who are not self-employed or who have a manageable financial situation in spite of previous self-employment. The "Regular Insolvency Proceedings" are intended for persons who are not consumers as defined by the InsO and for legal entities. The regulations whether the insolvency proceedings are to be carried out as regular or consumer insolvency proceedings are binding and do not concede the debtor any option of choice.

Different rules apply to the regular insolvency proceedings and the consumer insolvency proceedings.

The "Consumer Insolvency Proceedings" are initially divided up into two stages, the extra-judicial debt discharge proceedings and the judicial insolvency proceedings, which in turn consist of two stages, the debt discharge proceedings, which the court may dispense with, and indeed, regularly does so, and the simplified insolvency proceedings.

Assuming that in the majority of cases an out-of-court settlement of his financial situation by the consumer with his creditors is successful, the legislator prescribed an out-of-court settlement attempt which must be carried out for the insolvency proceedings to be admitted in court. In practice however, it has been proven that in the vast majority of cases the creditors refuse an out-of-court settlement. The debtor cannot attempt the out-of-court debt discharge on his own. He needs to engage the help of professionals such as attorneys, CPAs or municipal or charitable advisory agencies. The debtor must make

a specific proposal in the plan as to how the debts are to be adjusted. If the creditors agree to the plan, the plan is regarded as approved. Where no agreement is reached, the advisory body will certify the failed attempt and this certificate must be submitted to the Insolvency Court.

By the latest six months after issue of the certificate confirming the failure of the out-of-court-settlement, the debtor can file for instatement of insolvency proceedings against his assets at the Insolvency Court at his place of residence; the legislator prescribes special forms intended for simplification and greater convenience for the settlement. Already upon filing for insolvency the debtor must submit a declaration that he is assigning to a trustee the amount of his income which may be garnished to creditors for six years after instatement of the insolvency proceedings. The debtor must also submit a list of assets, an overview of assets, an overview of existing liabilities and a judicial debt adjustment plan. The intention is that the court is to submit the judicial debt adjustment plan to the creditors again. However, since experience has proven that the substance of the judicial debt-adjustment plan does not deviate from the extra-judicial plan in favor of the creditors and that consequently the majority of the creditors also reject the judicial plan, most insolvency courts take the opportunity of dispensing with the judicial debt adjustment proceedings.

Insolvency proceedings may only be instated where there are sufficient assets to cover the proceedings. However, application of this principle would lead to no insolvency proceedings being able to be carried out for insolvent natural persons. In order to prevent this situation, the legislator has provided that the costs of the insolvency proceedings can be deferred upon application by the insolvent persons and only have to be paid back to the government treasury after the granting of the residual debt discharge. Where the insolvency proceedings are instated the debtor's assignable assets are determined and distributed to the creditors by the trustees appointed by the court. The debtor's assets encumbered with a lien are exempted from distribution by the trustee. In order to ensure a prompt settlement of the insolvency proceedings by the consumers, departing from the other regulations, the legislator assigned to the creditors having liens on items the right to use these items. The rights of contestation in all other types of proceedings in insolvency law are restricted in the interest of an efficient winding-up of the proceedings. The creditors have to exercise the right of contestation not the trustees. The entire assets belonging to the debtor at the time of instatement of the insolvency proceedings or which he acquires after this time are to be used to satisfy his creditors. The insolvency proceedings are concluded only after the assets of the debtors have been used. Upon conclusion of the insolvency proceedings, the Insolvency Court rules first on the residual debt discharge being applied for. This is followed by the "benevolent conduct" stage.

In the case of the "Regular Insolvency Proceedings" against the assets of natural persons who are not consumers the extra-judicial and judicial debt-adjustment plans do not apply. The debtor may immediately file for insolvency proceedings against his assets without first seeking an out-of-court settlement with his creditors. The ascertainment, use and distribution of the debtor's assets is normally carried out solely by the receiver in regular insolvency proceedings, who also has been conceded the right of contestation in these proceedings. Access by the debtor to the actual residual debt discharge is also decided on after distribution of the debtor's existing assets in the regular insolvency proceedings.

"Residual debt discharge" is only to be available to honest debtors. Reasons which undermine the debtor's honesty are listed in the Insolvency Ordinance. A party who was sentenced in penal law on grounds of bankruptcy or defeat of a creditor is regarded as dishonest, as is the debtor who willfully or gross negligently made false or incomplete written statements regarding his financial situation in order to obtain credit, receive benefits from public funds or avoid payments to public funds. A party is also regarded as dishonest where he has breached the duties of information and cooperation during the insolvency proceedings or willfully or gross negligently made false or incomplete statements on the list of assets and income, creditors and their claims, to be submitted by him. Where there are no such grounds for denial, the court approves insolvency proceedings or where this is not the case the court denies the residual debt discharge at this stage of the proceedings.

On the basis of the statement regarding the assignment and garnishing of the parts of income for a period of six years after instatement of the insolvency proceedings already submitted by the debtor when filing for insolvency the garnishing of the parts of the salary subject to garnishing are paid to the trustee during the residual debt discharge stage and distributed by him in the insolvency proceedings to the debtor's creditors in accordance with the final asset distribution list. In addition, there are further duties for the debtor during the residual debt discharge stage. He must be in adequate employment or must be in the process of seeking adequate employment. The debtor may not refuse any acceptable work regardless of whether the debtor receives income from employment, a pension or social welfare or other income, the debtor must be satisfied with the part of his income subject to garnishing to his creditors. The debtor may be self-employed. However, in this case he must submit the parts of his income that he would earn in an acceptable employed occupation to a trustee. In addition, the debtor must report any change of his residence or place of work to the court and trustee and provide information on all major changes in his personal and financial situation. In addition, the debtor must release specific amounts from any inheritance to the trustee during the residual debt discharge.

Where the debtor culpably breaches one of these duties the court will deny the residual debt discharge upon application by the creditor, during the residual debt discharge phase. The residual debt discharge stage is interrupted and a ten-year blocking period for applying for new residual debt discharge proceedings is imposed on the debtor. Where the debtor has fulfilled his duties during the residual debt discharge phase the court will grant him residual debt discharge after a period of six years after instatement of insolvency proceedings. Upon granting of residual debt discharge the debtor is released from all debts existing at the time of instatement of the insolvency proceedings. An exception to this are only the debtor's liabilities from willfully or illegally perpetrated acts to the extent that the respective creditor reported this expressly in the insolvency proceedings, referring to the legal ground of the willfully or illegally perpetrated act, from fines and penalty payments.

1.1 The legal grounds for the opening of or access to those procedures

The prerequisite for instatement of insolvency proceedings against the assets of a natural person is that person's insolvency pursuant to § 17 Sect.1 InsO. The definition of insolvency is set out in §17 Sect. 2 InsO. According to this,

a person is insolvent where he is not able to satisfy his payment obligations. §17 Sect. 2 Clause 2 InsO explains that insolvency must regularly be assumed where the debtor has stopped his payments. In order to move the instatement of insolvency proceedings to the earliest date possible, § 18 InsO provides the possibility that the debtor may already file for insolvency in the case of impending insolvency. Impending insolvency is defined in § 18 Sect. 2 InsO. According to this provision the debtor faces impending insolvency where it can be anticipated that he will not be able to satisfy the existing payment obligations when they are due.

1.2 How are these procedures made available?

Pursuant to § 13 Sect. 1 Clause 1 InsO, insolvency proceedings are only instated upon written application. All creditors as well as the debtor himself have the right to file an application. However, the creditor as an applicant must prove that he has a legal interest in the instatement of insolvency proceedings pursuant to § 14 Sect. 1 InsO and in addition he must prove that he is entitled to a claim and that there is a ground for insolvency.

In addition there must be a ground for instatement for both the debtor's and the creditors application pursuant to § 16 InsO. A ground for instatement is only existing or impending insolvency. The facts on which the instatement of insolvency proceedings depends are determined officially by the court pursuant to § 5 Sect. 1 InsO. Pursuant to § 18 I Nr. 1 RPflG the judge rules on the application for insolvency when it has reached the decision stage.

However, in the case of "consumer insolvency proceedings" the debtor must attempt to reach an out-of-court debt adjustment with his creditors before filing an application for insolvency. For details, see the statements above under Item 1.

1.3 Who can commence the procedure?

As already shown above in Item 1.1 the insolvency proceedings can be instated both upon application by the debtor and by the creditor. Where the creditor files an application for instatement of insolvency proceedings the court must give the debtor the opportunity to file an application for instatement of insolvency proceedings in conjunction with an application for granting of residual debt discharge. The judge decides on the application for instatement within the court pursuant to § 18 Sect. 1 Nr. 1 RPflG and appoints the receiver or trustee in the case of consumer insolvency. Where it concerns consumer insolvency proceedings, the judge also decides on the proceedings for the judicial debt discharge plan. The paralegal at the court is responsible for the further implementation of the insolvency proceedings after they have been instated within the court.

1.4 Who will supervise the procedure?

The receiver appointed by the court is responsible for the actual implementation of the insolvency proceedings outside of court. Where consumer insolvency proceedings are concerned, the receiver will bear the title of trustee (§ 313 Sect.1 Clause 1 InsO). The proceedings take place subject to court supervision, the paralegal is responsible within the court after instatement of insolvency proceedings.

1.5 What are the criteria such a person has to satisfy?

A person specially suitable for the respective individual case, with business expertise and independent of the debtor and creditors, to be selected from all persons willing to take on receivership is to be appointed receiver or trustee pursuant to § 56 InsO.

1.6 What are the available alternatives?

In the regular insolvency proceedings there is the possibility of the debtor losing his management and disposal authorization to a receiver appointed by the court. Pursuant to §§ 270 ff. InsO the debtor can file a petition to manage the assets himself (independent management). In the case of independent management the debtor has the right to independently manage and dispose of the insolvency assets under the supervision of a receiver appointed by the court. In consumer insolvency proceedings, independent management is not permitted pursuant to § 312 Sect. 2 InsO.

The insolvency plan as a special type of procedure is not applicable in consumer insolvency (§ 312 Sect. 2 InsO) but only in regular insolvency proceedings. The insolvency plan pursuant to §§ 217 ff InsO constitutes an opportunity for the creditors and debtor to deviate from the regulations of the Insolvency Ordinance and to agree under court supervision on the most advantageous arrangement for the respective case. This enables the parties involved to conclude a plan according to their own ideas.

Outside of these possibilities, the debtor always has the possibility of agreeing with the debtors on the settlement of his liabilities on a private law basis outside of court.

QUESTION 2

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2. Position of the debtor and the spouse

2.1 Which assets and income are excluded from the procedure?

Assets which would be subject to individual debt enforcement are not the object of insolvency proceedings (§ 36 Sect. 1 Clause 1 InsO). Chattels are not assignable where the debtor needs them for his subsistence (§ 811 ZPO). Claims to support, wages or pensions are only part of the insolvency assets where they exceed the debtor's minimum level of subsistence (§ 36 Sect.1 Clause 2 InsO). In the case of persons who receive wages, salaries or pensions the amount they are entitled to is determined according to § 850c ZPO. This regulation, which is adapted by the legislator at regular intervals to the development of wages and salaries as well as price developments determines the amount collected from the insolvency proceedings on the basis of the actual income situation and number of persons which the debtor is obligated to support. Furthermore, the court can determine the amounts exempt from execution. Claims to current social welfare monetary benefits are non-assignable.

Pursuant to § 851 Sect. 1 ZPO unassignable claims, i.e. highly personal claims of the debtor, are unassignable.

2.2 Does the debtor have restrictions on the disposition of his assets?

Pursuant to § 80 Sect. 1 InsO the management and disposal authorization of the debtor passes to the receiver upon instatement of the insolvency proceedings. However, the debtor may freely dispose of the assets from the assignment which are not part of the insolvency assets and do not require any approval by the receiver. Where there is consumer insolvency the management and disposal authorization passes to the trustees.

2.3 Which assets and income are included in the procedure?

The debtors' assets subject to the insolvency proceedings are designated as insolvency assets. Pursuant to § 35 Sect. 1 InsO this includes the entire assets of the debtor provided they are not subject to assignment (cf. above 2.2). Insolvency assets comprise the long-standing assets, i.e. the assets that belong to the debtor at the time of instatement of insolvency proceedings, as well as new assets. New assets are the assets acquired by the debtor during the insolvency proceedings. Assets comprise all in rem rights such as ownership, mortgages, liens, intangible assets such as copyrights; claims such as to pension and salary claims, damage compensation claims, support claims.

2.4 Are pension schemes included?

Pursuant to § 35 InsO items not subject to debt enforcement are not part of the insolvency assets. §§ 850, 850a, 850b, 850c, 850e, 850f Sect. 1, 850g - 850i, 851c and 851 d of the Civil Proceedings Ordinance apply accordingly.

§ 850b states that pensions are unassignable. However, according to Sect. 2 the earnings may be garnished according to the regulations applicable to income from work where debt enforcement on the miscellaneous chattels of the debtor has not led to complete satisfaction of the creditor or is not expected to lead to it and where the assignment is equitable in accordance with the circumstances of the case, in particular according to the type of claim to be collected and amount of the earnings. According to this, pensions are partly assignable claims without subjection to seizure under insolvency.

Accident and disability pensions, statutory support pensions, earnings from foundations, contracts for old age pensions and support, contracts to vacate premises, widows, orphan's, social assistance and healthcare schemes. Claims from a special life insurance upon decease are unassignable. In addition, statutory support pensions are likewise unassignable.

2.5 Does the debtor donate to the estate a part of his income for the benefit of the creditors?

The debtor must introduce his current income to the insolvency estate as new acquisitions. An assignment-free amount is left to the debtor pursuant to the table set out in § 850c ZPO.

2.6 Is there a means test?

According to § 850c ZPO, work earnings are unassignable where they do not exceed the statutory assignment threshold for the period in which they are paid. In exceptional cases, the Insolvency Court may also set the amount to be left to the debtor differently pursuant to § 36 Sect. 4 InsO if there are very specific reasons that make this necessary.

2.7 Is there a garnishment of regular income?

The debtor's work income is subject to insolvency seizure with the exception of the amounts exempt from garnishment in the individual case and must be paid by the debtor's employer directly to the receiver or trustee.

2.8 Is there protection for the debtor's privacy, his mail and his home?

In general, the basic rights to secrecy of correspondence, inviolability of postal and telecommunications secrecy and inviolability of the home set out in Art. 10 Sect. 1 and 13 Sect. 1. Basic laws also apply in insolvency proceedings. They may only be restricted in very specific and exceptional cases due to an order given by court.

During the period between the filing of the insolvency application and the official decision on the application the Insolvency Court may take all measures to prevent a deterioration of the debtor's financial situation (§ 21 Sect. 1 InsO). Where the debtor refuses information or co-operation he may be summoned and incarcerated. A mail embargo (§§ 21 Sect. 2 Nr.4, 99 InsO) may also be used as a necessary means for protecting the insolvency assets. The mail addressed to the debtor is forwarded to the receiver and inspected first by him but must otherwise be forwarded to the debtor.

2.9 Is there protection of the spouse's interests in the home?

Only the debtor's assets are subject to insolvency seizure. The insolvency proceedings only target him, not his wife or relatives, who may dispose freely of their assets. Moreover, the legislator has placed the debtor's home under special protection. The receiver / trustee is not authorized to terminate the lease concluded by the debtor for his home. The receiver / trustee may merely declare to the lessee that the insolvency assets do not cover any rent backlog incurred after instatement of the insolvency proceedings.

2.10 Is the debtor restricted to receive information?

Instatement of insolvency proceedings does not have any impact outside of the asset seizure for the debtor. The debtor's mail is only forwarded to the receiver first pursuant to §§ 21 Sect. 2 Nr.4, 99 InsO due to the mail embargo. Mail which does not concern the insolvency assets is to be forwarded immediately to the debtor. The debtor may inspect the remaining mail (§ 99 Sect. 2 S. 2 InsO).

2.11 Does the debtor have the liberty to move freely and to leave any State, including his own?

The right to free choice of place of abode is not restricted by the instatement of insolvency proceedings. However, pursuant to §§ 20, 97 Sect. 3 InsO the debtor has extensive information and co-operation duties in the insolvency proceedings. As soon as the debtor is aware that an application for instatement of proceedings is pending he must report any change of address to the court. In exceptional cases the debtor may not impose regulations such as the place of residence or a specific region without the permission of the court. Thus, the debtor's freedom of movement can be temporarily restricted by the court. Outside of these regulations, which only apply in absolute individual cases, the debtor may choose his place of abode freely including relocation to any overseas country.

2.12 Is the debtor entitled to cost-free legal assistance?

In the area of consumer insolvency proceedings in which the debtor must offer an extra-judicial debt adjustment plan with the help of an advisory body the necessity of providing free legal representation or counsel is not recognized.

Shortly after the enactment of the InsO, it was proved that the costs of the insolvency proceedings could not be paid by the majority of the debtors. The legislator then introduced the "deferred payment" model. The deferred payment model is regulated in §§ 4a - 4d InsO. The court's fee claims are deferred through the model. The possibility of deferral may be used by all debtors seeking relief from residual debt. The pre-requisite for the concession is that the debtor's assets are not expected to be sufficient to cover the costs of the insolvency proceedings. In addition, the debtor must have filed an application for residual debt discharge and declared that there is no ground for denial. The payment deferral covers the legal fees, remuneration of the receiver / trustee and the expenditure incurred in the preliminary insolvency proceedings and debt adjustment proceedings as well as attorney's fees in the case of allocation of an attorney. The deferral ends with the granting of the residual debt discharge. This means that the debtor must pay the costs of the insolvency proceedings after the granting of the residual debt discharge and thus after his debt release from the treasury.

2.13 Are there restrictions on the debtor after the procedure?

After the granting of residual debt discharge the debtor is no longer subject to any restrictions.

2.14 Is the spouse (automatically) included in the procedure?

Statutory matrimonial property regime is primarily significant in the case of insolvency. Where the spouses have not agreed otherwise, separation of goods applies automatically. Each spouse is liable toward his creditors with his own assets. The consequence of this is that only the assets of the insolvent spouse belong to the insolvency estate pursuant to §§ 35,36 InsO. The other spouse's assets are not affected by the insolvency proceedings.

2.15 In which way do the International or European Convention and Covenant play a role?

It cannot be ignored that insolvency law encroaches to a large extent on a number of positions protected in constitutional law, not only to the detriment of the debtor, but also to the detriment of the creditors who also experience massive encroachment on their legal positions protected by the Basic Law and Human Rights Convention through the proceedings for granting residual debt discharge. As intervention by the court in legal positions protected under constitutional law is exclusively reserved for the judge having jurisdiction, neither constitutionality nor the compliance of the Insolvency Ordinance with the European Human Rights Convention is presently a topic of debate.

QUESTION 3

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3. Position of the creditor

Insolvency proceedings take place before the Insolvency Court and is subject to its supervision. The aim of the insolvency proceedings is the satisfaction of the creditors' claims to the furthest extent. This also applies in the area of insolvency proceedings on the assets of natural persons. In order to strengthen the creditor's legal position, the Insolvency Ordinance provides for co-operation, presence, information and of course also rights of objection.

The rights of co-operation include the right of creditors to a convocation of a creditors' meeting by the court, the right to resolution in the creditors' meeting, the right to approval in specially significant legal acts. Of course the right of the creditors to take part in creditors' meetings and to inspect the documents which the court must present for inspection by the parties to the proceedings must be recognized. With the information claims the creditors can obtain information both from the debtor and from the receiver or trustee. Finally, the creditors have a complaint right against the essential decisions by the Insolvency Court guiding the proceedings.

3.1 Can a creditor force the debtor to commence a procedure or oppose the debtor from doing so?

The creditor may have insolvency proceedings instated against his debtor by filing an application in court. Pursuant to § 14 Sect. 1 InsO the creditor application is admissible where the applicant has a legal interest in instatement of the proceedings. Moreover, the creditor must prove his claim and the ground for instatement using the means set out in § 294 ZPO. Before the court instates the proceedings it needs to be convinced that there is a ground for insolvency (§ 16 Sect. 1 InsO). Where the debtor meets the pre-requisites for consumer insolvency the court must give the debtor the opportunity to likewise file for instatement of insolvency proceedings in accordance with § 306 Sect. 3 Clause 1 InsO and simultaneously apply for concession of residual debt discharge. Irregardless of whether the debtor files his own application, he must be heard regarding the creditor's application (§ 14 Sect. 2 InsO). The obligation

to hear the debtor has the purpose of clarifying the facts on the one hand and on the other to give the debtor the opportunity to respond to the insolvency application. The responses are different. Where the debtor pays in order to prevent insolvency proceedings the legal interest of the creditor does not apply; insolvency proceedings are not instated. Where the debtor contests the prerequisites of the application the court must determine the contested facts. The debtor can thus only comment on the application or respond with his own application. However, the debtor cannot defend himself against the instatement of the proceedings where the court admits the creditor's application.

On the other hand, the creditor may not prevent the filing of an insolvency application by his debtor.

3.2 Which creditors' claims can be excluded from a discharge?

The claims exempted by the concession of the residual debt discharge are listed in § 302 InsO. Liabilities of the debtor from willfully perpetrated illegal acts provided that the debtor has registered the respective claim, specifying this legal ground; fines and liabilities by the debtors equated with these in § 39 Sect. 1 Nr. 3 and liabilities from interest-free loans conceded to the debtor for payment of the costs of the insolvency proceedings are exempted from the concession of residual debt discharge.

3.3 Does a creditor have to accept a curtailment of his claim?

Residual debt discharge is conceived in such a way that all creditors regardless of whether they have registered their claims for insolvency proceedings or not lose their claims upon the concession of the residual debt discharge. The creditors who registered their claims for insolvency proceedings receive their percentage from the use of the debtor's assets and from the garnishment of his salary. Only the creditors entitled to a claim for which no residual debt discharge is conceded (cf. above regarding 3.2), can still assert their claims against the debtor after concession of residual debt discharge.

3.4 Do certain creditors receive more protection than others?

The principle of equal treatment of creditors applies ("par conditio creditorum"). The amount equivalent to the ratio of all claims to all debts is allocated to each debt. Only the creditors entitled to preferential claims on the debtor's assets may specially use the items subject to their preferential claims. Where there is a preferential claim to a property the creditors may use the property in spite of the debt enforcement ban applicable to all creditors even during the insolvency proceedings and satisfy their claims from it.

QUESTION 4

4. Avoidance actions

Legal acts carried out before initiating of the insolvency proceedings which are to the disadvantage of the creditors have different consequences in consumer and regular insolvency proceedings. In the “consumer insolvency proceedings” the trustee appointed by the court does not have a right of contestation in the interest of a rapid settlement of the process. Instead, it is incumbent on the creditors to independently lodge objections or for the creditors’ meeting to appoint one of the creditors or the trustee with the contestation. In “regular insolvency proceedings” in contrast, the receiver appointed by the court is fully entitled to contestation.

4.1 What are the legal proceedings to protect / realize the debtor’s assets?

According to the basic regulation of the Insolvency Ordinance all legal acts carried out prior to instatement of insolvency proceedings and which are detrimental to the creditors may be contested.

Subject to the condition that at the time the legal act was carried out the debtor was insolvent and the creditor was aware of this, all legal acts in the last three months before instatement of insolvency proceedings through which an insolvency creditor gained security or satisfaction of a claim may be contested. The same applies to acts carried out after the filing of the application for instatement of insolvency proceedings where the creditor was aware of the insolvency or where an application for insolvency was being filed (“congruent coverage”). In addition, legal acts which conceded or facilitated the procurement of security or satisfaction of a claim by the creditor which he did not claim, did not claim in that manner, or at the time are contestable. Under this rule all legal acts are contestable in the last month prior to instatement of insolvency proceedings or after the application, in the last three months prior to instatement of insolvency proceedings where the debtor was insolvent at the time the legal act was carried out or the creditor was aware that the legal act was detrimental to the insolvency creditors (incongruent coverage). Legal acts directly detrimental to the insolvency creditors are subject to contestation within the last three months prior to instatement of insolvency proceedings where the debtor was insolvent and the other party knew this.

The law provides for a significant time extension in the case of willful detriment to the insolvency creditors. Every legal act which the debtor carried out in the last ten years before insolvency proceedings were filed for with the intention of aversely affecting his creditors is contestable if the other party was aware of the debtor’s intention at the time of the act. Gratuitous services by the debtor are always contestable unless they were carried out more than four years before instatement of insolvency proceedings.

The law further includes assumptions to the detriment of close relatives of the debtor in order to facilitate the assertion of the contestation claims.

QUESTION 5

5. Good faith

5.1 Does the principle of "good faith" play a role and in which way?

The Insolvency Ordinance works with the assumption of an honest debtor instead of the principle of "good faith". Only the honest debtor is entitled to enjoy the benefits of residual debt discharge. The debtor is defined as honest where his assets, to the extent that they are subject to access by the creditor, are provided to him for joint satisfaction within the framework of the insolvency proceedings, where he pays the portion of his salary subject to garnishment or equivalent earnings during the residual debt discharge phase, fulfills his information and co-operation duties and did not get into financial difficulties due to prosecutable conduct.

QUESTION 6

6. Re-payment plan

In English Law a re-payment plan is an out-of court attempt by the debtor to redeem his debts toward his creditors in his own way. In Germany too the debtor has the possibility of out-of-court debt adjustment if he is a natural person. Where the attempt fails, the offer of an out-of-court debt adjustment plan is a prerequisite for a consumer to instate future insolvency proceedings.

6.1 Is the debtor submitted to a payment plan?

As in German law a payment plan is only relevant in the stage of an out-of-court settlement attempt and the creditors are to be persuaded to accept it, payments are regularly offered that do not put the creditors in a worse position than in the case of residual debt discharge proceedings. For the insolvent consumer, an out-of-court debt adjustment attempt is a pre-requisite for filing for insolvency proceedings. Other natural persons are not required to present any special plan regarding their debt adjustment.

6.2 How long is the duration of such a plan?

With the intention of facilitating the formation of an out-of-court debt adjustment plan the regular payment of the share of the salary subject to garnishment for six years after the formation of the out-of-court plan is offered in order to achieve a duration of regular payments to creditors similar to the residual debt discharge proceedings.

6.3 Does the plan have an educational purpose?

In the case of the out-of-court debt adjustment plan the debtor is given the opportunity of contacting the creditors himself and satisfying them independently. An educational intention could be recognized here as the debtor must attempt to adjust his debts independently through negotiations with the creditors. After instatement of the insolvency proceedings however the debtor is bound to the regulations of the residual debt discharge proceedings. The approach in these tends to closely follow the letter of the Insolvency Ordinance. Thus, it must be stated that there appears to be no “learning effect”.

QUESTION 7

7. Voluntary settlement

It is incumbent only on the insolvent consumer to seek out debt adjustment with his creditors outside of the court in order to be able to file for insolvency proceedings against his assets at all following the failed attempt. Every other insolvent debtor of course has the possibility of reaching an agreement with his creditors. The creditors’ willingness to reach an agreement with the debtor outside of the court is slight however. In many cases the creditors bank on the expectation that through the somewhat formalized court insolvency proceedings the chances are greater that additional assets of the debtor can be used for their benefit.

7.1 What are the possibilities for a voluntary settlement?

In order to motivate the creditors to accept an out-of-court debt adjustment procedure the debtor will normally have to offer the creditors benefits similar to the benefits the creditors would be entitled to by law in insolvency proceedings. In addition to the promise to pay the parts of the salary subject to garnishment the debtor will be obligated to additionally provide a detailed overview of his personal and financial situation in order to diminish suspicions by the creditors that assets or income are being concealed.

QUESTION 8

8. Discharge

In principle, the debt adjustment proceedings according to § 286 ff. InsO are open to all natural persons. As the statutory debt adjustment does not require the approval of the creditors, these proceedings are only acceptable to creditors if the entire assets of the debtor have already been used. The prerequisite for this is that all assignable assets are distributed in the insolvency proceedings without this having achieved complete satisfaction

of the creditors. An additional pre-requisite for instatement of the residual debt discharge proceedings is that the debtor, who is the only party entitled to file an application, has already also filed an application for residual debt discharge upon filing for instatement of insolvency proceedings. Where a creditor files for instatement of insolvency proceedings the debtor must file separately for residual debt discharge. Where the debtor fails to comply with the deadline of two weeks by which the application needs to be filed he will be denied residual debt discharge.

In order to obtain residual debt discharge the debtor must submit a declaration upon filing for insolvency stating that he will assign the assignable claims on his salary for six years as from instatement of the insolvency proceedings to a trustee appointed by the court (§ 287 Sect. 2 InsO). This ensures that for a total and maximum period of six years the creditors are equally satisfied from the garnishment of the parts of the debtor's salary.

Denial of residual debt discharge may only be issued upon application by the creditor where one of the reasons set out in the law is given. The reasons for denial are enumerated in § 290 InsO. The reasons include: legally enforceable sentencing of the debtor for insolvency offences, delayed filing of insolvency, dissipation of assets by the debtor during the last year prior to filing for insolvency proceedings, prior credit fraud, willful or gross negligent breach of information-or co-operation duties during the insolvency proceedings or false statements on the list of assets, prior concession of residual debt discharge within the last ten years before the current application for residual debt discharge.

Where the application for residual debt discharge has been filed for and there is no reason for denial the court must pass a resolution after conclusion of the insolvency proceedings that the debtor attains residual debt discharge if he fulfills the obligations set out in § 295 InsO. These obligations include the exercise of adequate employment or the attempt to find such employment, payment of half of the value of an inheritance where the debtor receives such, compliance with information duties toward the court regarding place of residence and work, prohibition from concealment of assets or income, the duty to provide information on his personal and financial situation to the court and trustee at any time as well as the duty to only effect payments to satisfy insolvency creditors to the trustee and not to procure any special advantage for any insolvency creditor.

Where the debtor does not culpably breach these obligations, residual debt discharge is granted six years after instatement of the insolvency proceedings, irregardless of the amount at which the creditors were satisfied. Pursuant to § 301 InsO residual debt discharge will apply to all creditors, including such who have not registered their claim.

8.1 In which way is a discharge granted?

Where the prerequisites set out in Item 8 are given the court will grant residual debt discharge. Pursuant to § 286 InsO the principle applies that the debtor who is a natural person is exempted from the liabilities toward insolvency creditors not satisfied in insolvency proceedings.

8.2 Can a discharge, after it has been granted be revoked?

The residual debt discharge already granted to the debtor may be revoked. The revocation of the residual debt discharge can be made at the application of a creditor. The creditor must file this application pursuant to § 303 Sect. 2 InsO within one year after the enforcement of the ruling on the residual debt discharge. The prerequisite for this is that it turns out subsequently that the debtor willfully breaches his duties and has thus significantly impaired the satisfaction of the creditors. The creditor filing the application must prove that these conditions are given as well as the fact that until enforcement of the ruling on the granting of the residual debt discharge he was unaware of the debtor's misconduct.

QUESTION 9

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9. Remuneration / costs

9.1 How are the costs of the procedure dealt with?

Pursuant to § 53 InsO the costs of the insolvency proceedings and other insolvency asset liabilities must be adjusted before distribution to the insolvency creditors. The costs of the insolvency proceedings are set out in § 54 InsO and comprise the legal fees for the insolvency proceedings, the remuneration and expenditure of the preliminary receiver, the receiver and the members of the creditors' committee, where the latter has been appointed.

Application of this principle would entail that insolvency proceedings would normally not be feasible and thus that the debtor would be unable to obtain residual debt discharge. The legislator has thus provided that the costs of the insolvency proceedings can be deferred until residual debt discharge has been granted. The payment deferral also comprises costs of the proceedings on the debt adjustment plan and of the proceedings for residual debt discharge. The court can extend the deferral and adjust repayment according to the debtor's assets. However, the court can also lift the deferral where for example the debtor has provided false information, is not adequately employed, or the residual debt discharge fails or is revoked.

As hardly any IP would be willing to wait for payment of his fees until residual debt discharge has been granted his fees are paid directly from the treasury after they are incurred and asserted against the debtor together with the legal fees after granting of the residual debt discharge.

To the extent that the consumer concerned must submit a debt adjustment plan prior to court settlement enlisting the help of a relevant agency or person the debtor may seek advisory assistance. However, the attorney's fees incurred will be assumed by the treasury.

9.2 Is the court the correct forum to scrutinize fees?

Only the court is responsible for setting the IP's fees. Stipulation of the fees is on the basis of the Remuneration Regulations in Insolvency Law (InsVV). The latter includes a remuneration calculation deviating from other insolvency proceedings to the detriment of the IP.

9.3 What is the appropriate method of calculation of fees when dealing compositions or voluntary arrangements?

In the case of an out-of-court debt adjustment plan the fees are to be paid in accordance with the Attorneys Remuneration Act for the debtor's legal counsel.

9.4 What is the method of calculation of fees when dealing with bankruptcy proceedings?

Pursuant to § 1 InsVV remuneration of the receiver / trustee is to be calculated according to the value of the insolvency assets to which the final calculation refers. On the basis of the continuous changes during the proceedings the time of the termination of the proceedings are decisive for the final calculation of the assets. Calculation outside of the regulations of the InsVV is not permitted.

9.5 Can IPs charge fees based on the value they created for the creditors during an assignment?

The amount of remuneration the receiver / trustee receives from the insolvency proceedings is based on the assets which become part of the insolvency estate. In the case of proceedings which do not concern a consumer the minimum remuneration of the receiver is EUR 1,000. In proceedings in which more than ten creditors have asserted their claims the remuneration is increased to 150 after every 5 creditors and after 31 creditors it is increased by EUR 100 after every five creditors.

In consumer insolvency proceedings the trustee receives 15% of the insolvency estate as remuneration, but at least EUR 600. Increases are also provided for here where more than 5 creditors are party to the proceedings.

The trustee is remunerated separately for work during the residual debt discharge phase. The remuneration of the trustee InsO is calculated according to the total of the amounts calculated which are received by the trustee for satisfaction of the debtor's creditors on the basis of an assignment declaration by the debtor or in another way. The trustee receives 5% of the first EUR 25,000, 3% for an additional amount up to EUR 50,000 and 1% for an amount in excess thereof. The minimum remuneration of the trustee during the residual debt discharge phase is EUR 100 per annum.

QUESTION 10

10. Cross-border considerations in consumer insolvency

10.1 Are overseas assets included?

Pursuant to § 35 InsO, insolvency assets comprise the entire assets belonging to the debtor at the time of instatement of the proceedings and which he acquires during the proceedings. Overseas assets are also included in the insolvency assets irregardless of whether they were collected as part of the insolvency estate in accordance with the provisions of overseas law or not. The receiver is obligated to also take possession of and use overseas assets of the debtor.

10.2 Is forum shopping by the debtor for more favorable personal insolvency laws possible?

Within Germany the court at the district where the debtor has his residence has jurisdiction pursuant to § 36 ZPO. An agreement by the debtor with his creditors regarding jurisdiction by a specific court is not admissible.

In many cases it can be observed that German debtors try to use allegedly more favorable foreign insolvency laws by relocating abroad. The Supreme Court affirmed the possibility of recognizing residual debt discharge granted abroad in its File No. IX ZB 51/00 of 18 September 2001. According to this ruling, international jurisdiction of a foreign bankruptcy court is based on the actual situation. Whether a residence recognized by a foreign court was relocated abroad for legally abusive purposes is in the opinion of the Supreme Court at most a question of reviewing whether the recognition of the foreign ruling is contrary to the German public order ("ordre public"). The Supreme Court assumes that residence is determined according to §§ 7 ff. BGB. According to this, the permanent place of establishment and life focus are decisive for the debtor at the time of filing his application abroad. In contrast, the degree of personal integration in the country or place of work are regarded as irrelevant. Where the foreign court regards itself as having local jurisdiction its ruling and its consequences must be accepted from the German point of view. The Supreme Court assumed that the debt discharge effect from foreign insolvency proceedings does not *per se* violate the German public order. In addition the burden of proof for a violation of German public order is incumbent on the objecting creditor. It must therefore be assumed of cases of legal abuse that the debtor's relocation abroad in order to achieve debt discharge there is not objectionable.

QUESTION 11

11. What is the result of subsequent insolvencies?

Pursuant to§ 290 Sect. 1 Satz 3 InsO after the granting of residual debt discharge there is a ten year blocking period for re-applying for debt discharge. According to this, residual debt discharge is to be denied where the debtor was already granted residual debt discharge or the latter was denied to him within the past ten years. The purpose of this blocking period is to prevent abuse of insolvency proceedings. After the ten-year blocking period the debtor may re-apply for instatement of insolvency proceedings. Thus, previous proceedings only have an impact on future proceedings to a limited extent.

QUESTION 12

12. Recommendations?

The above exposition shows that the debt-release procedure of insolvent natural persons is regulated in a confusing way, already due to the differentiation between consumers and other natural persons. In practice, many debtors fail to comply with their duties with the necessary care and conscientiousness. The prerequisites under which the residual debt discharge may be denied should thus be loosened. Ultimately, it is untenable for the debtor to be obligated to pay half of an inheritance he receives but is able to keep money won in the lottery to the full amount, for example. The remuneration system is biased toward the concerns of the treasury, in the majority of the proceedings they are not commensurate with the actual amount of work expended.

INDIA

QUESTION 1

1. What are the options or procedures available for a natural person / consumer regarding their over-indebtedness in your jurisdiction?

There are two statute that deal with personal insolvency, namely; The Provincial Insolvency Act 1920 ("Provincial Act") and the Presidential Towns Insolvency Act 1909 ("Presidency Act"). The Presidency Towns Insolvency Act, 1909 (Presidency Act) applies to presidency towns of Calcutta, Madras, and Bombay of British India, and the Provincial Insolvency Act, 1920 (Provincial Act) applies to the whole of India except the presidency towns mentioned above. Both the statutes are similar in content and philosophy and deal with insolvency of individuals, partnership firms and sole proprietorships.

1.1 The legal grounds for the opening of or access to those procedures;

According to both the Acts, an insolvency petition may be presented when an '*act of insolvency*' is committed by a debtor. A debtor is said to commit an act of Insolvency in each of the following cases if[1]:

(a) the debtor transfers all or a substantial part of his property to a third person for the benefit of his creditors generally;

(b) the debtor transfers his property or part of it with an intent to defeat or delay his creditors;

(c) the debtor transfers his property or part of it and the said transfer would be void as fraudulent either under the Presidency or Provincial Act or any prevailing law if he were adjudged as insolvent;

(d) the debtor with an intent to defeat or delay his creditors;

(i) departs or remains out of the jurisdiction of this Act;

(ii) departs from dwelling - house or usual place of business or otherwise absents himself;

(iii) secludes himself so as to deprive his creditors from means of communicating with him;

(e) any of his property has been sold in execution of the decree of any court for the payment of money;

(f) he petitions to be adjudged an insolvent;

(g) he gives notice to any of his creditors that he has suspended, or that he is about to suspend, payment of his debts; or

[1] Section 9 of the Presidency Insolvency Act, 1909 and Section 6 of the Provincial Insolvency Act, 1920.

(h) he is imprisoned as a result of an execution of a decree of any court for the payment of money;

(i) where the creditor has obtained a decree or order for payment of money and has served a notice for the same and the debtor fails to comply with that notice within the period specified therein.

1.2 How are these procedures made available?

The only way to initiate the insolvency procedure is by filling an insolvency petition in the relevant District / High court.

1.3 Who can commence the procedure?

Insolvency proceedings may be initiated either by a creditor or a debtor by way of presenting an insolvency petition in an appropriate court if an act of insolvency is committed by a debtor.[2] The presentation of a petition by the debtor is also deemed to be an act of insolvency.

1.4 Who will supervise the procedure?

In terms of the provisions of the Provincial Insolvency Act, 1920, an insolvency petition can be presented to a Court having jurisdiction under this Act in any local area in which the debtor ordinarily resides or carries on business, or personally works for his gain, or if he has been arrested or imprisoned where he is in custody.[3] The Insolvency proceedings are supervised by the court where the insolvency petition is filed.

The jurisdiction for the petition to be filed under The Presidency Towns Insolvency Act 1909 vests with the High Courts at Madras, Mumbai and Calcutta.[4] The matters are to be ordinarily heard by a single judge or a special judge appointed to hear such matters by the Chief Justices.[5]

1.5 What are the criteria such a person has to satisfy?

There are a different set of conditions / requirements which must be met before filling an insolvency petition by a creditor and debtor.

A creditor shall be entitled to file an insolvency petition only if he satisfies the following conditions[6]:

(i) The amount of the debt owing by the debtor to the creditor, or, if two or more creditors join in the petition, the aggregate amount of debts owing to such creditors amounts to Rs 500 or more.

(ii) The debt is a liquidated sum payable immediately or at a certain future time.

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2 Section 7 of the Provincial Insolvency Act, 1920 and Section 10 of the Presindency Insolvency Act, 1909.
3 Section 11 of the Provincial Insolvency Act, 1920.
4 Section 3 of the Presidency Insolvency Act 1909.
5 Section 4 of the Presidency Insolvency Act 1909.
6 Sec 9 of Provincial Insolvency Act, 1920 and Sec 12 of Presidency Towns Insolvency Act 1909.

(iii) The act of insolvency on which the petition is based has occurred within three (3) months before the presentation of the petition.

An additional condition applicable on secured creditors is that such creditors are required to state in his petition that either he is willing to relinquish his security for the benefit of the creditors in the event of the debtor being declared insolvent or give an estimate of the value of the security. In the latter case he may be admitted as a petitioning creditor to the extent of the balance of the debt due to him after deducting the value so estimated in the same way as if he were an unsecured creditor.

On the other hand, a debtor shall not be entitled to present an insolvency petition unless[7]:

(i) his debt amounts to Rs 500; or

(ii) he has been arrested and imprisoned in execution of the decree of any court for the payment of the money; or

(iii) an order of attachment in execution of such decree has been made and is subsisting against his property.

1.6 What are the available alternatives?

The alternatives available under Indian Insolvency law is filling of insolvency petition with appropriate High Court in towns of Madras, Mumbai and Calcutta and in the appropriate district court in places other than the presidency towns.

QUESTION 2

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2. Position of the debtor and the spouse

2.1 Which assets and income are excluded from the procedure?

Upon the order of the court being made against an insolvent, the whole of his property shall vest in the Court or in the receiver. According to Section 28 of the Provincial Insolvency Act, 1920, the property exempted by the Code of Civil Procedure, 1908, or by any other enactment for the time being in force from liability to attachment and sale in execution of a decree.

2.2 Does the debtor have restrictions on the disposition of his assets?

Once a court makes an order of adjudication against a debtor and declares the debtor to be an insolvent, the whole of the property of the insolvent shall vest in the court or in a receiver if appointed.[8]

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[7] Sec 10 of Provincial Insolvency Act, 1920 and Sec 14 of Presidency Towns Insolvency Act 1909.

[8] Section 28 of the Provincial Insolvency Act, 1920 and Section 17 of the Presidency Towns Insolvency Act, 1909.

Besides the court may also order attachment by actual seizure of the whole or any part of the property in possession or control of the debtor before making an order of adjudication.[9] The power of attachment before making an order of adjudication can be exercised by court if the court is satisfied that the debtor:

- has absconded or departed from the local limits of the jurisdiction of the court; or
- is about to abscond or depart from such limits; or
- is remaining outside of the limits; or
- has failed to disclose; or
- has concealed, destroyed, transferred or removed from such limits any documents likely to be of use to his creditors in the course of the hearing of the insolvency petition or any part of his property.

2.3 Which assets and income are included in the procedure?

As stated above, the whole of the property of the debtor shall vest in the court or with the receiver except the property exempted by the Code of Civil Procedure, 1908, or by any other enactment that is in force from liability to attachment and sale in execution of a decree.

2.4 Are pension schemes included?

The position with regard to pensions is the same as stated in 2.3.

2.5 Does the debtor donate to the estate a part of his income for the benefit of the creditors?

Where an insolvent is an officer of the Indian Army or Navy, or an officer or clerk or otherwise employed or engaged in the civil service of the Government, the official assignee shall receive for distribution amongst the creditors so much of the insolvent's pay or salary liable to attachment in execution of a decree as the court may direct.

Where an insolvent is employed elsewhere, the court may, at any time after adjudication and from time to time, make such order as it thinks just for the payment to the official assignee, for distribution among the creditors of so much of the salary or income as may be liable to attachment in execution of a decree, or of any portion thereof.[10]

2.6 Is there a means test?

Indian law relating to personal insolvency does not contain any provision with respect to means testing.

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[9] Section 21 of the Provincial Insolvency Act, 1920 and Section 17 of the Presidency Towns Insolvency Act, 1909.
[10] Section 60 of the Presidency Towns Insolvency Act, 1909.

2.7 Is there a garnishment of regular income?

Where an insolvent is an officer of the Indian Army or Navy, or an officer or clerk or otherwise employed or engaged in the civil service of the Government, the official assignee shall receive for distribution amongst the creditors so much of the insolvent's pay or salary liable to attachment in execution of a decree as the Court may direct.

Where an insolvent is employed elsewhere, the Court may, at any time after adjudication and from time to time, make such order as it thinks just for the payment to the official assignee, for distribution among the creditors of so much of such salary or income as may be liable to attachment in execution of a decree, or of any portion thereof.[11]

2.8 Is there protection for the debtor's privacy, his mail and his home?

Where an interim receiver has been appointed or an order of adjudication is made, the court, on the application of the official assignee, may, from time to time, order that for any time up to three months, all post letters, whether registered or unregistered, parcels and money orders addressed to the debtor shall be re- directed, or delivered to the official assignee, or otherwise as the court directs.[12]

Further an insolvent in respect of whom an order of adjudication has been made, may apply to court for a protection order granting him protection from arrest or detention.[13]

2.9 Is there protection of the spouse's interests in the home?

Indian insolvency law is silent on all issues relating to the spouse of the insolvent / debtor.

2.10 Is the debtor restricted to receive information?

A debtor receives notice at every stage of the insolvency proceedings and as regards mails and correspondence addressed to the debtor from other sources is concerned, the same is accessible by the debtor unless in cases where the interim receiver has been appointed or an order of adjudication is made, and application is made to court by an official assignee for directly receiving posts, parcels, money orders addresses to debtor. In such an event the court may order that the all such mail, posts, parcels, money orders be re-directed to the official assignee for a maximum period of 3 months.

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[11] Section 60 of the Presidency Towns Insolvency Act, 1909.
[12] Section 35 of the Presidency Towns Insolvency Act, 1909.
[13] Section 31 of The Provincial Insolvency Ac, 1920 and Section 25 of the Presidency Towns Insolvency Act, 1909.

2.11 Does the debtor have the liberty to move freely and to leave any State, including his own?

Under Section 32 of The Provincial Insolvency Act, 1920 Court after making an order of adjudication the court may issue a warrant for arrest of the debtor, if the court is satisfied upon the application of any creditor or receiver that the debtor has absconded or departed from the local limits of its jurisdiction with intent to avoid any obligation which has been or might be imposed on the debtor under the said Act. However the Court may release such debtor upon furnishing of reasonable or necessary security by the debtor.

Similar provisions for arrest of the debtor on grounds of absconding or departing from the jurisdiction of the court are contained in section 34 of the Presidency Act.

2.12 Is the debtor entitled to cost-free legal assistance?

Indian insolvency does not contain any provision on cost free legal assistance. However free legal aid to poor and weaker sections of the society is provided for under Article 39A of the constitution of India. Legal Services Authorities Act, 1987 has been enacted with an object to establish a nationwide uniform network for providing free and competent legal services to the weaker sections of the society. The National Legal Services Authority (NALSA) has been constituted under the Legal Services Authorities Act, 1987 to monitor and evaluate implementation of legal services available under the Act.

2.13 Are there restrictions on the debtor after the procedure?

An order of discharge releases the insolvent from all debts provable under the Acts. However the order of discharge does not release the insolvent from the following debts:

(i) debt due to the government;

(ii) any debt or liability incurred by means if any fraud or fraudulent breach of trust to which the insolvent was a party;

(iii) debt or liability in respect of which the insolvent has obtained forbearance by any fraud to which the debtor was a party;

(iv) liability under an order for maintenance made under section 488 of the Code of Criminal Procedure, 1895.

2.14 Is the spouse (automatically) included in the procedure?

Insolvency law in India is silent on all issues relating to the spouse of the Insolvent.

2.15 In which way do the International or European Convention and Covenants play a role?

Indian insolvency does not recognize any international convention.

QUESTION 3

3. Position of the creditor

3.1 Can a creditor force the debtor to commence a procedure or oppose the debtor from doing so?

A creditor whether secured or unsecured may present an insolvency petition to the court provided the creditor satisfies the conditions specified in the Acts. There's no provision entitling a creditor to oppose opening of proceedings by a debtor.

3.2 Which creditors' claims can be excluded from a discharge?

All debts and liabilities, present or future, certain or conditional are provable against an insolvent except those debts (i) whose value is incapable of being fairly estimated and demands; and (ii) demands in the nature of unliquidated damages arising otherwise than by reason of a contract or a breach of trust cannot be proved against the insolvent.[14]

Except in the above two categories of debts which cannot be proved against the insolvent, Presidency Act provides for one more category of debt which is excluded from purview of insolvency proceedings. Section 46 of the Presidency Act prohibits the person having notice of the presentation of any insolvency petition by or against the debtor from proving for any debt or liability contracted by the debtor subsequently to the date of him receiving notice.

3.3 Does a creditor have to accept a curtailment of his claim?

The court may, on the application of the (i) receiver and after notice to the creditor; or (ii) any creditor and such inquiry (if any) as the court thinks necessary, expunge entry or reduce the amount of the debt, if the debt has been improperly entered in the schedule.[15]

3.4 Do certain creditors receive more protection than others?

Section 61 of the Provincial Act states the priority of debts and provides that while distributing the property of the insolvent the following shall be paid in priority over other debts:

(i) debts due to the government or any local authority; and

(ii) wages or salary not exceeding twenty rupees in all, of any clerk, servant or labourer in respect of services rendered to the insolvent during four months before the date of the presentation of the petition.

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[14] Section 3 of the Provincial Insolvency Act, 1920.
[15] Section 50 of the Provincial Insolvency Act, 1920.
[16] Section 28 of the Provincial Insolvency Act, 1920 and Section 17 of the Presidency Towns Insolvency Act 1909.

Section 49 of The Presidency Act provides a third category of priority debts (along with the above two in the same order) which includes rent due to landlords from the insolvent, provided the rent does not exceed one months' rent.

The three categories of debts rank equally between themselves and in case the property of the insolvent is insufficient to pay-off the above mentioned debts in full then both shall abate equally. Subject to the provisions of this Act, all debts entered in the schedule shall be paid rateably according to the amounts of such debts respectively and without any preference. Where there is any surplus after the payment of the foregoing debts, it shall be applied in payment of interest from the date on which the debtor is adjudged an insolvent at the rate of six per cent per annum on all debts entered in the schedule.

Except the above categories of priority debts, the secured creditors are also not affected by any insolvency proceedings of the court in case he is not one of the petitioners or parties to the insolvency proceedings and he is entitled to recover his dues as usual against his securities if needed.[16]

QUESTION 4

4. Avoidance actions

4.1 What are the legal proceedings to protect / realize the debtor's assets?

An order appointing an interim receiver may be made by the court for the protection of the estate of the insolvent, while admitting the insolvency petition or at any time thereafter before adjudication. Such an interim receiver upon appointment immediately takes possession of the property, or any part of the property of the debtor.[17]

Further, the court may also order attachment by actual seizure of the whole or any part of the property of the debtor either at the time of admitting insolvency petition or at any subsequent time before making order of adjudication.

[16] Section 28 of the Provincial Insolvency Act, 1920 and Section 17 of the Presidency Towns Insolvency Act 1909.
[17] Section 20 of the Provincial Insolvency Act, 1920 and Section 16 of the Presidency Towns Insolvency Act 1909.

QUESTION 5

5. Good faith

5.1 Does the principle of "good faith" play a role and in which way?

The principle of 'good faith' comes into play to protect the interest of the innocent purchasers of property of a debtor under a sale in execution, and such a person acquires a good title to property purchased against the receiver.[18]

Further Section 54 of the Provincial Act and Section 56 of the Presidency Act which prohibits an insolvent from giving preference to any particular creditor over other creditors also provide that these sections will not affect the rights of any person who in good faith and for valuable consideration has acquired a title through or under a creditor of the insolvent.

QUESTION 6

6. Re-payment plan

6.1 Is the debtor submitted to a payment plan?

No payment plans have been specified in law other than composition schemes detailed in subsequent paragraph.

6.2 How long is the duration of such a plan?

The law does not prescribe any duration of such composition schemes and each case is decided on its own merits.

6.3 Does the plan have an educational purpose?

Such plans do not have any educational purpose.

[18] Section 51 of the Provincial Insolvency Act, 1920 and Section 53 of the Presidency Towns Insolvency Act 1909.

QUESTION 7

7. Voluntary settlement

7.1 What are the possibilities for a voluntary settlement?

A debtor is entitled to submit a proposal for a composition in satisfaction of his debts, or a proposal for a scheme of arrangement of his affairs upon being adjudged as an insolvent. Consequent to which the court shall fix a date for the consideration of the proposal, and shall issue a notice to all creditors. If, after consideration of the proposal, a majority in number and three- fourths in value of all the creditors whose debts are proved and who are present in person or by pleader, resolve to accept the proposal, the same shall be deemed to be duly accepted by the creditors. However the court shall approve any such proposal only if it is satisfied after considering the report of the receiver if any and / or objection(s) of any creditor that such proposal is calculated to benefit the general body of creditors.

Insolvency law does not provide for or fixes any fixed duration of the composition schemes and each case is decided by the court on its own merits. Once the scheme of composition is approved by the court, the same shall be embodied in order of court and the court may annul such composition scheme and re-adjudge the debtor as insolvent, if it appears to the court that default is made in payment of any installment due, or that the composition or scheme cannot proceed without injustice or undue delay, or that the approval of the court was obtained by fraud.[19]

QUESTION 8

8. Discharge

8.1 In which way is a discharge granted?

A debtor at any time after passing of order of adjudication may apply to court for an order of discharge. A debtor is under an obligation to apply for a discharge within the period specified in the order of adjudication, failing which the order of adjudication will be annulled. Upon receiving an application for obtaining an order of discharge from the debtor the court shall fix a day for the hearing and any objection against such application. On the day of such a hearing, the court may after considering the objections of the creditors or report of the receiver if any, (a) grant or refuse an absolute order of discharge (b) suspend the operation of the order for a specified time; (c) grant an order of discharge subject to any conditions with respect to any earnings or income which may afterwards become due to the insolvent or with respect to his after acquired property.[20]

[19] Sections 38 to 40 of the Provincial Insolvency Act, 1920.
[20] Sections 41 to 43 of the Provincial Insolvency Act, 1920.

8.2 Can a discharge, after it has been granted be revoked?

Discharge may be revoked and the debtor may be re-adjudged as an insolvent if it appears to the court that default is made in payment of any installment due under any composition or scheme or that the composition or scheme cannot proceed without injustice or undue delay, or that the approval of the court with respect to any composition or scheme was obtained by fraud.[21]

QUESTION 9

9. Remuneration / costs

9.1 How are the costs of the procedure dealt with?

The costs of any insolvency proceeding, including the costs of maintaining a debtor in the civil prison shall be at the discretion of the court in which the proceeding is held.[22]

9.2 Is the court the correct forum to scrutinize fees?

Under Indian insolvency, courts decide in view of the circumstances of each case the quantum of costs associated with insolvency proceedings.

9.3 What is the appropriate method of calculation of fees when dealing with compositions or voluntary arrangements?

Without laying down any method of calculation of any fee of any proceeding related to insolvency, Indian insolvency law has left it to the discretion of the court under which such proceeding is held.

9.4 What is the method of calculation of fees when dealing with bankruptcy proceedings?

Without laying down any method of calculation of any fee of any proceeding related to insolvency, Indian insolvency law has left it to the discretion of court under which such proceeding is held.

9.5 Can IPs charge fees based on the value they created for the creditors during an assignment?

Remuneration of every intermediary namely receiver or manager other than official receiver / assignee is within the discretion of the court (where the insolvency proceedings are held) to decide.

[21] Sections 38 to 40 of the Provincial Insolvency Act, 1920.
[22] Sec 76 of the Provincial Insolvency Act 1920 and Section 90 of the Presidency Towns Insolvency Act, 1909.

QUESTION 10

10. Cross-border considerations in consumer insolvency

The Indian laws concerning insolvency and winding-up closely follow the principles of English common law. The Presidency Towns Insolvency Act, 1909 and the Provincial Insolvency Act, 1920 are substantially along the lines of the Bankruptcy Act 1914 (repealed). Neither of these two Indian Acts makes any reference to cross-border insolvencies.

10.1 Are overseas assets included?

Indian insolvency laws do not have any extra-territorial jurisdiction, nor do they recognize the jurisdiction of foreign courts. Therefore only the property or assets of the debtor shall be included in and impacted by the insolvency proceeding in India which is situated in India.

10.2 Is forum shopping by the debtor for more favourable personal insolvency laws possible?

Forum shopping or choosing a forum is not permissible under the Indian insolvency law. A court having jurisdiction would be determined based over the area where a debtor ordinarily resides or carries on business, or personally works for gain, or if he has been arrested or imprisoned, where he is in custody.

QUESTION 11

11. What is the result of subsequent insolvencies?

There are no provisions in Indian insolvency law dedicated specifically to subsequent insolvencies and subsequent insolvencies shall also be treated the way initial insolvency is treated.

QUESTION 12

12. Recommendations?

The personal insolvency laws in India are in need of an urgent makeover. In India, generally, personal insolvencies are resolved out of court by methods such as restructuring of the loan or waiving the interest due or settling for partial repayment. This is largely due to the complexity of the legal framework, therefore the existing laws need to be modified. A mechanism must be formulated paving the way for renegotiation of debts, at the same time ensuring that debtors are not afforded an opportunity to escape obligations. Such a framework should also recognize that many debt claims may be from informal sources, that the most indebted may be very poor, that they may need counselling and financial advise as much as debt rescheduling, and that they may have little resources to navigate the legal system.

Education of public at large is non-existent, and in this context wide publicity must be given to the concept of credit counselling and the free availability of such services. Further, it would also be desirable to have a system of accreditation of counsellors. Quality of personnel responsible to implement the system of credit counselling is crucial for the success of these counselling centres.

There is urgent need to amend the current insolvency procedure in such a manner which makes the current laws less tedious and less time-consuming. Typically, it takes four to five years before the case is resolved. Insolvency in its present form fails to address the issue of early detection of insolvency. Thus steps are required for guidelines and procedures to distinguish between willful and non-willful defaulters. Presently, a court appointed receiver takes the call on the merits of the case. Since professionals are not involved, it often leaves scope for misuse of the provisions of the law by unscrupulous elements.

JAPAN

QUESTION 1

1. What are the options or procedures available for a natural person / consumer regarding their over-indebtedness in your jurisdiction?

Options under Japanese law include (i) consumer bankruptcy, (ii), rehabilitation for individuals with small - scale debts ("Small scale debt rehabilitation") (iii) rehabilitation for salaried workers ("Salaried worker rehabilitation") and (iv) Civil rehabilitation ("Civil rehabilitation and collectively with (ii) and (iii) above, "Rehabilitation").

In general, consumer bankruptcy is a straight-forward "liquidation" proceeding like bankruptcy proceeding for corporations and other legal entities, while rehabilitation is a proceeding for the repayment of a debtor's incurred debts pursuant to a rehabilitation plan meeting statutory requirements. Generally, in a bankruptcy proceeding, all assets that the bankrupt possessed prior to commencement of the proceeding will be disposed of or converted into cash, and distributed to creditors. In order to financially rehabilitate the bankrupt individual, bankruptcy proceeding has the significance of discharging the bankrupt individual's debts that could not be paid off under the proceedings following certain conditions. In contrast, rehabilitation for individuals is a process of paying off debt in accordance with a rehabilitation plan, and has the purpose of restoring the individual from insolvency by reducing the amount of debt.

Small scale debt rehabilitation and Salaried worker rehabilitation are rehabilitation procedures for individuals anticipated to have continuous income. Such procedures have been simplified and rationalized to make them more accessible to individual debtors. As a result, Small scale debt rehabilitation and Salaried worker rehabilitation are special procedures derived from Civil rehabilitation.

The main differences between Small scale debt rehabilitation and Salaried worker rehabilitation are as follows. In the case of Salaried worker rehabilitation, the approval of creditors is not required for the rehabilitation plan. Court approval is sufficient. In contrast, in the case of Small scale debt rehabilitation, "passive consent of creditors" is required for approval of the rehabilitation plan. "Passive consent of creditors" means that the number of creditors that have expressed disapproval of the rehabilitation plan proposal in writing is less than one-half the number of all creditors, and the amount of claims of such creditors is less than one - half of the total claims. If the "passive consent of creditors" is obtained, the creditors will be deemed to have consented to the rehabilitation plan proposal.

In the case of Salaried worker rehabilitation, the substance of the rehabilitation plan must meet a requirement known as the "disposable income requirement." "Disposable income requirement" is a requirement that the total amount to be paid under the rehabilitation plan must be at least twice the amount obtained after subtracting the minimal expenses for one year required to maintain a living, from after - tax income for one year. As a result, the requirements of Small scale debt rehabilitation are easier to meet in many cases than Salaried

worker rehabilitation, and many salaried employees, government employees and pensioners, who may use the Salaried worker rehabilitation, actually choose to use Small scale debt rehabilitation.

1.1 The legal grounds for the opening of or access to those procedures

The legal grounds for the opening of the procedures above are the following statutory provisions:

- Consumer bankruptcy - Article 15 Bankruptcy Act (Act No. 75 of June 2, 2004)
- Small scale debt rehabilitation - Article 21 and 221 of the Civil Rehabilitation Act (Act No. 225 of December 22, 1999)
- Salaried worker rehabilitation - Article 21 and 239 of the Civil Rehabilitation Act
- Civil rehabilitation - Article 21 of the Civil rehabilitation Act

1.2 How are these procedures made available?

A creditor or debtor (debtor only in the case of Small scale debt rehabilitation and Salaried worker rehabilitation) may file a petition to commence any of the procedures described above with a court which has jurisdiction. The petitions are filed in the form of documents prescribing certain matters required by the Rules of the Supreme Court of Japan. A court may order the commencement of such procedures if it determines the following:

Consumer bankruptcy - (i) it is likely that there will arise facts (please see 1.5) that will become a cause for the bankruptcy of the debtor, (ii) fees for bankruptcy procedures have been paid, and (iii) the petitioner did not petition to commence bankruptcy proceedings for any illegitimate purpose or otherwise in bad faith.

Rehabilitation - (i) it is likely that there will arise facts that will become a cause for the bankruptcy of the debtor, (ii) fees for rehabilitation procedures have been paid, (iii) bankruptcy proceedings or special liquidation proceedings are continuing in court, and such proceedings are not in the general interest of creditors, (iv) it is not apparent that there is no possibility of formulating or adopting a rehabilitation plan proposal, or approval of a reorganization plan, and (v) the petitioner did not petition to commence rehabilitation proceedings for any illegitimate purpose or otherwise in bad faith.

1.3 Who can commence the procedure?

As explained above, a debtor or a creditor may generally file a petition to open the procedures, but only the debtor may file a petition to open procedures for Small scale debt rehabilitation and Salaried worker rehabilitation.

1.4 Who will supervise the procedure?

Consumer bankruptcy - Where a court-appointed trustee carries out the bankruptcy proceedings, the court with which the petition for commencement of bankruptcy proceedings has been filed will supervise the proceedings and other ancillary matters.

Small scale debt rehabilitation and *Salaried worker rehabilitation* - There is no supervisor prescribed under law. A court, however, may appoint an individual rehabilitation inspector ("Individual Rehabilitation Inspector") to advise and assist in the formulation of the rehabilitation plan. In the case of the Tokyo District Court, an Individual Rehabilitation Inspector will be appointed for all cases on the date the petition to commence proceedings is filed.

Civil rehabilitation - A supervising inspector ("Supervising Inspector") will supervise all procedures. In the case of the Tokyo District Court, a Supervising Inspector is generally appointed for all cases petitioned by the debtor.

In the case of bankruptcy, the court will supervise the bankruptcy trustee and in the case of Rehabilitation, the court will supervise the Supervising Inspector and Individual Rehabilitation Inspector. As a result, the court will ultimately supervise the procedures for both bankruptcy and Rehabilitation.

1.5 What are the criteria such a person has to satisfy?

Consumer bankruptcy - The only requirement for a debtor in the case of consumer bankruptcy is that such debtor is unable to pay his debts. Note that when a debtor has suspended payments, such debtor is presumed to be unable to pay his debts. "Unable (or inability) to pay debts" in this case means a condition where a debtor generally and continuously cannot pay his debts as they come due, as a result of such debtor's inability to make payments.

Small scale debt rehabilitation - A debtor may request Small scale debt rehabilitation if:

- it is likely that there will arise facts which will be a cause for the bankruptcy of the debtor (inability to pay) or the debtor is unable to pay debts which are due without having a significant adverse effect on the debtor's business;
- exists no reason that would be a cause for the dismissal of the petition for commencement of proceedings (for example, not having paid the fees for the proceedings or if the petition was filed wrongfully or in bad faith);
- the debtor is an individual;
- the debtor is likely to earn income continuously or regularly in the future, and;
- total amount of debt owed by the debtor is not more than 50 million yen (except housing loans).

Salaried worker rehabilitation - A debtor may request Salaried worker rehabilitation if such debtor meets requirements (i) to (v) above, as well as (vi) such debtor is expected to receive salary or earn similar regular income in the future and (vii) the amount of such salary or other income will fluctuate by only a small margin.

Civil rehabilitation - The requirements are (i) and (ii) above.

1.6 What are the available alternatives?

An alternative proceeding involving the court is special mediation (*"tokuteichoutei"*; enacted as Act No. 158 of Dec 17, 1999), and is available for debtors mainly concerning debts to money lending businesses and credit companies. This proceeding, however, is not binding on creditors who reject the agreement that is reached.

QUESTION 2

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2. Position of the debtor and the spouse

2.1 Which assets and income are excluded from the procedure?

The following assets and income are excluded in bankruptcy proceedings:

- Assets which the bankrupt earned after the commencement of bankruptcy proceedings.
- Cash in the amount of 990,000 yen, which is the equivalent of an average family's 3-month budget, which can be subject to increase in order to assure debtor's livelihood upon approval by the court.
- Other assets which the court approves to be excluded from the bankruptcy estate.
- Assets which the bankruptcy trustee waives to be included in the bankruptcy estate.

In the case of Rehabilitation, all of the debtors's assets and income before and after the commencement of the proceedings are included in the procedure.

2.2 Does the debtor have restrictions on the disposition of his assets?

Consumer bankruptcy - Debtors in bankruptcy lose the right to administer and dispose of their assets except for assets excluded from the proceedings. As a result, such debtors generally may not dispose of their assets at will.

Rehabilitation - Debtors in rehabilitation do not lose their rights to dispose of their assets, and may dispose of their assets without restriction. In practice, however (in the case of the Tokyo District Court), the court will appoint a Supervising Inspector for all Civil rehabilitation cases and the court will

stipulate certain matters concerning the disposal and management of the debtor's assets which will require permission from the Supervising Inspector. In addition, although there is no Supervising Inspector for Small scale debt rehabilitation and Salaried worker rehabilitation, the court may stipulate certain conduct of the debtor which will require the court's permission.

2.3 Which assets and income are included in the procedure?

Consumer bankruptcy **-** All assets, except for excluded assets, that the bankrupt debtor holds at the time of commencement of bankruptcy proceedings, regardless of whether or not such assets exist in Japan, are included in the bankruptcy estate.

Rehabilitation - In the case of rehabilitation proceedings, future income is also included in the procedure in addition to all assets existing as of the commencement of the procedures.

2. 4 Are pension schemes included?

Consumer bankruptcy **-** Any future claims arising out of events prior to commencement of bankruptcy proceedings belong to the bankruptcy estate. Accordingly, pension premiums paid up to the commencement of bankruptcy proceedings should be a part of the bankruptcy estate. However, because the law prohibits the seizure of public pensions, public pension schemes are not included in the bankruptcy estate. As a result, a debtor may use his public pensions freely. On the other hand, because insurance agreements pursuant to private contracts, including private individual pensions, are included in the bankruptcy estate, the trustee will generally terminate the insurance contract and include any amounts received as refund in the bankruptcy estate. In practice, however, the trustee will not include any refund less than 200,000 yen.

Rehabilitation - The issue of which assets will become the source of payment of debt depends on the rehabilitation plan. As a result, in theory pension schemes can be included as a source of payment, but are usually not included in practice.

2.5 Does the debtor donate to the estate a part of his income for the benefit of the creditors?

Consumer bankruptcy **-** In the case of bankruptcy, the debtor does not donate estate assets obtained after the court order to commence bankruptcy proceedings.

Rehabilitation - In the case of rehabilitation, a debtor's future income of 2 years or more will become a source for payment to creditors.

2.6 Is there a means test?

Consumer bankruptcy - It is not necessary to confirm whether the debtor has the means to carry out the procedure.

Small scale debt rehabilitation and *Salaried worker rehabilitation* - There is a test to determine whether the debtor will likely be able to pay his debts over a period of time. In the case of the Tokyo District Court, after the Individual Rehabilitation Inspector is appointed, such Individual Rehabilitation Inspector will provide the debtor bank account and other information in order for the debtor to make installment deposits. The debtor is required to make scheduled payments for each month as an installment deposit by a certain deadline set by the Individual Rehabilitation Inspector to the bank account of the Individual Rehabilitation Inspector. The amounts deposited by the debtor will not be applied to the repayment of debts, but to pay the remuneration of the Individual Rehabilitation Inspector. Any amount remaining after payment of such remuneration will be returned to the debtor. The Individual Rehabilitation Inspector will take into consideration whether the debtor was able to make the installment payments in a timely manner when providing its opinion to the court as to whether the debtor will likely be able to repay its debts in the future.

Civil rehabilitation - Not applicable.

2.7 Is there a garnishment of regular income?

Garnishment of regular income is not possible after the commencement of proceedings.

2.8 Is there protection for the debtor's privacy, his mail and his home?

Consumer bankruptcy - A bankruptcy trustee, upon receiving a mail or other postal items addressed to the debtor, may open it and view its contents in order to get information on creditors who have not filed bankruptcy claims and properties which have not yet been discovered. In addition, the name and address of the debtor as well as the content of decisions by the court regarding the proceedings will be published in the official gazette (*kampo*) at certain times and will be available to the public. The fact that the debtor filed for bankruptcy will not be written in the debtor's family register or residence registry.

Rehabilitation - For rehabilitation, information on the debtor will be published at certain times in the official gazette and made available to the public.

2.9 Is there protection of the spouse's interests in the home?

If an individual manages his spouse's assets pursuant to a matrimonial property agreement, this arrangement generally cannot be changed after submitting a marriage notification to the local government. If a bankruptcy proceeding commences with respect to such individual, however, the spouse may petition a family court to obtain the right to manage the assets. In addition, the spouse may request a division of community property. Further, if the spouse registers a change in the rights over the assets and the division of community property, the spouse may use this as evidence against the trustee or others to show ownership and control of assets.

A spouse's interests in real estate will be excluded from the insolvency estate if such interests are registered in the real estate register of the local government, or there exist other evidence showing the spouse's interest in the home.

2.10 Is the debtor restricted to receive information?

Consumer bankruptcy - There are no restrictions on debtor's receipt of information. Importantly, as noted in 2.8 above, because the bankruptcy trustee will receive mail and other postal items addressed to the debtor, the debtor may not be able to receive certain information in a timely manner. In addition, because the bankruptcy trustee takes possession of the debtor's passbook and account ledgers, the debtor is physically restricted from accessing certain information.

Rehabilitation - There are no specific restrictions on the information that the debtor may receive.

2.11 Does the debtor have the liberty to move freely and to leave any State, including his own?

Consumer bankruptcy - The law provides that a bankrupt debtor may not leave his place of abode without obtaining permission from the court. The actual practice depends on the practices of each court. In the case of the Tokyo District Court, if the debtor desires to change his address or leave his place of abode during the proceedings, the debtor must apply and obtain the permission of the bankruptcy trustee. If the debtor seeks to change his address, he must also submit a notification to the court.

Rehabilitation - There are no restrictions under the law, but in practice, a debtor will normally notify the court when leaving his place of abode or changing his address during the proceedings.

2.12 Is the debtor entitled to cost-free legal assistance?

The debtor is not entitled to cost - free legal assistance under the law. There is no economic assistance institution in Japan for the debtor that would take care of all costs of the debtor, including legal fees, but because bankruptcy procedures have a public purpose, there is an institution for the country to temporarily advance up front fees for the procedure on behalf of the debtor, though cases of such system being used are not common. There is also an institution for the Japan Legal Assistance Center (*nihon shiho shien sentaa*), an incorporated administrative agency, to advance up front legal fees on behalf of the debtor.

2.13 Are there restrictions on the debtor after the procedure?

Consumer bankruptcy **-** A debtor who is a lawyer or certified accountant will lose his license and may not be appointed as a guardian or a curator. The debtor's right to vote and to run for office will not be restricted. When the debtor becomes bankrupt, that fact will be registered with a credit agency. As a result the debtor will not be able to obtain a loan, incur debt or use a credit card for 5 to 7 years.

Rehabilitation - There are no restrictions regarding licenses or qualifications. Voting right, right to run for office and handling of creditworthiness information are the same as in the case of bankruptcy.

2.14 Is the spouse (automatically) included in the procedure?

No, the effects of the commencement of bankruptcy or rehabilitation procedures will not automatically extend to the spouse.

2.15 In which way do the International or European Convention and Covenants play a role?

Japanese bankruptcy procedures do not follow treaties or EU rules. In response to a resolution in 1997 by member states of the General Assembly of the United Nations encouraging the adoption of domestic laws that comply with the UNCITRAL Model Code, Japan implemented the "Law concerning the Recognition of Foreign Bankruptcy Procedures" (Act No. 129 of November 29, 2000).

This law specifies the procedures necessary for the recognition in Japan of bankruptcy procedures commenced overseas. Foreign bankruptcy proceedings are recognized in Japan only upon the issuance by a Japanese court of an order. Japanese courts have authority to issue orders ceasing enforcement and preservation actions, orders prohibiting the disposition of assets or repayments, orders stopping the exercise of security interests, as well as management orders (order restricting the right to manage the debtor's domestic operators and assets), thereby extending the reach of foreign bankruptcy proceedings to the debtor's assets in Japan.

QUESTION 3

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3. Position of the creditor

3.1 Can a creditor force the debtor to commence a procedure or oppose the debtor from doing so?

Consumer bankruptcy and *Civil rehabilitation* - A creditor may file a petition for commencement of bankruptcy proceedings or file an immediate appeal against a judicial decision approving a petition to commence bankruptcy proceedings.

Small scale debt rehabilitation and *Salaried worker rehabilitation* - Only the debtor can file a petition to commence proceedings. An immediate appeal may be filed by a creditor against a judicial decision approving a petition to commence rehabilitation proceedings.

3.2 Which creditors' claims can be excluded from a discharge?

The following claims can be excluded from discharge:

(i) A claim for tax, etc.

(ii) A claim for damages for a tort that the bankrupt has committed in bad faith.

(iii) A claim for damages for a tort harming the life or body of another that the bankrupt has committed intentionally or by gross negligence (except the claim set forth in the preceding item (ii)).

(iv) A claim for domestic support obligations, such as child support and alimony.

(v) A claim of an employee against her employer and a claim for return of an employee's money deposited with her employer, which have arisen from an employment relationship.

(vi) A claim that the bankrupt has not stated in the list of holders of dischargeable claims while knowing it (excluding a claim held by a person who knew that an order of commencement of bankruptcy proceedings against the bankrupt had been made).

(vii) A claim for a fine, etc.

Please note that, (i) to (iv) are excluded from a discharge both in cases of bankruptcy and rehabilitation, while (v) to (vii) are excluded only in the case of bankruptcy.

3.3 Does a creditor have to accept a curtailment of his claim?

Consumer bankruptcy - A creditor has to accept a curtailment of his claim when the court finalizes its determination for approval of discharge. When a debtor files a petition for commencement of bankruptcy proceedings, they will be deemed to have simultaneously petitioned for an approval of discharge, unless they manifest an intention to the contrary.

Small scale debt rehabilitation and *Salaried worker rehabilitation* - After the rehabilitation plan is carried out and claims covered in the rehabilitation plan (claims of creditors submitted to the court by the debtor or claims submitted by creditors) have been paid, the debtor will be discharged from paying any remaining claims. In such case, the claims of a creditor whose claims were not part of the rehabilitation plan may be curtailed. Generally, a debtor will not be discharged if the rehabilitation plan is not carried out, but in exceptional cases, a court may grant an approval of discharge.

Civil rehabilitation - A creditor must accept a curtailment of his claim when the court's approval of the rehabilitation plan becomes final.

3.4 Do certain creditors receive more protection than others?

A creditor who holds a special statutory lien, pledge or mortgage against property that belongs to the estate may exercise rights which are independent of the bankruptcy or rehabilitation proceedings and may receive payment with priority over payments determined by the proceedings. A creditor who holds common benefit claims (e.g. court cost, cost for provision or realization or distribution of estate) or general claims (e.g. salary claim, taxation claim) can receive them as needed. A bankruptcy creditor may effect a set-off without going through bankruptcy proceedings if such creditor owes a debt to the bankrupt at the time of commencement of bankruptcy proceedings.

QUESTION 4

4. Avoidance actions

4.1 What are the legal proceedings to protect / realize the debtor's assets?

Consumer bankruptcy - The right of avoidance is a right held by the bankruptcy trustee and is a process to correct after the fact any wrongful actions taken by the debtor prior to commencement of bankruptcy proceedings. As a result of exercising the right of avoidance, the bankruptcy trustee can recover any assets which were wrongfully lost from the bankruptcy estate.

Avoidance of fraudulent conveyance (sagai-koui hinin) - This is the right to void any actions which reduce the assets of the debtor, such as the sale of assets for a low price, or a creditor receiving payment of claims in an amount exceeding the actual debt owed. In each case, the party engaging in the act with respect to the debtor must have known at the time that such act would harm the debtor's creditors.

Avoidance of preferential transfer (henpa-koui hinin) - This is the right to void any actions which grants a security interest over or extinguishes an existing debt, after (i) the debtor became incapable of paying his debts or (ii) the filing of a petition for commencement of bankruptcy proceedings. The party engaging in such actions must have known at the time that the debtor was incapable of paying his debts or a petition for commencement of bankruptcy proceedings had been filed.

Small scale debt rehabilitation and *Salaried worker rehabilitation* - There are no legal proceedings to protect or realize the debtor's assets. Because exercising the right of avoidance takes a long time, laws on rehabilitation proceedings for individuals do not provide for the right of avoidance for the sake of making the proceedings simple and smooth.

Civil rehabilitation - The right of avoidance is the same as consumer bankruptcy, and can be exercised by the Supervising Inspector or the trustee to which the exercise of such right has been granted.

QUESTION 5

5. Good faith

5.1 Does the principle of "good faith" play a role and in which way?

Any acts that a creditor engages in with respect to the debtor while knowing that such acts will harm other creditors, will cease to be effective through the exercise of avoidance or other rights.

QUESTION 6

6. Re-payment plan

6.1 Is the debtor submitted to a payment plan?

Consumer bankruptcy - A bankrupt debtor is not required to create or follow a payment plan.

Rehabilitation - A rehabilitation debtor must prepare a proposal for a rehabilitation (payment) plan and submit it to the court within the period specified by the court, which comes after expiration of the period for filing proofs of claim

6.2 How long is the duration of such a plan?

Consumer bankruptcy - Not applicable.

Small scale debt rehabilitation and *Salaried worker rehabilitation* - Generally, the duration of the plan is 3 years from the date on which the plan is approved by the court. If there are special circumstances (inability to pay in 3 years the minimum amount required under the law to be paid under the plan), the duration of the plan may be extended for a period of up to 5 years from the date on which the plan is approved by the court. As a result, the maximum duration of the plan is 5 years. In practice, the courts have been approving plans that exceed 3 years without much difficulty.

Civil rehabilitation - The duration of the plan cannot be longer than 10 years from the time when the court approves the plan.

6.3 Does the plan have an educational purpose?

The plan has no educational purpose. Unlike ordinary rehabilitation, in the case of personal rehabilitation, there is no mechanism for overseeing execution of the plan, but there is a practice of evaluating the prospects of carrying out a rehabilitation plan. The rehabilitation debtor must make payment of each installment of the Deposit to an account of the Individual Rehabilitation Inspector every month until approval of the rehabilitation plan (typically, for 6 months). Failure to make payment leads to dismissal of the petition and to the possibility that the rehabilitation plan will not be approved.

QUESTION 7

7. Voluntary settlement

7.1 What are the possibilities for a voluntary settlement?

Private workout ("*Shitekiseiri*") and voluntary settlement ("*Niniseiri*") are Japan's insolvency proceedings based on the agreement of stakeholders without a legal process. Out of court bankruptcy settlements can be divided into private workouts and bankruptcy alternative dispute resolution ("Bankruptcy ADR"). In the case of Bankruptcy ADR, a third-party intermediary serves as a mediator.

QUESTION 8

8. Discharge

8.1 In which way is a discharge granted?

Consumer bankruptcy - Where a debtor has filed a petition for commencement of bankruptcy proceedings, they will be deemed to have filed a petition for a grant of discharge upon filing said petition. The court may have a bankruptcy trustee conduct an investigation into whether there exist requirements for an order of a grant of discharge or whether there are circumstances that should be considered when determining whether or not to issue an order of a grant of discharge, and report the results of such investigation to the court in writing. The court will issue an order for a grant of discharge if the bankrupt debtor falls under no recognized cases.

Small scale debt rehabilitation and *Salaried worker rehabilitation* -The court may grant an approval for discharge of all outstanding rehabilitation debts except debts not subject to discharge and penalties assessed prior to commencement of the rehabilitation procedures, pursuant to a petition by the debtor. The following requirements must be satisfied for discharge of rehabilitation debts: (i) carrying out the rehabilitation plan has become extremely difficult for reasons not attributable to the debtor, (ii) at least three-fourths of the claims covered by the rehabilitation plan have been paid, (iii) an approval of discharge will not be against the general interests of the creditors, and (iv) changing the rehabilitation plan is extremely difficult.

Civil rehabilitation - Discharge will be granted for certain claims when the court approves the rehabilitation plan.

8.2 Can a discharge, after it has been granted be revoked?

Consumer bankruptcy - When a judgment finding the bankrupt guilty for the crime of fraudulent bankruptcy becomes final and binding, the court, upon the petition of a bankruptcy creditor or by its own authority, may issue an order of revocation of discharge. In addition, where a court finds that the order of a grant of discharge was made due to unlawful means of the bankrupt, a bankruptcy creditor must file a petition for revocation of discharge within one year after the order of a grant of discharge was issued in order to revoke the grant of discharge.

Small scale debt rehabilitation - In contrast to Civil rehabilitation procedures, the procedures will terminate upon approval of the rehabilitation plan and there is no automatic discharge of debts not covered in the plan. Rather, the debts will only be changed according to a certain standard under the law. For example, if a debtor is required to pay 20% of a debt under the plan to a certain creditor, the remaining 80% will only be discharged when the debtor pays the required 20%.

The rehabilitation plan will be voided in the cases set forth below. In such cases, the rehabilitation debts will be restored to their original amounts. Causes for voidance are the following: (i) the plan was formulated by illegitimate means, (ii) the debtor fails to carry out the plan, (iii) without court permission, the debtor engages in an act that he is prohibited from engaging in without such permission, (iv) it becomes apparent as of the time of approval of the rehabilitation plan that the total payment amount under the plan falls below the total amount distributable in bankruptcy proceedings.

Salaried worker rehabilitation - In addition to the above, a discharge can be voided if (v) it becomes apparent that the sum to be repaid under the plan will be less than 2 years of after-tax income.

Civil rehabilitation - If a decision to void a discharge becomes final, rehabilitation debts which were modified by the rehabilitation plan will be restored to the original amounts, and any exemption or extension of payment deadlines under the plan will lose effect. Cause for voidance are as follows: (i) the plan was formulated by illegitimate means, (ii) the debtor or trustee fails to carry out the plan, (iii) without court permission or consent of the Supervising Inspector, the debtor engages in an act that he is prohibited from engaging in without such permission or consent.

QUESTION 9

9. Remuneration / costs

9.1 How are the costs of the procedure dealt with?

Generally, the petitioner will pay all costs of the procedures, including remuneration for the trustee and other procedural fees listed below. The remuneration for trustee is determined by the court as discussed in 9.4, and other fees are fixed. The following fees are examples of fees of the Tokyo District Court as of 2006.

Consumer bankruptcy

(i) Petition fee

- Petition for bankruptcy of individual and discharge: 1500 yen
- Petition by creditor: 20,000 yen

(ii) Deposit

- Cases terminating simultaneously with the commencement of proceedings due to the lack of assets: 20,000 yen to cover publication fees of the official gazette
- Case of petition by debtor with an attorney: 200,000 yen and 16,413 yen per individual (as publication fee of the official gazette)
- Case of petition by creditor and petition by debtor pro se: Depends on the amount of debt. If the debt is less than 50 million yen, the deposit is 50,000 yen.

(iii) Postage stamp fee

Small scale debt rehabilitation and Salaried worker rehabilitation

(i) Petition fee: 10,000 yen

(ii) Deposit: 11,982 yen as publication fee for official gazette

(iii) Postage stamp fee

Civil rehabilitation

(i) Petition fee: 10,000 yen

(ii) Deposit

- Petition by a director of a company which has filed for rehabilitation,or by an individual guarantying the debts of such company with the director : 250,000 yen
- Petition by a director of a company that has not filed for rehabilitation: 500,000 to 2,000,000 yen

- Petition by other individuals: 500,000 yen for debts under 50 million yen.

(iii) Postage stamp fee

9.2 Is the court the correct forum to scrutinize fees?

Yes, the court is the correct forum to scrutinize fees.

9.3 What is the appropriate method of calculation of fees when dealing with compositions or voluntary arrangements?

Generally, the method of calculation will be based on the number of creditors and the amount of debt.

9.4 What is the method of calculation of fees when dealing with bankruptcy proceedings?

Although the amount of fees to be paid to the bankruptcy trustee is determined at the court's discretion, the fees will be paid from the amount of the bankruptcy estate which the trustee collected. Difficulties, time and effort of work, adequacy of duties, estate growth, and quick disposal are also considered in deciding the fees. Other fees described under 9.1 above are fixed.

9.5 Can IPs charge fees based on the value they created for the creditors during an assignment?

Please see 9.4 regarding compensation of the bankruptcy trustee. The fees of the debtor's lawyer depend on the services agreement between the debtor and the lawyer. There is often a retainer fee and a monthly fee. We do not find any other practitioner such as accountants involved in usual insolvency proceedings for consumers in Japan.

QUESTION 10

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10. Cross-border considerations in consumer insolvency

10.1 Are overseas assets included?

Yes, all assets that the bankrupt holds at the time of the commencement of bankruptcy proceedings will be part of the bankruptcy estate, regardless of whether or not such assets are in Japan.

10.2 Is forum shopping by the debtor for more favourable personal insolvency laws possible?

There are no specific laws in Japan that prevent forum shopping, but because bankruptcy and rehabilitation laws of Japan are national laws, a debtor cannot forum shop within the country. This is similar to the bankruptcy laws of the United States, which is federal rather than state specific. A debtor who is a Japanese national, however, can attempt to file for bankruptcy in another country, subject to the requirements of the laws of that country. Similarly, because a petition for commencement of bankruptcy or rehabilitation proceedings under Japanese law may be filed by an individual debtor that has a business office, domicile, residence or property in Japan, a non-Japanese individual may file for bankruptcy or Rehabilitation in Japan by meeting such requirements.

QUESTION 11

11. What is the result of subsequent insolvencies?

Consumer bankruptcy - When the bankruptcy proceedings terminate, the bankruptcy trustee loses its right to manage and dispose of the debtor's assets, and the debtor regains his right to manage and dispose of his assets. If the debtor received an approval of discharge from the court, he generally cannot file a petition for commencement of bankruptcy proceedings and approval of discharge for a period of 7 years from the date when the court granted the approval of discharge, even if he becomes bankrupt again.

Small scale debt rehabilitation and *Salaried worker rehabilitation* - As mentioned previously, although the debtor will make payments in accordance with the rehabilitation plan, a court may grant an approval of discharge with respect to outstanding debts pursuant to a petition by the debtor, if certain requirements are satisfied. If the rehabilitation proceedings terminate without the formulation of a rehabilitation plan, a court can transfer the case to a bankruptcy case at its discretion. Where the debtor has received a discharge of debts, such debtor is not entitled to use the procedures under the Salaried worker rehabilitation for a period of 7 years from the date on which such debtor's rehabilitation plan was approved. In addition, such debtor generally cannot be discharged of debts in bankruptcy proceedings.

Civil rehabilitation - If the Civil rehabilitation proceedings terminate, the order of the court will be executed and the litigation will terminate. If the rehabilitation proceedings terminate without the formulation of a rehabilitation plan, a court can transfer the case to a bankruptcy case at its discretion.

QUESTION 12

12. Recommendations?

As mentioned above, the legal bankruptcy procedures available to consumers having difficulty repaying their debts are consumer bankruptcy, Small-Scale Debt Rehabilitation, and Salaried worker rehabilitation. The debtor must consider their personal situation, the requirements for each bankruptcy procedure, and the results of each procedure in deciding which one is best.

As a general rule, someone with no income and no means to repay their debts has to file for consumer bankruptcy. If someone has income and is able to make monthly payments, rehabilitation procedures are possible.

For instance, someone with an outstanding mortgage who wants to continue living in their residence should choose a rehabilitation proceeding because the alternative, consumer bankruptcy, would require disposition of all assets, including the residence. In addition, the filing of a consumer bankruptcy leads to disqualification to practice certain professions, such as law, accounting, and security services, so persons engaged in those professions should opt for rehabilitation.

In Small - Scale Debt Rehabilitation, as in the typical rehabilitation procedure, the rehabilitation creditors must vote on the rehabilitation plan. In the case of Salaried worker rehabilitation, on the other hand, the court can approve the plan without creditor vote. As a result, if there is certain possibility that creditors oppose to a rehabilitation plan, Salaried worker rehabilitation may be the better option (provided only individuals with a steady income are eligible for Salaried worker rehabilitation, however).

NIGERIA

QUESTION 1

1. What are the options or procedures available for a natural person / consumer regarding their over-indebtedness in your jurisdiction?

Although there is a Consumer Protection Council Act No. 66 of 1992 which seeks to protect interests of consumers and establishes a regulatory body to facilitate speedy redress of consumer complaints, there is no consideration of consumer credit issues under the personal insolvency law in Nigeria.

1.1 The legal grounds for the opening of or access to those procedures

The insolvency procedure available to a natural person / consumer lies generally in personal insolvency procedure governed by the Bankruptcy Act (hereafter BA) of 1979 as amended (substantive law) and Bankruptcy Rules, 1990 (adjectival law hereafter BR).

The BA provides for two formal bankruptcy procedures: debtor's bankruptcy petition and creditor's bankruptcy petition. The former may be said to be the formal insolvency option readily available to a consumer that has become indebted. Informally however, a debtor may usually attempt to resolve issues through means such as accord and satisfaction, informal arrangements with creditors (particularly his financial lenders) and out of court settlements (if he is made subject to ordinary remedial actions by a creditor on the basis of breach of contract or action for money had and received) prior to commencement of the above stated procedure with a view to implementing a workable repayment plan.

In practice, it should be noted that a debtor (as well as a creditor) may some times resort to extra-judicial measures (use the instrumentality of law enforcement agencies such as the police and EFCC) as a reprieve or alternative to personal formal insolvency procedures.

1.2 How are these procedures made available?

Debtor bankruptcy petition procedure is made available under the BA and the BR. The same applies with creditor's petition which shall be discussed further below under relevant answers on creditor's position (see question 5).

1.3 Who can commence the procedure?

The procedure can be opened by the debtor. There is also a clear possibility for a debtor to have a bankruptcy petition indirectly commenced by a friendly creditor in order to take advantage of certain features of a creditor's petition or for private reasons. For instance, for a debtor's petition, the BA does not specifically mention the debtor proposing a repayment plan whereas a creditor's petition, as we shall see below, at least envisages expresslly that the debtor can make a proposal for a scheme of arrangement or compromise under such a procedure.

1.4 Who will supervise the procedure?

The procedure is supervised by the court and court officials, particulalry the Official Receiver (hereafter sometimes described as OR) of the court. The latter can immediately take control of the estate of the debtor pending the court's making of a receiving order and has a right of information as against a debtor. He may also apply for a subpoena to be issued for the attendance of a witness or the production of documents (Rules 8,9 BR), the court can also appoint him as an interim receiver pending the making of a receiving order where it is expedient to do so to protect. The court may, after a receiving order appoint the OR or any other person as a trustee in bankruptcy. It may also stay other pending proceedings after the commencement of a bankruptcy petition. The OR can apply to the court for the appointment of a special manager having regard to the nature of the business of the estate. (See Ss.6, 9 to 13 BA)

1.5 What are the criteria such a person has to satisfy?

There are not many formalities and conditions that a debtor needs to satisfy. Under the BA and BR a debtor may without the need of filing any declaration of inability to pay debt, present a petition in the Federal High Court alleging his inability to pay debt in the format (Form 10) and with the particulars prescribed by BA (S8) and BR. (Rules 16, 34(1))

The petition is deemed to be an act of bankruptcy.

A debtor may also file an exparte application with a view to urgently protect his estate.

The objective is for the court to make a receiving order so that no creditor to whom the debtor is indebted in respect of any debt provable in bankruptcy can have a remedy against the property or person of the debtor in respect of the debt. In other words, other procedures or remedies available against the debtor shall be stayed pending the conclusion of the bankruptcy proceedings. (See Ss 3 and 10 BA)

The receiving order is made by the court upon satisfaction that there is sufficient ground to proceed otherwise it shall be refused. A receiving order shall not be given by the court where:

- the court is not satisfied that the assets available for division amongst unsecured creditors are sufficient to pay a 15% dividend;
- non attendance of the debtor at the hearing of the petition;
- of any material book of account;
- fraud or misconduct of debtor in relation to his affairs.

Obviously, this rule (S8 BA) and as well the fact that a debtor can not withdraw his petition once presented is meant to prevent abuse and prevent situations where a debtor would use these bankruptcy procedures to shield himself from attending to its commercial obligations.

1.6 What are the available alternatives?

Subject to the answer given to question 1.1 above, there are no alternatives to bankruptcy procedures.

QUESTION 2

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2. Position of the debtor and the spouse

The Bankruptcy Act does not make any distinction between the position of a debtor and his spouse. In fact it contemplates under S.39 that where a married woman has been adjudged bankrupt, her husband shall not be entitled to claim any dividend as a creditor in respect of any money or other estate lent or entrusted by him to her until all claims of the other creditors of his wife for valuable consideration in money or money's worth have been satisfied, and where the husband is the debtor and adjudged bankrupt, any money or other estate of his wife lent or entrusted by her to him shall be treated as assets of his estate, and the wife shall not be entitled to claim any dividend as a creditor in respect of any such money or other estate until all claims of the other creditors of the debtor for valuable consideration in money or money's worth have been satisfied.

2.1 Which assets and income are excluded from the procedure?

Under the BA, except from those assets charged as security to secured creditors, there appears to be no assets or income in the estate of the debtor that are excluded from the procedure.

2.2 Does the debtor have restrictions on the disposition of his assets?

Once bankruptcy proceedings is commenced the debtor does not seem to have any powers to dispose of any of his assets under the BA / BR, In fact, where a receiving order has been granted by the court or he is adjudged bankrupt, any direct, indirect or fraudulent disposition of any of his assets would amount to a punishable crime (see e.g. S133 BA). Thus, the debtor cannot upon presentation of the petition dispose of any of its property. Rather the OR or Trustee in Bankruptcy may do so with the sanction of the court. (See S.24 BA)

2.3 Which assets and income are included in the procedure?

Further to 2.1 above and subject to 2.4 below, all assets and income are included in the procedure and are available for the benefit of creditors See also S54(2) BA. Note S.41 BA which gives a description of assets divisible amongst creditors.

2.4 Are pension schemes included?

Pension schemes are subject to statutory regulations under the Pension Reform Act (PRA) 2004. They are administered by certain Pension Funds Administrators and regulated by the National Pension Commission and to that extent such assets are not available in the event of bankruptcy. In view of the fact that PRA 2004 was enacted post the BA and as well has specific provisions tending towards the segregation of employees contributions which are made available as retirement funds, it is submitted that to that extent, such assets are not available in the event of bankruptcy. (See also Ss.2, 7 and 98 of PRA 2004)

2.5 Does the debtor donate to the estate a part of his income for the benefit of the creditors?

The issue above does not arise as all assets and income are made available for the benefit of the creditors. The BA merely dampens the hardship of such a position by providing for powers of a trustee to give allowance to a bankrupt person with the persmission of the Committtee of Inspection for the support of the bankrupt and his family or when the bankrupt is appointed to superintend the winding up of his estate. (S.60 BA)

2.6 Is there a means test?

The BA provides a basic means test for the court regarding debtors, and propriety of filing a bankruptcy petition and the court would dismiss a bankruptcy petition if it is not satisfied that the assets for division among unsecured creditors, after payment of preferential debts, will be sufficient to pay a dividend of 15%.

2.7 Is there a garnishment of regular income?

There are no obviious provisions for garnishment of regular income but presumably since a garnishee order can be made under the provisions of the Sheriff and Civil Process Act 2004, the court can upon application, garnishee the income of the debtor under the said general law for enforcement of court orders and judgments.

2.8 Is there protection for the debtor's privacy, his mail and his home?

The debtor at the point of commencement of a creditor's bankruptcy is meant to disclose in detail everything concerning his estate. The BA further vests the Official receiver (S.6 BA), trustee and even the creditors (S.24 BA) with right to information and wide powers to issue subpoenas, seek the examination of any person in Nigeria, administer interrogatories and or obtain discoveries (see Rules 8 to 10 of BR). It further allows the court where it makes a receiving order, upon the application of the OR or trustee to make an order for re-direction of debtor's telegrams and letters (S.26 BA) for a period not exceeding 3 months. However, these are limited exceptions always under the general supervision of the court of the constitutional right to privacy of the debtor under the 1999 Constitution of the Federal Republic of Nigeria. The trustee is further vested with all the assets in the estate, and controls even the home and may secure such assets in any manner he deems fit. To that extent it may be said that there is not much protection of debtor's privacy, mail or home.

2.9 Is there protection of the spouse's interests in the home?

Further to the answers given in section 2.0, there is no real protection of the debtor's home or of the spouse's interest in the home. The BA is not friendly to a spouse's interests, particularly where the husband is the debtor and adjudged bankrupt, any money or other estate of his wife lent or entrusted by her to him shall be treated as assets of his estate, and the wife shall not be entitled to claim any dividend as a creditor in respect of any such money or other estate until all claims of the other creditors of the debtor for valuable consideration in money or money's worth have been satisfied. At the commencement of the petition, he is meant to submit to the OR upon a receiving order having been made, a statement in relation to his affairs inter alia showing details of all property held by him in a name or under any alias, or by his wife or his children, or by any person in trust for him or them, with full particulars as to the manner and date of its being acquired. This is not to say however that a wife's personal assets purchased in her own name would be available to creditors but it remains that even then such assets would be subjected to scrutiny to the extent that the court may, on the application of the OR or trustee, at any time after a receiving order has been made against a debtor, summon before it the debtor or his wife or any person known or suspected to have in his possession any of the estate or effects belonging to the debtor or supposed to be belonging to the debtor. (See Ss. 16 and 27 BA)

2.10 Is the debtor restricted to receive information?

As stated in 2.8, the debtor may be restricted temporarily from receiving information.

2.11 Does the debtor have the liberty to move freely and to leave any State, including his own?

A debtor is ordinarily free to move within and outside the state howsoever that his freedom of movement may be curtailed because of the bankruptcy proceedings and only subsequent to the issuance of a bankruptcy notice, where it is shown that such a debtor seeks to abscond or move goods or assets or otherwise avoid bankruptcy proceedings. In such a case, a court may issue a warrant for his arrest. (See Ss.25, 27(1)(2) BA)

2.12 Is the debtor entitled to cost-free legal assistance?

Apart from the general rules on the provision of free legal services for indigent persons, nothing in the BA suggests that a debtor is entitled to cost free legal assistance. Indeed, legal costs are factored as costs of the bankruptcy. (See for instance S35(2) BA)

2.13 Are there restrictions on the debtor after the procedure?

Please see response to question 8 on conditional discharge.

2.14 Is the spouse (automatically) included in the procedure?

Further to answers 2, 2.8 and 2.9, to a certain extent, the debtor's spouse is included included in the bankruptcy procedure and there is no special protection offered.

2.15 In which way do the International or European Convention and Covenants play a role?

International treaties and conventions play no role in Nigerian personal insolvency proceedings by virtue of the mandatory rule of domestication of international laws under S.12 of the 1999 Constitution of the Federal Republic of Nigeria. To the best of our knowledge, as at date, Nigeria has not internalized any relevant international instrument on personal or consumer insolvency.

QUESTION 3

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3. Position of the creditor

A creditor driven petition is truly the main substance of the provisions under the BA and BR as Nigeria operates a creditor friendly individual bankruptcy system.

The procedure is commenced and driven by the creditor and supervised by the Court. The grounds for the presentation of the petition must be that a debt of an aggregate amount of not less than N,2000 (about $13) and is a liquidated (not validly disputable) due immediately or at a future time. (See S.4 BA)

On the other hand, demand in the nature of unliquidated damages arising otherwise than by reason of contract, and promise of breach of trust shall not be provable in bankruptcy. (S.32 BA)

The petition is filed in the relevant form 4 (form 8 is also used where the petition would seek for the appointment of an interim receiver pending the court making a receiving order). See Rules 15,16, 22 and 27 BR. Rules 23 to 26 provide for service of the petition as well as giving of security by the creditor.

After commencement of the bankruptcy petition, creditors constituted as a Committee of Inspection may have the trustee appoint the bankrupt himself to superintend the managment of the property of the bankrupt (S.59 BA). Also a creditor may directly or through the OR “force the hand” of a debtor who fails to submit proper statement of affairs within fourteen days of the making of a receiving order by causing the debtor to be committed for contempt of court. (S.16(2) BA)

A bankruptcy notice is issued to a judgment creditor or a creditor who has obtained a final order by the Registrar on the filing by such creditor of a request in form 2 for that purpose (Rule 18). The notice shall require the debtor to pay in accordance with the terms of the judgment / order or to secure / compound for it, stating the consequence of failure to comply with the bankruptcy notice. Where he fails to appear and prosecute his petition, he may not bring any subsequent petition against the same debt or debtors except with the leave of the court in which the previous petition was presented. (Rule 33)

The court directly or through its official receiver also supervises this procedure and indeed a creditor's petition may not be withdrawn except with the leave of the court, and if withdrawn before the advertisment of the petition and or after the appointment of an interim receiver shall be liable to be dismissed.

3.1 Can a creditor force the debtor to commence a procedure or oppose the debtor from doing so?

A creditor cannot prevent a debtor from opening a bankruptcy petition. In fact BA encourages a debtor to do so as it only requires the debtor to allege his inability to pay debts and present such a petition without filing any previous declaration to that effect. The court thereupon shall simply grant a receiving order and the procedure will continue in full force with the limitation being placed on a creditor to seek remedial actions against the debtor, or his property or commence any legal proceeding pending the determination of the bankruptcy procedure except with the leave of the bankruptcy court (Ss. 10(1), 43 BA). The reason for this is because it is a collective procedure, and notice must be given to all creditors and the debtor would be subjected to a public examination after submission of his statement of affairs so that a creditor who has not proved his right before declaration of a dividend shall not be entitled to disturb the distribution of any dividend declared before his debt was proved by reason of his non-participation. (S67BA)

There are several conditions attached to a creditor's petition which can be broadly interpreted as means for a creditor to force a debtor into a bankruptcy procedure. A creditor should ensure that he puts the debtor in a position where it can be said that the debtor has committed an act of bankruptcy under S.1 BA and what would amount to such act. These may be:

a. A judgment or final order against a debtor who has been served a bankruptcy notice and without any subsisting order of stay of execution.

b. The levying of execution against the debtor and his properties being sold or held by the bailiff for 21days.

c. The filing of a valid declaration by a debtor in court stating that he is unable to pay his debt.

d. Notice given by a debtor to the effect that he has stopped payment of his debt.

e. Circumstances arising under a Credit Agreement which allow the Creditor to file a bankruptcy petition. It does not matter if a petition is yet to be filed.

f. Within or outside Nigeria, the debtor executing a conveyance or assignment of his property to a trustee or trustees for the benefit of his creditors.

g. If a debtor makes a fraudulent conveyance, gift, delivery or transfer of his property or any part thereof with intent to defeat or delay the claim of his creditor whether in Nigeria or outside Nigeria.

h. Where he makes any conveyance or transfer of his property or part, or creates a charge which could be void or incompetent under any law in the event that he is declared bankrupt.

i. Where the debtor with intent to avoid or delay the claims of his creditors departs Nigeria or departs from his dwelling and makes himself unavailable.

The procedure is triggered by any of the foregoing acts of bankruptcy occurring within 3 months before the presentation of the petition and where the debtor is resident or has been resident in Nigeria within one year preceding the presentation of the petition.

3.2 Which creditors' claims can be excluded from a discharge?

Under S.29(1) BA, an order of discharge shall not release the bankrupt from the following creditors claims :

- from any debt or a recognizance, or from any debt with which the bankrupt may be chargeable from the suit of the State, or of any person for any offence against a statute relating to any branch of the public service, on a bail bond entered into for the appearance of any person prosecuted for any such offence; or

- from any debt or liability incurred by means of any fraud or fraudulent breach of trust to which he was a party, or from any debt or liability whereof he has obtained forbearance by any fraud to which he was a party.

Indeed, even in the context of where a composition or scheme proposed by the debtor is accepted and approved, a discharge of the debtor shall not release him from any debt or liability for creditors claims as above stated except where such creditors have assented to the composition or scheme.

3.3 Does a creditor have to accept a curtailment of his claim?

Generally, subject to the priority of preferential payments, all debts proved in the bankruptcy rank *pari passu* (S.36(8) BA) and distribution is from divisible assets available to the unsecured creditors. However, a creditor may accept to curtail his claims under the provisions relating to Compositions and Schemes of Arrangements (S.18 BA) provided such scheme is accepted by a 2 / 3 majority of the creditors and sanctioned by the court. Also, creditors may forgo certain interests when it comes to distribution of the surplus available after payment of preferential debts and other debts. In such a case, the surplus is applied in payment of interests from the date of the receiving order at the rate of one per cent above the prevailing bank rate on all the debts proved in the bankruptcy. Finally, a secured creditor that wants to take advantage of the procedure under the bankruptcy Act as a creditor must elect to give up his security.

3.4 Do certain creditors receive more protection than others?

Apart from secured creditors that have the opportunity to realize the security given to them by the debtor or enforce their rights outside the procedure established under BA, certain categories of creditors receive a higher

protection than others in accordance with the priority rules under Ss. 35 to 38 BA. These include:

- Firstly, actual costs and charges in the bankruptcy procedure (e.g. expenses incurred by the OR to protect the property and assets of the debtor or by his authority in carrying on the business of the debtor, fees payable to OR, Trustee, Special Manager, costs of legal proceedings. (S.35BA)

- Secondly, ranking equally, all debts due by the bankrupt to the State as at the time of grant of a receiving order and all wages and salary in respect of services renedered 4 months before the date of the receiving order. The problem with this latter category of debt is that there is a very archaic statutory limit regarding the amount to be paid (N300 which was a substantial amount of money at the time of promulgation of BA in 1992) and it is not clear whether the N300 is a lump sum for the four month period or a monthly limit.

- Preferential claim in case of apprenticeship.

- A landlord's power of distress upon goods and effects of the bankrupt for the rent due to him by the bankrupt, provided that if such distress for rent is levied after the commencement of the bankruptcy, it shall only be available for a maximum of 6 months rent that have accrued before the commencement of the bankruptcy proceedings.

QUESTION 4

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4. Avoidance actions

4.1 What are the legal proceedings to protect / realize the debtor's assets?

Avoidance issues are dealt with in BA under Ss.43 to 50 and are a function of a number of factors such as whether the transactions with the bankrupt occurred before the commencement of the bankruptcy petition; if it occurred after commencement of bankruptcy proceedings; whether the transaction was consummated prior to or without knowledge of bankruptcy proceedings i.e. before advertisement of the said proceedings; the nature of the transactions that can potentially be avoided; and having also regard to the rights of a bona fide purchaser for value without notice of the bankruptcy status.

If however a creditor has issued execution against the property of a bankrupt or attached any debt due before the date of a receiving order and before notice of the presentation of the petition, he cannot retain the benefit of such execution or attachment against a trustee in bankruptcy. (S43 BA)

A bailiff involved in an execution who is served with a notice of a receiving order shall on request deliver to the OR such monies, moveable properties, negotiable instruments being recovered for a judgment creditor and the costs of execution shall be a first charge on the property so delivered to the OR.

General assignments of existing or future book debts of a person subsequently adjudicated as bankrupt shall be void against a trustee as regards those book debts which have not been paid at the commencement of the bankruptcy except if the assignment had been registered in accordance with the provisions of the Bill of Sale Law S45 BA.

Every disposition by the debtor of assets or property to any creditor or a guarantor / surety of such creditor which would amount to a fraudulent preference over other creditors and be avoided if that debtor is subject to a bankruptcy petition within the next 3 months following such disposition S46 BA.

Avoidance actions by a trustee may however not affect the rights of any person taking title in good faith for valuable consideration through or under a creditor of the bankrupt.

The payment or transfer by a person having in possession some money or property of a bankrupt to another person without knowledge of a receiving order is ordinarily void against a trustee except the person by whom the payment or transfer is made shows that he had no notice of the receiving order. In such case a trustee may not enforce his right of recovery.

QUESTION 5

5. Good faith

5.1 Does the principle of "good faith" play a role and in which way?

Further to our response in question 4 above, Ss.46 to 50 of BA show that good faith on the part of third parties (mostly) and certain creditors as well (secured creditors, or creditors whose transactions were registered, e.g. assignment of book debts under the Bill of Sale Law) who have assets of the bankrupt or his agent for valuable consideration and without notice play a crucial role in defeating some of the avoidance and recovery powers of the trustee. Section 47 specifically lists certain categories of bona fide transactions as being protected subject to other provisions of the BA. They are:

(a) payment by the bankrupt to any of his creditors;

(b) payment or delivery to the bankrupt;

(c) conveyance or assignment by the bankrupt for valuable consideration.

(d) any contract, dealing or transaction by or with the bankrupt for valuable consideration:

For an avoidance procedure to succeed the following two conditions must also be complied with, namely -

(i) that the payment, delivery, conveyance, assignment, contract, dealing or transaction, as the case may be, takes place before the date of the receiving order, and

(ii) that the person (other than the debtor) to, by or with whom the payment, delivery, conveyance, assignment, contract, dealing or transaction was made, executed or entered into has not at the time of the payment, delivery, conveyance, assignment, contract, dealing or transaction notice of any available act of bankruptcy committed by the bankrupt before that time.

As stated earlier, good faith also plays a role even after the granting of the receiving order.

QUESTION 6

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6. Re-payment plan

6.1 Is the debtor submitted to a payment plan?

The debtor is not required to submit a payment plan (his estate is entrusted to the oversight of an Official Receiver and thereafter administered by a trustee who is responsible to wind up his estate after completion of the collective procedure process which shall see creditors participating in the proceedings with a view to proving their claims) except that the debtor makes a proposal for a composition or scheme of arrangement for consideration by his creditors within 7 days of submitting his statement of affairs after a receiving order is granted. (See S18 BA)

If a re-payment plan is to be construed to include any scheme of arrangement or composition proposed by the debtor, then the terms of such proposal (which is accompanied by a report from the OR) would include particulars as to securities proposed, any sureties and the terms of such proposal (including any proposal as to a payment plan) would be as agreed by the a qualified majority of 2/3 of the creditors at a meeting scheduled to deliberate such proposal in the presence of the debtor. The debtor may even be appointed to superintend the management of his estate with a view to accomplishing the above objective.

6.2 How long is the duration of such a plan?

A repayment plan is not expressly provided for, and therefore a duration of such plan, is also not stated.

6.3 Does the plan have an educational purpose?

There is no requirement under the BA regarding any plan or even any scheme of arrangement by the debtor to have an educational purpose but presumably the court and creditors would take such provision into consideration when looking at a proposal.

QUESTION 7

7. Voluntary settlement

7.1 What are the possibilities for a voluntary settlement?

The debtor may make a proposal for settlement within 7 days from the submission of his statement of affairs. However, even when such a proposal is accepted, the debtor or OR may not apply to court for its endorsement until the collective procedure of public examination is completed. This of course is to ensure that the court would be in a position to assess that the proposal is reasonable and fair to the general body of creditors. In essence, once the debtor or creditor chooses a formal option of initiating a procedure of bankruptcy, their initiative is to a large extent limited by the interposition of a court process that must see that publicity is given to the process and every creditor is taken forward.

QUESTION 8

8. Discharge

8.1 In which way is a discharge granted?

A bankrupt may on a successful application to the court (after being adjudged bankrupt) be discharged but this must be after a public examination (see generally Ss. 28, 29 BA). The court on its own may also call on the debtor to appear for the purposes of his discharge as a bankrupt. A debtor is deemed automatically discharged in law after 5 years of the grant of a receiving order (S.31 BA). In considering whether to grant a discharge, a court would look at the conduct of the debtor, including in the course of the bankruptcy proceedings, the report of the Official Receiver, if the bankrupt has committed any offence connected with his bankruptcy under BA. The court may grant a discharge on terms.

S.28(4) BA also states conditions when a discharge would not be granted by the court or would be suspended until a dividend of not less than fifty per cent has been paid to the creditors. These conditions are that the bankrupt person has:

(a) assets that are not of a value equal to fifty per cent of his unsecured liabilities, unless he satisfies the court that the fact that the assets are not of a value of fifty per cent of his unsecured liabilities has arisen from circumstances for which he cannot justly be held responsible;

(b) omitted to keep such books of account that are usual and proper in the business carried on by him, and sufficiently disclose his business transactions and financial position within the three years immediately

preceding his bankruptcy, or in the case of a firm, that a partnership book has not been kept, or that such books have not been available for the trustee during the bankruptcy proceedings, unless they have been accidentally lost or destroyed, the onus of proof of such accidental loss or destruction being on the bankrupt;

(c) continued to trade after knowing himself to be insolvent;

(d) contracted any debt provable in the bankruptcy without having at the time of contracting it any reasonable or probable ground of expectation (proof whereof shall lie on him) of being able to pay it;

(e) failed to account satisfactorily for any loss of assets or for any deficiency of assets to meet his liabilities;

(f) brought on or contributed to his bankruptcy by rash and hazardous speculations, or by unjustifiable extravagance in living, or by gambling, or by culpable neglect of his business affairs;

(g) put any of his creditors to unnecessary expense by a frivolous or vexatious defence to any action properly brought against him;

(h) brought on or contributed to his bankruptcy by incurring unjustifiable expense by bringing a frivolous or vexatious action;

(i) within three months preceding the date of the receiving order, when unable to pay his debts as they become due, given an undue preference to any of his creditors;

(j) that the bankrupt has within three months preceding the date of the receiving order incurred liabilities with a view to making his assets equal to fifty per cent of his unsecured liabilities;

(k) on any previous occasion, whether Nigeria or elsewhere, been adjudged bankrupt or made a composition or arrangement with his creditors;

(l) been guilty of any fraud or fraudulent breach of trust.

As stated earlier above (see answer to question 3) an order of discharge shall not release the bankrupt from certain categories of debts (S29 (1) BA). Further, it shall not release any person who at the date of the receiving order was a partner or co-trustee with the bankrupt or was jointly bound or had made any joint contract with him, or any person who was surety or in the nature of a surety for him.

8.2 Can a discharge after it has been granted be revoked?

S.28(10) of BA envisages that the court may revoke an order discharging a bankrupt where the latter although he had been discharged, failed to give such assistance as the trustee may have required in the realisation and distribution of such of his property as was vested in the trustee, the revocation does not however affect the validity of any sale, disposition or payment duly made or thing duly done subsequent to the discharge but before its revocation.

QUESTION 9

9. Remuneration / costs

9.1 How are the costs of the procedure dealt with?

Remunerations, costs and fees of trustee are guided by the provisions of Ss.82, 83 and 112 BA essentially. They also enjoy priority over other forms of debts by virtue of Ss. 35, 36 BA. Most of the considerations below apply to a manager appointed prior to the grant of a receiving order and appointment of a trustee.

A Trustee's remuneration is in the form of a commission or percentage, of which one part shall be payable on the amount realised by the trustee, after deducting any sums paid to secured creditors out of the proceeds of their securities, and the other part on the amount distributed in dividend. Such percentage shall be as the court may approve or as may be prescribed from time to time (S.82(1) BA). The remuneration covers all expenses except actual out of pocket expenses properly incurred and no liability shall attach to the bankrupt's estate or to the creditors in respect of any other expenses. Where a trustee acts without remuneration he shall be allowed out of the bankrupt's estate such proper expenses incurred by him in or about the proceedings of the bankruptcy as the court may approve (S.82(2)(3) BA).

Where a trustee or manager receives remuneration for his services as such, no payment shall be allowed in his accounts in respect of the performance by any other person of the ordinary duties which are required by this Act to be performed by himself. And where he is a legal practitioner, he may contract that the remuneration for his services shall include all professional services ((S.83(1) (2) BA)).

As regards fees and remunerations payable to an Official Receiver, they are regulated by Ss.111 and 112 BA which provide as follows:

111. The Chief Judge of the court may prescribe a scale of fees and percentages to be charged for or in respect of proceedings under this Act.

112. All fees and commissions received by or payable to the Official Receiver on the appointment of a trustee other than himself or for acting as trustee, and any remuneration received by the Official Receiver as an interim receiver or otherwise, shall be paid by such officer forthwith into the Consolidated Revenue Fund of the Federation.

9.2 Is the court the correct forum to scrutinize fees?

Yes, to the extent that it is the Court that ultimately approves such (percentage of) fees.

9.3 What is the appropriate method of calculation of fees when dealing with compositions or voluntary arrangements?

There is no provision under the BA / BR for a method of calculation of fees for schemes of composition or arrangement.

9.4 What is the method of calculation of fees when dealing with bankruptcy proceedings?

There is no provision under the BA / BR for method of calculation of fees. The Chief Justice has the powers to prescribe the scale of fees but none exists.

9.5 Can IPs charge fees based on the value they created for the creditors during an assignment?

Not applicable under our jurisdiction.

QUESTION 10

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10. Cross-border considerations in consumer insolvency

10.1 Are overseas assets included?

The Bankruptcy Act and indeed the general corporate insolvency statute, and, The Companies and Allied Matters Act do not provide for cross-border considerations in personal a fortiori consumer insolvency.

The BA under S.53 only briefly mentions that subject to any enactment relating to foreign exchange, where the bankrupt is possessed of any property out of Nigeria, the trustee shall require him to join in selling the same for the benefit of the creditors and to sign all necessary authorities, powers, deeds and documents for the purpose, and if and so often as the bankrupt refuses to do so he may be punished for a contempt of court. This does not in any way entertain or capture how the claims of foreign creditors or local creditors where proceedings are started against the debtor abroad would be protected.

10.2 Is forum shopping by the debtor for more favourable personal insolvency laws possible?

Forum shopping does not seem to be allowed for more favourably personal insolvency laws since once a bankruptcy petition is commenced, the control thereof is out of the debtor's control. Proceedings in other courts or actions are also stayed or continued with the leave of the bankruptcy court until his discharge.

QUESTION 11

11. What is the result of subsequent insolvencies?

By S.42 BA, where a second or subsequent receiving order is made against a bankrupt, or where an order is made for the administration in bankruptcy of the estate of a deceased bankrupt, then for the purposes of any proceedings consequent upon any such order the trustee in the last preceding bankruptcy shall be deemed to be a creditor in respect of any unsatisfied balance of the debts provable against the property of the bankrupt in that bankruptcy.

In the event of a second or subsequent receiving order made against a bankrupt followed by an order adjudging him bankrupt, or in the event of an order being made for the administration in bankruptcy of the estate of a deceased bankrupt, any property acquired by him since he was last adjudged bankrupt, which at the date when the subsequent petition was presented had not been distributed amongst the creditors in such last preceding bankruptcy, shall, subject to any disposition thereof made by the Official Receiver or trustee in that bankruptcy, without knowledge of the presentation of the subsequent petition, and subject to the provisions of section 50 in this Act, vest in the trustee in the subsequent bankruptcy or administration in bankruptcy as the case may be.

Where the trustee in any bankruptcy receives notice of a subsequent petition for the administration of his estate in bankruptcy, the trustee shall hold any property then in his possession which has been acquired by the bankrupt since he was adjudged bankrupt until the subsequent petition has been disposed of, and if on the subsequent petition an order of adjudication or an order for the administration of the estate in bankruptcy is made, he shall transfer all such property or the proceeds thereof (after deducting his costs and expenses) to the trustee in the subsequent bankruptcy or administration in bankruptcy, as the case may be.

QUESTION 12

12. Recommendations?

The Bankruptcy Act is observed more in breach. It is in fact very unattractive for use even to creditors in Nigeria. There is no record of bankruptcy cases in Nigeria, There is a general need for reform of personal insolvency and corporate insolvency.

With the development of e-commerce, a consumer insolvency law is becoming a more urgent piece of legislation to be enacted.

Reform of bankruptcy or personal insolvency is one of the items on the reform agenda of the Business Recovery and Insolvency Practitioners Association of Nigeria (BRIPAN), the leading voice of Insolvency Practice in Nigeria.

SINGAPORE

QUESTION 1

1. What are the options or procedures available for a natural person / consumer regarding their over-indebtedness in your jurisdiction?

1.1 The legal grounds for the opening of or access to those procedures;

The jurisdiction for Bankruptcy is set out in Sections 60(1) and 61(1) of the Bankruptcy Act (Cap. 20) ("Bankruptcy Act"). In essence, the Court's bankruptcy jurisdiction can be invoked against an individual debtor who:

(a) is domiciled in Singapore;

(b) has assets or property in Singapore; or

(c) one year before the bankruptcy application the debtor has:

(i) been ordinarily resident or has had a place of residence in Singapore; or

(ii) carried on business in Singapore.

In addition, the following conditions must be satisfied at the time the bankruptcy application is made in Court:

(a) the amount of the debt is not less than S$10,000;

(b) the debt is for a liquidated sum and payable immediately;

(c) the debtor is unable to pay the debt.

It should also be noted that if the debt is incurred outside Singapore, i.e a foreign debt, the creditor must obtain an enforceable judgment or award in Singapore, whether by registering the foreign judgment in Singapore under the appropriate reciprocal recognition legislation or by commencing fresh proceedings in the Singapore courts.

1.2 How are these procedures made available?

The bankruptcy applications are filed in the High Court of Singapore. The High Court of Singapore has the jurisdiction to hear bankruptcy applications under Section 3 of the Bankruptcy Act.

Bankruptcy applications are filed by way of originating summons with affidavits in support, and in the forms prescribed under the Bankruptcy Rules. The bankruptcy applications are heard in chambers before an Assistant Registrar of the Supreme Court of Singapore.

1.3 Who can commence the procedure?

Under Section 57(3) of the Bankruptcy Act, a creditor can file the bankruptcy application. Also, a debtor can make a self application under Section 58 of the Bankruptcy Act for a bankruptcy order.

1.4 Who will supervise the procedure?

The bankruptcy procedure is subject to the general supervisory jurisdiction of the Court. While the Official Assignee administers the conduct, affairs and estate of the bankrupt, the Court has the overriding power to inquire and review the decision of the Official Assignee under Section 30 and 31 of the Bankruptcy Act.

General powers of the bankruptcy court under Section 6 of the Bankruptcy Act

(1) Subject to this Act, the court, under its jurisdiction in bankruptcy, shall have full power to decide all questions of priorities and all other questions whatsoever, whether of law or fact, which may arise in any case of bankruptcy coming within the cognizance of the court, or which the court considers it expedient or necessary to decide for the purpose of doing complete justice or making a complete distribution of property in any such case.

(2) Where default is made by a debtor or bankrupt or any other person in obeying any order or direction given by the court or the Official Assignee or any other officer of the court under this Act, the court may, on the application of the Official Assignee or any other duly authorised person, or of its own motion, order such defaulting debtor, bankrupt or person to comply with the order or direction so given, and may also, if it thinks fit, make an immediate order for the committal of such defaulting debtor, bankrupt or other person.

(3) The power given by subsection (2) shall be deemed to be in addition to and not in substitution for any other right or remedy in respect of such default.

General duties of Official Assignee as regards bankrupt's conduct and affairs under Section 21 of the Bankruptcy Act

(1) The Official Assignee shall have the following duties as regards a bankrupt:

(a) to investigate the conduct and affairs of the bankrupt, and report to the court as to whether there is reason to believe that the bankrupt has committed any act which constitutes an offence under this Act or under section 421, 422, 423 or 424 of the Penal Code, or which would otherwise justify the court in refusing, suspending or qualifying an order for his discharge;

(b) to make such other reports concerning the conduct of the bankrupt as the court may direct or as are prescribed;

(c) to take such part as may be directed by the court or as is prescribed, in any examination of the bankrupt and other persons; and

(d) to take such part and give such assistance in relation to the prosecution of any fraudulent bankrupt or any other person charged with an offence under this Act, as the court may direct or as is prescribed.

(2) A report by the Official Assignee under subsection (1) shall in any proceedings be prima facie evidence of the facts stated in it.

(3) In this section, the conduct and affairs of a bankrupt shall include his conduct and affairs before the making of the bankruptcy order against him.

General duties of Official Assignee as regards estate of bankrupt under Section 22 of the Bankruptcy Act

(1) The Official Assignee shall have the following duties as regards the estate of a bankrupt administered by him:

(a) to act as the receiver of the bankrupt's estate and where a special manager has not been appointed under section 113, as the manager thereof;

(b) to raise money or make advances for the purposes of the estate, and to authorise the special manager (if any) to raise money or make advances for the like purposes in any case where in the interests of the creditors it appears necessary to do so;

(c) to summon and preside at all meetings of creditors held under this Act;

(d) to issue forms of proxy for use at the meetings of creditors;

(e) to report to the creditors as to any proposal which he makes with respect to the mode of liquidating the bankrupt's affairs; and

(f) to advertise the bankruptcy order, the date of any public examination and such other matters as may be necessary to advertise.

(2) For the purpose of carrying out his duties as receiver or manager, the Official Assignee shall have the same powers as if he were a receiver and manager appointed by the court.

(3) The Official Assignee shall, as far as practicable, consult the creditors with respect to the management of the bankrupt's estate, and may for that purpose, if he thinks it advisable, summon meetings of the persons claiming to be creditors.

(4) The Official Assignee shall account to the court and pay over all moneys and deal with all securities in such manner as the court may, subject to this Act, direct.

Control of court over Official Assignee under Section 30 of the Bankruptcy Act

(1) The court shall take cognizance of the conduct of the Official Assignee in his administration of the estate of a bankrupt.

(2) If the Official Assignee does not faithfully perform his duties or duly observe all the requirements imposed on him by this Act, the rules or any other written law with respect to the performance of his duties, or if any complaint is made to the court by any creditor in regard thereto, the court shall inquire into the matter and take such action thereon as it may consider expedient.

(3) The court may:

(a) at any time require the Official Assignee to answer any inquiry made by it in relation to his administration of the estate of a bankrupt; and

(b) direct an investigation to be made of the books and vouchers of the Official Assignee or examine him on oath concerning his administration of the estate of a bankrupt.

Review by court of Official Assignee's act, omission or decision under Section 31 of the Bankruptcy Act

(1) If a bankrupt or any of his creditors or any other person is dissatisfied by any act, omission or decision of the Official Assignee in relation to the Official Assignee's administration of the bankrupt's estate, he may apply to the court to review such act, omission or decision.

(2) On hearing an application under subsection (1), the court may -

(a) confirm, reverse or modify any act or decision of the Official Assignee; or

(b) give such directions to the Official Assignee or make such other order as it may think fit.

(3) The Official Assignee may apply to the court for directions in relation to any particular matter arising under the bankruptcy.

1.5 What are the criteria such a person has to satisfy?

A creditor intending to file a bankruptcy application in the Singapore Courts must satisfy the conditions set out in Sections 60(1) and 61(1) of the Bankruptcy Act (Cap. 20)

Conditions to be satisfied in respect of debtor (Section 60)

(1) No bankruptcy application shall be made to the court under section 57(1) (*a*) or 58(1)(*a*) against an individual debtor unless the debtor:

(a) is domiciled in Singapore;

(b) has property in Singapore; or

(c) has, at any time within the period of one year immediately preceding the date of the making of the application -

(i) been ordinarily resident or has had a place of residence in Singapore; or

(ii) carried on business in Singapore.

Grounds of bankruptcy application (Section 61)

(1) No bankruptcy application shall be made to the court in respect of any debt or debts unless at the time the application is made:

(a) the amount of the debt, or the aggregate amount of the debts, is not less than $10,000;

(b) the debt or each of the debts is for a liquidated sum payable to the applicant creditor immediately;

(c) the debtor is unable to pay the debt or each of the debts; and

(d) where the debt or each of the debts is incurred outside Singapore, such debt is payable by the debtor to the applicant creditor by virtue of a judgment or an award which is enforceable by execution in Singapore.

1.6 What are the available alternatives?

There are 2 main alternatives to bankruptcy, namely Individual Voluntary Arrangement ("IVA") under Part V of the Bankruptcy Act and Debt Repayment Scheme ("DRS") under Part VA of the Bankruptcy Act.

Debt Repayment Scheme ("DRS")

- Pursuant to Part VA of the Bankruptcy Act, the Court will adjourn a bankruptcy application against a debtor and refer the matter to the Official Assignee to consider whether the debtor is suitable for DRS if the following criteria are satisfied:

  - The aggregate of the debtor's debts must not exceed S$100,000;

  - The debtor must not be an undischarged bankrupt, and must not have been a bankrupt within the last 5 years preceding the date of bankruptcy application;

  - No voluntary arrangement is in effect, or was in effect at any time within the last 5 years preceding the date of the bankruptcy application;

- The debtor is not subject to any DRS and has not been so subject within the last 5 years preceding the date of bankruptcy application; and

- debtor is not a sole proprietor, partner of a firm within the meaning of the Partnership Act or a partner in a limited liability partnership.

- The Court usually adjourns the hearing of the bankruptcy application for six (6) months to give the Official Assignee adequate time to consider whether the debtor is suitable for DRS. In practice, the Official Assignee will revert with its decision within a shorter period and the Court will restore the bankruptcy hearing to an earlier hearing date if the debtor is found suitable.

- Under the DRS, the debtor will submit a debt repayment plan with a maximum repayment period of five (5) years. The Official Assignee will then convene a creditors' meeting to review the terms of the debt repayment plan. Ultimately, it is the Official Assignee who will approve the debt repayment plan. The creditors' only recourse if they disagree with the debt repayment plan is to appeal to the Appeal Panel under Section 56D(4) of the Bankruptcy Act. Even then, the ground for appeal is limited as the creditor has to satisfy the Appeal Panel that the terms of the debt repayment plan "unfairly prejudices his interests".

Individual Voluntary Arrangement ("IVA")

- Under Part V of the Bankruptcy Act, a debtor may make a proposal to his creditors for a composition or a scheme of arrangement. The debtor will file an application in Court for an Interim Order imposing a moratorium on all legal, enforcement and bankruptcy proceedings against him. The Interim Order has a 42-day lifespan and the debtor's nominee has to submit a report during this period.

- The court will not make an Interim Order unless it is satisfied that:

  - debtor intends to make a proposal for a voluntary arrangement;

  - debtor has not in the preceding 12 months made an application for an Interim Order; and

  - The nominee appointed by the debtor's proposal is qualified and willing to act.

- If the court grants the Interim Order, the debtor's nominee must submit a nominee's report stating whether in their opinion, a meeting of the debtor's creditors should be summoned to consider the debtor's proposal.

- If a creditors' meeting is summoned, the creditors will vote at the meeting to approve the proposed voluntary arrangement. Under Section 51(1) of the Bankruptcy Act, the proposal must be approved by at least 75% in value and majority in numbers of the creditors present and voting at the meeting.

QUESTION 2

2. Position of the debtor and the spouse

2.1 Which assets and income are excluded from the procedure?

Section 78(2) of the Bankruptcy Act provides that the property of the bankrupt which are divisible among his creditors does not include:

(a) property held by the bankrupt on trust for any other person;

(b) the tools of his trade;

(c) such clothing, bedding, furniture, household equipment and provisions as are necessary for satisfying the basic domestic needs of the bankrupt and his family; and

(d) property of the bankrupt which are excluded under any other written law.

Notably, one of the assets excluded from bankruptcy administration is a Housing and Development Board ("HDB") flat, which is a form of public housing in Singapore. Under the Housing and Development Act, a HDB flat does not vest in the Official Assignee upon bankruptcy if the owner of the flat is a citizen of Singapore or one of owners is a Singapore citizen. There is also case authority that the sale proceeds of the HDB flat will not vest in the Official Assignee (*Re Ng Lai Wat* [1996] 3 SLR 106).

In addition, the funds in the bankrupt's Central Provident Fund ("CPF") are excluded from the bankruptcy estate by virtue of Sections 24(4) and 24(5) of the CPF Act.

The monies payable under a life insurance policy which benefits the bankrupt's spouse or children will also be excluded under Section 73(1) of the Conveyancing and Law of Property Act ("CLPA") unless the policy was effected with the intent to defraud creditors (section 73(2) of the CLPA).

Further, under Section 76(3) of the Bankruptcy Act, a secured asset will remain subject to the secured creditors' right to realise or dispose of the asset in satisfaction of the secured debt. The bankruptcy order does not displace the secured creditors' rights.

2.2 Does the debtor have restrictions on the disposition of his assets?

Section 77(1) of the Bankruptcy Act provides that where a person is adjudged bankrupt, any disposition of property made by him from the day the bankruptcy application was filed up to the day the bankruptcy order was made shall be void unless ratified by the court.

Upon the making of the bankruptcy order, the debtor will not be able to freely dispose of his assets because the assets will vest in the Official Assignee upon the making of the bankruptcy order (section 76(1)(a)(i) of the Bankruptcy Act).

2.3 Which assets and income are included in the procedure?

Generally, all property which the bankrupt owns beneficially shall vest in the Official Assignee and become divisible among his creditors (section 76(1) of the Bankruptcy Act).

Section 2(1) of the Bankruptcy Act defines 'property' to include money, goods, things in action, land and every description of property wherever situated, and also obligations and every description of interest, whether present or future or vested or contingent, arising out of or incidental to property.

Under Section 78(1) of the Bankruptcy Act, the property of the bankrupt which is divisible among his creditors (i.e. the bankrupt's estate) comprise:

(a) all property which belongs or is vested in the bankrupt on the day the bankruptcy order is made;

(b) all property which is acquired or devolves on the bankrupt after the bankruptcy order is made but before the order is discharged; and

(c) the bankrupt's right to exercise any powers over property or take proceedings to exercise such powers.

Where the matrimonial home is owned by the bankrupt solely or jointly with his spouse, the bankrupt's interest will form part of his estate unless the matrimonial home is a HDB flat.

After the bankruptcy order is made, if the bankrupt receives an income / salary, Section 109(2) of the Bankruptcy Act provides that the Official Assignee may make an application to Court for the income / salary to be applied as the Court directs.

Generally, the moneys payable under any life insurance policy that a bankrupt has effected on his own life will belong to his estate on bankruptcy unless the policy is for the benefit of a third party and there is an express declaration of trust in favour of the third party e.g. where the policy is for the bankrupt's spouse or children under section 73(1) of the CLPA.

2.4 Are pension schemes included?

Section 109(2)(b) of the Bankruptcy Act provides that the Official Assignee has a right to apply to court to receive directly any pension that the bankrupt is entitled to.

2.5 Does the debtor donate to the estate a part of his income for the benefit of the creditors?

Section 78(1) of the Bankruptcy Act provides that property which the bankrupt acquires post-bankruptcy order shall form part of his bankruptcy estate. This will also include his after acquired income. Further, Section 109(2) of the Bankruptcy Act allows the Official Assignee to apply to Court for the payment of the bankrupt's salary or income to the Official Assignee to be applied in such manner as the Court directs.

2.6 Is there a means test?

There is no "means test" applicable under the Bankruptcy Act. The threshold to satisfy for a bankruptcy order is set out under Section 61 of the Bankruptcy Act, i.e. the amount of the debt must not be less than S$10,000.00 and the debtor is unable to pay the debt.

There is a "means test" to be satisfied if the debtor wants to obtain free legal assistance from the Legal Aid Bureau.

Only persons who are Singapore citizens or permanent residents with an annual disposal income of S$10,000 or less and a disposal capital of S$10,000 or less may be granted legal aid.

Disposable income of the debtor is the total income of the debtor and their spouse (if any) for the past 12 months, after deducting an amount as follows:

- equal to S$3,500 per year for each person totally or partially dependent on the debtor or the spouse (e.g. child);
- equal to S$4,500 per year for the debtor;
- exceeding S$1,000 per year for rent; and
- equal to the debtor's contribution to CPF.

Disposable capital is the property the debtor possess or which the debtor is entitled to, excluding the following:

- subject matter of the proceedings;
- debtor's clothes;
- tools of trade;
- debtor's household furniture in their home;
- a dwelling-house owned and exclusively used by the debtor and their family as their home assessed at an IRAS annual value of not more than S$7,800; or a HDB flat owned and exclusively used by the debtor and their family as their home;
- debtor's savings of up to S$30,000 if the debtor is 60 years and above; and
- debtor's CPF money in their CPF account.

Note: If the debtor does not satisfy the "means test" but is facing financial hardship, the debtor can appeal to the Director of Legal Aid who has the discretion to grant the debtor further deductions for the relief of hardship in exceptional cases.

2.7 Is there a garnishment of regular income?

Section 78(1) of the Bankruptcy Act provides that property which the bankrupt acquires post - bankruptcy order shall form part of his bankruptcy estate. This will also include his after acquired income. Further, Section 109(2) of the Bankruptcy Act allows the Official Assignee to apply to Court for the payment of the bankrupt's salary or income to the Official Assignee to be applied in such manner as the Court directs.

2.8 Is there protection for the debtor's privacy, his mail and his home?

In general, there are no privacy laws in Singapore. The bankrupt may be compelled to provide information regarding his assets and liabilities under the provisions of the Bankruptcy Act.

The Official Assignee has power to redirect mail under Section 115 of the Bankruptcy Act.

Re-direction of bankrupt's letters, etc. under Section 115 of the Bankruptcy Act

(1) Where a bankruptcy order has been made, the Official Assignee may from time to time direct a postal licensee under the Postal Services Act (Cap. 237A) to re-direct and send or deliver to the Official Assignee or otherwise any postal article which would otherwise be sent or delivered by it to the bankrupt at such place or places as may be specified in the direction.

(2) A direction under this section shall have effect for such period, not exceeding 3 months, as may be specified in the direction.

2.9 Is there protection of the spouse's interests in the home?

Where the matrimonial home is owned by the bankrupt, the bankrupt's interest will form part of his bankruptcy estate. If the home is owned by the bankrupt and his spouse as joint tenants, the bankruptcy operates as a severance of the joint tenancy such that the bankrupt's interest passes to the trustee in bankruptcy (*Malayan Banking Bhd v Focal Finance Ltd* [1998] 3 SLR(R) 1008).

However, where the matrimonial home is a HDB flat, it will not vest in the Official Assignee upon bankruptcy if the owner of the flat is a citizen of Singapore or one of owners is a Singapore citizen. There is also case authority that the sale proceeds of the HDB flat will not vest in the Official Assignee (*Re Ng Lai Wa**t*** [1996] 3 SLR 106).

2.10 Is the debtor restricted to receive information?

There are no provisions in the Bankruptcy Act which restricts a debtor from receiving information.

2.11 Does the debtor have the liberty to move freely and to leave any State, including his own?

Section 131(1)(b) of the Bankruptcy Act provides that an undischarged bankrupt cannot leave, remain or reside outside Singapore without the permission of the Official Assignee.

The Official Assignee may issue a direction to the Controller of Immigration to request that the bankrupt be prevented from leaving Singapore if the Official Assignee thinks that this is necessary for the purposes of ensuring that the bankrupt does not leave Singapore during the administration of his estate (Section 116(1) of the Bankruptcy Act).

The Official Assignee may also detain the bankrupt's passport, certificate of identity or other travel document (Section 116(4) of the Bankruptcy Act).

2.12 Is the debtor entitled to cost-free legal assistance?

The debtor is entitled to legal aid from the Legal Aid Bureau if the debtor is a Singaporean or a Permanent Resident in Singapore, and the debtor satisfies the Means Test (see 2.6 above) and the "merits test". Under the "merits test", the debtor must show that he / she has a good reason to defend his case under the law.

2.13 Are there restrictions on the debtor after the procedure?

There are wide ranging consequences after a bankruptcy order is made. For instance, a bankrupt cannot:

(a) dispose or deal with any property which he used to own because the property vests in the Official Assignee upon the making of the bankruptcy order (section 76(1)(a)(i) of the Bankruptcy Act);

(b) act as a trustee or personal representative of any trust, estate or settlement except with the leave of court (section 130(1) of the Bankruptcy Act);

(c) maintain any action other than an action for damages in respect of an injury to his person without the sanction of the Official Assignee (section 131(a) of the Bankruptcy Act);

(d) leave, remain or reside outside Singapore without the permission of the Official Assignee (section 131(1)(b) of the Bankruptcy Act);

(e) be a director or manager of any corporation without the leave of court or the written permission of the Official Assignee (section 148(1) of the Companies Act);

(f) obtain credit to the extent of S$500 or more without informing the person that he is an undischarged bankrupt (section 141(1)(a) of the Bankruptcy Act);

(g) practise as an advocate and solicitor in Singapore (sections 26(1)(e) and 26(9)(b) of the Legal Profession Act);

(h) be elected or continue to hold office as a Member of Parliament (article 45(1)(b) of the Constitution of the Republic of Singapore); and

(i) obtain a housing developer's licence (section 5(c) of the Housing Developers (Control and Licensing) Act.

2.14 Is the spouse (automatically) included in the procedure?

The debtor's spouse is not included in the bankruptcy procedure. The bankruptcy order only affects the individual debtor, and does not make his/her spouse bankrupt as well.

The bankruptcy order will affect the spouse in limited ways. For instance, whether the bankrupt owns the house with their spouse as joint tenants, the bankruptcy will automatically sever the joint tenancy and the bankrupt's interest will divest to the Official Assignee.

Also, if there is a life insurance policy in favour of the spouse, then the moneys payable under the policy are protected from the debtor's creditors by virtue of section 73(1) of the CLPA.

More importantly, any undervalue transaction or unfair preference transaction in favour of the spouse may be voided pursuant to Sections 98 and 99 of the Bankruptcy Act.

2.15 In which way do the International or European Convention and Covenants play a role?

Singapore is not bound by the International or European Convention.

QUESTION 3

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3. Position of the creditor

3.1 Can a creditor force the debtor to commence a procedure or oppose the debtor from doing so?

A creditor may file for a creditor's bankruptcy application against the debtor under Section 57 of the Bankruptcy Act and compel the debtor into bankruptcy provided the conditions in Bankruptcy Act are satisfied. However, if a debtor is eligible and found by the Official Assignee to be suitable for DRS, the creditors' bankruptcy application will be deemed withdrawn.

There is nothing in the Bankruptcy Act which prevents a creditor from opposing a debtor's bankruptcy application. However, there is a general power of the Court to stay or dismiss a bankruptcy application under Section 64 of Bankruptcy Act.

3.2 Which creditors' claims can be excluded from a discharge?

In general, a discharge releases the debtor from all debts provable in bankruptcy except for debts due to the government, debt incurred in respect of fraud or fraudulent breach of trust, fines, damages for negligence etc in respect of personal injuries to any person, and orders made under Women's Charter relating to family matters. The secured creditors' rights over their security are not affected.

3.3 Does a creditor have to accept a curtailment of his claim?

A creditor's claim must be proved by way of the "proof of debt" and will be subject to adjudication by the Official Assignee. Payments to the creditors are based on dividends declared by Official Assignee and subject to priority under Section 90(1) of the Bankruptcy Act.

Priority of debts under section 90 of the Bankruptcy Act

(1) Subject to this Act, in the distribution of the property of a bankrupt, the order of priority will be as follows:

(a) firstly, the costs and expenses of administration or otherwise incurred by the Official Assignee and the costs of the applicant for the bankruptcy order (whether taxed or agreed) and the costs and expenses properly incurred by a nominee in respect of the administration of any voluntary arrangement under Part V;

(b) secondly, subject to subsection (2), all wages or salary (whether or not earned wholly or in part by way of commission) including any amount payable by way of allowance or reimbursement under any contract of employment or award or agreement regulating the conditions of employment of any employee;

(c) thirdly, subject to subsection (2), the amount due to an employee as a retrenchment benefit or an ex gratia payment under any contract of employment or award or agreement that regulates the conditions of employment, whether such amount becomes payable before, on or after the date of the bankruptcy order;

(d) fourthly, all amounts due in respect of any work injury compensation under the Work Injury Compensation Act (Cap. 354) accrued before, on or after the date of the bankruptcy order;

(e) fifthly, all amounts due in respect of contributions payable during the 12 months immediately before, on or after the date of the bankruptcy order by the bankrupt as the employer of any person under any written law relating to employees' superannuation or provident funds or under any scheme of superannuation which is an approved scheme under the Income Tax Act (Cap. 134);

(f) sixthly, all remuneration payable to any employee in respect of vacation leave, or in the case of his death, to any other person in his right, accrued in respect of any period before, on or after the date of the bankruptcy order; and

(g) seventhly, the amount of all taxes assessed and any goods and services tax due under any written law before the date of the bankruptcy order or assessed at any time before the time fixed for the proving of debts has expired.

(2) The amount payable under subsection (1)(*b*) and (*c*) shall not exceed an amount that is equivalent to 5 months' salary whether for time or piecework in respect of services rendered by any employee to the bankrupt or S$7,500, whichever is the lesser.

3.4 Do certain creditors receive more protection than others?

Secured creditors' rights over their security are not affected by bankruptcy. Certain preferential creditors are conferred priority under Section 90 of the Bankruptcy Act. (See 3.3 above)

QUESTION 4

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4. Avoidance actions

4.1 What are the legal proceedings to protect / realize the debtor's assets?

Transactions at undervalue and unfair preference transactions are subject to clawback provisions under Section 98 and 99 of the Bankruptcy Act. The Official Assignee may apply to Court to restore the position vis-à-vis such transactions.

Transactions at an undervalue under Section 98 of the Bankruptcy Act

(1) Subject to this section and sections 100 and 102, where an individual is adjudged bankrupt and he has at the relevant time (as defined in section 100) entered into a transaction with any person at an undervalue, the Official Assignee may apply to the court for an order under this section.

(2) The court shall, on such an application, make such order as it thinks fit for restoring the position to what it would have been if that individual had not entered into that transaction.

For the purposes of this section and sections 100 and 102, an individual enters into a transaction with a person at an undervalue if:

(a) he makes a gift to that person or he otherwise enters into a transaction with that person on terms that provide for him to receive no consideration;

(b) he enters into a transaction with that person in consideration of marriage; or

(c) he enters into a transaction with that person for a consideration the value of which, in money or money's worth, is significantly less than the value, in money or money's worth, of the consideration provided by the individual.

Unfair preferences under Section 99 of the Bankruptcy Act

(1) Subject to this section and sections 100 and 102, where an individual is adjudged bankrupt and he has, at the relevant time (as defined in section 100), given an unfair preference to any person, the Official Assignee may apply to the court for an order under this section.

(2) The court shall, on such an application, make such order as it thinks fit for restoring the position to what it would have been if that individual had not given that unfair preference.

(3) For the purposes of this section and sections 100 and 102, an individual gives an unfair preference to a person if:

(a) that person is one of the individual's creditors or a surety or guarantor for any of his debts or other liabilities; and

(b) the individual does anything or suffers anything to be done which (in either case) has the effect of putting that person into a position which, in the event of the individual's bankruptcy, will be better than the position he would have been in if that thing had not been done.

(4) The court shall not make an order under this section in respect of an unfair preference given to any person unless the individual who gave the preference was influenced in deciding to give it by a desire to produce in relation to that person the effect mentioned in subsection (3)(*b*).

(5) An individual who has given an unfair preference to a person who, at the time the unfair preference was given, was an associate of his (otherwise than by reason only of being his employee) shall be presumed, unless the contrary is shown, to have been influenced in deciding to give it by such a desire as is mentioned in subsection (4).

(6) The fact that something has been done in pursuance of the order of a court does not, without more, prevent the doing or suffering of that thing from constituting the giving of an unfair preference.

QUESTION 5

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5. Good faith

5.1 Does the principle of "good faith" play a role and in which way?

The principle of "good faith" has limited application in the individual bankruptcy regime in Singapore as it is not expressly provided for in the Bankruptcy Act.

QUESTION 6

6. Re-payment plan

6.1 Is the debtor submitted to a payment plan?

Save for the IVA and DRS regimes, there is no repayment plan post - bankruptcy order. The repayment plan is based on the Official Assignee's arrangement with the debtor, after assessing his ability to repay, income and assets.

6.2 How long is the duration of such a plan?

See 6.1 above.

6.3 Does the plan have an educational purpose?

There is no express provision in the Bankruptcy Act which alludes to such an educational purpose.

QUESTION 7

7. Voluntary settlement

7.1 What are the possibilities for a voluntary settlement?

After the bankruptcy order is made, the debtor may still propose a composition or scheme of arrangement under Section 95 of the Bankruptcy Act. If accepted by the creditors, the debtor will be granted an annulment of the bankruptcy order by the Official Assignee. The composition or scheme of arrangement must be approved by at least 75% in value and majority in numbers of the creditors present and voting at the creditors' meeting.

QUESTION 8

8. Discharge

8.1 In which way is a discharge granted?

Generally, there are 3 forms of discharge from bankruptcy, namely, (a) Annulment by Court, (b) Discharge by Court, and (c) Discharge by Official Assignee's Certificate.

Firstly, the bankrupt may apply to court for an annulment order pursuant to Section 123 of the Bankruptcy Act. The Court may grant the annulment order if (a) there was any ground existing at the time the bankruptcy order was made where the order ought not to have been made, or (b) both the debts and the expenses of the bankruptcy have all either been paid or secured for to the satisfaction of the court.

The effect of the annulment will be as if the bankruptcy order was not made.

Secondly, under Section 124 of the Bankruptcy Act, the bankrupt may apply to be discharged from bankruptcy. The Court may:

(a) refuse to discharge the bankrupt from bankruptcy;

(b) make an order discharging him absolutely; or

(c) make an order discharging him subject to such conditions as it thinks fit to impose, including conditions with respect to:

    (i) any income which may be subsequently due to him; or

    (ii) any property devolving upon him, or acquired by him, after his discharge, as may be specified in the order.

Thirdly, the Official Assignee may issue a certificate discharging a bankrupt from bankruptcy if the following conditions are met:

(a) a period of 3 years has elapsed since the bankruptcy order; and

(b) the debts which have been proved in bankruptcy do not exceed S$500,000.

8.2 Can a discharge, after it has been granted be revoked?

A discharge from bankruptcy may be revoked under Section 128 of the Bankruptcy Act if the debtor fails to give assistance to the Official Assignee.

According to section 28:

1) A discharged bankrupt shall, notwithstanding his discharge, give assistance as the Official Assignee requires in the realisation and distribution of such of his property as is vested in the Official Assignee.

2) If the discharged bankrupt fails to give assistance to the Official Assignee under subsection (1)

    (a) he shall be guilty of an offence and shall be liable on conviction to a fine not exceeding $10,000; and

    (b) the court may, if it thinks fit, revoke his discharge, but without prejudice to the validity of any sale, disposition or payment duly made, or thing duly done subsequent to the discharge, but before its revocation.

QUESTION 9

9. Remuneration / costs

9.1 How are the costs of the procedure dealt with?

The Official Assignee is a public servant and their remuneration is determined by the government. However, if a private trustee is appointed over the estate of the bankrupt, their remuneration is determined in accordance with Section 38 of the Bankruptcy Act, i.e. by agreement between the private trustee and the creditors' committee, by special resolution of the creditors or by the Court.

Further, the bills and charges of the special manager or the private trustee's solicitors, accountants, etc must be taxed by the Court unless agreed to by the Official Assignee. The Official Assignee remains subject to the supervisory control of the Court.

Official Assignee deemed to be public servant under Section 20 of the Bankruptcy Act

The Official Assignee and any officer appointed by the Minister under section 17(3) shall be deemed to be public servants within the meaning of the Penal Code (Cap. 224).

Remuneration of trustee under Section 38 of the Bankruptcy Act

(1) A trustee shall be entitled to receive such salary or remuneration as is determined in the following manner:

(a) by agreement between the trustee and the creditors' committee, if any;

(b) failing any agreement with the creditors' committee or where there is no such committee, by a special resolution of the creditors whose debts have been admitted for the purpose of voting and who are present in person or by proxy and voting at a meeting to be convened by the trustee by a notice to each creditor in accordance with subsection (2); or

(c) failing a determination in the manner referred to in paragraph (*a*) or (*b*), by the court.

(2) The trustee shall attach to every notice under subsection (1)(*b*) a statement of all receipts and expenditure by the trustee and the amount of remuneration sought by him.

Costs under Section 149 of the Bankruptcy Act

(1) No payment shall, without the approval of the Official Assignee, be allowed in the accounts of any trustee in bankruptcy or of any special manager in respect of the performance by any other person of the ordinary duties which are required by this Act or the rules to be performed by himself.

(2) Unless agreed to by the Official Assignee, all bills and charges of solicitors, managers, accountants, auctioneers, brokers and other persons shall be taxed by the prescribed officer, and no payments in respect thereof shall be allowed in the accounts of the Official Assignee without leave of the court given after such taxation has been made.

(3) Every such person shall, on request by the Official Assignee, which request the Official Assignee shall make a sufficient time before declaring a dividend, deliver his bill of costs or charges to the prescribed officer for taxation, and if he fails to do so within 7 days after receipt of the request, or such further time as the court on application grants, the Official Assignee shall declare and distribute the dividend without regard to any claim by him, and thereupon any such claim shall be forfeited as well against the Official Assignee personally as against the estate.

Control of court over Official Assignee under Section 30 of the Bankruptcy Act

(1) The court shall take cognizance of the conduct of the Official Assignee in his administration of the estate of a bankrupt.

(2) If the Official Assignee does not faithfully perform his duties or duly observe all the requirements imposed on him by this Act, the rules or any other written law with respect to the performance of his duties, or if any complaint is made to the court by any creditor in regard thereto, the court shall inquire into the matter and take such action thereon as it may consider expedient.

(3) The court may:

(a) at any time require the Official Assignee to answer any inquiry made by it in relation to his administration of the estate of a bankrupt; and

(b) direct an investigation to be made of the books and vouchers of the Official Assignee or examine him on oath concerning his administration of the estate of a bankrupt.

Review by court of Official Assignee's act, omission or decision under Section 31 of the Bankruptcy Act

(1) If a bankrupt or any of his creditors or any other person is dissatisfied by any act, omission or decision of the Official Assignee in relation to the Official Assignee's administration of the bankrupt's estate, he may apply to the court to review such act, omission or decision.

(2) On hearing an application under subsection (1), the court may:

(a) confirm, reverse or modify any act or decision of the Official Assignee; or

(b) give such directions to the Official Assignee or make such other order as it may think fit.

(3) The Official Assignee may apply to the court for directions in relation to any particular matter arising under the bankruptcy.

9.2 Is the court the correct forum to scrutinize fees?

Pursuant to Section 38 of the Bankruptcy Act, the fees of the private trustee are determined by agreement between the private trustee and the creditors' committee, by special resolution of the creditors or by the Court.

9.3 What is the appropriate method of calculation of fees when dealing with compositions or voluntary arrangements?

For IVA, the Bankruptcy Act is silent on the appropriate method of calculation of the remuneration of the Nominee. However, it is usual for the Nominee to state his fees in the Nominee's Report and in the debtor's proposal. It will then be for the creditors to approve his fees at the creditors' meeting.

9.4 What is the method of calculation of fees when dealing with bankruptcy proceedings?

Generally, the costs of the bankruptcy proceedings is subject to discretion of the Court. This will include the Official Assignee's deposit of S$1,600.00. The Court generally follows the scale prescribed in Bankruptcy (Costs) Rules and Bankruptcy (Fees) Rules.

9.5 Can IPs charge fees based on the value they created for the creditors during an assignment?

The value created is only one of the considerations. The private trustee's remuneration is still to be determined by agreement between the private trustee and the creditors' committee, by special resolution of the creditors or by the Court (Section 38 of the Bankruptcy Act).

Further, the bills and charges of the special manager or the private trustee's solicitors, accountants, etc must be taxed by the Court unless agreed to by the Official Assignee. The Official Assignee subject to supervisory control of the Court.

QUESTION 10

10. Cross-border considerations in consumer insolvency

10.1 Are overseas assets included?

The definition of property under the Bankruptcy Act covers all property "wherever situated" and does not expressly confine property to only Singapore-located property. However, the usual conflict of law principles dictate that the Bankruptcy Act does not have extra-territorial effect.

Section 151 of Bankruptcy Act does provide for assistance and vesting of Singapore situate assets for benefit of Official Assignee of Malaysia.

Action in aid of courts of Malaysia and designated countries (Section 151)

(1) The High Court and the officers thereof shall, in all matters of bankruptcy and insolvency, act in aid of and be auxiliary to the courts of Malaysia or any designated country having jurisdiction in bankruptcy and insolvency so long as the law of Malaysia or the designated country requires its courts to act in aid of and be auxiliary to the courts of Singapore.

(2) An order of any such court of Malaysia or any designated country, seeking aid with a request to the High Court, shall be deemed sufficient to enable the High Court to exercise in respect of the matters directed by the order such jurisdiction as either the court which made the request or the High Court could exercise in respect of similar matters within their several jurisdictions.

(3) In this section, "designated country" means any country designated for the purposes of this section by the Minister by notification in the Gazette.

Reciprocal recognition of Official Assignees (Section 152)

(1) The Minister may, by notification in the Gazette, declare that the Government of Singapore has entered into an agreement with the government of Malaysia for the recognition by each government of the Official Assignees in bankruptcy appointed by the other government.

(2) From the date of that notification where any person has been adjudged a bankrupt by a court in Malaysia, such property of the bankrupt situate in Singapore as would, if he had been adjudged bankrupt in Singapore, vest in the Official Assignee of Singapore, shall vest in the Official Assignee appointed by the government of Malaysia, and all courts in Singapore shall recognise the title of such Official Assignee to such property.

(3) Subsection (2) shall not apply where a bankruptcy application has been made against the bankrupt in Singapore until the application has been dismissed or withdrawn or the bankruptcy order has been rescinded or annulled.

(4) The production of an order of adjudication purporting to be certified, under the seal of the court in Malaysia making the order, by the registrar of that court, or of a copy of the official *Gazette* of Malaysia containing a notice of an order adjudging that person a bankrupt shall be conclusive proof in all courts in Singapore of the order having been duly made and of its date.

(5) The Official Assignee of Malaysia may sue and be sued in any court in Singapore by the official name of "the Official Assignee of the Property of (name of bankrupt), a Bankrupt under the Law of Malaysia".

10.2 Is forum shopping by the debtor for more favourable personal insolvency laws possible?

The recognition of a foreign bankruptcy order is not a matter of course. There is a dearth of local authority on point and there are no statutory provisions other than Section 151 of Bankruptcy Act relating to bankruptcy orders in Malaysia. The common law principles on conflict of law should apply, eg. domicile and comity principles.

QUESTION 11

11. What is the result of subsequent insolvencies?

It is possible for a debtor to have a second and subsequent bankruptcy. There is no restriction under the Bankruptcy Act and the same principles will apply. The Official Assignee of first the bankruptcy will be deemed a creditor of unpaid balance in the second bankruptcy under Section 97 of the Bankruptcy Act.

QUESTION 12

12. Recommendations?

Currently, there are two statutory regimes for debtors in financial distress to resort to in order to reach a repayment plan with their creditors, namely the Individual Voluntary Arrangement ("IVA") and the Debt Repayment Scheme ("DRS"). There is an overlap between these two regimes and they do not seem to sit well together. It is altogether possible for a debtor to abuse the process by getting two bites at the same cherry – first with the IVA, then the DRS.

The present IVA mechanism under the Bankruptcy Act is dated and unwieldy. It can be simplified to a 2-step process akin to the Scheme of Arrangement under Section 210 of the Companies Act (Cap. 50), involving (a) the application to Court for leave to convene a creditors' meeting and (b) subsequent Court sanction for the approved Scheme of Arrangement. Class distinction should likewise be introduced for IVA such that creditors with dissimilar rights and interests will get to vote in separate class meetings.

Under the current IVA, only creditors who have filed a bankruptcy application against the debtor may attend the debtor's application for an Interim Order. Such a restriction makes no sense and it is submitted that all creditors have a vested interest and should be given the right of audience.

One final comment on the IVA. Even though an Interim Order has expired months ago (eg. because the nominee's report was not submitted), the debtor can simply apply for an extension of the Interim Order. This way, the debtor circumvents the 12 month prohibition rule under Section 48(1)(b) of the Bankruptcy Act and he can take advantage of the moratorium under the Interim Order to prevent creditors from filing a bankruptcy application. A creditor will be prejudiced because the relation back periods for avoidance actions start from the date of the bankruptcy application.

SOUTH AFRICA

QUESTION 1

1. What are the options or procedures available for a natural person / consumer regarding their over-indebtedness in your jurisdiction?

There are two proceedings namely, the "debt review proceedings" governed by the National Credit Act, No. 34 of 2005 as ammended ("NCA") and the "voluntary surrender of the debtor's assets" governed by the Insolvency Act, No. 24 of 1936 as ammended. ("Insolvency Act") These proceedings will be discussed separately under the following subject headings.

1.1 The legal grounds for the opening of or access to those procedures

1.2 How are these procedures made available?

1.3 Who can commence the procedure?

1.4 Who will supervise the procedure?

1.5 What are the criteria such a person has to satisfy?

1.6 What are the available alternatives?

A. Debt review proceedings

The legal grounds for the opening of or access to those procedures

A debtor is considered over-indebted if, having regard to available information at the time, a determination is made that the particular debtor is or will *be* unable to satisfy in a timely manner all the obligations under all the credit agreements to which the debtor is a party. The NCA addresses the problem of over - indebtedness by providing for debt relief in the form of debt - restructuring.

How are these procedures made available?

A debtor is empowered under section 86 of the NCA to initiate debt review proceedings by applying directly to a debt counsellor for purposes of being declared over - indebted.

Courts are also given the power in section 85 of the NCA, in any court proceedings in which a credit agreement is being considered and it is alleged that the debtor under a credit agreement is over-indebted, to refer the debtor directly to a debt counsellor with a request that the debt counsellor evaluate the debtor's circumstances and make a recommendation to the court, alternatively, declare that the debtor is over - indebted and make any order contemplated in section 87 of the NCA to relieve the debtor's over - indebtedness. In this regard, section 87 of the NCA provides that the Court may:

(a) reject the recommendation or application as the case may be; or

(b) make -

(i) an order declaring any credit agreement to be reckless;

(ii) an order re-arranging the debtor's obligations; or

(iii) both orders contemplated in subparagraph (i) and (ii).

Who can commence the procedure?

Debtors who are over-indebted may take the initiative and voluntarily apply to a debt counsellor for debt review once they realise they are over - indebted or attend a debt counsellor after they have received a notice in terms of section 129 of the NCA ("section 129 Notice"). A section 129 notice would be prepared by the creditor and delivered to the debtor. The notice would draw the default to the notice of the debtor in writing and propose that the debtor refer the credit agreement to a debt counsellor, alternative dispute resolution agent, debtor court or ombud with jurisdiction, with the intent that the parties resolve any dispute under the agreement or develop and agree on a plan to bring the payments under the agreement up to date.

Alternatively, a debtor may wait until a credit provider attempts to enforce a credit agreement in respect of which the debtor has defaulted and then raise the issue of over - indebtedness in court.

As aforesaid, a court faced with this issue can either refer the matter to a debt counsellor for debt review or itself make a declaration of over - indebtedness.

Who will supervise the procedure?

Debt review proceedings will generally be supervised by the debt counsellor. The debt review proceedings may be commenced when a debtor applies to a debt counsellor for an evaluation to determine whether the debtor is over - indebted. When an application is received, the debt counsellor must notify the debtor's credit providers and all registered credit bureaux of that fact. The debtor and credit providers are obliged to co - operate in the debt review process.

The debt counsellor will make a determination as to whether the debtor is over - indebted, likely to become over - indebted or is not over - indebted at all. If, as a result of the debt - review assessment, the debt counsellor reasonably concludes that the debtor is over - indebted, he may issue a proposal recommending that the Court that has jurisdiction make an order that the debtor's credit agreements be declared reckless, and / or that one or more of the debtor's obligations be rearranged. A credit agreement is regarded as being reckless if, at the time that the agreement was made, or at the time when the amount approved in terms of the agreement is increased the credit provider:

(*a*) failed to conduct an assessment for purposes of determining the debtor's general understanding and appreciation of the risks and costs of the proposed credit, and of the rights and obligations of a debtor under a credit agreement; the debtor's debt re-payment history; the debtor's existing financial means, prospects and obligations; and whether there is areasonable basis to conclude that any commercial purpose may prove to be successful, if the debtor has such a purpose for applying for that credit agreement; or

(b) having conducted an assessment as aforesaid, entered into the credit agreement with the debtor despite the fact that the preponderance of information available to the credit provider indicated that the debtor did not generally understand or appreciate the debtor's risks, costs or obligations under the proposed credit agreement; or entering into that credit agreement would make the debtor over - indebted.

Only the Court can declare a debtor to be over - indebted. Debt counsellors are merely empowered to conduct a debt review to determine whether a debtor is over - indebted. At no stage does the debt counsellor acquire the power to formally declare a debtor to be over - indebted.

What are the criteria such a person has to satisfy?

When assessing the debtor's application to determine whether he is over-indebted, the debt counsellor must consider the following:

- a debtor is over - indebted if the total monthly debt payments exceed the minimum living expenses from their net income;

- net income is calculated by deducting from the gross income, statutory deductions and other deductions that are made as a condition of employment; and

- minimum living expenses are based upon a budget provided by the debtor, adjusted by the debt counsellor with reference to guidelines issued by the National Credit Regulator.

In making a determination that the granting of credit was reckless, a debt counsellor must consider the following:

- the level of indebtedness of the debtor after that particular agreement was entered into;

- whether, when that particular credit agreement was entered into, the total debt obligations including the new agreement exceeded the net income reduced by minimum living expenses;

- the debtor's bank statement, salary or wage advice and records obtained from a credit bureau; and

- any guidelines published by the National Credit Regulator proposing evaluative mechanisms, models and procedures.

What are the available alternatives?

A debtor may apply for an administrator order in terms of section 74 of the Magistrates' Courts Act, No 32 of 1944, provided that the debts do not exceed R50 000. The debtor must make certain regular payments to an administrator once such an order has been granted. The administrator must draw up a list of creditors and pay them from the amounts received from the debtor. The only debt relief that the debtor enjoys is a rescheduling of the repayment terms of his or her debt. A note of caution, however, an application for an administration order which also demonstrates actual insolvency, is an act of insolvency and may result in the debtor's estate being sequestrated, as more fully discussed in 3 below.

B. Voluntary surrender of the debtor's estate

The legal grounds for the opening of or access to those procedures

The Insolvency Act, No 24 of 1936 as amended ("the Insolvency Act") provides that a debtor may apply to Court to surrender his estate in circumstances where the debtor is insolvent and where such debtor owns realisable property of a sufficient value to defray all costs of the sequestration which will be payable out of the free residue of his estate, and where it will be to the advantage of his creditors if his estate was to be sequestrated.

The way these procedures are made available

The application by the debtor to the Court for the surrender of his estate must be preceded by the publication of a notice of surrender in the South African *Government Gazette* (formal government publication for legal notices) and in a newspaper circulating in the district in which the debtor resides, or, where the debtor is a trader, in the district in which his principal place of business is situated. Within a period of seven days as from the date of publication thereof in the *Gazette*, the debtor must deliver or post a copy of the notice of surrender to each of his creditors "whose address he knows or can ascertain". Such notice must give timeous notice of the debtor's intention to surrender, of the date when, and of the Court in which, his application is to be made, of the availability for inspection of his statement of affairs and of the place where such inspection may be made.

The debtor must lodge, in duplicate, a statement of his affairs at the office of the Master of the High Court of the Republic of South Africa that has jurisdiction ("the Master") (the Master's office deals with the administration of insolvent estates) and must be verified by an affidavit attested before a commissioner of oaths who is not the debtor's own attorney. The intention in this respect is to provide each of the creditors with pertinent information concerning the debtor' assets and liabilities and regarding the cause or causes of the debtor's insolvency in order to enable such creditor to evaluate the debtor's application for voluntary surrender.

The Court may accept the surrender only where it holds that each of the substantive requirements (set out in paragraph 1.1 above) have been established. However, the acceptance of the surrender is in the discretion of the Court.

By whom the procedure can be opened

A debtor in financial difficulties may voluntarily surrender his estate as insolvent, that is, procure the sequestration of such estate by the Court independently of proceedings brought by a creditor.

By whom the procedure will be supervised

Once the Court has accepted the voluntary surrender of an individual's estate, then such debtor's estate will be sequestrated. Upon the sequestration of an estate, the Master may appoint a provisional trustee who must administer the estate and account to the Master. Thereafter, a trustee (or not more than two trustees jointly) of an insolvent estate will be elected by the proved creditors at the first meeting of creditors. The functions of a trustee are essentially to control and administer the property and affairs of the estate and to liquidate it in accordance with the provisions of the Insolvency Act. In relation to the property of the estate, the trustee's function is to realise it expeditiously for the purpose of enabling the creditors of the insolvent to achieve the maximum possible dividend payable in respect of their claims.

What requirements must the debtor meet

The requirements which must be observed before the Court may accept the surrender of the debtor's estate are procedural and substantive. The substantive requirements are that the debtor is insolvent, that he owns realisable property of a sufficient value to defray all costs of the sequestration which will in terms of the Insolvency Act be payable out of the free residue of his estate, and that it will be to the advantage of his creditors if his estate was to be sequestrated. The onus of establishing that all requirements have been proved is that of the debtor.

What are the alternatives

As an alternative to voluntary surrender, where the debtor is insolvent, his or her estate may be sequestrated by means of a "friendly sequestration", that is, a compulsory sequestration by Court Order to be achieved through the co-operation between the debtor and a "friendly" creditor. A "friendly sequestration" will, however, not be granted if it constitutes an abuse of process, that is, if on the facts the Court would be unable competently to grant a sequestration Order or, even where it could do so, if the application was brought primarily for the relief of a harassed debtor.

QUESTION 2

2. Position of the debtor and the spouse

2.1 Which assets and income are excluded from the procedure?

Debt review

When dealing with the debt review process the Court / debt counsellor takes all the debtor's income into account but does not take into account any other assets owned by the debtor. This procedure does not result in the sale of the debtor's assets. It simply allows for the restructuring of the debtor's debts in order to allow the debtor to settle their debt in terms of the debtor's available income.

Sequestration

There are certain assets that are excluded from the insolvent estate, they are as follows:

Money and property protected under the Friendly Societies Act, 1956

Monies due by way of a benefit in terms of the rules of a friendly society on the retirement of a member of the society who was such for a period of at least three years do not form part of such member's insolvent estate.

Certain policy benefits

Section 63 of the Long Term Insurance Act protects any assistance, life, disability and health policies, and the protection afforded by the section applies to "the policy benefits" provided or to be provided to a person under one or more of the aforementioned types of policy, under which that person or the spouse of that person is the life insured, or to the "assets acquired exclusively with those policy benefits".

Insurance monies payable in respect of liability of insolvent insured

If at the date of sequestration the debtor has a liability to a third party, and an insurer is obliged to indemnify the debtor in respect of such liability, the third party, upon such sequestration, is entitled to recover the amount of the indemnity directly from the insurer in terms of the Insolvency Act, without there being any contractual nexus between the third party and the insurer, provided that the third party is able to show that he has a good claim in law against the debtor.

Trust money and trust properties held by an attorney, notary or conveyancer

Section 78(7) of the Attorneys Act 53 of 1979 excludes from the assets of any insolvent attorney or notary or conveyancer, any amount which, at the date of sequestration, is standing to the credit of his trust account or of any savings or other interest-bearing account to which trust moneys have been deposited.

Trust monies held by estate agent

The amount which as at the date of sequestration is standing to the credit of an insolvent estate agent's trust account, or of any savings or other interest-bearing account to which trust moneys have been deposited, does not form part of his insolvent estate.

Marriage subject to accrual system: spouse's right to share in accrual of other spouse's estate

Where the marriage is subject to the accrual system, a spouse's claim to share in the accrual of the estate of the other spouse arises and is acquired only on the date of the dissolution of the marriage and its value, if any, is only determinable at such date. Section 3(2) of the Matrimonial Property Act provides that, subject to any order of the Court under section 8(1) thereof, "the right of a spouse to share . . . in the accrual of the estate of the other spouse is during the subsistence of the marriage not transferable or liable to attachment, and does not form part of the insolvent estate of a spouse".

Accordingly, the intention is that a spouse's right to share in the accrual, which in fact is merely a *spes* (hope) is to be excluded from such spouse's insolvent estate only during the subsistence of the marriage. Thus, on the sequestration of a spouse's estate during the subsistence of the marriage, such spouse's right to share in the accrual of the estate of the other spouse is excluded from the former's insolvent estate. But if the marriage terminates during the administration of such estate, the resulting "claim" becomes part of such estate and vests in the trustee thereof.

However, one must take section 21 of the Insolvency Act into account. This is discussed in 2.9 below.

Insolvent's essential means of subsistence

The Insolvency Act effectively excludes the debtor's wearing apparel, bedding, household furniture, tools and other essential means of subsistence from his estate since these may not be sold by the trustee.

Workmen's compensation

The Compensation for Occupational Injuries and Diseases Act, No 130 of 1993, provides that "notwithstanding anything to the contrary in any other law contained, compensation shall not be capable of attachment or any form of execution under a judgment or order of a court of law".

Unemployment insurance benefits

Benefits payable under the Unemployment Insurance Act, No 63 of 2001, are incapable of being attached by order of any Court, except by any court order relating to maintenance of the dependants, including a former spouse, of that contributor.

Compensation for loss or damage by reason of defamation or personal injury

Compensation for loss or damage suffered by the debtor as at or after the date of sequestration by reason of defamation or personal injury may be recovered by him for his own benefit.

2.2 Does the debtor have restrictions on the disposition of their assets?

Debt review proceedings

In terms of debt review the Court will make various recommendations and may make the following orders:

- An order extending the period of the agreement and reducing the amount of each payment accordingly.
- Postponing during a specified period the dates on which payments are due under the agreement.
- Extending the period of the agreement and postponing during a specified period the dates on which payments are due under an agreement.
- Recalculating the debtor's obligations due to contraventions of the NCA.

None of the above orders restrict a debtor from freely disposing of their assets.

Sequestration

A disposition in terms of section 2 of the Insolvency Act is defined as any transfer or abandonment of rights to property including a sale, lease, mortgage, pledge, delivery, payment, release, compromise, donation or any contract therefore, but excluding a disposition in compliance with an order of the court.

Disposition without value

Section 26 of the Insolvency Act provides that where the trustee proves that at any time *more than* two years before the sequestration of his estate the insolvent made a disposition of his property and that immediately after such disposition his liabilities exceeded his assets, the disposition may be set aside by the Court if the *trustee* also proves that it was not made for value.

Where it is proved that such a disposition is made, the Court may set aside the disposition, however, if it is proved that "at any time after the making of the disposition" the liabilities of the insolvent exceeded his assets by an amount less than the "value of the property disposed of", then the disposition may be set aside only to the extent of such excess.

Voidable preference

If a disposition by a creditor of his property within six months before the date of sequestration had the effect of preferring one of his creditors above another, and immediately after it was made the liabilities of the insolvent exceeded the value of his assets, then the Court may set aside the disposition in terms of section 29 of the Insolvency Act.

Undue preference

If a debtor made a disposition of his property at a time when his liabilities exceeded his assets, with the intention of preferring one of his creditors above another, and his estate is thereafter sequestrated, then and in terms of section 30 of the Insolvency Act the Court may set aside the disposition.

Collusive dealings

After the sequestration of a debtor's estate the Court may in terms of section 31 of the Insolvency Act set aside any transaction entered into by the debtor before the sequestration, whereby he, in collusion with another person, disposed of property belonging to him in a manner which had the effect of prejudicing his creditors or of preferring one of his creditors above another.

2.3 Which assets and income are included in the procedure?

Debt review

When determining whether or not a debtor is over-indebted and when restructuring the debtor's debt, the Court will take into account the net income (determined in accordance with paragraph 1.5 above). The court does not take any other assets into account when determining whether or not an individual is over indebted or when making any of the aforesaid orders.

Sequestration

The basic principle is that all the property of the insolvent at the date of sequestration, and all the property subsequently acquired by or accruing to the debtor during sequestration, vests in the Master, and subsequently in the trustee upon his appointment. However, as discussed in 2.1 above, there are a number of exceptions to this principle.

2.4 Are pension schemes included?

Debt review

A debtor may apply to a debt counsellor as prescribed by the NCA for debt review. In this regard Regulation 24 to the NCA provides that the debtor must furnish the debt counsellor with his personal information, such as the debtor's monthly expenses, which include but are not limited to taxes, unemployment insurance fund, pension, medical aid, insurance, court orders and any other expenses.

Sequestration

The insolvent debtor may recover for his own benefit (and, therefore, keep for himself) any pension to which he may be entitled for services rendered by him. There are a number of statutes which exclude from the estate of an insolvent debtor, pensions and like benefits payable to him. In applying such provisions it is necessary always to determine the Legislature's intention as to whether the exclusion relates only to moneys which become payable to the insolvent after the sequestration or extends to those already paid to him, and still in his possession, at such date. In relation to section 3 of the General Pensions

Act 29 of 1979, it was held, in *Foit v First Rand Bank Bpk* that the protection afforded by that section of the Act applied only in the situation where the insolvent debtor receives the relevant benefit after the date of sequestration of his estate and that protection was not afforded to pension monies received by the insolvent debtor prior to the sequestration of his insolvent estate.

2.5 Does the debtor donate to the estate a part of his income for the benefit of his creditors?

Debt review

If, as a result of the debt-review assessment (which must take into account the debtor's income, including employment income and other sources of income), the debt counsellor reasonably concludes that the consumer is over-indebted, he may issue a proposal recommending that the Court with jurisdiction make an order that one or more of the debtor's obligations be rearranged as discussed in paragraph 2.2 above.

Apart from ensuring that the rearranged obligations are timeously met, the debtor need not donate income to his estate. In fact, as it is a requirement in terms of section 86(7) for the implementation of the debt review process that the debtor is in fact over-indebted, the debtor should in theory not have any funds left from his income to donate to his estate.

Sequestration

No donation is required by an insolvent to the trustee of his insolvent estate. The insolvent may recover for his own benefit the remuneration or reward for work done or for professional services rendered by him or on his behalf after the sequestration of his estate. He is entitled to retain any moneys received by him in the course of his profession, occupation, or other employment, unless the Master of the High Court has expressed the opinion that the moneys are not necessary for the support of the insolvent or those dependent upon him, in which case, the trustee is entitled to that money.

2.6 Is there a means test?

Debt review

Refer to question 1.5

A debtor is over-indebted if his total monthly debt payments exceed the balance derived by deducting his minimum living expenses from his net income.

Sequestration

Refer to question 1.5

In short, in terms of voluntary surrender of an estate, a debtor must be able to show that he is insolvent, that he owns realisable property of a sufficient value to defray all costs of the sequestration which will, in terms of the Insolvency Act, be payable out of the free residue of his estate and that it will be to the advantage of his creditors if his estate is sequestrated.

2.7 Is there a garnishment of regular income?

Debt review

In terms of debt review the Court will make various recommendations and may make a number of orders as discussed in paragraph 0 above, but will not make any orders specifically attaching an individual's income. The Court's order is however made having regard to the income available to the debtor thus allowing the debtor to liquidate all outstanding debts.

Sequestration

Section 23(9) read with section 23(5) of the Insolvency Act provides that if the Master believes that the insolvent debtor's full remuneration is not necessary for the support of the insolvent or those dependent upon him, the trustee may notify the insolvent debtor's employer that the trustee is entitled to a part of the insolvent debtor's remuneration (at the time of notification or which may subsequently become due to him), and the employer is then obliged to pay over that portion to the trustee.

2.8 Is there protection for the debtor's privacy, his mail and his home?

Debt review

A debt counselor is obliged to notify the debtor's credit providers and all registered credit bureaus of the fact that the debtor has made application for debt review.

The debtor is required to provide a debt counselor with personal information, details regarding his income, monthly commitments and debt obligations. The debtor is also required to consent to such information being released to all registered credit bureaus. Credit bureaus must provide the debt counselor with any credit records relevant to the debtor. There is therefore no protection for the debtor.

Sequestration

Section 154(1) of the Insolvency Act states that the Master shall have the custody of all documents relating to insolvent estates.

A trustee shall, in accordance with section 69 of the Insolvency Act, as soon as possible after his appointment take into his possession or under his control all movable property, books and documents belonging to the insolvent debtor's estate. If, however, the trustee has reason to believe that any such property, book or document is concealed or otherwise unlawfully withheld from him, he may apply to the Court having jurisdiction for a search warrant.

Additionally, in the administration of an insolvent estate there may arise the necessity to obtain information about the affairs of the insolvent. The provisions of sections 64, 65 and 66 of the Insolvency Act are intended to afford a means of obtaining such information by way of interrogation of the insolvent debtor and other persons as well.

The scope for interrogation under these provisions is wide: in the case of an insolvent estate the presiding officer at the interrogation may, in terms of section 65 of the Insolvency Act, interrogate all matters relating to the insolvent or his business or affairs, whether before or after the sequestration of his estate, and concerning any property belonging to his estate, and concerning the business, affairs or property of his or her spouse. The only limitations on the scope of the enquiry are that questions must be relevant and that questions may not be asked which the presiding officer considers would prolong the interrogation unnecessarily. In the case of *Pitsiladi v van Rensburg and Others NNO* 2002 (2) SA 160 the Court held that is not an abuse of the process to obtain information for purposes of future civil litigation. It must be pointed out, however, that the purpose of the interrogation is not to put the insolvent debtor's trustee in a better position than that of the debtors and creditors of the insolvent estate but to place the trustee, because of the difficulties he faces in the administration of the sequestration, on such a footing that he can litigate on equal terms with such debtors and creditors.

2.9 Is there protection of the spouse's interest in the home?

Refer to questions in 2.8 and 2.1

Section 21 of the Insolvency Act effected an important change in the common law by vesting in the trustee of an insolvent debtor's estate all the property of the solvent spouse and placing on such spouse the onus of showing that the property claimed is, in fact, the spouse's separate property. Such vesting is not necessarily permanent, because the solvent spouse may secure the release (and thereby regain ownership) of the assets by proving that they fall into any one of several categories. Until the solvent spouse actually does this, the solvent spouse does not have any of the ordinary powers of ownership over the assets and cannot alienate them or encumber them.

Under certain circumstances the vesting of the property of the solvent spouse in the trustee of the insolvent debtor's estate could have very serious consequences. Therefore, the Insolvency Act provides that if it appears to the Court, that the solvent spouse is carrying on the business of a trader or the solvent spouse is likely to suffer serious prejudice by reason of the vesting in the trustee, and the Court is satisfied that the solvent spouse is willing and able to make arrangements to safeguard the interest of the insolvent estate in such property without the property necessarily vesting in the trustee, then the Court, either when making the sequestration order or at some later stage, but subject to the immediate completion of relevant arrangements by the solvent spouse, may exclude that property or any part of it from the operation of the sequestration order for a period which the Court deems fit.

During the period stipulated in the Court's order, the solvent spouse must produce evidence to the trustee in support of such spouse's claim to the property. The trustee must notify the solvent spouse as to whether or not he will release the property. However, section 21 of the Insolvency Act provides that if the property is not released, it vests in the trustee upon the expiry of such period stipulated in the Court's order, but this is subject to the solvent spouse's rights to seek the release of the property through the Court.

The property of the solvent spouse which vests in the trustee of the insolvent debtor's estate includes incorporeal property. Thus, in circumstances where the solvent spouse has an interest in immovable property, then, unless the solvent spouse's rights are released, the solvent spouse's rights vest in the trustee.

2.10 Is the debtor restricted to receive information?

The debtor is entitled to receive any information with regards to the sequestration of his estate as well as any information pertaining to the determination and outcome of debt review proceedings.

2.11 Does the debtor have the liberty to move freely and to leave any State, including his own?

Debt review

There are no provisions restricting the debtor's movement in terms of the implementation of debt review proceedings.

Sequestration

The insolvent debtor and the solvent spouse's liberty to move freely and to leave South Africa is limited by section 140 of the Insolvency Act. This section provides that an insolvent or the spouse of an insolvent shall be guilty of an offence and liable to imprisonment for a period not exceeding six months if, when summoned to give evidence in any proceedings instituted by or against the trustee of the insolvent estate he or she conceals himself or herself or leaves the South Africa, or without reasonable excuse fails to attend those proceedings or refuses to answer any question which may be lawfully put to him or her in the course of those proceedings.

In addition to the above, the insolvent debtor is bound to attend the first and second meetings of creditors of his insolvent estate or any adjourned such meeting, unless he has obtained permission from the presiding officer at the meeting to absent himself. The insolvent is bound also to attend any subsequent meeting of creditors and, accordingly, any special meeting thereof convened specifically for the purpose of interrogation, if he is required so to do by written notice from the trustee.

2.12 Is the debtor entitled to cost free legal assistance?

Debt review

Refer to paragraph 1 - Debt review

A debt counsellor may require the debtor to pay an application fee not exceeding the prescribed amount.

With regards to legal costs the debtor may apply for legal assistance from a number of legal aid facilities such as the Legal Aid Board, provided that the debtor qualifies for such assistance.

Sequestration

Refer to paragraph 1 - Sequestration

2.13 Are there restrictions on the debtor after the procedure?

Debt review

A debtor who has filed an application for debt review or who has alleged in court that he is over indebted must not incur any further charges under a credit facility or enter into any further credit agreement until one of a number of specified events has occurred, namely that the:

- debt counsellor rejects the application and the prescribed time period for direct filing has expired without the debtor having so applied;
- court has determined that the debtor is not over-indebted, or has rejected a debt counsellor's proposal or the debtor's application;
- court having made an order or the debtor and credit providers having made an agreement re-arranging the debtors obligations;
- debtor's obligations under the credit agreements that are re- arranged are fulfilled, unless the debtor fulfilled the obligations by way of a consolidation agreement.

Sequestration

The insolvent debtor's right to hold office is restricted by various statutory provisions. These provisions are not intended to punish the insolvent, but are aimed at the protection of the interests of members of the general public who are entitled to the assurance that persons holding offices of responsibility are people of stability and integrity. The restrictions on the offices which an insolvent debtor may hold are the following:

- a person is not eligible to be a member of the National Assembly of the Government of South Africa if he is an unrehabilitated insolvent and similar provisions apply also to members of a Provincial Legislature;
- an unrehabilitated insolvent is, save under authority of the Court, disqualified from being appointed from acting as a director of a company;
- the liquor board of a province may not grant a liquor licence to an unrehabilitated insolvent or to such insolvent debtor's spouse. If the holder of a liquor licence becomes insolvent, the trustee of his estate, subject to the law regulating insolvency, becomes the holder of the licence and may, for purposes of administration of the estate, conduct the business to which the licence relates;
- an insolvent is disqualified from being elected or appointed a trustee;
- an unrehabilitated insolvent may not be a member of the board with governs the National Credit Regulator and may not be registered as a credit provider in terms of the NCA.

An insolvent debtor may generally follow any profession or occupation or enter into any employment but may not, without the consent of their trustee, either carry in or be employed in any capacity, or have any direct or indirect interest, in the business of a trader who is a general dealer or manufacturer.

2.14 Is the spouse (automatically) included in the procedure?

Debt review

The debtor's spouse is not automatically included in the debt review process.

However, the procedure provided in section 86 of the NCA in terms of which an application for debt review is made to Court by a debt counsellor, and in terms of which the debt counsellor makes a recommendation to Court for the rearrangement of the debtor's obligations, entails a notice of motion and a supporting affidavit that contains relevant information regarding the merits of the matter. In this regard, the affidavit must include, *inter alia,* details regarding the debtor's marital status and his income, as well as his spouse's income, and proof must be attached.

Sequestration

Upon the sequestration of a debtor's estate, the property of the debtor's spouse vests automatically in the Master and then, upon his appointment, in the trustee (or provisional trustee) if the debtor and such spouse are living together and even if they are living apart, unless pursuant to a judicial order of separation.

It should be noted that section 21 of the Insolvency Act can apply only to spouses married out of community of property since, where spouses are married in community of property; there is only one estate, namely the joint estate.

An application to surrender the joint estate of spouses married in community of property, irrespective of when the marriage was contracted, must be made by both spouses. Where either spouse is uncooperative or is for any reason unavailable, then the application should not be made at all.

2.15 In which way do the International or European Convention or Covenants play a role?

The Model Law on Cross-Border Insolvency (hereinafter referred to as "the UNCITRAL Model Law") was accepted by the United Nations Commission on International Trade Law ("UNCITRAL") in Vienna on 30 May 1997 and was intended to serve as a basis for the introduction of national legislation in member States of the United Nations.

A further example of the global movement towards the regulation of cross-border insolvency matters is the EU Regulation adopted by the European Union in terms of Council Regulation (EC) 1346/2000 of 29 May 2000 on Insolvency Proceedings which is binding on all member states (except Denmark) with effect from 31 May 2002. However, this Regulation regulates cross-border insolvency matters only among European member states.

South Africa has no cross-border insolvency treaty with any other jurisdiction, nor is it a party to any convention in this regard. Although the Cross-Border Insolvency Act, No 42 of 2000 ("the CBIA") came into force on 28 November 2003, it is for all practical purposes not yet in operation since its operation is dependent upon the designation by the Minister of Justice of States to which the CBIA will apply. As yet, no States have been designated.

Presently the Courts must still apply common law dealing with international private law and precedent and having regard to comity, convenience and equity, is entitled to recognise the appointment of a foreign trustee. The principles of international private law will also be applied with regard to the treatment of property situated in this jurisdiction.

QUESTION 3

3. Position of the creditor

3.1 Can a creditor force the debtor to commence a procedure or oppose the debtor from doing so?

A creditor may apply for the sequestration of a debtor's estate, if the debtor has committed an act of insolvency as contemplated in section 8 of the Insolvency Act, or the debtor is factually insolvent, that is, his liabilities in fact exceed the value of his assets. It is essential for the creditor to also prove that it will be to the advantage of creditors of the debtor if his estate is sequestrated.

In terms of section 8 of the Insolvency Act, a debtor commits an act of insolvency if:

(a) the debtor leaves the Republic or having been out of the Republic remains absent therefrom, or departs from his dwelling or otherwise absents himself, with intent by so doing to evade or delay the payment of his debts;

(b) a court has given judgment against the debtor and he fails, upon the demand of the officer whose duty it is to execute that judgment, to satisfy it or to indicate to that officer disposable property sufficient to satisfy it, or if it appears from the return made by that officer that he has not found sufficient disposable property to satisfy the judgment;

(c) the debtor makes or attempts to make any disposition of any or his property which has or would have the effect of prejudicing his creditors or of preferring one creditor above another;

(d) he removes or attempts to remove any of his property with intent to prejudice his creditors or to prefer one creditor above another;

(e) he makes or offers to make any arrangement with any of his creditors for releasing him wholly or partially from his debts;

(f) after having published a notice of surrender of his estate which has not lapsed or been withdrawn, the debtor fails to lodge the requisite statement of his affairs or he lodges such a statement which is incorrect or incomplete in any material respect or he fails to apply for the acceptance of the surrender on the relevant date stipulated in such notice;

(g) he gives notice in writing to any one of his creditors that he is unable to pay any of his debts; or

(h) if, being a trader, he gives notice in the Gazette in terms of section 34 of the Insolvency Act, and is thereafter unable to pay all his debts.

The NCA may, however, significantly influence insolvency proceedings as a result of, for instance, the powers of a Court to refer a matter to debt review and thereby to invoke the debt-relief remedies afforded by the NCA in respect of over-indebtedness. Thus, in its discretion to grant a sequestration order based on compulsory sequestration or voluntary surrender, a court may consider alternative options such as the debt review process provided for by the NCA before granting the sequestration order.

However, once the debt review process has been initiated by the debtor, the NCA allows, under section 86(10), for termination of the debt review process by providing that, if a debtor is in default under a credit agreement, the credit provider in respect of that credit agreement may give notice at any time but at least 60 business days after the date on which the debtor applied for the debt review to terminate the review process. Such notice must be given to the debtor, the debt counsellor, and the National Credit Regulator.

3.2 Which creditors' claims can be excluded from a discharge?

Sequestration

Subject to certain exceptions only a liquidated claim in existence as at the date of sequestration of the insolvent estate, and generated by a cause of action which arose before the date of sequestration of the insolvent estate, and which has not prescribed at such date, is capable of being proved against such insolvent estate. The Prescription Act No 68 of 1969 ("the Prescription Act") governs the periods of prescription relevant to claims. In terms of the Prescription Act all debts would prescribe after a period of 3 years from the date that the debt is due. Proof of an unliquidated claim may be tendered at a meeting of creditors, and where the claim becomes a liquidated claim, that is, where the trustee has compromised or admitted it or it has been settled by judgment of a Court, then such claim is deemed to have been proved against the estate at such meeting.

3.3 Does a creditor have to accept a curtailment of his claim?

Debt review

Refer to paragraph 2.2. It should be noted, however, that a Court is not permitted to reduce the interest rate applicable to an agreement in order to provide debt relief to a debtor.

Section 88(3) of the NCA further provides that, a credit provider who receives notice of an application by a debtor to a debt counsellor for debt review, or of court proceedings to have a debtor declared over-indebted and for the rearrangement of the debtor's obligations, may not exercise or enforce by litigation or other judicial process any right or security under that credit agreement until the debtor is in default under the credit agreement, and the debt counsellor rejects the application for debt review; or the court has determined that the consumer is not over-indebted, or has rejected a debt counsellor's proposal or the consumer's application; or a court having made an order or the consumer and credit providers having made an agreement re-arranging the consumer's obligations, all the consumer's obligations under the credit agreements as re-arranged are fulfilled, unless the consumer fulfilled the obligations by way of a consolidation agreement; or

the consumer defaults on any obligation in terms of a re-arrangement agreed between the consumer and credit providers, or ordered by a court or the Tribunal.

Sequestration

The costs of sequestration are payable before any other payment may be made to the proved creditors, with the exception (where applicable) of funeral and death-bed expenses. The costs of sequestration rank as follows: firstly, deputy sheriff's charges; secondly, Master's fees; thirdly, and from the "first funds of the estate available" in the free residue, the costs, as taxed by the Registrar of the Court of the creditor's application pursuant to which the order sequestrating the estate was granted (in the case of a compulsory sequestration); and fourthly, all other general costs. Insofar as general costs are concerned it must be noted that they are payable in equal proportions where payment of all of them in full cannot be achieved.

3.4 Do certain creditors receive more protection than others?

Debt review

In terms of debt review the Court will make various recommendations and may make an order rearranging the debtor's obligations. The Court may in the course of rearranging the debtor's obligations, prefer one creditor above another (however only in respect of the time periods relevant to payments to the creditors, and recalculating the debtor's obligations due to a creditor who may have contravened the NCA).

Sequestration

Special provision is made by the Insolvency Act for the realisation of a secured creditor's security. A proved secured claim must be paid in priority to any other claim from the proceeds of the realisation of the property constituting the security, after deduction from such proceeds of the costs of sequestration for which the creditor concerned is responsible. Where property is held in security by more than one proved creditor, the payments to each must in turn be in accordance with their order of preference. The payment to such a creditor carries post-sequestration interest on the secured claim in respect of any period not exceeding two years immediately before the date of sequestration as if it were part of the capital indebtedness.

The proved claims to which the Insolvency Act, or any other statute, has assigned preferences are payable out of the free residue in priority to any other claims. After (where relevant) the funeral and death-bed expenses, the costs of sequestration and the costs of execution have been settled, the free residue must be applied in payment of, firstly, the salary and wages and certain other amounts payable to or on behalf of former employees of the insolvent, secondly, certain statutory obligations, thirdly, taxes, and, fourthly, proved preferent claims arising from bonds which afford preferences but not security. These latter claims must be paid in their order of preference and they too carry post-sequestration interest.

Concurrent claims, being neither secured nor preferent, and which may include any claim for the unpaid amount (including interest) of any secured claim, are payable, if proved, from the free residue after all other claims including, where payable, interest and costs have been paid. The payment of these claims must be in proportion to the amount of each, and they also carry interest proportionally, but only after the capital indebtedness of each of the concurrent creditors has been fully paid.

It is also important to point out that a contribution becomes payable by proved creditors where there is no free residue or where it is insufficient to pay all the costs of sequestration. A secured creditor should not be liable in any way for the costs of sequestration, other than those to which his security is subject, save to the extent that he participates in the distribution as a concurrent creditor.

QUESTION 4

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4. Avoidance actions

4.1 What are the legal proceedings to protect / realize the debtor's assets?

Refer to question 2.2 - Sequestration

Sequestration

In addition, at common law any creditor may seek by way of the *actio Pauliana* an order from the Court setting aside an alienation by a debtor of his property in fraud of his creditors where such alienation has had the effect of diminishing the debtor's property.

In this context, "fraud" exists where the alienation of the property is effected as between the debtor and the alienee with the common intention of prejudicing the debtor's other creditors in any way in respect of the recovery of their claims or where such alienation is effected with the debtor alone having such intention. But in the latter case, the alienation is capable of being set aside only where the alienee acquired gratuitously and then only to the extent that he has been enriched by the acquisition.

The *actio Pauliana* is available to creditors before the sequestration of the debtor's estate and after such sequestration it remains available to them: since the Insolvency Act does not deprive creditors of their rights at common law, the enforcement of which would not be inconsistent with any of its provisions.

The Insolvency Act does not deny the *actio Pauliana* to the trustee of the insolvent estate and it appears that he, too, may invoke such action as a result of the operation of the common law. However, it is considered that in most cases where the trustee is able to invoke the *actio Pauliana* he would be able to proceed in any event in terms of section 31 of the Insolvency Act (collusive dealing before sequestration) and ordinarily would do so since the latter section enables relief additional to the setting aside of the alienation to be obtained.

A creditor who seeks to invoke the *actio Pauliana* after sequestration must do so in his own name and at his own risk for costs, joining the trustee as a defendant (or respondent), and he is under no obligation to furnish any indemnity to the trustee in terms of the Insolvency Act. It is submitted that in as much as the essential object of the *actio* is *restitutio in integrum*, any fruits of such a creditor's successful invocation of the *actio* must be delivered by him to the trustee to be administered by the latter in accordance with the provisions of the Insolvency Act.

QUESTION 5

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5. Good Faith

5.1 Does the principle of "good faith" play a role and in which way?

Debt review

The National Credit Act obliges both the debtor who applies for debt review and credit providers to co-operate in the debt-review process. In this regard they are obliged to comply with any reasonable requests from the debt counsellor to facilitate the evaluation of the debtor's state of indebtedness and the prospects for responsible debt re-arrangement and to participate in good faith in the review and in any negotiations designed to result in responsible debt arrangement.

Sequestration

The concept of "good faith" is referred to in the Insolvency Act in relation to the disposition of property. In this context "good faith" is defined as the absence of any intention to prejudice creditors in obtaining payment of their claims or to prefer one creditor above another.

QUESTION 6

6. Re-payment plan

6.1 Is the debtor submitted to a payment plan?

Debt review

The debtor is only subject to a repayment plan under the debt review process. The NCA provides where a counsellor, after having conducted an investigation of over-indebtedness and reckless credit-granting with a view to making appropriate recommendations for debt relief, determines that the debtor is not over-indebted but is nevertheless experiencing, or is likely to experience, difficulty satisfying in a timely manner all of his obligations under credit agreements, then the debt counsellor may recommend that the debtor and the respective credit providers voluntarily consider and agree to a plan of debt re-arrangement.

When a debt counsellor makes such a recommendation and the debtor and each credit provider concerned accepts that proposal, the debt counsellor must record the proposal in the form of an order which must then be filed as a consent order. However, should the debt counsellor's proposal not be accepted, he must refer the matter, together with his recommendation, to the Magistrates' court.

If, however, as a result of the aforesaid debt-review assessment, the debt counsellor reasonably concludes that the debtor is indeed over-indebted, he may issue a proposal recommending that the Court make an order as set out in paragraph 2.2 - Debt Review.

6.2 How long is the duration of such a plan?

A debtor whose debt has been rearranged in terms of the NCA may apply to a debt counsellor at any time for a clearance certificate relating to that debt re-arrangement. A debt counsellor (and not the court) who receives such an application must investigate the circumstances of the debt re-arrangement. He must then either issue a clearance certificate where the debtor has fully satisfied all the obligations under every credit agreement that was subject to the debt re-arrangement order or agreement, in accordance with that order or agreement, or refuse to issue a clearance certificate in any other case.

6.3 Does the plan have an education purpose?

The NCA does not contain any formal educational provisions. However, Section 3 of the NCA provides that the purposes of the Act are, *inter alia*, to promote responsibility in the credit market by encouraging responsible borrowing, avoidance of over-indebtedness and fulfilment of financial obligations by debtors; discourage reckless credit-granting by credit providers and contractual default by debtors; and address and prevent over-indebtedness of debtors, and provide mechanisms for resolving over-indebtedness based on the principle of satisfaction by the debtor of all responsible financial obligations.

To achieve these goals, the NCA has introduced measures aimed at preventing reckless credit-granting, sanctions to be applied in certain instances of reckless credit, and debt-relief measures to deal with the problem of over-indebted debtors. It could be argued that as an indirect consequence, the NCA also has an educational purpose.

QUESTION 7

7. Voluntary settlement

7.1 What are the possibilities for voluntary settlement?

Debt review

Once the debt counsellor has determined that the debtor is not over-indebted but nevertheless experiencing, or likely to experience, difficulty satisfying in a timely manner all of his obligations under credit agreements, then the debt counsellor may recommend that the debtor and the respective credit providers voluntarily consider and agree to a plan of debt re-arrangement.

Additionally, debt counsellors in cases where a consumer was clearly over-indebted, as a matter of course, first approach the credit providers with a voluntary-repayment proposal before approaching the Court for an order declaring the debtor as being over-indebted and for the rearrangement of the debtor's obligatons.

Sequestration

The Insolvency Act allows for a written composition between an insolvent and his creditors. Composition in this context means an agreement in terms of which the insolvent is to pay, and each creditor bound by the composition is to accept in settlement of such creditors claim, an amount less than 100 cents in the Rand. In practice, however, an agreement by which a creditor merely obtains an extension of time to pay creditor's claims in full is also treated as a composition. The debt review procedure, and specifically re-arrangement of a debtor's obligations to their creditors, can be considered to be a composition.

QUESTION 8

8. Discharge

8.1 In which way is a discharge granted?

Debt review

Refer to question 6.2

A debt counsellor, not the court, must issue a clearance certificate if the consumer has fully satisfied all the debt obligations under every credit agreement that was subject to the debt re-arrangement order or agreement, in accordance with that order or agreement.

Upon receiving a copy of the clearance certificate, a credit bureau or the national credit register must expunge from its records the fact that the debtor was subject to the relevant debt re-arrangement order or agreement; any information relating to any default by the consumer that may have precipitated the debt re-arrangement or may have been considered in making the debt re-arrangement order or agreement; and any record that a particular credit agreement was subject to the relevant debt re-arrangement order or agreement.

Sequestration

An insolvent is deemed to be rehabilitated upon the expiry of a period of ten years from the date of sequestration of his estate, unless before the expiry of such period the Court orders otherwise upon any interested person's application. In the case of a compulsory sequestration, the period of ten years runs from the date of the provisional sequestration order.

The circumstances in which the Court may rehabilitate an insolvent debtor are the following:

(a) a statutory composition in terms of which the dividend to concurrent creditors of at least 50c in the Rand has been paid or security for the payment thereof has been given, as confirmed by a certificate of the Master issued under section 119(7) of the Insolvency Act;

(b) an insolvent debtor may apply to Court for rehabilitation after twelve months have expired from the confirmation by the Master of the trustee's first account in the insolvent debtor's estate, subject, however, to the following:

    i. the current sequestration should be the first in the insolvent debtor's history;

    ii. the insolvent debtor should not have been convicted of any fraudulent act in relation to the current or any previous insolvency or of any offence under the Insolvency Act or corresponding Act; and

    iii. he must have the recommendation of the Master where at the date of the grant of the application four years from the date of sequestration of his estate have not elapsed;

c) the insolvent debtor may apply to Court for rehabilitation after the expiration of a period of six months from the sequestration of his estate where, at the time he makes application, no claim has been proved against his estate, he has not been convicted of any fraudulent act and his estate has never been sequestrated previously;

d) the insolvent debtor may apply to Court for rehabilitation at any time after the confirmation by the Master of a plan of distribution providing for the payment in full of all claims proved against the debtor's insolvent estate

together with interest thereon from the date of sequestration and of all the costs of sequestration.

However, in respect of paragraphs (a) to (d) above, it must be pointed out that irrespective of whether or not the application for rehabilitation is opposed, the Court may either refuse it, postpone or grant the application, whether absolutely or conditionally. The Court's powers in this regard are discretionary and the insolvent debtor has no automatic right to be rehabilitated.

8.2 Can a discharge, after it has been granted be revoked?

Debt review

A debt counsellor must issue a clearance certificate if the debtor has fully satisfied all the obligations under every credit agreement that was subject to the debt re-arrangement order or agreement, or refuse to issue a clearance certificate in any other case.

Should a debt counsellor refuse to issue a clearance certificate, the debtor may apply to the National Credit Tribunal ("Tribunal") to review that decision. If the Tribunal is satisfied that the debtor is entitled to the clearance certificate, it may order the debt counsellor to issue a clearance certificate to him.

Once a clearance certificate has been issued to the debtor, it is accepted that it may not be revoked.

Sequestration

Section 149(2) of the Insolvency Act provides that the "*Court may rescind or vary any order made by it under the provisions of this Act*". There are no express limitations on this power and it is accepted that the intention is that the Court should be able to exercise such power in any circumstances which it may consider just, including the circumstance that the order was made in error, that is, it should not have been made at all. In this context, the reference to an "order" clearly includes a reference to a rehabilitation order made pursuant to an application to Court.

QUESTION 9

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9. Remuneration & costs

9.1 How are the costs of the procedure dealt with?

Debt review

The debt counsellor must, on receipt of the application for debt review, explain to the debtor, inter alia, the debt counsellor's fee and the costs that will be charged to the debtor while the debt counsellor is dealing with the debtor's financial position, for the duration of both the debt-review process and the

restructured agreement until the issue of a clearance certificate. The debt counsellor will initially charge the debtor R50 for the application for debt review.

The National Credit Regulator has agreed to interim guidelines proposed by the Debt Counsellors' Association of South Africa (DCASA), together with other Debt Counsellors, setting the maximum fees that Debt Counsellors may charge in order to limit exploitation of over-indebted debtors, pending the finalisation of the fee regulations by the Department of Trade and Industry.

The guidelines cover debtors earning more than R2500 (individual gross income). Debtors earning below R2500 will be subsidised by the National Credit Regulator. In terms of the guidelines, a debt counsellor may receive the following amounts in respect of debtors with an individual gross income of more than R2 500.00 per month or household income of more than R3 500.00 per month:

- an application fee, recoverable directly from the debtor upon receiving an application for debt review, limited to R50 as prescribed by the NCA;

- a rejection fee of R300.00 in respect of debtors whose applications have been rejected in terms of section 86(7)(a) of the NCA;

- a rearrangement fee of the lesser of the first instalment of the debt rearrangement plan which is capped at R3000.00 (excluding Vat), in respect of a debtor whose applications have been accepted in terms of sections 86(7)(b) or 86(7)(c) of the NCA. (Should a joint application be required the fee can be increased to R4000.00 (excluding Vat));

- should a debt counsellor fail to submit proposals to credit providers or refer the matter to the Court within 60 business days from date of the debt review application, the debt counsellor has to refund 100% percent of the fee paid by the debtor;

- a monthly after-care fee of 5 percent (excluding Vat) of the monthly instalment of the debt re-arrangement plan up to a maximum of R300 (excluding Vat), for a period of 24 months, thereafter reducing to 3 percent (excluding Vat) of the monthly instalment, to a maximum of R300 (excluding Vat), for the remaining period of the debt rearrangement plan;

- should the debtor wish to withdraw from the process after the debt counsellor has completed the rearrangement negotiations a fee equal to 75 percent of the rearrangement fee contemplated in paragraph c above is payable by the debtor;

- legal fees, if and when they occur, may be recovered from the debtor provided the amount of such fees are disclosed up-front to the debtor and agreed to in writing by the debtor.

However, it must be noted that the debt counsellor's fee is negotiable.

Sequestration

A trustee is entitled to a reasonable remuneration for his services, to be taxed by the Master according to the prescribed tariff set out in the Insolvency Act.

In terms of such tariff, the trustee is entitled to remuneration determined on the basis of a particular percentage of various items, for example 10% on the gross proceeds of the sale of movable property, other than shares or similar securities, and on the gross amount collected under promissory notes or book debts or as rent, interest or other income; 3% on the gross proceeds of the sale of immovable property, shares or similar securities and on the proceeds recovered under insurance policies or mortgage bonds and on the proceeds recovered in respect of immovable property sold prior to sequestration; 1% on money found in the estate and "the gross proceeds of amounts standing to the credit of the insolvent in current, savings and other accounts and of fixed deposits and other deposits at banking institutions, building societies or other financial institutions.

However, the tariff is merely a guide to taxation and is not to be regarded as embodying a full statement of the services which may be performed by a trustee, or as constituting a minimum or maximum scale of remuneration, and the overriding consideration is that a trustee should receive reasonable remuneration for the services which he renders. The Master may accordingly reduce or increase the remuneration. The exercise of the Master's discretion in this regard is subject to review by the Court.

9.2 Is the court the correct forum to scrutinize fees?

Debt review

The National Credit Regulator, and not the Court, is the correct forum to scrutinize a debt councillor's fees.

Sequestration

Even though a trustee is entitled to reasonable remuneration for his services, the Master (being an officer of the High Court) will be entitled to scrutinize and thereafter tax (discount or increase) the trustee's remuneration. However, the exercise of the Master's discretion in this regard is subject to review by the Court.

9.3 What is the appropriate method of calculation of fees when dealing with compositions or voluntary arrangements?

Debt review

The fees of a debt councillor is calculated as set out in question 9.1 above, irrespective of whether or not compositions or voluntary arrangements are dealt with.

Sequestration

In terms of the prescribed tariff set out in the Insolvency Act, the trustee is entitled to remuneration determined on the basis of a particular percentage of various items. However, such tariff is merely a guide to taxation by the Master, and the overriding consideration is that a trustee should receive reasonable remuneration for the services which he renders.

9.4 What is the method of calculation of fees when dealing with bankruptcy proceedings?

Debt review

Debt review proceedings do not contemplate sequestration of the debtor, but rather the restructuring of the debtor's debts. The calculation of fees when dealing with sequestration is more fully set out below.

Sequestration

The legal fees and cost incurred during the course of a sequestration application at Court will be taxed by the Master in terms of the tariff prescribed by the Rules and Regulations under the Supreme Court Act. No 59 of 1959.

Thereafter, however, the trustee's remuneration will be calculated in terms of the tariff prescribed by the Insolvency Act, with the overriding consideration being that a trustee should receive reasonable remuneration for the services which he rendered.

9.5 Can IPs charge fees based on the value they created for the creditors during an assignment?

Debt review

The National Credit Regulator has agreed to interim guidelines setting the maximum fees that Debt Counsellors may charge. In the circumstances, the Debt Counsellor's fees are not based on the value the debtors created during the debt review process.

Sequestration

The tariff that is prescribed by the Insolvency Act is percentage based, and therefore the trustee of an insolvent estate is indirectly remunerated based on the value that they can create for the creditors.

QUESTION 10

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10. Cross - border considerations in debtor insolvency

10.1 Are overseas assets included?

Under South African law, a sequestration order issued by a Court in the country in which the insolvent is domiciled has the effect that the trustee of the insolvent estate becomes vested with all the latter's movable property, wherever situated, and accordingly when the estate of a debtor who is domiciled in South Africa is sequestrated by a South African Court, the insolvent's movable property situated both in South Africa and in a foreign country will vest in the trustee of the debtor's insolvent estate. However, the

trustee may nonetheless have to obtain assistance from a foreign Court where such property is situated for the purposes of the administration of such property.

The position is different, however, in relation to immovable property, where recognition must be obtained in the foreign jurisdiction if the immovable property is not situated in South Africa. The foreign Courts are, however, accorded a discretion to reject or approve an application for recognition. If the trustee fails to obtain this recognition, the immovable property remains vested in the insolvent debtor.

Where the order of sequestration is made by a Court other than one in the country of the debtor's domicile, then neither the insolvent debtor's immovable nor movable property situated in such foreign jurisdiction, will vest in the trustee of the insolvent debtor's estate. In order to administer any such property, the trustee would require recognition as such under the relevant foreign law and must accordingly apply for recognition to the Court situated in such foreign jurisdiction. The applicable law of the foreign jurisdiction will usually provide mechanisms to protect the interests of creditors in its own jurisdiction.

10.2 Is forum shopping by the debtor for more favourable personal insolvency laws possible?

In an attempt to limit forum shopping, section 149 of the Insolvency Act provides that a Court shall have jurisdiction over every debtor and in regard to the estate of every debtor who:

- on the date on which proceedings for the voluntary surrender or for the sequestration of the debtor's estate is instituted, is domiciled or owns or is entitled to property situate within the jurisdiction of the Court; or

- at any time within twelve months immediately preceding the aforesaid proceedings ordinarily resided or carried on business within the jurisdiction of the Court,

provided that when it appears to the Court equitable or convenient that the estate of a person domiciled in a foreign State, should be sequestrated by a court outside South Africa, or that the estate of a debtor over whom it has jurisdiction be sequestrated by another court within South Africa, the Court may refuse or postpone the acceptance of the voluntary surrender or the sequestration.

Consequently, our law does not allow "forum shopping" in the sense that insolvency proceedings are limited to the jurisdiction of the debtor as set out above.

QUESTION 11

11. What is the result of subsequent insolvencies?

Refer to question 8.1. The Court, in the course of considering an application for rehabilitation, must take previous insolvencies into account, and may in the exercise of its discretion refuse the insolvent debtor's application for rehabilitation.

However, once rehabilitated, whether it is automatic (after 10 years) or granted by the Court, the effect of rehabilitation is to eliminate the debtor's status as an insolvent, that is, it has the effect "of putting an end to the sequestration" and "of relieving the insolvent of every disability resulting from the sequestration". It also has the effect of discharging each of the debtor's debts as existing at the date of sequestration, including debts owed to foreign creditors (except for any debts which arose out of fraud the debtor's part).

A rehabilitated debtor will as a result be able to acquire another estate. It will therefore be possible, after rehabilitation, that debt review or sequestration proceedings be initiated in circumstances where there is substantive and procedural reasons to institute such proceedings.

It should be noted that if a debtor acquires assets after the sequestration of his estate, an din fact builds up another estate, that estate can also be sequestrated if the debtors becomes insolvent once again.

QUESTION 12

12. Recommendations

Currently, consideration is being given by Government to regulating the insolvency industry by the promulgation of a Unified Insolvency Act. It is envisaged that such Unified Insolvency Act would focus on all aspects of insolvency in South Africa including individuals, partnerships, trust and companies.

It is further suggested that the new legislation will deal with the licensing and regulation of insolvency practitioners (trustees) and will effectively replace the Insolvency Act.

Such Unified Insolvency Act and the proposed regulation of the insolvency industry itself, would no doubt be widely welcomed by the financial sector in South Africa. At this stage, there is no indication as to when the new Act is to be promulgated.

THE NETHERLANDS

QUESTION 1

1. What are the options or procedures available for a natural person / consumer regarding their over-indebtedness in your jurisdiction?

1.1 The legal grounds for the opening of or access to those procedures

1.2 How are these procedures made available?

1.3 Who can commence the procedure?

1.4 Who will supervise the procedure?

1.5 What are the criteria such a person has to satisfy?

1.6 What are the available alternatives?

The Dutch Bankruptcy Act (*Faillissementswet*, also referred to as the Act or DBA), in force since 1896, provides for three distinct insolvency proceedings: (i) bankruptcy, (ii) moratorium of payments, and since 1998 (iii) debt restructuring. The points 1.1 – 1.6 (listed above) are answered below under the headings of the three Dutch insolvency proceedings rather than on an individual point by point basis.

Bankruptcy (faillissement)

Under the Act, all individuals, whether engaged in business or not, and all legal entities, may be declared bankrupt. A debtor can be declared bankrupt upon their own request or at the request of their creditors. These requests need to be filed with the court. The sole requirement is that the debtor has ceased to pay their debts (if the debtor has only one single debt the debtor may not be declared bankrupt).

The court appointed trustee liquidates all assets except certain personal belongings and those basic assets needed for day-to-day existence. The trustee distributes the net proceeds to the creditors according to their respective ranking. No debts are discharged either by operation of law or by the courts. If the debtor fails, as is the case in the majority of bankruptcies, to make an agreement with his creditors during the bankruptcy, the debtor remains indebted following closure of the bankruptcy proceedings.

The trustee in bankruptcy is supervised by a supervisory judge appointed by the court in each bankruptcy. For a number of actions the judge's approval is required.

Moratorium of payments (surseance van betaling)

Only the debtor (not the creditors) can apply for a moratorium of payments if he or she foresees that he will not be able to continue paying his debts. All legal entities (engaged in commercial business or not) and all individuals engaged in business or professional activities may apply for a *provisional* moratorium of payments which is perfunctorily applied by the Dutch courts. At a later stage of the proceedings, the creditors vote on a definite moratorium of payments and a possible arrangement of debts.

The debtor and the court appointed administrator co-operate to continue or transfer the business. Debts may be partially discharged by an arrangement with the creditors. Moratorium of payments proceedings are frequently unsuccessful and debtors are subsequently declared bankrupt.

The trustee is supervised by a supervisory judge. For a number of actions the judge's approval is required.

Debt restructuring under the Wsnp scheme (de wettelijke schuldsaneringsregeling)

Any individual (engaged in commercial business or not) may submit a request to the bankruptcy court to apply for admission to the debt restructuring scheme (creditors may not submit such requests). The statutory criteria for admission are complex. The debtors must demonstrate certain facts and circumstances, see (1a)-(1c) below. Even then the courts can reject the application on grounds discussed under (2a) – (2d) below. If the conditions causing the debts are 'under control' certain rejection criteria can be circumvented, cf. (3a) and (3b) below.

Debtors applying for admission to the scheme must demonstrate (1a) that the debtor is unable to continue paying their debts, and (1b) that during a period of five years the debtor has acted in *good faith* when incurring debts or leaving them unpaid, and (1c) that the debtor will comply with their obligations under the Wsnp scheme and will make efforts to acquire as many assets as possible during the application of the Wsnp scheme.

However, the courts *must* reject a debtor's request if (2a) the scheme already applies to the debtor (to avoid secondary proceedings concerning new debts incurred during the application of the initial Wsnp scheme), or (2b) the attempt to come to an extra-judicial creditors' arrangement has not been carried out by certain authorities or qualified persons, or (2c) if the debtor has certain criminal debts for which the debtor has been convicted during a period of five years before the application for the admission to the Wsnp scheme (the courts may extend this relevant period beyond five years at their discretion), or (2d) the Wsnp scheme previously applied within a ten year period prior to the (new) application – certain exceptions to this criterion apply.

The statutory admission rules allow the courts (3a) to overlook the debtor's lack of good faith and also allows the court (3b) to admit debtors with debts arising from criminal offences, but only if the causes of the debt problems are 'under control'.

If the court decides to allow the debtor admission to the Wsnp scheme, the scheme will, in general, operate for three years. During the application of the scheme the debtor is required to make all best efforts to generate income in order to pay their creditors. If the debtor is unable to generate sufficient income to allow any payments to creditors (e.g. for reasons of ill-health) the debt restructuring period may be reduced to e.g. one year. In some cases the court may stipulate a longer period, for example five years.

The application of the scheme may be terminated early if (a) all debts are paid, or (b) the debtor incurs excessive new debts or otherwise fails to comply with his obligations under the Wsnp scheme; in these cases the debtor's bankruptcy follows automatically unless no assets are available for any distribution to the creditors.

Preferred schemes for consumers and the self-employed

For individuals who are not self-employed debt restructuring is usually the preferred option. Accordingly if a bankruptcy petition concerning an individual is filed with the court, the court invites the debtor to file an application to be admitted to the debt restructuring scheme.

Despite not being stated in the Act, parliamentary history indicates that a self-employed individual who wishes to continue their business should opt for the moratorium of payments proceedings rather than applying for restructuring under the Wsnp. The temporary continuation of a business is possible under the Wsnp restructuring scheme, however the Wsnp does not offer adequate provisions to restructure or re-launch a business. The Wsnp assumes that assets will, at some point, be liquidated and that no new debts will be incurred. Accordingly, the courts are reluctant to admit self-employed individuals who are still running a business and more particularly to admit those who want to continue their business. Applications from self-employed debtors without any or with few assets and low fixed costs, such as freelancers, have a higher chance of being successful. Such freelancers can sometimes continue their business with low financial risks for the Wsnp-estate. Liquidation of assets can sometimes be avoided as part of an arrangement with creditors during the application of the Wsnp scheme whereby debts are (partially) discharged.

Dutch courts also seem fairly reluctant to admit to the Wsnp scheme those who have only recently wound up a business, specific reasons for rejection of a Wsnp request in such cases being lack of good faith due to (1) the inadequacy of the administration/accounts, (2) continued loss-making business activities, and/or (3) the existence of tax debts.

Please note that if it has not been indicated otherwise, all answers below discuss the situation under the Wsnp scheme and not situations of bankruptcy and / or moratorium of payments.

QUESTION 2

2. Position of the debtor and the spouse

2.1 Which assets and income are excluded from the procedure?

The insolvency estate includes all the debtor's assets acquired during and before the application of the Wsnp scheme.[1] The exceptions are numerous and include but are not limited to (1) goods bought by the debtor using exempt income during the application of the scheme, (2) certain personal belongings and normal household goods, (3) certain rights ensuing from life insurance policies, (4) certain goods pertaining to trusts.

Income that is exempt from garnishment by creditors' recovery in general is also exempted from the insolvency estate. The supervisory judge can increase the amount of exempted income. The courts apply detailed guidelines issued by an association of the supervisory judges in the Netherlands (hereinafter: the court guidelines issued by Recofa, cf. http://www.wsnp.rvr.org). These guidelines are supported by an Excel-calculator and take into account several personal circumstances (e.g. marital status, children) and real household cost subject to certain limits.

2.2 Does the debtor have restrictions on the disposition of his assets?

The debtor can, in principle, dispose of all exempt assets and income (see 2.1 above). However, the court and/or the supervisory judge may impose budget control by the trustee. In addition the debtor may not pay off the insolvency creditors, this is the trustee's prerogative.[2]

2.3 Which assets and income are included in the procedure?

Except for the exemptions referred to under 2.1 above, the insolvency estate includes all debtor's assets acquired by the debtor before and during the application of the Wsnp scheme

2.4 Are pension schemes included?

Pension rights are considered to be personal rights and cannot be commuted by the trustee. Actual payments ensuing from pension rights are taken into account when calculating the exempt income.

2.5 Does the debtor donate to the estate a part of his income for the benefit of the creditors?

Yes, see 2.1 above.

1 Article 295 of the Dutch Bankruptcy Act (DBA).
2 Article 306 DBA.

2.6 Is there a means test?

The admission criteria do not include a 'means test'. The debtor needs to demonstrate that he cannot continue paying his debts. Income and the future ability to pay off debts are irrelevant. However, the debtor has to confirm that he will make all best efforts to do so (cf. paragraph 1 above). Additionally, if the debtor is unable to pay current expenses this may be sufficient reason to reject the application for admission to the scheme, see paragraph 1 above sub (iii).

2.7 Is there a garnishment of regular income?

Yes, see 2.1 above.

2.8 Is there protection for the debtor's privacy, his mail and his home?

The court guidelines stipulate that the trustee must visit the debtor's home within two weeks of the application to the Wsnp scheme. The trustee can, of course, revisit the debtor.

Post addressed to the debtor is redirected to the trustee's office for a period of, in principle, thirteen months.

2.9 Is there protection of the spouse's interests in the home?

If the admitted debtor is married under a general communal property regime (in Dutch: *gemeenschap van goederen*), the insolvent estate of the debtor includes all communal goods. In principle all goods of both spouses are included in the communal property, however some goods may be excluded from the communal property due to the personal nature of the goods or testamentary stipulations.

The insolvent estate includes the debtor's home (and the family home if the Wsnp scheme applies to both spouses or to one spouse if the communal property includes the home). According to the court guidelines the home should be sold by the trustee if there is a positive equity in the home i.e. a value exceeding the mortgage debt. If the family home is rented the actual rent may not be fully taken into account when the exempt income is calculated (cf. par. 1 above). Accordingly the debtor(s) may effectively be forced to look for cheaper housing.

2.10 Is the debtor restricted to receive information?

No, except for the redirection of post during a certain period of time (cf. 2.8 above).

2.11 Does the debtor have the liberty to move freely and to leave any State, including his own?

During bankruptcy proceedings the debtor's passport may be invalidated. During the Wsnp scheme there are no travel restrictions and the debtor's passport cannot be invalidated. However, in most cases the debtor's residence abroad will prevent him or her from complying with their obligations under the Wsnp scheme including the obligation to acquire assets for the insolvency estate and the obligation to inform the trustee of all relevant facts.

2.12 Is the debtor entitled to cost-free legal assistance?

No free legal aid is available for attempting a settlement with creditors. No free legal aid is available for filing the request to be admitted to the Wsnp scheme. If the admission is rejected legal aid may be granted for appeal proceedings. The debtor may also apply for legal aid for appeal proceedings against other court decisions during the Wsnp scheme such as a premature termination of the Wsnp scheme or a termination without a discharge of debt.

2.13 Are there restrictions on the debtor after the procedure?

None. However, the discharge of debts can, under certain circumstances, be revoked.

2.14 Is the spouse (automatically) included in the procedure?

No. Applications of spouses to be admitted to the Wsnp debt restructuring scheme are decided separately on an individual basis. Accordingly, if both spouses apply to be admitted to the scheme it is possible for one application to be rejected whilst the other is accepted. Similarly the application of one single spouse is not dependent on the simultaneous application of the other spouse.

2.15 In which way do the International or European Convention and Covenants play a role?

Since 2008 the debtor can request the court to impose a cram down on creditors attempting to avoid application of the Wsnp scheme or bankruptcy.[3] According to the Minister of Justice this statutory regulation meets the requirements of Protocol 1 of the European Convention of Human Rights.

QUESTION 3

3. Position of the creditor

3.1 Can a creditor force the debtor to commence a procedure or oppose the debtor from doing so?

No, the creditor cannot file for the application of the Wsnp scheme or oppose its application. However, the creditor can file for the premature termination of the application of the Wsnp scheme.[4] Such termination can be based on (a) the fact that the debtor does not comply with their obligations under the Wsnp scheme, or (b) facts and circumstances that were unknown to the court at the time of the debtor's admission to the scheme and which, if known at that time, would have prevented the admission to the Wsnp scheme.

[3] Article 287a DBA.
[4] Article 350 DBA.

If the debtor incurs new debts during the application of the Wsnp scheme, creditors can file for bankruptcy on the basis of such new debts that fall outside the scope of the Wsnp scheme and the discharge.[5]

3.2 Which creditors' claims can be excluded from a discharge?

The following debts are excluded from the discharge by operation of law:[6]

- certain student loans granted by the government;
- fines for criminal offences;
- debts due to confiscation of illegally obtained profits (related to criminal acts);
- compensation payments to or for the benefit of victims of crime.

Upon the completion of the period of the application of the Wsnp scheme (usually three years, cf. paragraph 1 above) the court will decide whether or not the debtor has fulfilled their obligations under the scheme. If so, or if the shortcomings are negligible, the discharge of debts will be granted once the trustee has distributed the liquidated assets of the estate (also see par. 8.1 below). However, the courts have no discretionary power to include any specific debts into the discharge and/or to exclude any specific debts from the discharge.

Mortgagees (mortgage banks) and pledge holders can execute their secured rights irrespective of the insolvency proceedings. Neither the statutory provisions nor the Supreme Court's case law give a clear answer to the question of whether or not the (unsecured) debts remaining after the bank's foreclosure or the sale by the trustee of the debtor's home are discharged. According to statutory rules introduced in 2008 the court and the supervisory judge may allow interest payments on mortgage debt incurred to finance the debtor's home; subsequently the discharge would not affect the mortgage debts.[7] These rules were introduced in order to prevent unnecessary sales of the debtor's family home. However, the Supreme Court has since ruled that the new, specific statutory rules to resolve these issues are superfluous.[8] The Supreme Court has ruled that mortgage debts are not discharged, however, the decision does not offer sufficient clarity as to whether (unsecured) debts remaining after foreclosure and / or sale of the home are discharged or not.

3.3 Does a creditor have to accept a curtailment of his claim?

The discharge transforms pre-Wsnp debts into natural obligations. Accordingly creditors have no means to recover their discharged claims. However, should a debtor pay a discharged debt, the debtor cannot claim such payment back.

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5 Article 312 DBA.
6 Article 299a and 358 DBA.
7 Article 303(3) and article 358(5) DBA.
8 Dutch Supreme Court March 13th 2009, see www.rechtspraak.nl case reference LJN: BG7996.

Creditors can lodge an appeal against the court's decision (cf. par. 3.2 above and 8.1 below) that the debtor has fulfilled their obligations under the Wsnp scheme. If the creditors' appeal is successful a discharge of debts can be prevented. Creditors can also request a revocation of the discharge, see par. 8.2 below.

3.4 Do certain creditors receive more protection than others?

If the trustee distributes monies to creditors preferential creditors receive a double percentage in comparison with ordinary creditors.[9] The tax authorities are the principal preferential creditor. If the trustee sells assets subject to creditors' security rights the mortgagee or pledgee also receives a double percentage (i.e. where the available monies originate from the proceeds of secured assets and the mortgagee / pledgee has not sold these encumbered assets themself).

QUESTION 4

4. Avoidance actions

4.1 What are the legal proceedings to protect / realize the debtor's assets?

Under the Wsnp scheme the trustee has powers that are equal to those of a trustee in bankruptcy with regards to overturning pre-insolvency transactions damaging the creditors.[10] The following text summarises the outlines of such avoidance actions.

The statutory rules distinguish non-obligatory acts from obligatory acts. In order to successfully nullify *non-obligatory acts* the trustee has to demonstrate that both the debtor and the third party knew or should have known that creditors would suffer losses from the nullified act. The relevant knowledge of the detrimental effect is presumed if the act took place in the year preceding the admission to the Wsnp scheme and if specific circumstances exist including but not limited to the following:

(a) the value transferred to the third party exceeds by far the value received from the third party;

(b) transactions have been entered into with the debtor's spouse or other family members.

In the event of a debtor's gift (or other acts without consideration passing from the third party) the debtor's knowledge of the detrimental effects for creditors is sufficient. However in such cases the third party that received the gift can counter the nullification if he or she demonstrates that he or she did not benefit from the gift at the time of the admission to the Wsnp scheme.

9 Article 349 DBA.

10 Article 313 DBA refers to the corresponding articles 42-48 DBA.

Obligatory payments by the debtor before entering into the Wsnp scheme can be nullified if the:

(a) paid creditor knew that an application to be admitted to the Wsnp scheme had been filed; or

(b) payment resulted from a conspiracy between the debtor and the paid creditor planning to benefit the paid creditor to the detriment of other creditors.

QUESTION 5

5. Good faith

5.1 Does the principle of "good faith" play a role and in which way?

Yes, the principle of good faith (in Dutch: *goede trouw*) plays a prominent role in the court's decision to admit a debtor to the Wsnp scheme or to reject such admission.[11] The following text discusses (a) parliamentary history, (b) a small selection of Supreme Court decisions, (c) outlines of the lower courts' jurisprudence.

(a) According to the 'Explanatory Memorandum to the Bill' the good faith test aims to prevent *abuse*. The parliamentary history gives only a few examples of situations in which an application should be rejected on the basis of lack of good faith e.g. the incurrence by an over-indebted debtor of further debts in a situation of financial distress. However no definition of good faith or abuse is provided. It is unclear who or what is intended to be protected from such abuse. The creditors play no active role in the good faith test.

According to the Explanatory Memorandum the principle of good faith under the Wsnp differs from the principle as laid down in other areas of Dutch law. It is not the same as that referred to in Book 3 of the Dutch Civil Code i.e. if good faith is required for a legal effect, it will be deemed as lacking not only if the person knew of the relevant facts but also if that person should have known of the relevant facts. In addition it does not equate to the principles of reasonableness and fairness as detailed in Book 6 of the Dutch Civil Code. Furthermore the principle of good faith referred to in the Wsnp does not equate to that mentioned in Article 54 of the Dutch Bankruptcy Act which relates to the preclusion of the setting off of claims, by an individual who happens to be both a debtor and a creditor of the bankrupt where that debtor / creditor did not act in good faith when acquiring a debt owed to, or a claim against, the bankrupt. The Dutch legislator decided to leave it to the courts to apply the good faith principle under the Wsnp, allowing the court to take into account all the circumstances of the specific situation of the debtor.

[11] See paragraph 1 sub (iii) above and article 288(1)(b) DBA.

(b) In several judgments the Supreme Court quotes the following explanation given by the Minister of Justice during the passage of the legislation through parliament:

> "Relevant are the nature and the amount of the debts, the moment that the debts were incurred, the extent to which the debtor could be blamed for incurring the debts or for leaving them unpaid, the debtor's efforts to pay off the debts or the debtor's actions to prevent creditors' recourse."

Attempts by debtors to limit the scope of the good faith principle or to relate the principle to the objectives of the Wsnp have not been successful in the Supreme Court. Debtors who stated in court cases that not all debts or all circumstances provide justification for the rejection of a Wsnp application have also been unsuccessful. According to the Supreme Court, it is not necessary for the court to establish a causal link between culpable conduct and the incurring of debts or the non-payment of debts in order to reject a Wsnp application.[12] A debtor who has unintentionally incurred debts or left them unpaid could still be considered to have acted without good faith. The Supreme Court has given the lower courts large freedom to apply the good faith principle taking into consideration all facts and circumstances of each individual case. The Supreme Court is reluctant to overturn decisions rejecting Wsnp applications where such decisions are made by the lower courts providing that all relevant circumstances have been considered. However, in April 2007 the Supreme Court found that it was inconceivable that a lower court should reject a Wsnp application, based on criminal debts amounting to less than half a percent of total debts. Thus the lower courts were urged to take into account the fact that those debts which were incurred with a lack of good faith were only a very small portion of the total debts incurred.[13]

Since 2008 the new statutory rules provide that the burden of proof is shifted to the debtor. However, the new rules allow the courts to accept the debtor's lack of good faith if the causes of the debt problems are 'under control'. In 2011 the Supreme Court ruled that the lower courts must consider the debtor's statements in detail if the debtor wishes to rely on such circumvention of a good faith defect.[14]

(c) In the absence of clear statutory rules and Supreme Court guidelines, it is hardly surprising that many variations can be identified in decisions made by the lower courts concerning the good faith principle. However, in the case law rendered since 1998, it is possible to identify certain categories of debts and circumstances which will, in the majority of cases, result in a rejection of a Wsnp application by the lower courts. Where debts occur as a result of (i) social security fraud, (ii) criminal offences or (iii) substance addiction, the debtor is usually considered to be lacking good faith. From extensive case law and court statistics it can be concluded that some courts are more strict than others in terms of admitting to the scheme

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[12] See the decision of the Dutch Supreme Court January 10 2003, www.rechtspraak.nl LJN: AF0749 and Dutch Supreme Court June 13 2003, www.rechtspraak.nl LJN: AF7006.

[13] See the decision of the Dutch Supreme Court April 20 2007, www.rechtspraak.nl LJN: BA0903.

[14] Supreme Court 28th January 2011, www.rechtspraak.nl LJN BO4931 (concerning the Articles 288(1)(b) and 288(3) DBA).

debtors whose good faith may be brought into question. In the absence of clear statutory rules and Supreme Court guidelines the emergence of such a *local legal culture* is almost inevitable. In 2009 the supervisory judges of the lower courts published new guidelines concerning the application of the good faith test indicating that lack of good faith is to be assumed if:

- debts are incurred whilst there is no prospect of payment;
- new substantial debts are incurred prior to the application for the admission to the Wsnp scheme;
- debts result from various addictions;
- a self-employed debtor failed to keep proper administration of his affairs or if the bookkeeping is not available;
- the debtor has certain debts to the tax authorities or social security debts;
- the debtor committed social security fraud and the allowances are being reclaimed;
- debts ensue from crimes or offences;
- traffic violations have resulted in serious debts. However, it should be noted that case law rarely refers to these guidelines and that the remarkably varied more or less strict approaches by the local courts remain unchanged.

QUESTION 6

6. Re-payment plan

6.1 Is the debtor submitted to a payment plan?

No. The original Dutch statutory rules on debt restructuring for natural persons that came into force on December 1st 1998 did provide for such payment plan. Usually these plans were limited to the court's determination of the period of time that the Wsnp scheme would apply. As of January 1st 2008 these payment plans have been abolished. According to a new statutory provision the Wsnp scheme applies, in principle, for a period of three years.[15] Although no specific plan is put into place, the debtor is required to make all best efforts to generate income to pay their creditors.

6.2 How long is the duration of such a plan?

Not applicable.

[15] Article 349a DBA.

6.3 Does the plan have an educational purpose?

Not applicable.

QUESTION 7

7. Voluntary settlement

7.1 What are the possibilities for a voluntary settlement?

Most Dutch local authorities offer some sort of debt counselling or assistance to initiate creditors' compositions. Municipal money-lending institutions offer credit to debtors to finance such compositions. Debt couselling often proves to be ineffective and creditors frequently refuse out of court debt settlements. Currently, there is no legislation regulating these varying local initiatives. A framework act to regulate the municipal efforts was presented to parliament in January 2010, the legislative progress is slow.[16]

Voluntary settlements require the consent of all creditors and often fail due to the opposition of one or two creditors. In 2008 a new statutory provision was included in the Dutch Bankruptcy Act facilitating a cram down on creditors.[17] The debtor can file an application requesting the insolvency court to impose a proposed debt settlement on one or more opposing creditors thus avoiding the application of the Wsnp scheme. The court imposes the cram down if the opposing creditor(s) could not reasonably refuse the offered settlement taking into account the interests of the debtor, the opposing creditor and the consenting creditors. The majority of such petitions in 2008 (60%) and 2009 (53%) were awarded with a cram down.[18] If the cram down is refused the court will consider the application of the Wsnp scheme as a secondary solution to resolve the debt problems.

During the application of the Wsnp scheme the debtor can also offer a settlement to his creditors. For the acceptance of such an offer a 50% majority of ordinary creditors representing 50% of the ordinary claims and a 50% majority of the preferential creditors representing 50% of the preferred claims is required.[19] If there is no such majority the court can, subject to further statutory conditions, impose the offered settlement on all creditors.

[16] The draft Act is entitled 'Wet gemeentelijke schuldhulpverlening'.
[17] Article 287a DBA.
[18] These percentages have been calculated ignoring the number of applications withdrawn by the debtor.
[19] Article 332 DBA.

QUESTION 8

8. Discharge

8.1 In which way is a discharge granted?

Upon the completion of the three year period of the application of the Wsnp scheme the court decides whether or not the debtor has fulfilled their obligations under the scheme.[20] If so, or if the shortcomings are negligible, the discharge of debts is automatically granted once the plan of final distribution to the creditors has become definite. If there is no prospect (e.g. due to sickness) of the debtor paying off any of their debts the application can be terminated after only one year.[21] In such cases no plan of distribution will be drafted and the discharge is automatically granted once the courts decision that the debtor has fulfilled his obligations or that any shortcomings are negligible, has become final.

8.2 Can a discharge, after it has been granted be revoked?

Yes. Creditors can file a request to the court to overturn the discharge.[22] The single ground for such revocation is that the debtor, during the application of the Wsnp scheme, has attempted to damage the creditors.[23]

QUESTION 9

9. Remuneration / costs

9.1 How are the costs of the procedure dealt with?

For the application to be admitted to the Wsnp no court fee is required. During the application of the Wsnp scheme the trustee is entitled to receive a monthly salary from the debtor's estate amounting to € 40 approximately for a single debtor and €50 approximately if the case concerns two (married) persons. Moreover, the trustee is entitled to receive a one-off subsidy paid by the government. The amount of this subsidy varies between approximately € 1,000 and € 3,000 depending on the nature of the case: single debtor / two debtors; previously self-employed or a not self-employed debtor. All amounts vary from time to time, the amounts referred to above are applicable in 2010 / 2011.

[20] Article 352/354 DBA.
[21] Article 354a DBA.
[22] Article 358a DBA.
[23] Article 358a DBA refers to 350 (3)(c) including one of the seven reasons for premature termination of the Wsnp scheme.

9.2 Is the court the correct forum to scrutinize fees?

The courts determine the amount of salary to be paid to the trustee out of the insolvent estate. A government agency determines and pays the subsidies (cf. 9.1 above).

9.3 What is the appropriate method of calculation of fees when dealing with compositions or voluntary arrangements?

The Wsnp-trustee is entitled to receive €500 (as per July 1st 2010) from the insolvent estate for his work concerning a creditors composition during the application of the Wsnp scheme.

9.4 What is the method of calculation of fees when dealing with bankruptcy proceedings?

The calculation is based on a standard fee of € 198.- per hour (2011) multiplied by factors depending on the value of the accumulated assets and the years of experience of the trustee in bankruptcy. These factors vary between 0.6 and 1.3 to reflect the trustee's experience and between 1,0 and 1,2 for the accumulated assets.

9.5 Can IPs charge fees based on the value they created for the creditors during an assignment?

In bankruptcy proceedings this is standard practice. (See also 9.4)

In Wsnp cases the accumulated assets are, in principle, irrelevant for the fees to be received by the trustee. However, the trustee can claim additional fees if the number of hours spent on a Wsnp case exceeds 36 hours (if the debtor is an individual without a business) or 56 hours (if the debtor conducted a business before entering the scheme).

QUESTION 10

10. Cross-border considerations in consumer insolvency

10.1 Are overseas assets included?

Yes, based on the universal effect of Dutch insolvency proceedings also applies to the Wsnp proceedings according to most authors. However, legal practice acknowledges the sovereignty of and the authorities in foreign countries where such assets are located.

10.2 Is forum shopping by the debtor for more favourable personal insolvency laws possible?

Yes, the Dutch courts can apply the Wsnp scheme to any debtor, irrespective of the debtor's nationality and formal residence, if the Centre of Main Interests (COMI) is located in the Netherlands.[24]

[24] See the Articles 3 and 4 and Annex B of the EU Insolvency Regulation.

QUESTION 11

11. What is the result of subsequent insolvencies?

In principle (notwithstanding certain exceptions to this rule) if a debtor has been admitted to a Wsnp scheme in a ten year period prior to the (new) application for admission to the scheme, the debtor's new application will be refused.[25]

Debts incurred during bankruptcy proceedings (i.e. debts of the estate) preceding a direct transformation (in Dutch: *omzetting*) into the application of the Wsnp scheme are not included in the discharge.[26] However, if the bankruptcy is lifted due to a lack of assets and followed by an application for admission to the Wsnp scheme the debts of the bankrupt estate will be included in the discharge.

QUESTION 12

12. Recommendations?

Recommendations concerning the Dutch debt restructuring scheme (Wsnp) are as follows:

(i) The complicated Wsnp admission criteria should be reconsidered. Rather than scrutinizing the debtor's past (good faith test etc.) which is seldom beyond criticism, the focus should be on (1) balancing the debtor's income and expenditure as of the date of the application for admission to the Wsnp scheme, and (2) the future effort to maximize income in order to pay off creditors.

(ii) A description (list) of the debtor's obligations during the application of the scheme should be incorporated in the statutory provisions.

(iii) The statutory rules concerning mortgage debts related to the debtor's home cause unnecessary foreclosures and uncertainty with regard to the scope of the discharge. These rules should be reviewed and reconsidered.

[25] Article 288(2)(d).
[26] Article 15d(1)(b).

UNITED STATES OF AMERICA

QUESTION 1

1. What are the options or procedures available for a natural person / consumer regarding their over-indebtedness in your jurisdiction?

U.S. bankruptcy law offers two principal alternatives for treating the over-indebtedness of natural persons: liquidation bankruptcy under "Chapter 7" of the Bankruptcy Code, or a debt-adjustment repayment plan under "Chapter 13." Theoretically, a reorganization under Chapter 11 is available to individuals not engaged in business, as well, though such procedures tend to be far too expensive and labor-intensive for average consumer debtors, and Chapter 12 contains special provisions for reorganization by family farmers, but this contribution will focus on the generally applicable Chapters 7 and 13.

1.1 The legal grounds for the opening of or access to those procedures

The legal grounds for opening a case under either Chapter 7 or Chapter 13 are largely the same. If the debtor files a voluntary petition for relief, that alone is sufficient grounds for opening a case; the debtor need not technically be or indicate that she or he is "insolvent" or "over-indebted" or any other eligibility criterion. For a Chapter 13 case, the debtor must in addition file a proposed repayment plan and have "regular income" and debts below certain thresholds; that is, noncontingent, liquidated, unsecured debts cannot exceed $360,475, and noncontingent, liquidated, secured debts cannot exceed $1,081,400 (these figures are indexed for inflation every three years, and the last indexation occurred in 2010). In addition, individuals seeking relief under either chapter must have received credit counseling from an approved provider within the six-month period preceding the filing of the petition for relief.

1.2 How are these procedures made available?

A case is opened by the simple filing of a petition for relief (with supporting documents detailing the debtor's financial affairs and a list of creditors) with the Bankruptcy Court for the federal district where the debtor resides. Theoretically, a case may be commenced in the district where the debtor's "principal assets" are located, but in consumer cases, it is seldom the case that the district of the debtor's residence differs from that of their principal assets. Debtors need not be represented by an attorney; they can proceed on their own behalf, or "pro se." But in most cases, the debtor is represented by counsel, and the papers are filed by an attorney.

1.3 Who can commence the procedure?

The overwhelming majority of cases are opened by debtors. Creditor petitions seeking involuntary adjudication of bankruptcy against a consumer debtor are extremely rare in the U.S. due to the cost-benefit imbalance and the more stringent requirements. First, only a Chapter 7 liquidation can be requested in an involuntary petition, not a Chapter 13 payment plan. Second, an involuntary petition can be filed only jointly by three or more unsecured creditors with non-contingent, undisputed claims amounting to at least $14,425, or if the debtor

has fewer than 12 unsecured creditors, then any one with at least $14,425 in non-contingent, undisputed claims can file the petition alone. Third, the petitioning creditor(s) must prove that the debtor is generally not paying their undisputed debts as they come due. Simple balance-sheet insolvency is not a ground for involuntary bankruptcy; it is the debtor's failure to pay "generally" that matters, not their ability or financial state. This vague standard has given rise to much controversy and confusion and contributes to the dearth of involuntary petitions generally, but especially against consumers.

1.4 Who will supervise the procedure?

All procedures are supervised by the Bankruptcy Court in general, but in particular, Chapter 7 cases are administered by a "panel" trustee chosen from a standing list of qualified trustees and appointed to individual cases by a government officer called the U.S. Trustee. Chapter 13 cases are also administered by trustees, but these are generally "standing" trustees in each district with longer-term appointments.

1.5 What are the criteria such a person has to satisfy?

Trustees are usually lawyers, less frequently accountants, The minimum qualifications for service as a trustee are established by the U.S. Attorney General. In addition to "integrity and good moral character" and other general attributes, the only experience qualification is that an applicant possess at least a bachelor's degree in a business-related field or "equivalent experience." The U.S. Trustee selects from among applicants to fill vacancies on the list of panel trustees based on these factors and a preference, though not a requirement, for bankruptcy experience.

1.6 What are the available alternatives?

Extra-legal alternatives, such as private contractual debt management plans, are theoretically available, as well. This option is discussed below in section 7.

QUESTION 2

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2. Position of the debtor and the spouse

The financial affairs of married debtors are often so intertwined with that of their spouses that they seek joint relief, but married debtors are not required to seek joint relief. For the few states that have a "community property" regime of shared matrimonial property, the "community discharge" operates in a specific way with respect to claims against community property, but in all other instances, including the separate property of spouse in community property states, debtors are separate from their spouses, and each can choose to seek or not seek bankruptcy relief.

2.1 Which assets and income are excluded from the procedure?

Any property or rights in property acquired by or accruing to the debtor *after* the moment of filing of a bankruptcy petition belong to a Chapter 7 debtor, such as wages for work performed after the petition date. As for property and rights in property acquired *before* the filing, certain property is "exempt" for the exclusive benefit of the debtor. Debtors claim exemptions in identified property on the papers filed with the petition, and after the trustee establishes the propriety of the claimed exemptions, this property is "abandoned" back to the debtor. In a compromise between state and federal law, each state is allowed to "opt out" of the list of exempt property in the Bankruptcy Code, offering its residents only the list of property exempt from creditor claims generally under state law. Most states have thus "opted out," and those that have not generally have *more* generous exemption statutes than the Bankruptcy Code; thus, the range of property exempted for the debtor varies widely from state to state. Some states, like Texas, exempt vast amounts of property (up to $60,000 in value in movable property and an unlimited "homestead" exemption in immovable property used as the debtor's residence), while others, such as Delaware, exempt only minimal property, such as the family Bible, clothing, and perhaps tools of the debtor's trade up to a low value. Most state exemption laws fall somewhere between these two extremes. An "average" exemption scheme likely includes (1) a homestead exemption of $15,000-$20,000 in equity in the debtor's immovable property used as a residence, (2) the tools of the debtor's trade, probably limited to $2000-$5000 in value, (3) clothing and other items of little or no value, (4) some exemption for cars, furniture, or other items, perhaps of the debtor's choice, of a value not exceeding $5000-$10,000.

2.2 Does the debtor have restrictions on the disposition of his assets?

As of the moment of the filing of the petition, the debtor loses the right to dispose of "property of the estate," defined in section 2.3 below.

2.3 Which assets and income are included in the procedure?

All of the debtor's property and rights to property that have accrued as of the date of the filing of the petition are included in "the estate" for potential distribution to creditors. This includes such things as accrued but unpaid wages and tax refunds.

2.4 Are pension schemes included?

Retirement savings and other pension plans are fully exempt under federal law; that is, they are not included in the bankruptcy proceeding.

2.5 Does the debtor donate to the estate a part of his income for the benefit of the creditors?

Debtors make no income contributions in Chapter 7 liquidation cases. In a Chapter 13 case, in contrast, the debtor proposes to pay a portion of his or her debts through a payment plan drawing on the value of whatever property (especially future earnings) the debtor owns or expects to acquire through the period of the plan (theoretically, three to five years, but practically, almost

always five years). In exchange for payments from future income, the debtor is allowed to keep whatever property he or she chooses, subject to fulfillment of the minimum requirements for a Chapter 13 plan. The value of the payments proposed in the plan must equal at least what creditors would receive if the debtor's non-exempt property were liquidated and distributed to creditors in a Chapter 7, but it must also represent all of the debtor's "disposable income" for the repayment period. The calculation of "disposable income" involves subtraction of reasonable living expenses from the debtor's anticipated future income. For debtors with below-average income, expense allowances are determined at the bankruptcy court's discretion, while for debtors with above average income, the calculation of reasonable living expenses is a complex matter governed by the second stage of the "means test."

2.6 Is there a means test?

Yes, and its purpose is to determine whether debtors are eligible for Chapter 7 liquidation relief or must pursue relief via a Chapter 13 payment plan. As a general matter, debtors get to choose to seek relief under either Chapter 7 or Chapter 13, but as of October 2005, the so-called "means test" identifies debtors thought to be abusing the benefit of Chapter 7 and limits them to seeking relief through a Chapter 13 payment plan. The means test analyzes the finances of every individual debtor in two steps, and if the debtor "fails" *both* of these tests, Chapter 7 is unavailable absent a specific exception for "special circumstances."

The first step of the means test compares the debtor's "current monthly income" (CMI) with the inflation-adjusted median family income of a household of the same size as the debtor's in the debtor's state. Debtors with income above the applicable median must move to the next step of examination of their living expense deductions. The notion of "current monthly income" here, incidentally, is defined to mean the average of the debtor's monthly income over the six months preceding the petition date (not an evaluation of the debtor's likely payment ability going *forward*). Most debtors have experienced an income interruption (*e.g.,* unemployment, divorce, medical problem), so their backward-looking income is generally well below the applicable median, even if they indeed do possess the "means" to make future payments; thus, this "means test" is mostly an exercise in useless formality. Consistently around 90% of all debtors filing under Chapter 7 have passed this median-or-below income test.

For above-median-income debtors who fail the first step, the second step of the means test subtracts certain restrictively defined living expenses from the debtor's "current monthly income" to reveal whether significant "disposable income" remains for distribution to creditors. After deducting standard national monthly allowances (developed by the taxing authority, the Internal Revenue Service) for food, clothing, and general household expenses, as well as regional allowances for housing and transportation, in addition to amounts due to secured and priority creditors over the next five years, abuse is presumed if the remainder exceeds about $200 per month, or about $12,000 over a five-year repayment plan.

In the first five post-reform years, fewer than 10% of the above-median income debtors have failed this second step of the means test. Even for these debtors, the U.S. Trustee has exercised its discretion to decline to challenge Chapter 7 relief for 50-70% of these presumptively abusive cases in light of "special circumstances," especially unemployment. Only a small fraction of cases have thus ultimately been caught in the net of the means test and prevented from seeking more liberal Chapter 7 relief.

2.7 Is there a garnishment of regular income?

All pre-petition garnishments or other attachments of the debtor's wages must cease as of the petition date, and a garnishing creditor receives no further benefit from the pre-petition garnishment order. A Chapter 7 debtor is not required to cede any post-petition income back to the estate for the benefit of creditors. In Chapter 13 payment plan cases, payments are generally made voluntarily by the debtor to the trustee for distribution to creditors. Though the standing Chapter 13 trustee can request that the Bankruptcy Court enter a garnishment order to ensure timely delivery of these payments, this occurs in a minority of cases (the debtor cannot be forced to continue making payments under the plan if he or she chooses to dismiss the Chapter 13 case and forego relief - creditors are then relegated to their enforcement rights under state law based on the debtor's pre-bankruptcy obligations).

2.8 Is there protection of the debtors' privacy, his mail and his home?

Debtor's privacy and mail are protected by federal law, especially relating to privacy in electronic communications. Debtors' names are not redacted or otherwise obscured in public bankruptcy filings, though sensitive Social Security identification numbers are redacted to protect debtors' financial privacy (as this number is often used when opening credit accounts). U.S. law does not subject debtors to any indignities relating to home inspections or trustee monitoring of postal or electronic mail. General rules and norms respecting privacy are thus preserved for debtors. As discussed above in section 2.1, the various states provide differing protection to the debtor's interest in a home, ranging from a total exemption in state like Texas, Florida, Iowa, and Kansas, to a smaller exemption of a few thousand dollars in equity in states like Illinois, to no protection at all in some states.

2.9 Is there protection of the spouse's interests in the home?

As for those states that do not protect the debtor's home (or do not protect it sufficiently to prevent seizure and sale to realize some unprotected value for creditors), the non-petitioning spouse's interest in the matrimonial home is seldom protected. However, several U.S. states have a matrimonial property regime that offers protection to "community property" in ways often similar to European matrimonial property regimes, and several others have a Common Law estate in land called "tenancy by entireties," under which only *joint* creditors of *both* spouses may seize the marital home held in this form of tenancy. Under one of these regimes, the non-filing spouse's interest in a matrimonial home may be protected, but these protections can be and often are evaded contractually by creditors.

2.10 Is the debtor restricted to receive information?

No, the debtor can receive whatever information he or she wants regarding the case. Most case information is freely available in a public case file, open to the public generally.

2.11 Does the debtor have the liberty to move freely and to leave any State, including his own?

Yes. The debtor does not lose their freedom of movement and travel.

2.12 Is the debtor entitled to cost-free legal assistance?

No. Though various forms of "legal aid" are available to varying degrees in many states, cost-free legal assistance is not a legal entitlement in the United States in non-criminal matters, and it is therefore not generally available to debtors for preparing petitions for bankruptcy relief (much less for preparing Chapter 13 payment plans). Nonetheless, the lawyer fees for such cases are seldom prohibitive. Most debtors are able to collect the $2000-$3000 to pay a lawyer to prepare a Chapter 7 petition by simply not paying their creditors for one or more months immediately before filing for relief, and the Chapter 7 case discharges these unpaid obligations. The significantly higher fees of lawyers preparing payment plans in Chapter 13 cases can be and often are paid over time through the plan, diverting some of the debtor's "disposable income" from distribution to other creditors. Thus, the U.S. consumer bankruptcy system is for the most part effectively funded indirectly by creditors.

2.13 Are there restrictions on the debtor after the procedure?

No specific restrictions are placed on debtors after the procedure is closed; indeed, to the contrary, discrimination by government agencies and employers against debtors on the basis of their having sought relief is specifically forbidden.

2.14 Is the spouse (automatically) included in the procedure?

No, spouses are not automatically included in an individual procedure. Other than the indirect effects of the "community property" rules applicable in a minority of state, mentioned above, a petition by one spouse does not automatically impact the property or financial affairs of the debtor's spouse.

2.15 In which way do the International or European Convention and Covenants play a role?

Neither the European Convention or Covenant nor any other international human rights authority plays any significant role in the U.S. consumer bankruptcy system.

QUESTION 3

3. Position of the creditor

The position of creditors in U.S. consumer bankruptcy is decidedly a secondary consideration. Most creditors have few rights in a system designed primarily to rehabilitate financially distressed debtors, and most consumer debtors have very little if any significant value beyond the exemptions discussed above in section 2. The focus in both Chapter 7 and Chapter 13 is on reintroducing the consumer debtor into the open credit economy, not maximizing creditor power or returns.

3.1 Can a creditor force the debtor to commence a procedure or oppose the debtor from doing so?

As discussed above in section 1.3, creditors can force consumer debtors into Chapter 7 liquidation proceedings (*not* Chapter 13 payment plans), but this is somewhat difficult and extremely rare, especially since about 97% of all Chapter 7 consumer cases produce no distribution to creditors (and the distribution in the majority of the remaining cases is very small). Creditors cannot challenge the debtor's petition for Chapter 7 relief, and though they could in theory challenge a debtor's petition to open Chapter 13 proceedings, usually the contents of the plan and the debtor's proposed budget are challenged, not the opening of the proceedings *per se*.

3.2 Which creditors' claims can be excluded from a discharge?

In a compromise for the generous discharge provisions in both Chapter 7 and 13 proceedings, a relatively large number of claims are excepted from discharge altogether. The range of such excepted claims differs slightly in the two types of proceedings. In Chapter 7 bankruptcy, not subject to the discharge at all are debts for:

- income taxes less than three years old and property taxes less than one year old (as well as loans from third parties made to finance the payment of such taxes);
- value obtained by fraud, presumptively including debts for more than $600 for "luxury goods" incurred within 90 days before the petition date or cash advances of more than $875 incurred within 70 days of the petition date;
- embezzlement or theft (larceny);
- domestic support obligations (child support or alimony owed to a former spouse), as well as property division obligations arising from a divorce or separation action;
- "willful and malicious injury" to the person or property of a third party;
- fines and penalties owed to governmental units *not* related to compensation for financial loss to such units;

- student loans (unless the debtor makes an exceptional showing of "undue hardship");
- death or personal injury arising from the debtor's operating a motor vehicle under the influence of drugs or alcohol;
- orders of restitution following criminal conviction under federal law;
- fees or assessments owed to a condominium or homeowners' association that come due *after* the petition date; and
- deferred filing fees for any civil suit brought *in forma pauperis* by a prisoner, as well as costs imposed on the prisoner following an adverse judgment.

Claims based on fraud and "willful and malicious injury" must be explicitly excepted from discharge after a determination by the court that the specific elements of such claims are present; all of the other listed claims are simply not subject to discharge in a Chapter 7 case. The list of debts not subject to discharge following successful completion of a Chapter 13 payment plan is slightly smaller: "Willful and malicious" injury debts are dischargeable in Chapter 13, as are debts for fines owed to government units, restitution orders, and prisoner litigation fees and costs.

3.3 Does a creditor have to accept a curtailment of his claim?

The end result of a case under Chapter 7 or 13 is that creditors' claims, not in the list above, that remain unpaid after distribution of the liquidation value of the debtor's non-exempt assets (Chapter 7) or three to five years of payment of the debtor's "disposable income" (Chapter 13) are discharged.

3.4 Do certain creditors receive more protection than others?

Secured claims are treated specially, in that they are entitled to at least the value of the collateral securing their claims, and if the debtor wishes to retain the collateral, claims secured by the debtor's home, or by collateral securing recent loans used to purchase the collateral ("purchase money security interests"), must be paid in full in a Chapter 13 plan.

In addition, in both Chapter 7 liquidations and Chapter 13 payment plans, a small number of "preferred" claims must receive payment in full before any general unsecured claim can share in the distribution, if any. Most preferred claims relate to business-related cases, but for pure consumer cases, a few preferred claims stand out such as:

- domestic support obligations (child and spousal support);
- income taxes less than three years old and property taxes less than one year old, and;
- liability for death or personal injury arising from the debtor's operation of a motor vehicle while under the influence of drugs or alcohol.

QUESTION 4

4. Avoidance actions

The use of avoidance actions in consumer cases is quite rare given the low value of most property involved in such cases, but in isolated instances, the following avoidance actions are available.

4.1 What are the legal proceedings to protect / realize the debtor's assets?

First, the equivalent of the Actio Pauliana in U.S. law is called the law of "fraudulent conveyances." Transfers of value by the debtor to a third party can be set aside, or the third party can be ordered to pay back the value of the property transferred, if either (1) the debtor actually intended to hinder or delay creditors in such a transfer, or (2) if the transfer occurred in exchange for less than reasonably equivalent value, and it thus rendered the debtor insolvent or increased their insolvency. Transfers from up to two years before the petition date can be avoided under the federal Bankruptcy Code, and state laws (also available in insolvency proceedings) sometimes allow for an even longer "look-back" period (often four years for inadvertently "increasing insolvency," and up to ten years for intentionally fraudulent transfers).Second, transfers of the debtor's interest in property that were "preferential" toward one creditor can be unwound, also. The details of which transfers quality as "preferential" are complex, but the basic rule is that creditors who receive property or money of more than $600 on account of (in exchange for or payment of) an earlier debt can be forced to return such transfers that occur within 90 days of the petition date in order that the amount of such transfers be redistributed among creditors according to the insolvency rules. Not only voluntary (or coerced) payments by the debtor, but also creditor garnishments, e.g., collected within 90 days of the debtor's petition generally fall within this category of "preferential" transfers, though only if the aggregate amount collected during the 90-day suspect period exceeds $600.

Third, security interests and mortgages that are not properly "perfected" (*i.e.,* made fully enforceable against third parties according to the rules of secured transactions) as of the petition date can be destroyed, depriving the creditor of the benefits of its collateral and rendering it a general unsecured claimant. Improperly perfected security interests in automobiles, for example, are sometimes "avoided" in this way in consumer bankruptcy cases, though again, the use of these and other avoidance actions in consumer cases is a rarity in general.

QUESTION 5

5. Good faith

5.1 Does the principle of "good faith" play a role and in which way?

The only notable respect in which "good faith" plays a role in consumer cases is in Chapter 13 payment plans. One of the requirements for court confirmation of a plan is that the debtor has proposed it in "good faith." Various courts have used this vague criterion to deny confirmation to plans that offer an insufficient dividend to creditors (with courts in various areas making widely differing and often unpredictable judgments as to the "sufficiency" of payment) or where the debtor just seems to be trying to take advantage "unfairly" of the benefits of the law. Note that "good faith" is *not* a criterion for acceptance of a Chapter 7 or Chapter 13 petition, and it is *not* a criterion for receiving a discharge. To be sure, an explicit finding of "bad faith" and "abuse" of the relief system can lead to an involuntary dismissal of a Chapter 7 case, but outside the "means test," as discussed above, dismissals for "bad faith" are hard to predict and represent a rare exception.

QUESTION 6

6. Re-payment plan

6.1 Is the debtor submitted to a payment plan?

Only in Chapter 13 is the debtor expected to make any payment from future income, and the requirements for the amount of payment are discussed above in sections 2.5 and 2.6. Debtors are required to dedicate all of their "disposable income" to creditors over the term of the plan, and their deductible expense allowances are based either on the court's discretion or on the "means test," depending upon whether the debtor's income is above or below the applicable median.

6.2 How long is the duration of such a plan?

Though the law theoretically allows for plans from three to five years in length, the overwhelming majority of plans extend to this maximum period, five years, with very limited exception.

6.3 Does the plan have an educational purpose?

Nothing in the text or legislative record of the law suggest that any educational purpose is intended by subjecting debtors to this payment plan; rather, Chapter 13 was designed to allow debtors to avoid a feeling of guilt and the stigma of "bankruptcy" in Chapter 7 by offering at least some payment to their creditors over time. Given that two-thirds of Chapter 13 plans fail (that is, the debtor is unable to make all the payments called for in the plan), it is an open question whether even this purpose has been achieved.

QUESTION 7

7. Voluntary settlement

Voluntary settlement is an available alternative to formal relief in Chapter 7 or Chapter 13. Note that Chapter 13 plans are *not* dependent upon (or even influenced by) any vote of creditors to support the proposed plan. If the debtor's proposed plan complies with the required payment and other rules, it is confirmed, generally over the strenuous objection of nearly all creditors.

7.1 What are the possibilities for a voluntary settlement?

The only possibility for voluntary settlement is a contractual arrangement with creditors, generally but unofficially called a "debt management plan" ("DMP"). Consumer counseling organizations often negotiate these DMPs on behalf of debtors, sometimes in exchange for quite substantial fees, and these DMPs very often fail to provide any relief to debtors; indeed, they often exacerbate the debtor's financial distress and lead to a bankruptcy filing. To be bound to such a DMP, each creditor must accept the contractual arrangement; creditors who refuse to accept the arrangement are not and cannot be bound to it. As a result of this, in addition to waning creditor support for counseling agencies and a growing unwillingness especially by large institutional creditors to agree to compromise arrangements with debtors, DMPs have become a less and less prominent feature of the system for addressing consumer financial distress in the U.S.

QUESTION 8

8. Discharge

As noted above, the automatic result of successful completion of a Chapter 7 case or Chapter 13 payment plan is a discharge of all non-excepted debts.

8.1 In which way is a discharge granted?

Debtors must certify that they have attended an approved "personal financial management" instructional course after the petition date and before discharge is entered, but otherwise, after the trustee files a report of case completion, the bankruptcy court's computer system automatically generates and mails a discharge order to the debtor or the debtor's attorney.

8.2 Can a discharge, after it has been granted be revoked?

Once granted, the discharge can be revoked by special challenge by a creditor or trustee, but only within one year after the grant of the discharge, and in Chapter 13 only on the basis of fraud in obtaining the discharge which the creditor discovered *after* the discharge had been entered. A Chapter 7

discharge can be revoked also on the basis of the debtor's failure to respond properly to court orders or trustee information requests. Revocation of discharge in either case is extremely rare.

QUESTION 9

9. Remuneration / costs

In most consumer insolvency cases, costs are quite minimal, but attorney's fees are substantial and are dealt with differently in the two different procedures.

9.1 How are the costs of the procedure dealt with?

In Chapter 7 cases, debtors must pay the clerk of court a filing fee, currently $299 (consisting of $245 case filing fee, $39 miscellaneous administrative fee, and $15 trustee surcharge).- With the court's permission, debtors may pay this $299 fee in up to four installments over no more than six months. Indeed, debtors whose income is less than 150% of the poverty level may seek permission to file "*in forma pauperis*," and the court may waive the requirement that the fees be paid, though this is quite rare. From this $299 filing fee, the appointed "panel trustee" (who administers the case) receives only a minimum fee of $60 in the 97% of cases in which no valuable assets are available for liquidation and distribution. In the few cases where non-exempt assets are available, the trustee is entitled to an additional fee, subject to court approval, of up to 25% of the first $5000 of value distributed, then 10% of amounts from $5000 to $50,000, then 5% of amounts from $50,000 to $1 million. Trustees thus *can* theoretically increase their fees by generating returns for creditors (perhaps through aggressive use of the avoidance powers discussed above in section 4), but consumer cases relatively seldom present such opportunities. Because very few cases involve any significant asset value available for distribution, the U.S. Trustee who assigns panel trustees to individual cases tries to fairly allocate the "asset" cases among all acting trustees to compensate them for the burden of administering the bulk of "no-asset" cases. Part of the funding for the general administration of this system is defrayed by the small filing fees and by governmental budgets funded by taxes, and a portion of the cost is covered by quarterly fees collected as a percentage of all disbursements in Chapter 11 business reorganization cases.

In Chapter 13 cases, the filing fee is only $274 (a $235 case filing fee and a $39 miscellaneous administrative fee), paid according to the same rules as discussed above for Chapter 7 fees. As for the trustee, instead of panel trustees appointed from a list to each case, one or more standing trustees in each district are appointed by the U.S. Trustee to administer the plan payments for all confirmed plans. In exchange for administering the payments in ongoing Chapter 13 plans (and other duties), Chapter 13 standing trustees are entitled to retain a percentage of all disbursements made to creditors (usually 7-10%), with the specific amount established for each individual region by the U.S. Trustee. Here again, the standing trustee thus *can* increase their fee by challenging the debtor's plan and demanding that more payments be made to creditors, though overly aggressive pursuit of this strategy can and often does lead to overly optimistic or demanding plans that ultimately fail after a few months or years.

9.2 Is the court the correct forum to scrutinize fees?

The bankruptcy court does scrutinize the amount of private lawyer fees, especially in Chapter 13 cases (given that more activity is required to guide these cases through plan confirmation and perhaps through successful completion of the plan, as opposed to the generally once-and-done nature of Chapter 7 cases), though most districts have established a "no-look" fee amount that will not be challenged absent some specific reason for doubting that the lawyer is properly fulfilling their duty to debtor clients.

9.3 What is the appropriate method of calculation of fees when dealing with compositions or voluntary arrangements?

The fees paid to debt management companies for out-of-court arrangements (DMPs, see above in section 7) vary significantly and have been the topic of great controversy. They often consist of both a flat fee (sometimes several thousand dollars), as well as a flat or percentage monthly "administrative fee" for distributing the payments among creditors. These fees, and the DMP process in general, are unregulated and unsupervised, so little is known for certain about these fees. Often these substantial fees are taken from the first payments made by the debtor, however, and if the plan fails, the debtor is thus usually in far worse financial shape than before the DMP was initiated.

9.4 What is the method of calculation of fees when dealing with bankruptcy proceedings?

Fees charged by private lawyers are a private, negotiated matter, and lawyers charge widely varying fees. For Chapter 7 liquidation cases, the largest expense from the debtor's perspective is the fee charged by private lawyers for representing the debtor in preparing the required paperwork (and, less frequently, representing the debtor in contested proceedings later on in the case, which are rare). This fee generally ranges from around $2000 on the low end to more than $5000 on the higher end, plus extra for representation in contested matters beyond the basic case. Debtors generally produce this fee by borrowing from friends and family or by withholding payment from creditors in the months leading up to the bankruptcy filing and applying this money instead to a bankruptcy lawyer's fee.

In Chapter 13 cases, the private lawyer fee for representing the debtor in filing the case paperwork, drawing up the plan, and guiding the debtor through confirmation and implementation of the plan is generally at least $4 - 5000 on the low end, and $10,000 or more on the high end, but part or all of this fee is often paid from the debtor's newly unencumbered income in the early installments due under the plan.

9.5 Can IPs charge fees based on the value they created for the creditors during an assignment?

To the extent that this question relates to the trustee remuneration based on asset distribution, especially in Chapter 13 plans, see above in section 9.1. Otherwise, the question does not seem to apply to the structure of U.S. bankruptcy practice, since insolvency professionals are hired by and represent debtors, not creditors.

QUESTION 10

10. Cross-border considerations in consumer insolvency

10.1 Are overseas assets included?

Theoretically, assets located outside the United States are considered part of the "estate" to be administered as part of the debtor's U.S. bankruptcy case. Practically, however, very few consumer bankruptcy cases in the U.S. involve assets outside the United States, so "cross-border" issues arise highly infrequently. Periodically, a debtor will have immovable property, for example, in Canada or Mexico, and in such cases, the trustee can now resort to international bankruptcy arrangements such as the UNCITRAL Model Law on Cross-Border Insolvency, adopted by both Canada and Mexico.

10.2 Is forum shopping by the debtor for more favourable personal insolvency laws possible?

International forum shopping is not an issue in the U.S., as the regimes available to consumers in Canada and Mexico are not as favorable as that in the U.S. Within the United States, however, the borders between states raise important issues of forum shopping. Some aspects of the federal bankruptcy process are governed by state law, particularly the list of "exempt" property (see above in section 2). The 2005 reform included a response to perceptions of debtors' moving house shortly before filing for bankruptcy in order to shop for more generous state property exemptions (*e.g.,* moving to Texas or Florida and investing all available non-exempt asset value in a home, which is exempt without limitation in these and six other U.S. states). First, the exemption regime applicable in a consumer case is the one from the state where the debtor has lived for the two years before the petition date (or, if the debtor has moved within the last two years, for most of the three-month period preceding this two-year period). A debtor in effect has to remain in a state for two years before being able to take advantage of its exemption scheme in bankruptcy. Second, focusing on the debtor's often most valuable asset, homes acquired within 3.3 years (1215 days) before the petition date are exempt only up to a maximum of $136,875 (unless they were purchased with money from another homestead in the same state acquired before the 3.3-year period began). This rule was designed to prevent debtors from shielding all of their non-exempt assets in new homes in the eight U.S. states with unlimited "homestead" exemptions. Thus, forum shopping for generally more favorable law is not possible, and shopping for more generous state property exemptions by moving from state to state has been sharply curtailed since 2005.

QUESTION 11

11. What is the result of subsequent insolvencies?

Bankruptcy is not regarded as a "once-in-a-lifetime" event in the U.S., but the extraordinary relief of a discharge is available on somewhat limited terms. In a Chapter 7 case, a discharge is not available if the debtor has obtained a Chapter 7 discharge within the previous eight years, or if the debtor has obtained a Chapter 13 discharge within the past six years without paying at least 70% of unsecured claims. In a Chapter 13 case, a discharge is not available (even upon successful completion of the five-year plan) if the debtor has obtained a Chapter 7 discharge within the four years before the commencement of the Chapter 13 case, or if the debtor has obtained a discharge in another Chapter 13 case within the two years before filing the second Chapter 13 petition.

QUESTION 12

12. Recommendations?

One could make any number of small and not-so-small recommendations for reform of the U.S. consumer bankruptcy system, but this does not seem to be the proper forum for such an extended discussion. Nonetheless, for the benefit of readers of this publication taking a comparative approach to individual insolvency, three comments and recommendations are worthy of particular attention.

First, as discussed above in section 2.6, the "means test" as it is peculiarly structured in U.S. law, is little more than a cruel joke, a wasteful and distracting burden, both for debtors and for system administrators. Countless hours, nerves, and dollars are now expended in the Quixotic pursuit of "abuse," when no evidence of such abuse was ever identified, and the incidence of potential abuse has now been revealed to be only a fraction of one percent of all filed cases. The means test should be repealed and replaced with a simpler, more flexible approach to evaluating the repayment potential and reasonable expenses of each filer, without any presumption of the chimerical notion of "abuse" that was so *de rigueur* in the 1990s and early 2000s in the U.S.

Second, a long history of failure demonstrates that the system of Chapter 13 payment plans is not structured properly. The plan period is likely too long and should be reduced to three years. This movement is clearly underway in Europe, and the U.S. should learn this vital lesson, as well. In addition, the artificial and constricting application of the "means test" to calculating projected income and budgets is a failure and should be abandoned. Life is simply too complicated to fit every debtor into the same rigid framework, and we need to trust our system administrators to implement the policy of Chapter 13 with

controlled but discretionary guidance on the allocation of budgetary items, especially a reserve of some sort for unforeseen interruptions and expenses. Moreover, basing plan payment requirements on projected / anticipated income is a recipe for disaster. The debtor's *actual* income should form the basis for monthly or annual distribution (or not) of excess income during the life of the plan, after deducting the approved expenses. This avoids the need for modifying plans when debtors experience income interruptions, and it ensures that creditors not only share in the pain of downturns, but also enjoy the benefits of improvements in the debtor's financial situation during the term of the plan.

Finally, combining the two preceding observations, a final recommendation might be for the U.S. to do away with the complexity of the dual-track, debtor-selected system altogether. Instead, the U.S. system should be redesigned to put the system administrator in charge of the decision whether to route debtors toward an immediate liquidation and discharge or toward a payment plan, again preferably no longer than three years. The presumption should be that most debtors who confront the stigma of failure have insufficient income to make administering a protracted payment plan worth the expense and delayed reinsertion of the debtor into the productive economy. Only debtors who have clearly turned the corner financially and have a clear expectation of excess income should be routed into a three-year payment plan to allocate a fair share of that future income to creditors.

In general, the U.S. and other systems should be structured and reformed on the basis of real observation evidence of what *really happens* to the actors in these systems. Too often decisions have been made, especially for reform, on the basis of isolated and often inaccurate anecdotes and empty rhetoric. Refocusing our attention on the real goals of this system and the real effects of one or another policy decision would improve system operation and avoid many of the traps into which the U.S. and other systems have fallen in recent years.

Country	Does your country have personal bankruptcy laws? Yes / No	If the answer is No, please state briefly how individual debtors cope or don't	Is personal bankruptcy a criminal offence in your country?	
			Yes / No	
Argentina	No	Fighting in singular foreclosures (or summary judgments) or seeking protection under the general bankruptcy system (available for individuals and corporations)	No	
Australia	Yes	Not applicable	No	
Belgium	No	The Law dated July 5, 1998 on Collective Debt Settlement gives the possibility to non - traders who cope with serious personal insolvency in good faith to apply for a collective debt settlement. This law has a double goal: (1) to create a situation whereby the debtor can pay his debts and (2) to guarantee that the debtor and his family are still able to lead a dignified life. Such a request must be filed at the Labour Court of the debtor's residence and must involve all the debtor's debts. When approved, the labour judge will appoint a mediator, which may be a (pro bono) lawyer. The mediator tries to obtain an amicable settlement with all the creditors of the debtor. This amicable settlement will then be approved by the labour judge and the mediator supervises the observance of the amicable debt settlement. If no amicable debt settlement can be reached, the labour judge can enforce a judicial debt settlement or a partial waiver of debt accompanied by a forced sale of confiscable	No	Because Belgium does not have a personal bankruptcy law.

		possessions of the debtor. This confiscation will normally only concern valuable possessions. If a judicial debt settlement is not possible, the labour judge can enforce a total waiver of debt, which can be accompanied by the forced sale of all confiscable possessions of the debtor. This confiscation will normally only concern valuable possessions. Additional obligations towards the debtor, such as budget guidance, can also be imposed. These three types of collective debt settlement can always be revoked by the labour judge if (1) the debtor has not complied with the imposed conditions of the collective debt settlement, (2) the debtor has made false declarations in order to obtain a collective debt settlement or (3) has created new substantial debts. A revocation of a collective debt settlement implies that the creditors can reclaim payment of the outstanding claims.		
Bermuda	Yes		No	
Cayman Islands	Yes	Not applicable.	No	
Channel Island	Yes		No	
China	No	An individual takes “unlimited” and life-term liability for their obligations and indebtedness. In practice, most lenders will prefer to lend with security e.g. property mortgage, pledges from the debtors own or third party, or third party's guarantee.	No	This is not applicable in China as there is no individual bankruptcy law. The insolvency of a person or the failure of an

				individual to repay their debt in itself does not constitute a crime. However, if such insolvency / failure of repayment involve misconducts of an individual which is criminal e.g. fraudulence, forgery of government documents, etc, then criminal action can be raised against the individual.
Czech Republic	Yes		No	• Personal bankruptcy itself is not a criminal offence; • But if an insolvent individual intentionally acts to the detriment of his of her creditor (s) or treats one of more of the creditors preferentially; such behaviour could constitute a criminal offence.
Denmark	Yes		No	

England and Wales	Yes	It is complicated. Bankruptcy - both domestic and business failures of individuals, IVAs the same as bankruptcy, Debt Management Plans (DMPs) domestic only, Debt Relief Orders domestic only.	No	Not generally, we stopped locking debtors up in 1869.
Estonia	Yes		No	
Finland	Yes	The Finnish Bankruptcy Law is the same both for companies and for persons. We have also the law of arrangement of the debts of a person.	No No	
France	Yes	We have personal bankruptcy laws in France.	No	Personal bankruptcy is not a criminal offence in France.
Germany	Yes		No	
Indonesia	Yes	An individual can file an application for bankruptcy, provided that such individual has at least two or more creditors and fails to fully repay at least one debt that is due and payable. This provision is stated in Law Number 37 of 2004 on Bankruptcy and Suspension of Payment.	No	
Ireland	Yes		No	
Italy	No	• Since 2009 there is a draft law pending, but nobody knows when it will become effective. • At the moment for over indebted individuals there is	No	Not in general (i.e. there are no special provisions concerning this matter). But a lot of other

		no other way out than private negotiations with creditors (that rarely happens).		provisions (e.g. fraud) may apply. In case of bankruptcy of entrepreneurs (individuals exercising a business) the normal provisions apply.
Japan	Yes	There are no special bankruptcy laws for individuals, but there are special rehabilitation procedures for individuals under the Civil Rehabilitation Act called rehabilitation for individuals with small - scale debts and rehabilitation for salaried workers.	No	
Republic of Kosovo	No	• Individual bankruptcy is highly unusual as the levels of credit available to consumers is very low. • Individuals rely on family to support them in times of need. Family bonds are very strong. • Individuals cope with indebtedness by making informal arrangements with creditors. If necessary, property is ceded to extinguish debt including family homes.	No	
Latvia	Yes		No	A person may be held criminally liable for submission of a false application for insolvency.

Luxembourg	No New legislation pending	Bankruptcy Laws in Luxembourg are applicable to commercial companies and individual merchants, but no specific bankruptcy laws apply to consumers, although limited procedures for reorganization of debts can apply to individuals. • Article 1244 of the Civil code: judges have the discretionary power to grant delays of payment to debtors. • Law of 8 December 2000: procedure of conventional or judicial reorganization of debts, allows freezing of late interest, extension of delays for payment, and other related measures aiming at reorganizing the debtor's debts. • A draft Bill is actually under discussion to modernize the procedure of reorganization of debts and introduce a personal bankruptcy regime (draft bill n°6021 of March 2009) applicable when the means provided by the law of 8 December 2000 remain inefficient.	No	Personal bankruptcy is not a criminal offence as such.
Mexico	No	The Insolvency Law (Ley de Concursos Mercantiles, D.O. May 12, 2000, as amended December 27, 2007), does not have a separate chapter with respect to personal bankruptcy. It does, however, include a limited number of provisions applicable only to individuals. We all cope, with an inefficient judiciary and a reluctance by the Federal Courts to hear bankruptcy cases. There are no special procedures for	No	A fraudulent bankruptcy may lead to criminal prosecution. To date, this has not occurred.

		individuals, and in eleven years under the new Insolvency Law, an astonishing few 363 cases in total, of insolvencies have been brought to court. Out of those, only a dozen or so have been personal bankruptcies. It is uncommon and consumers simply cope with the menacing calls and actions of collection agencies (and usually any property is placed formally in the name of the spouse).		
Republic of Moldova	No	Creditors of individual debtors has the right to sue them in a civil court. After, if debtor does not pay his debt voluntarily, creditor can obtain his money through law enforcement officer (executor). In this case if a debtor does not have money to pay the debt, the executor sells the goods, except some of the personal goods of the debtor which can't be sold.	No	
The Netherlands	Yes		No	(Not as such. However, there are criminal acts related to bankruptcy).
New Zealand	Yes		No	
Peru	Yes	In Peru personal bankruptcy is not a judicial process but a administrative process.	No	In Peru the personal bankruptcy is not a criminal offence, but if a person is in bankruptcy process and commit a fraud that's considered a crime.

Portugal	Yes	Personal bankruptcy rules are part of the (general) Portuguese Insolvency Act (some apply both to individuals and companies and other were especially conceived to cope with the insolvency of individuals, namely the discharge and the payment's plan).	No	No, not by itself. Personal bankruptcy can lead to criminal sanctions though: if there is evidence that the debtor (a) had the intention to harm creditors or (b) caused the insolvency throughout grossly negligent behaviour. These rules are deployed in the Portuguese Penal Act.
Romania	No	In Romania there is currently no personal bankruptcy framework. However, a legislative proposal in this respect was proposed in 2009 and is still subject to deliberations in the Romanian Parliament. Therefore, forced debt recovery from natural persons is strictly limited to several enforcement procedures (available under the Civil Procedure Code, the Banking Law, Securities in Personal property Act, etc.). Although several such enforcement procedures may take place simultaneously, they never become a "collective procedure" and they do not grant to the debtor the protection available under the personal bankruptcy legislation.	No	

The State of Qatar	Yes	Yes, personal bankruptcy law is included in the Qatar Commercial Code (Law No (27) of 2006) – Articles (606) to (846).	No	In general personal bankruptcy is not a criminal offence. It may however become a criminal offence in some circumstances (Articles 834 to 846 of the Commercial Code).
Scotland	Yes		No	
Serbia	No	Since there isn't a legal procedure, the only way, but not likely, is that an individual debtor tries to reprogram the debt with the bank. Since 2009, the Serbian Ministry of Justice's Law Drafting Committee, with technical assistance provided by USAID, has proposed significant reforms to the current enforcement law, including the introduction of a system of professional enforcement. That new law, after being adopted, could affect the individual debtors on effective way since that kind of procedure is not operative for a long period of time.	No	
Slovenia	Yes	Articles 381 - 413 of Financial Operations, Insolvency Proceedings and Compulsory Dissolution Act (ZFPPIPP) Enacted 15 January 2008 Applied from 1 October 2008.	Yes	Article 226 of (New) Criminal Code Enacted 1 November 2008 Personal bankruptcy per se is not a criminal offence.

Singapore	Yes, personal bankruptcy laws is governed by the Bankruptcy Act (Cap. 20) in Singapore.	Not applicable.	No	
South Africa	Yes		No	
Sri Lanka	Yes		No	
Switzerland	Yes		No	
Thailand	Yes		No	
Uruguay	Yes	Not applicable.	No	
USA	Yes	The Bankruptcy Act Chapter 82 of the laws of Zambia.	No	

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INSOL INTERNATIONAL

6-7 Queen Street, London EC4N 1SP, UK
Tel: +44 (0)20 7248 3333
Fax: +44 (0)20 7248 3384
www.insol.org

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