Pace International Law Review

Volume 27
Issue 1 *Commercial Edition*
Spring 2015

Article 6

April 2015

Reflections of the World Bank's Report on the Treatment of the Insolvency of Natural Persons in the Newest Consumer Bankruptcy Laws: Colombia, Italy, Ireland

Jason J. Kilborn
John Marshall Law School, jkilborn@jmls.edu

REFLECTIONS OF THE WORLD BANK'S *REPORT ON THE TREATMENT OF THE INSOLVENCY OF NATURAL PERSONS* IN THE NEWEST CONSUMER BANKRUPTCY LAWS: COLOMBIA, ITALY, IRELAND

Jason J. Kilborn*

I. INTRODUCTION

In 2011, the World Bank initiated its first-ever examination of the policies and characteristics of effective insolvency systems for individuals (natural persons). This paper describes the two-year process that led to the publication of the World Bank's landmark *Report on the Treatment of the Insolvency of Natural Persons*.[1] After examining the key content and three major themes of the *Report*, three of the most recent new personal insolvency regimes are introduced with an eye to identifying the ways in which the themes of the *Report* are reflected in these new laws. The personal insolvency provisions in Co-

* John Marshall Law School (Chicago), jkilborn@jmls.edu. Though I served as the volunteer chairperson of the committee responsible for drafting the World Bank report described here, all comments on the report and its potential interpretation are my own and do not necessarily reflect the position of any other member of the drafting committee, the Working Group, the Task Force, or the World Bank. I am deeply grateful for the World Bank's invitation for me to lead this monumental project. All translations of non-English materials are mine, and most of the materials cited here for the Colombian and Italian developments are unfortunately not available in English.

[1] World Bank, Report on the Treatment of the Insolvency of Natural Persons (2013) [*hereinafter,* WB Report].

lombian law most directly evidence the influence of the World Bank project. Its major themes are reflected distinctly in the new laws in Italy and Ireland, as well, though in very different ways, lending support to the World Bank's predictions of convergence but continuing diversity of approach around the world in this rapidly developing area of law.

II. GENESIS, CREATION AND CONTENT OF THE WORLD BANK'S *REPORT*

In reaction to a financial crisis in emerging markets in 1997-1998, the World Bank formalized and systematized its practice of offering guidance to policymakers in the developing world on how to structure effective business bankruptcy and restructuring systems.[2] While the content and methodology of this formal guidance evolved over the first decade of the 21st century,[3] neither the World Bank nor the International Monetary Fund addressed the parallel challenge of regulating the growing problem of *personal* insolvency and individual over-indebtedness.[4]

When another global financial crisis in 2007-2008 struck the household sector head-on and triggered a worldwide recession, observers inside the Bank recognized that the building macro-economic pressure of personal insolvency posed a systemic risk to economic development and international financial

---

[2] WORLD BANK, PRINCIPLES FOR EFFECTIVE CREDITOR RIGHTS AND INSOLVENCY SYSTEMS, *available at* http://go.worldbank.org/LYCZB7H890; World Bank, *Principles and Guidelines for Effective Insolvency and Creditor Rights Systems* 2 (2001) *available at* http://www-wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2009/04/20/000333038_2009 0420014706/Rendered/PDF/481650WP02001110Box338887B01PUBLIC1.pdf.

[3] World Bank, Principles for Effective Creditor Rights and Insolvency Systems, *supra* note 2 (charting the development of the Principles from 2001 to their most recent amendment in 2011); *see also* World Bank, Creditor Rights and Insolvency ROSC Assessment Methodology (December 2005 Revised Draft), *available at* http://siteresources.worldbank.org/GILD/Resources/ROSC_Methodology_ICR_FINAL_(March_09).pdf.

[4] *See, e.g.,* Yan Liu & Christoph B. Rosenberg, International Monetary Fund, Dealing with Private Debt Distress in the Wake of the European Financial Crisis: A Review of the Economics and Legal Toolbox, IMF Working Paper 13/44 (2013), https://www.imf.org/external/pubs/ft/wp/2013/wp1344.pdf (noting that, despite an urgent need, "there is no established international best practice at all in this area [of household debt restructuring]").

stability.[5] The World Bank's Insolvency and Creditor/Debtor Regimes Task Force (the "Task Force") had been instrumental in developing strategies for evaluating business insolvency systems and practices.[6] Therefore, the Bank turned to this Task Force again at its January 2011 meeting to explore the possibility of producing guidance for treating the expanding epidemic of personal insolvency.

A. Convening the Committee and Creating the Report

The Task Force "generally acknowledged the necessity and importance for international organizations to develop guidance with regard to consumer insolvency law and policy," as well as the "need for the modernization of domestic laws and institutions to enable jurisdictions to deal effectively and efficiently with the risks of individual over indebtedness."[7] Consequently, the World Bank and the Task Force created a special Working Group on the Treatment of the Insolvency of Natural Persons (the "Working Group") to examine the most salient issues, policies, and practices implicated distinctly in the context of personal insolvency, as opposed to the liquidation or restructuring of business entities.[8] The Working Group's specific assignment was "to study the issue of natural person insolvency and produce a reflective document on this matter, suggesting guidance for the treatment of the different issues involved, and taking into account different policy options and the diverse sensitivities around the world."[9]

For the hands-on task of drafting this reflective document, the Working Group reached out to several academics who had concentrated for years on a comparative analysis of the policies and developing practices of treating personal insolvency.[10]

---

[5] Susan Block-Lieb, The World Bank, Best Practices in the Insolvency of Natural Persons: Rapporteur's Synopsis ¶¶ 1, 17 (2011), *available at* http://siteresources.worldbank.org/EXTGILD/Resources/ WB_TF_2011_Consumer_Insolvency.pdf; WB Report, *supra* note 1, ¶ 3.

[6] For a description of this Task Force, see WB Report, *supra* note 1, ¶ 2 (describing the Task Force as "[b]ringing together experienced judges, expert practitioners, academics and policymakers from around the world").

[7] Block-Lieb, *supra* note 5, ¶¶ 14, 17.

[8] *Id.* ¶ 17; WB Report, *supra* note 1, ¶¶ 5-7.

[9] WB Report, *supra* note 1, ¶ 7.

[10] José Garrido, Senior Counsel in the World Bank's Legal Vice Presiden-

Their collective knowledge and perspectives would provide the baseline for drafting a report to be discussed, debated, and adopted over the next two years by the Working Group and the larger Task Force. The drafting committee produced a first draft for discussion at the Working Group's first meeting at the World Bank in Washington, D.C., in November 2011.[11] In response to numerous comments and questions, the committee revised the report over the course of the following year and presented a second draft at the Working Group's second and final meeting in December 2012.[12] Both the Working Group and the Task Force approved the final *Report on the Treatment of the Insolvency of Natural Persons*, which was subsequently published on the World Bank's website, within the Global Insolvency Law Database.[13]

B. Overview of the Report and Its Three Main Themes

As the Working Group's assignment[14] and the name of the document reflect, the *Report* is a "reflective document"; that is, it does not offer prescriptions or even recommendations.[15] Its purpose is to inform policymakers, first as to the need for and many advantages offered by a system for treating personal insolvency;[16] and second as to the characteristics of existing sys-

cy, recruited and actively participated in the drafting committee, providing both vital coordination and extremely insightful comments on the report throughout the drafting process. The drafting committee was chaired by Jason Kilborn, of John Marshall Law School (Chicago, USA), joined by Charlie Booth, of the University of Hawai'i School of Law (USA), Johanna Niemi, of the University of Helsinki Faculty of Law (Finland), and Iain Ramsay, of Kent Law School at the University of Kent (England).

11 WB REPORT, *supra* note 1, ¶ 8; *see also Insolvency and Creditor/Debtor Regimes Task Force Meeting* (2011), *available at* http://go.worldbank.org/X9MIOVN9Y0.

12 WB REPORT, *supra* note 1, ¶ 8; *see also Working Group for the Treatment of the Insolvency of Natural Persons,* WORLD BANK INSOLVENCY LAW DATABASE, (Last updated June 5, 2013)*, available at* http://go.worldbank.org/6NEL6E0A10.

13 *See Statement on the Report on the Treatment of the Insolvency of Natural Persons* (Dec. 14, 2012), http://go.worldbank.org/F28SN44XE0.

14 *See supra* note 9 and accompanying text.

15 WB REPORT, *supra* note 1, ¶ 55.

16 I will use the terms "insolvency" and "over indebtedness" interchangeably, and I will refer to "personal," "individual," and perhaps "consumer" as interchangeable adjectives to describe the subject of the problem to be treat-

tems that have proven most effective and most problematic.[17] An extended introductory section lays an important foundation in winning hearts and minds, implicitly but unmistakably suggesting that more countries should give serious consideration to adopting a system for treating personal over indebtedness.[18] After cataloguing the proper orientation of a personal insolvency system within the context of similar legal structures for combatting, for example, poverty and business insolvency,[19] the *Report* lays out a wide variety of advantages—for creditors, debtors, and society—identified by lawmakers as the reasons for their having adopted personal insolvency regimes.[20] The introductory section concludes with a discussion of several factors that have hindered the adoption or implementation of effective means for addressing personal insolvency. It suggests that fears of moral hazard and fraud by debtors have scant empirical foundation and can be overcome with proper administrative procedures, while struggling with social stigma and reluctance by debtors to seek relief remains the more significant challenge.[21]

As to the optimal way to structure a legal system for treating personal insolvency, the Working Group concluded that no one set of approaches could be identified as the "best" practices in this area, and attempting to impose one standard on widely varying cultures and socio-economic contexts would be unconstructive.[22] Nonetheless, the language of the *Report* clearly indicates that some approaches are preferable to others that have caused substantial problems and rendered existing systems less efficient and less effective.[23]

Indeed, the *Report* references several "precedents" that

---

ed. As to the complications with language, especially the key question of how to refer to the people being treated, the condition being treated, and the system for treating it, see WB Report, *supra* note 1, ¶¶ 17-18.

[17] WB REPORT, *supra* note 1, ¶¶ 10, 55, 391-92.

[18] A preliminary World Bank survey had revealed that "in more than half of the middle and low income countries surveyed there is no system [addressing consumer insolvency] at all." BLOCK-LIEB, *supra* note 5,¶1.

[19] WB REPORT, *supra* note 1, ¶¶ 17-18, 25-52.

[20] *Id.* ¶¶ 56-111.

[21] *Id.* ¶¶ 112-25.

[22] *Id.* ¶¶ 12, 53-55.

[23] WB REPORT*, supra* note *1,* ¶¶ 131-34, 266-67, 277, 279, 285-89, 311-13.

served as source material for its preparation,[24] some of which make explicit recommendations as to at least better, if not best, practices. For example, both the first and second edition of INSOL International's *Consumer Debt Report*[25] contain numerous, specific recommendations. Also, the Council of Europe's *Report on Legal Solutions to Debt Problems In Credit Societies*[26] makes several broad but clear recommendations, which were ultimately adopted formally as human rights norms by the Council of Europe.[27] These and other recommendations from international organizations are reflected in the World Bank's *Report*, and they all form a consistent baseline of at least *minimal* best practice in personal insolvency treatment.[28]

Although the *Report* eschews recommendations as to optimal detail,[29] three major themes stand out from both the *Report* and the recommendations from international organizations that preceded it. These three themes are useful, high-level guidelines by which to evaluate existing and new personal

[24] *Id.* ¶¶ 19-21.

[25] INSOL INTERNATIONAL, CONSUMER DEBT REPORT: REPORT OF FINDINGS AND RECOMMENDATIONS 11-31 (2001), http://www.insol.org/pdf/consdebt.pdf; INSOL INTERNATIONAL, CONSUMER DEBT REPORT II: REPORT OF FINDINGS AND RECOMMENDATIONS 13-24 (2011).

[26] Johanna Niemi-Kiesiläinen & Ann-Sofie Henrikson, Bureau of the European Committee on Legal Co-Operation *Report on Legal Solutions to Debt Problems In Credit Societies* (2005).

[27] A working group formulated a series of final recommendations and an explanatory memorandum in February 2007. *Final Activity Report of the Group of Specialist for Legal Solutions to Debt Problems (CJ-S-DEBT)* (2007). These recommendations were adopted by the Committee of Ministers of the Council of Europe in June 2007. *Legal solutions to debt problems: Recommendation Rec(2007)8 and explanatory memorandum, available at* https://wcd.coe.int/ViewDoc.jsp?id=1155927&Site=CM&BackColorInternet=9999CC&BackColorIntranet=FFBB5 5&BackColorLogged=FFAC75#.

[28] For a survey and analysis of several prominent recommendations from international organizations, *see* JASON J. KILBORN, EXPERT RECOMMENDATIONS AND THE EVOLUTION OF EUROPEAN BEST PRACTICES FOR THE TREATMENT OF OVERINDEBTEDNESS, 1984-2010 (2011).

[29] The Report discusses several topics under the heading "Core Legal Attributes of an Insolvency Regime for Natural Persons," including, in addition to the major themes discussed below, (i) institutional framework (placement within the corpus of the law, the roles of advisers, counselors, and courts versus administrative agencies, financing issues), (ii) access and restrictions on access, (iii) limited creditor participation, (iv) liquidation of estate property and exemptions from liquidation, (v) plan supervision and modification, and (vi) special consideration of the payment of mortgages and other secured loans. WB Report, *supra* note 1, ¶¶ 139-261, 302-09, 319-53.

insolvency systems, as this paper will do in the following Part.

First, as mentioned above,[30] the most powerful overarching theme of the *Report* is that countries who have not already done so should implement a formal legal mechanism by which over indebted persons can seek relief in the form of a forced discharge of some or all[31] of their debts.[32] This has been a unifying and consistent theme of previous recommendations from international organizations spanning the past twenty years.[33] The Task Force's public statement announcing the completion of this project stresses that "[a]n effective regime for the insolvency of natural persons is of crucial importance for economic development and financial inclusion."[34]As the World Bank's preliminary survey reveals, however, many high-, middle-, and low-income countries continue to resist the notion of freeing individuals from their legitimate contractual and delictual obligations.[35] Perhaps this will begin to change as the World Bank adds its voice and gravitas to the chorus of those calling for personal insolvency relief.

Second, the *Report* echoes another earlier theme relating to negotiated workouts, though in decidedly less sanguine terms. For a variety of reasons, most importantly avoiding the costs and other burdens of formal intervention, the *Report* notes a widespread policy preference for debtors *not* to use the formal relief system.[36] Instead, debtors are encouraged to seek informal— or at least out-of-court—negotiated solutions to their financial distress. This was another prominent theme of earlier international recommendations, almost as unifying as

[30] *See* WB REPORT, *supra* notes 1¶¶ 17-18, 25-52, 56-111; BLOCK-LIEB, *supra* note 5 and accompanying text.

[31] The *Report* is more explicit in its preference for a broad discharge, not riddled with exceptions and exclusions. WB REPORT, *supra* note 1, ¶ 367 ("[I]t is important that as many of the debtor's debts as possible be included in the scope of the discharge.").

[32] *Id.* ¶¶ 354, 444 (observing that an essential element of economic rehabilitation, and a precondition for the many benefits outlined in the introductory section, is that "the debtor has to be freed from excessive debt").

[33] *See* KILBORN, *supra* note 28, at 18.

[34] *Statement on the Report on the Treatment of the Insolvency of Natural Persons,* THE WORLD BANK, INSOLVENCY LAW DATABASE, (Dec. 14, 2012), *available at* http://go.worldbank.org/F28SN44XE0.

[35] *See* BLOCK-LIEB, *supra* note 18.

[36] WB REPORT, *supra* note 1, ¶¶ 128-30.

the desire for a compulsory discharge.[37]

The World Bank's *Report* distinguishes itself from earlier commentary on the preference for voluntary solutions, however, by emphasizing the practical challenges to achieving this theoretically attractive goal. Noting that "the merits of voluntary settlements are often illusory," the *Report* cites the dangers of long delays and debtors being pressured to agree to "onerous payment plans that are not viable" and reveals that, for a variety of powerful reasons, only a small portion of cases have concluded with voluntary settlements even where institutional support for such negotiations was present.[38] In fact, the *Report* notes one country's abandonment of an earlier requirement that debtors seek voluntary workouts as a prerequisite to entry into the formal relief system due to the inevitable failure of such negotiations.

If out-of-court, negotiated settlements are to have any chance of success, the *Report* points out that, "some institutional support and incentives are needed," including free or low-cost assistance from professional advisors with experience negotiating with creditors.[39] The most substantial successes have emerged when a government regulator has played a more direct guiding role, such as by adopting codes of conduct for creditor behavior in such negotiations.[40]

The third and final most salient theme relates to the conditions for relief, the *quid pro quo* to be expected of debtors in exchange for the extraordinary relief of discharge of legitimate debt. A general desire for a careful balance between debtor and creditor interests came through powerfully in the Working Group's discussions and is reflected in the *Report*.[41] A crucial aspect of that balance is an almost universal demand in existing systems that debtors earn their fresh start by subjecting themselves to a rehabilitation plan and endeavoring to make some level of installment payments to creditors.[42] The core of this third theme is that these rehabilitation plans should be

[37] *See* KILBORN, *supra* note 28, at 23-24.
[38] WB REPORT, *supra* note 1, ¶¶ 131, 133-34, 404.
[39] *Id.* ¶¶ 135, 137.
[40] *Id.* ¶ 136.
[41] *See, e.g., id.* ¶¶ 57, 115, 270, 283.
[42] *Id.* ¶¶ 262, 356.

formulated with care, sensitive to the capacity of debtors to bear whatever burdens are imposed on them.[43] This key aspect of insolvency administration has been the focus of other international recommendations, as well, with a consistent emphasis on moderating burdens and respecting debtors' human dignity.[44] Expectations that these payment plans will produce substantial returns for creditors are destined for disappointment.[45]

The *Report* catalogues potential challenges in terms of both plan duration and the amount of payment debtors are called on to make to creditors over the life of the plan.[46] It cautions that there seems to be an "inverse relationship between plan length and plan success";[47] that is, longer plans fail, and the goals of an insolvency treatment system will be undermined if fewer debtors enter or are successful due to extended payment plans.[48] Likewise with respect to payment expectations, the *Report* is critical of any requirement of a minimum required payment or percentage dividend to creditors, which "invariably produces undesirable results," depriving "[s]ignificant numbers of 'honest but unfortunate' debtors" of needed relief.[49] The most effective approach to determining payment demands "is less a matter of defining a predetermined benefit for creditors than of defining a predetermined level of sacrifice for debtors."[50] This sacrifice is most effectively based on a legislative determination of reasonable subsistence budgets sufficient to sustain a modest but dignified lifestyle for various types of debtors and families, with "surplus" income dedicated to creditors.[51]

The *Report* is roundly critical of relying on judicial or administrative discretion in determining either the length or the payment demands of such rehabilitation plans.[52] "The appro-

[43] *Id.* ¶ 358 ("A realistic view of debtors' situations, however, often leads to prioritizing more lenient and shorter payment plans …").

[44] *See* KILBORN, *supra* note 28, at 53.

[45] WB REPORT, *supra* note 1, ¶¶ 264-65, 298-300, 312.

[46] *Id.* ¶¶ 262-301.

[47] *Id.* ¶ 270.

[48] *Id.* ¶ 265.

[49] *Id.* ¶ 357.

[50] *Id.* ¶ 274.

[51] Id.

[52] Id. ¶¶ 267, 285-89.

priate measure of sacrifice to be demanded of debtors in exchange for whatever relief an insolvency system offers is a crucial and inherently political decision," the *Report* asserts, concluding that "[s]uch a central issue of public policy is likely better made by a legislature or other representative entity, rather than by the administrators of the insolvency system."[53]

III. REFLECTIONS IN THE NEWEST PERSONAL INSOLVENCY LAWS: COLOMBIA, ITALY, IRELAND

The *Report* is based on observations of developments in systems in place before 2012. It was drafted in the hope that it might provide some useful guidance to policymakers in the process of developing new laws for treating personal over indebtedness.[54] This Part looks at three of the newest personal insolvency regimes to identify the degree to which the main themes of the *Report* are reflected in the general approaches and specific provisions of these new laws.

To the extent that the record reflects this, it also searches for evidence that the *Report* had any direct impact on policymakers' decision-making processes. Examination of the legislative process in Colombia, Italy, and Ireland reveals that the World Bank project had a direct impact in at least one of these countries, and the results in all three nations reflect—to varying degrees and in quite different ways—a desire to conform to the *Report*'s three main themes.

A. Colombia

The most powerful example of the influence of the *Report* is presented in the case of Colombia. Not only are the themes of the *Report* reflected in Colombia's new personal insolvency law, but the content of that law changed dramatically as a direct result of the World Bank project.

Colombian policymakers had for some time been concerned about protecting over indebted individuals, especially those not engaged in commercial activity. A formal bankruptcy system for businesses and individual merchants had been in place in

[53] *Id.* ¶ 290.
[54] *Id.* ¶¶ 7, 10, 22, 55.

one form or another in Columbia for over a century.[55] But never had the law addressed the specific concerns of over indebted individuals not engaged in commerce.[56]

The lack of attention to consumer debtors became the subject of serious concern in 2007 when the Constitutional Court was reviewing the latest in a series of insolvency laws, which explicitly excluded individual debtors not engaged in commerce.[57] In its order, the Court exhorted the Colombian Congress to implement a regime specifically aimed at addressing the insolvency of non-merchant individuals.[58] On 31 July 2008, several members of the House of Representatives (*Cámara de Representantes)* introduced a bill to respond to the Constitutional Court's call to action.[59] The motivation behind the law was expressed not in humanitarian terms, but in a desire to enhance productivity and protect the availability of consumer credit by allowing over indebted, non-merchant individuals to rehabilitate their finances and "be reintegrated rapidly into the financial system."[60]

The 2008 bill did not, however, propose an insolvency regime along the lines ultimately envisioned in the World Bank *Report*. It did not provide for a mandatory discharge of debts that the consumer debtor was unable to pay. Instead, this new system was introduced and structured simply as "a procedure for negotiation of debts."[61] Though novel in its focus, this legislative initiative did little more than provide a brief stay of debt enforcement procedures and explicitly assign the task of debt settlement negotiation to the existing network of Conciliation

---

[55] Ponencia para Primer Debate al Proyecto de Ley Numero 346 de 2009 Senado, 055 de 2008 Camara, *Gaceta del Congreso* 912/2009 (17 Sept.) at 1-2 (describing the history of Colombian bankruptcy law).

[56] Proyecto de Ley Numero 055 de 2008 Camara, *Gaceta del Congreso* 494/2008 (1 Aug.) at 8.

[57] *Id.* (citing article 3, point 8, of Law 1116 of 2006, excluding from the insolvency regime "natural persons who are not merchants").

[58] *Id.* (citing Constitutional Court Judgment C-699 of 2007); *see also* Ponencia, *supra* note 55, at 2-4 (quoting the Constitutional Court decision extensively).

[59] Proyecto, *supra* note 56, at 4, 9 (noting the date of introduction of House Bill 055 of 2008, "whereby a regime of insolvency for non-merchant natural persons is established").

[60] *Id.* at 7-9.

[61] *Id.* at 8.

Centers,[62] which had been created as part of a National Conciliation Program in 1991.[63] This limited "debt conciliation" approach passed through both houses of Congress and in January 2010 became the first legal regime in South America specifically designed to address the insolvency of non-merchant individuals.[64]

The new law was short-lived. The Constitutional Court declared it void on technical procedural grounds, as the final vote adopting the reconciled bill was held in an extraordinary session of Congress, which had not been properly announced by a timely published decree.[65] Luckily for Colombian consumers, their legislators continued to pursue the goal of implementing the first South American personal insolvency regime. A much larger project to reenact the Code of Civil Procedure was proceeding through Congress, so within weeks of the Constitutional Court's judgment, lawmakers in the House of Representatives attached the personal insolvency provisions to the bill for the new Code of Civil Procedure, adding a new Title on the insolvency regime for non-merchant natural persons.[66] These provisions remained, however, "in essence eminently conciliatory," still not providing for any compulsory discharge of debt.[67]

Meanwhile, the Justice Ministry appointed several experts to reexamine the personal insolvency provisions incorporated

[62] *Id.* at 4-7 (providing in articles 4-18 for a negotiation procedure with a stay of ongoing execution proceedings, but otherwise not constraining creditors' right to reject workout agreements and recommence execution).

[63] *See* MINISTERIO DEL INTERIOR Y DE JUSTICIA, CONCILIACION Y ARBITRAJE: NORMATIVIDAD, JURISPRUDENCIA Y CONCEPTOS [MINISTRY OF INTERIOR AND JUSTICE, CONCILIATION AND ARBITRATION: REGULATION, JURISPRUDENCE AND CONCEPTS]145-46, 175, (2d ed. 2007), *available at* http://www.conciliacion.gov.co/archivos/documentos/Publicaciones/Libro%20conciliacion%20y%20arbitraje%202007.pdf.

[64] Law 1380 of 2010, *Diario Oficial* 47603 (25 Jan. 2010).

[65] Constitutional Court Communication no. 38, Judgment C-685 (19 Sept. 2011), http://www.corteconstitucional.gov.co/comunicados/No.%2038%20comunicado%2019%20y%2021%20de%20septi embre%20de%202011.php; Corte tumbó Ley de Insolvencia Económica para personas naturales [Court overturns Law on Economic Insolvency for natural persons], *Elpaís.com.co* (20 Sept. 2011), http://www.elpais.com.co/elpais/economia/corte-tumbo-ley-insolvencia-economica-para-personas-naturales.

[66] Informe de Ponencia para Segundo Debate al Proyecto de Ley Número 196 de 2011 Cámara, *Gaceta del Congreso* 745/2011 (4 Oct.) at 29-30, 211-23.

[67] *Id.* at 30.

into the new Code of Civil Procedure.[68] Among the individuals appointed to this group was the main insolvency law expert-advisor to the Superintendent of Companies,[69] the Colombian agency in charge of business bankruptcy and restructuring proceedings.[70] Coincidentally, this expert is also a member of the World Bank's Insolvency and Creditor/Debtor Regimes Task Force and its Working Group on the Treatment of the Insolvency of Natural Persons.[71] Consequently, the Superintendent of Companies had access to the first draft of the World Bank *Report*, presented to the Working Group in November 2011.[72]

The Superintendent of Companies' insolvency expert commended the approach of the World Bank *Report* to the other experts appointed by the Ministry of Justice, in particular "the need to include the 'discharge' as part of the new policy."[73] The Ministry of Justice's expert group reformulated the personal insolvency provisions, most notably to include a compelled discharge of debt after distribution of the value of the debtor's non-exempt assets—the most essential theme of the World Bank *Report*.[74] After the revised articles on debt negotiation and discharge were approved by the Ministry of Justice, the Government proposed that these provisions be included in the

[68] Email from Diana Lucia Talero Castro, Superintendency of Companies, to author (July 26, 2013)(on file with author).

[69] *Id.*

[70] Superintendencia de sociedades, *Objetivo Misional,* http://www.supersociedades.gov.co/delegatura-para-procesosde-insolvencia/objetivo-misional/Paginas/default.aspx.

[71] The expert's name appears on the member list of the Working Group, which is not a public document but is on file with author. For the background of these two groups, see *supra* notes 6 and 8 and accompanying text.

[72] *See supra* note 11 and accompanying text. WB REPORT, *supra* note 1, ¶ 8; *see also Insolvency and Creditor/Debtor Regimes Task Force Meeting* (2011), *available at* http://go.worldbank.org/X9MIOVN9Y0.

[73] Email from Diana Lucia Talero Castro, *supra* note 68; *see also* Diana Lucia Talero Castro, *Insolvency of Natural Persons in Colombia* slide 3, http://siteresources.worldbank.org/EXTGILD/Resources/5807554-1357753286498/Colombia_Talero.pdf (PowerPoint presentation at World Bank, 13 Dececember 2012, noting the new Colombian law is "[b]ased on the World Bank's report on the treatment of the Insolvency of Natural Persons").

[74] *See* WB REPORT*, supra* notes 1¶¶ 17-18, 25-52, 56-111, 367, 354, 444; BLOCK-LIEB, *supra* note 5; KILBORN, *supra* note 28 at 18 and accompanying text.

final bill on the Code of Civil Procedure.[75] Supportive Senators agreed to do so in March 2012, immediately preceding the first debate on the bill in the Senate (*Senado*).[76]

Now Title IV of Section Three of Book Three of the Code of Civil Procedure,[77] the debt negotiation and discharge provisions passed through the legislative reconciliation process[78] and emerged as part of Law 1564 of 12 July 2012.[79] The provisions enacting the new personal insolvency regime became effective on 1 October 2012,[80] though it took a few more months for the necessary regulatory framework to be put in place by the Ministry of Justice on 21 December 2012.[81]

Thanks to the efforts of the Ministry of Justice and the Superintendent of Companies, the new Colombian personal insolvency rules clearly reflect the first major theme of the World Bank *Report*: After the distribution among creditors of whatever non-exempt assets the debtor possesses, any debts remaining unpaid "mutate into natural obligations";[82] that is, they are legally discharged, becoming morally but not legally enforceable, as "[u]nsatisfied creditors of the debtor cannot pursue assets that the debtor acquires after the initiation of the liquidation procedure."[83] This is just the sort of relief envisioned and encouraged in the World Bank *Report*,[84] and the new Colombian law implements it in a particularly effective and efficient

[75] Email from Diana Lucia Talero Castro, *supra* note 68.

[76] Informe de Ponencia para Primer Debate Proyecto de Ley Número 159 de 2011 Senado, 196 de 2011 Cámara, *Gaceta del Congreso* 114/2012 (28 Mar.) at 49-114.

[77] Articles 531 to 576.

[78] Informe de Conciliación al Proyecto de Ley Número 159 de 2011 Senado, 196 de 2011 Cámara, *Gaceta del Congreso* 316/2012 (6 June) (adopting the bill as passed in the second debate in the Senate).

[79] L. 15/109, julio 12, 2012, DIARIO OFICIAL [D.O.] (Colom.).

[80] Ley 1564 de 2012 art. 627(4).

[81] Ministerio de Justicia y del Derecho, Decreto Número 2677 de 21 dic. 2012.

[82] CÓDIGO DE PROCEDIMIENTO CIVIL [C.P.C.] [CODE OF CIVIL PROCEDURE] art. 571(1) [hereinafter "CODE OF CIVIL PROCEDURE"].

[83] *Id.*; *see also* CODE OF CIVIL PROCEDURE, *supra* note 82, art. 565(2) ("[A]ssets that the debtor acquires after [the opening of insolvency proceedings] may only be pursued by creditors of obligations contracted after this date.").

[84] *See* W.B. REPORT *supra* note 1, ¶¶ 367, 354, 444 31-32 and accompanying text.

way. This is a rare case of two ongoing projects overlapping quite by coincidence, such that one had a direct and salutary impact on the other.

The Colombian law powerfully reflects the second of the World Bank *Report*'s three themes, as well, with its emphasis on and institutional support for voluntary negotiation with creditors. As with many other national laws, the Colombian law is structured around a distinct preference for voluntary, private or semi-private negotiation, without formal intervention. The law was originally conceived to be only this, a platform for facilitating private workouts of excessive personal debt.[85] Until the serendipitous convergence between the progressing Colombian bill and the World Bank project via the dual participation of the Superintendent of Companies, the Colombian law contained little more than a hint of interference with private ordering and negotiation.[86] Even in its final form, though, the Colombian personal insolvency law still distinctly favors voluntary conciliation between overburdened debtors and their creditors. Debt negotiation is still listed as the first objective of the law,[87] the provisions on debt negotiation proceedings are listed first,[88] and the only avenue for seeking relief via a liquidation and discharge is through an attempted but unsuccessful debt negotiation proceeding.[89]

Most important, and also reflecting the World Bank *Report*'s observations on the challenges of out-of-court workouts, the Colombian regime supports the desired informal solutions in two particularly impressive ways. First, private debt negotiation fits quite comfortably within a well-established national program of conciliation of private disputes.[90] A network of conciliation centers spans the country, providing a ready support

[85] *See supra* notes 61-64 and accompanying text.

[86] *See supra* notes 73-76 and accompanying text.

[87] CODE OF CIVIL PROCEDURE, *supra* note 82, art. 531 (listing the law's three objectives, two of which involve debt negotiation).

[88] *Id.* arts. 538-62.

[89] *Id.* art. 563 (providing for the opening of a liquidation-and-discharge proceeding only upon the failure of an attempted debt negotiation under the preceding provisions, a declaration of nullity of a previously negotiated workout agreement, or the debtor's failure to fulfill a previously negotiated workout agreement).

[90] On the national conciliation program, spearheaded by the Ministry of Justice and Law, *see* http://www.conciliacion.gov.co/.

mechanism for non-merchant individuals who otherwise would be unlikely to have the knowledge and skill to represent themselves effectively in debt negotiations with creditors.[91] This is precisely the kind of support network that the World Bank *Report* envisions in its comments on overcoming the numerous barriers to effective privately negotiated solutions.[92]

Second, another key provision entered the law at the same time as the discharge provision, a new way of regulating when a "voluntary" workout plan has been accepted and is effective. Without formal intervention, the simple rule of contract law would be that a plan that binds any creditor would have to be accepted by each creditor, since no one creditor's contractual rights can be altered unilaterally by the debtor, without that creditor's consent.[93] The Colombian law ensures that an acceptable workout agreement cannot be undermined by a dissenting minority of holdout creditors, however, in its unique provision on the validity of negotiated plans. For a debt negotiation agreement (called in the law a "payment agreement"[94]) to be valid and effective, it must encompass all of the debtor's creditors,[95] but it need not be approved by all creditors; rather, at least two creditors holding claims exceeding 50% of the debtor's total *principal* debt load must approve the agreement.[96] That is, even if creditors holding 49% of the value of all claims against the debtor reject a proposed payment plan, the plan is

---

[91] *See supra* notes 62-63 and accompanying text; *see also* CODE OF CIVIL PROCEDURE, *supra* note 82, art. 533 (assigning responsibility for debt negotiation proceedings first to the existing conciliation centers "expressly authorized by the Ministry of Justice and Law to facilitate [advance] this type of proceedings, via conciliators registered in their lists" as well as to notary offices, who also have registered conciliators with the proper training required by regulation); Ministry of Justice and Law, Decree no. 2677 of 21 December 2012, art. 13-15 (requiring specialized training for personal debt conciliators); Ministry of Justice and Law, Resolution no. 21 of 15 June 2013 (outlining the minimum content of training programs for conciliators). Both of these regulations are available, in Spanish only, online at http://www.conciliacion.gov.co/paginas_detalle.aspx?idp=173.

[92] *See* W.B. REPORT *supra* note 1, ¶135, 137.

[93] *See, e.g.,* W.B. REPORT, *supra* note 1, ¶ 134 (noting that "one of several creditors may make settlement impossible through a veto").

[94] CODE OF CIVIL PROCEDURE, *supra* note 82, art. 553 ("*Acuerdo de pago*").

[95] *Id.* art. 553(3).

[96] *Id.* art. 553(2) (excluding claims for interest, fines, and penalties, legal or contractual, from the total debt load).

nonetheless imposed on these dissenters if creditors holding a majority of the value of claims approves the plan. If this plan is successfully completed by the debtor,[97] all of the claims encompassed within the plan are considered fully satisfied, and no further enforcement may be pursued on those claims against the debtor, co-debtors, or guarantors.[98]

Finally, the Colombian law takes a rare approach in rejecting the third theme of a required payment plan as part of the "earned start" discharge process. The alternative to a negotiated payment plan is a distribution to creditors of the debtor's available assets, followed by an immediate and unconditional discharge—without any provision for payments from the debtors' future income.[99] Perhaps this is part of a larger strategy that dovetails with the law's emphasis on voluntary conciliation. As noted above,[100] the Colombian regime requires debtors to seek assistance from conciliation centers (or other sources) for negotiating settlement arrangements with creditors before seeking coercive relief in the form of a discharge.[101] But the law indirectly pressures creditors to accept whatever payment the debtor reasonably has to offer from his or her future income, since if creditors reject that, they are likely to receive little or nothing of value from the debtor's meagre present assets. Most personal insolvency cases around the world reveal little or no value in the debtor's present assets.[102] By refusing to allow creditors to access debtors' future income in the liquidation-and-discharge process, the Colombian law may have struck on an ingenious strategy for leveraging greater voluntary payment agreements in the first stage of insolvency proceedings.

[97] The expected duration of such plans is five years, though longer terms are allowed with the assent of 60% of creditors or for claims with an original maturity period exceeding five years. *Id.* art. 553(10).

[98] *Id.* art. 558.

[99] *Id.* arts. 563-71.

[100] *See supra* note 89 and accompanying text.

[101] The Colombian regime thus joins that in "many countries" with a two-stage procedure of required negotiation followed by formal, compelled insolvency relief. *See* W.B. REPORT, *supra* note 1, ¶ 129.

[102] *See id.* ¶ 221 (noting that "the overwhelming majority of debtors in every existing system … have proven to have few if any assets of any value that are available for liquidation and distribution to creditors").

B. Italy

Italy took an almost identical path to its first personal insolvency regime as did Colombia. The final result, however, was markedly different. Just as Colombia did, Italy started down this path hesitantly, adopting a law in January 2012[103] that simply provided a statutory framework for negotiated debt settlements.[104] Indeed, such settlements were binding only on creditors who agreed, requiring full (though slightly deferred) payment to dissenting creditors.[105] Moreover, debtors could propose such settlements to their creditors only with the intermediation of so-called Crisis Composition Bodies (*Organismo di composizione della crisi*), a new institution whose members would be drawn from business mediation bodies and professional associations of lawyers, notaries, and accountants.[106] The fledgling negotiation procedure was all but doomed to failure, and in the first eight months of its effectiveness, only two cases were filed, one each in Rome and Florence.[107]

The Government had anticipated this problem. It had attempted twice in the first months of 2012 to propose more effective relief in the form of a non-negotiated discharge, but its

---

[103] Law of 27 January 2012, no. 3 (G.U. no. 24, 30 Jan. 2012), Disposizioni in materia di usura e di estorsione, nonché di composizione delle crisi da sovraindebitamento [Regulation on usury and extortion, as well as on settlement of overindebtedness crises] [*hereinafter* Law 3/2012].

[104] *Study on Means to Protect Consumers in Financial Difficulty: Personal Bankruptcy, datio in solutum of Mortgages, and Restrictions on Debt Collection Abusive Practices, London Economics* 64 (Contract No MARKT/2011/023/B2/ST/FC 2012), *available at* http://ec.europa.eu/internal_market/finservices-retail/docs/fsug/papers/debt_solutions_report_en.pdf.

[105] *Id.; see also* Giorgio Cherubini, *New Italian law for over-indebtedness,* EUROFENIX (Winter 2012/13) at 36, online at www.insol-europe.org/download/file_/8408.

[106] Cherubini*, supra* note 105 , at,37 n. 4.

[107] Decreto di Legge 18 ottobre 2012, n. 3533 (It.). no. 3533, Conversione in legge del decreto-legge 18 ottobre 2012, n. 179, recante ulteriori misure urgenti per la crescita del Paese (19 Oct. 2012) [Draft Law no. 3533, Conversion into law of decree-law 18 October 2012, n. 179, concerning further urgent measures for the country's growth], Relazione [Introductory Report of the Government] at 39, online at http://www.senato.it/japp/bgt/showdoc/16/DDLPRES/681211/index.html; http://www.legautonomie.it/content/download/8831/46405/file/S.3533.pdf [*hereinafter* Relazione 179/2012].

efforts had been rebuffed by the legislature.[108] While the record contains no indication that the Government's reform efforts were influenced by the World Bank *Report*, the first draft of which had just been released a few months earlier at the end of 2011, the timing is remarkable.[109]

Finally in the fall of 2012, the Government tied its desired insolvency reforms to a much larger bill aimed at spurring economic growth.[110] Introducing the new personal insolvency provisions, the Government attributed the "structural failure" of the January 2012 debt settlement law to Italy's failure to conform its laws to comparative analysis: "all countries in which a regulation is provided for the resolution of economic crises like the one with which we are dealing, have opted for a bankruptcy instrument with a discharge, and not negotiated [solutions] of a transitory nature."[111] Further shaming legislators with this comparative point, the Government observed that even neighboring Greece had adopted a personal discharge law in 2010, leaving Italy in the company of countries such as China, Vietnam, Bulgaria, Ukraine, and Hungary without an effective discharge law.[112] The legislature reacted swiftly, passing the proposed reforms of Law No. 3 of January 2012 into law on 17 December 2012.[113]

Reflecting the World Bank *Report*'s first theme, the reform law modifies the earlier Law no. 3 of 2012 to include an express provision for a non-negotiated discharge of unsatisfied debts following official liquidation of the debtor's non-exempt proper-

---

108 *Id.*

109 Moreover, the Working Group and the Task Force included several Italian members, one of whom later wrote of Decree-Law 179/2012 that it represented Italy's coming into line with other Western systems "in conformity with the recommendations of the World Bank." Luciano Panzani, *La Composizione della Crisi da Sovraindebitamento dopo il D.L. 179/2012*, at 2 (2013) [Settlement of Overindebtedness Crises per Decree-Law 179/2012], http://www.treccani.it/magazine/diritto/approfondimenti/diritto_processuale_civile_e_delle_procedure_concorsuali/ 2_Panzani_sovraindebitamento_2.html.

110 Decree-Law of 18 Oct. 2012, no. 179, Ulteriori misure urgenti per la crescita del Paese art. 18 [Further urgent measures for the country's growth] (G.U. no. 245, 19 Oct. 2012, ordinary supplement, at 20-28).

111 *Id.*

112 *Id.*

113 Law 17 Dec. 2012, no. 221, art. 18 (G.U. no. 294, 18 Dec. 2012, ordinary supplement, at 21-23).

ty.[114] The liquidation process unfolds over the course of four years, however, and any and all non-exempt property the debtor acquires during this period must be turned over to the liquidator.[115] This includes a portion of the debtor's income during this four-year period, as discussed below. Indeed, the Italian law is explicit in its expectation that the debtor will do everything reasonably possible to earn a fresh start. Among the requirements for discharge is that the debtor, during the four-year liquidation period, "has engaged in … income-producing activity commensurate with his own abilities and the situation of the market or, in any case, has sought work and has not refused, without justification, any proposals for employment."[116] The Italian law thus takes the more common "earned start" approach, rather than the straight "fresh start" approach of the Colombian law.[117]

The second World Bank theme of favoring settlements is reflected here, as well. As in the case of Colombia, Italy began in January 2012 with a simple framework for facilitating voluntary settlements with creditors.[118] Only at the end of that year did the notion of a court-ordered discharge enter the law, and the liquidation procedure is tellingly described as an "alternative to the proposal for crisis settlement."[119] Unlike the Colombian law, the liquidation and discharge in the Italian law are not secondary and succeed proceedings to the preferred settlement negotiations. This is a free-standing procedure; debtors need not seek any compromise with their creditors before pursuing liquidation-and-discharge relief.[120]

---

[114] Law 3/2012, *supra* note 103, art. 14-terdecies (offering "the benefit of a clearance of residual debts").

[115] *Id.* arts. 14-quinquies (4), 14-novies (2), (5), 14-undecies.

[116] Law 3/2012, *supra* note 103, art. 14-terdecies (1)(e). This fairly uncommon provision is strikingly similar to an earlier one in the German law governing personal insolvency and discharge. *See* Ins [Insolvency Act] § 295(1)(1) (2013), *available at* http://www.gesetze-im-internet.de/inso/__295.html.

[117] *See supra* note 42 and accompanying text.

[118] *See supra* notes 103-104 and accompanying text.

[119] Law 3/2012, *supra* note 103, art. 14-ter. (1).

[120] Law 3/2012, *supra* note 103, art. 14-ter (listing the requirements for opening liquidation proceedings, not including debt settlement negotiation); *See* also Law 3/2012, *supra* note 103, art. 14-decies (listing the conditions for a discharge, not including debt settlement negotiation).

Further potentially weakening the debt settlement process, the Italian proceeding is not constructed on as solid a foundation as that in Colombia[121] (or, as discussed below, Ireland).[122] On the one hand, the Italian law recognizes the need for institutional support for debtors in proposing and administering debt settlement plans. But it continues to rely on newly-

[121] *See* conciliation program, *supra* note 90; *See also* CODE OF CIVIL PROCEDURE, *supra* note 82, at art. 533 (assigning responsibility for debt negotiation proceedings first to the existing conciliation centers "expressly authorized by the Ministry of Justice and Law to facilitate [advance] this type of proceedings, via conciliators registered in their lists" as well as to notary offices, who also have registered conciliators with the proper training required by regulation); Ministry of Justice and Law, Decree no. 2677 of 21 December 2012, art. 13-15 (requiring specialized training for personal debt conciliators); Ministry of Justice and Law, Resolution no. 21 of 15 June 2013 (outlining the minimum content of training programs for conciliators). Both of these regulations are available, in Spanish only, online at http://www.conciliacion.gov.co/paginas_detalle.aspx?idp=173; Proyecto, *supra* note 56, at 4-7(providing in articles 4-18 for a negotiation procedure with a stay of ongoing execution proceedings, but otherwise not constraining creditors' right to reject workout agreements and recommence execution); *see* MINISTERIO DEL INTERIOR Y DE JUSTICIA, CONCILIACIÓN Y ARBITRAJE, *supra* note 63, at 145-146,175.

[122] Proyecto, *supra* note 56, at 4-7(providing in articles 4-18 for a negotiation procedure with a stay of ongoing execution proceedings, but otherwise not constraining creditors' right to reject workout agreements and recommence execution); *see* MINISTERIO DEL INTERIOR Y DE JUSTICIA, CONCILIACION Y ARBITRAJE, *supra* note 63, at 145-146,175;*See* conciliation program, *supra* note 90; *See also* CODE OF CIVIL PROCEDURE, *supra* note 82, art. 533 (assigning responsibility for debt negotiation proceedings first to the existing conciliation centers "expressly authorized by the Ministry of Justice and Law to facilitate [advance] this type of proceedings, via conciliators registered in their lists" as well as to notary offices, who also have registered conciliators with the proper training required by regulation); Ministry of Justice and Law, Decree no. 2677 of 21 December 2012, art. 13-15 (requiring specialized training for personal debt conciliators); Ministry of Justice and Law, Resolution no. 21 of 15 June 2013 (outlining the minimum content of training programs for conciliators). Both of these regulations are available, in Spanish only, online at http://www.conciliacion.gov.co/paginas_detalle.aspx?idp=173.; *See also* Cherubini, *supra* note 105, at 37 n.4..; Law 3/2012, *supra* note 103, arts. 7(1), 9, 11, 13, 15 (establishing in Article 15 that these bodies' qualifications and permissible fees will be regulated by the Ministry of Justice in consultation with the Ministry of Economic Development and Ministry of Economy and Finance).;*See* PIA 2012 §§ 48-54, 64, 75, 98, 112, 159-86; Insolvency Service, *What is a personal insolvency practitioner?* INSOLVENCY SERV. OF IR, http://www.isi.gov.ie/en/ISI/Pages/Practitioner (providing numerous links with further information).; *See* PIA 2012 §§ 7-24. (The Insolvency Service has a very useful website available at www.isi.gov.ie); *See* WB Report, *supra* note 1, ¶¶ 135, 137.

established and untested "Crisis Composition Bodies"[123] to evaluate debtors' financial history and future payment capacity, formulate proposed settlement plans, evaluate such plans and report to the court, collect creditor votes on proposals, and administer plans accepted by creditors.[124] It remains to be seen how this new institution will develop, especially given the law's insistence that, from the constitution and operation of these bodies, there "shall not derive any new or additional burdens on public finance."[125] One commentator has already expressed some doubt in light of the patently conflicting interests these bodies are called upon to serve.[126]

Moreover, the desired benefits of the settlement alternative are undermined by a greater than usual degree of participation by the courts. The proceeding is initiated with a court filing of the debtor's proposed plan and a detailed report from the Crisis Composition Body on, among other things, the plan's feasibility.[127] The court assesses the proposal and sends it to creditors to solicit their assent (or rejection).[128] Finally, the court must pass on any objections to the plan and confirm its implementation.[129] While this process is an improvement over full-blown court-based litigation, it leaves something to be desired in terms of unencumbering the courts and delegating authority to the out-of-court support system.

On the positive side, like the Colombian law,[130] the Italian rules include powerful leverage measures against holdouts from settlements. Creditors who fail to vote on the debtor's

[123] Cherubini, *supra* note 105, at 36, 37 n.4.; Law 3/2012, *supra* note 103, art. 15 (establishing that these bodies' qualifications and permissible fees will be regulated by the Ministry of Justice in consultation with the Ministry of Economic Development and Ministry of Economy and Finance).

[124] Law 3/2012, *supra* note 103, arts. 7(1), 9, 11, 13, 15.

[125] *Id.* art. 15(4) (noting some availability of financing for such bodies under current law). One commentator reacts to this limitation of funding by concluding "[t]his provision does not leave much hope in terms of professionalism and efficiency." *See also* Panzani, *supra* note 109, at 15.

[126] *See* Panzani, *supra* note 109, at 29.

[127] Law 3/2012, *supra* note 103, art. 9.

[128] *Id.* arts. 10,11(1) (directing creditors to submit their votes to the Crisis Composition Body).

[129] *Id.* arts. 12,13.

[130] *See supra* notes 96-98 and accompanying text.

settlement proposal are deemed to assent to it.[131] So long as creditors holding at least 60% of all claims either vote or are deemed to vote in favor of the proposal, the settlement becomes binding on all ordinary creditors.[132] Given the lack of financial support for the institutions in the center of this process, as well as the ease with which debtors can seek more direct and predictable relief in the liquidation-and-discharge process, it seems safe to predict that the debt settlement process is no better under the now-revised law than under the original.[133]

As for the third *World Bank Report* theme, the Italian law follows the growing trend in expecting debtors to earn their fresh start, though it does not formulate that expectation with the kind of care that international best practices seem to call for. Admirably, the four-year payment period seems relatively moderate in the context of worldwide trends.[134] Indeed, this term was chosen "in line with the models of other countries," with the intent not to squeeze several years of income from debtors to compensate creditors, but rather to dissuade debtors from seeking the benefit lightly or abusively.[135] As for the amount of payment to be made during this time, the Italian law also admirably focuses on the debtor's ability to bear the burden, not on any minimum payment or expected dividend to creditors, as suggested in the *World Bank Report*.[136]

---

[131] Law 3/2012, *supra* note 103, art. 11(1).

[132] *Id.* arts. 11(2), 12(3) (discussing that alternatively, a consumer debtor can submit a proposal for court approval without soliciting creditor support, in which case the court may confirm such a plan (binding on all creditors) so long as it is feasible and the debtor has not undertaken obligations without a reasonable prospect of being able to satisfy them and has not engaged in borrowing disproportionate to his or her financial capacity.). *Id.* arts. 12-bis, 12-ter. These subjective requirements seem likely to be seldom established. *See* Panzani, *supra* note 109, at 17 (noting that it is "a notion of common experience" that over indebtedness arises from consumers' excessive recourse to credit and their lack of adequate financial education).

[133] Relazione 179/2012, *supra* note 107 and accompanying text.

[134] *See* WB Report, *supra* note 1, ¶ 268 (noting a standard of 3 to 5 years, with a convergence around 5-year payment terms).

[135] Relazione 179/2012, *supra* note 107 at 44.

[136]. WB Report, *supra* note 1, ¶ 357, ¶ 274; *See also* Law 3/2012, *supra* note 103, art. 14-terdecies (1)(f) (noting that the law does require that creditors be satisfied at least "in part,", but so long as courts interpret the law to keep this "part" within very modest bounds, one would expect any debtor to be able to pay one or two ceremonial Euros to creditors over the course of four years.).

Unfortunately, the Italian law falls into a common and serious trap identified in the *Report*,[137] in that it assigns the court apparently unfettered discretion in determining an acceptable budget to be reserved for debtors' and their families' ordinary living expenses during the four-year liquidation period. While the exemptions for hard assets are made parallel with those in ordinary execution law,[138] the exemption for the debtor's future income does not take the common approach of relying on general income protections (*e.g.,* garnishment restrictions).[139] Rather, the court is assigned responsibility for determining, with no guidance from any statute, regulation, or guideline, how much of the debtor's future income to reserve as "necessary for the maintenance of [the debtor] and of his family."[140] With their applications for relief, debtors must submit a "list of current expenditures necessary to support [themselves and their families]."[141] However, there is no clear connection between this statement and the court's determination of an appropriate budget going forward. This could represent a disaster for debtors and the new insolvency regime if courts tend to impose unworkably sparse household budgets, or if judges in different areas of the country adopt widely varying approaches to determining budgets.[142]

C. Ireland

While the process and result of producing the new Irish consumer insolvency regime were not directly influenced by the World Bank *Report*, the same themes are clearly reflected in both projects. This is in part due to the fact that, as discussed below, the principal report that drove the Irish process relied heavily on two of the primary sources underlying the World Bank's *Report*. The debate about how to deal with excessive

---

137 WB Report, *supra* note 1, ¶¶ 267, 285-90.

138 Law 3/2012, *supra* note 103, art. 14-ter (6)(d).

139 *See* WB Report, *supra* note 1, ¶ 292.

140 Law 3/2012, *supra* note 103, arts. 14-ter (6)(b), 14-quinquies (2)(f) (containing in art. 14-quinquies (2)(f) an obviously erroneous reference to art. 14-ter (5)(b), intended to refer to art. 14-ter (6)(b), as art. 14-ter (5) has no subsections).

141 *Id.* arts. 9(2), 14-ter (2).

142 *See* WB Report, *supra* note 1, ¶¶ 287-88 (describing these problems in other systems).

consumer debt and many individuals' inability to pay those debts has long simmered in Ireland, however.

Well into the 21st century, the Irish system of debt enforcement continued the anachronistic procedure of allowing defaulting debtors to be imprisoned for simple failure to pay a civil debt.[143] While proposals for reform of this long-outdated method of debt collection were formulated by the Irish Government in the late 1990s,[144] individual debtors were still being jailed for simple non-payment of civil debts in the late 2000s.[145] During this same span of time, from the late 1990s to the late 2000s, Irish consumers were racking up debts at unprecedented levels. The national ratio of household debt to disposable income rose nearly four-fold, from a moderate 48% to a dangerous 176%, an even steeper rise than in debt-riddled countries like the United Kingdom, the United States and Canada.[146]

While Ireland had a formal bankruptcy system that theoretically provided for relief in the form of a discharge of unpaid debts, the law was dysfunctional and seldom used by individual debtors for a host of reasons. A 2009 report from the Irish legislative research service observed curtly that the bankruptcy system was "expensive and … unsuitable for a majority of debtors," further explaining that it failed to provide for an automatic discharge of debt in any case.[147] Rather, to obtain the *possibility* of relief, a debtor had to pay in full the hefty admin-

[143] *See, e.g.*, Joseph Spooner, Long Overdue: What The Belated Reform of Irish Personal Insolvency Law Tells Us About Comparative Consumer Bankruptcy, 86 AM. BANKR. L.J. 243, 249 (2012) (reporting that, in 2008 alone, 276 debtors were imprisoned pursuant to what the author characterizes as "a Kafkaesque procedure").

[144] *See* Paul Joyce, An End Based on Means?, FREE LEGAL ADVICE CENTRES 13 (2003), http://www.flac.ie/download/pdf/an_end_based_on_means.pdf.

[145] *See* Spooner, supra note 143 and accompanying text; Stuart Stamp, A Policy Framework for Addressing Over-indebtedness, COMBAT POVERTY AGENCY 35 (2009), *available at* http://www.combatpoverty.ie/publications/APolicyFrameworkForAddressingOverIndebtedness_2009.pdf.

[146] The Debt of the Nation: How we fell in and out of love with debt, AMÁRACH RESEARCH 4-5 (2009), *available at* http://www.amarach.com/assets/files/The%20Debt%20of%20the%20Nation.pdf.

[147] Spotlight: Debt Part 2: Personal Debt and Consequences, OIREACHTAS LIBR. & RES. SERV. 15-16 (2010), *available at* http://circleofdebt.files.wordpress.com/2011/05/personal_debt_and_consequences.pdf.

istrative costs of the formal process, turn over all non-exempt property acquired during the course of the next twelve years, and even after all this, the court might enter a discharge order only upon a finding that it would be "reasonable and proper" to grant such extraordinary relief.[148] Such an expensive system, offering relief that is both too little and too late, is obviously of little use to people desperately in need of financial rehabilitation.

As in Colombia[149] and Italy,[150] the first Irish policy response to the problem of consumer debt default was to set up a framework for helping consumers to manage their own financial affairs and, ultimately, to facilitate private, negotiated settlements between debtors and their creditors.[151] In 1992, the Irish Government's Department of Social and Family Affairs set up a pilot program of five Money Advice and Budgeting Service (MABS) centers, fully funded by the Department.[152] The initial purpose of MABS was to offer advice and assistance to low-income families who had been victimized by illegal, high-cost moneylenders, but the successful pilot project quickly grew into a formal service offering generalized money and budgeting advice in 65 centers throughout Ireland.[153]

In 2003, MABS implemented a pilot initiative with the Irish Bankers Federation to establish a framework for voluntary debt settlements involving a partial write-off of unsustainable consumer debt.[154] This pilot project was limited to 100

[148] *Id.* at 16.

[149] Proyecto, *supra* note 56, at 4-8 and accompanying text (providing in articles 4-18 for a negotiation procedure with a stay of ongoing execution proceedings, but otherwise not constraining creditors' right to reject workout agreements and recommence execution); *see also* MINISTERIO DEL INTERIOR Y DE JUSTICIA, CONCILIACION Y ARBITRAJE, *supra* note 63, at 145-146,175 and accompanying text; *See also* Law 1380 of 2010, *supra* note 64.

[150] *See* Law 3/2012, *supra* note 103 and accompanying text; *See also Study on Means to Protect Consumers in Financial Difficulty, supra* note 104 and accompanying text.

[151] *See* OIREACHTAS LIBR. & RES. SERV., *supra* note 147, at 3, 14 (observing in 2009 that "Ireland's response to over-indebtedness has largely focused on funding MABS.").

[152] Joyce, *supra* note 144, at 29.

[153] *Id.*; Dieter Korczak, *The Money Advice and Budgeting Service Ireland,* PEER REVIEW IN THE FIELD OF SOCIAL INCLUSION POLICIES13 (2004), http://www.euro.centre.org/data/1138965609_36492.pdf.

[154] Joyce, *supra* note 144, at 66-67 (describing the details of the project);

cases from select areas of Dublin, and it was not extended beyond those few cases, lasting only a few years.[155] MABS and IBF renewed their debt settlement initiative in 2009, however, with an "operational protocol" for negotiating "mutually-acceptable, affordable and sustainable repayment plan[s]" explicitly committing a list of key institutional creditors "to accept payment that may be less than the full amount of the debt owed."[156] Early evaluations of this new protocol were quite positive from both the creditor and debtor side,[157] but its salutary effects were limited by the small group of creditors who had signed on.[158] And for debtors with little or no wherewithal to make significant payments to their creditors, the protocol could offer little or no relief.

A path had been cleared for a more broadly applicable, formal, legislative solution, which would soon receive powerful impetus from two sources. The first would come from an influential voice within Ireland; the second from outside forces drawn in after Ireland as a country experienced the spectacular shock of national and international economic crisis. With such potent political forces converging around them, Irish lawmakers were all but forced to modernize their law in line with the principal themes of the World Bank's *Report*.[159]

First, Ireland has an impressive institution, the Law Reform Commission (LRC), dedicated to constantly reviewing and evaluating Irish law and making suggestions for reform when needed.[160] One of the main drivers of the LRC's work are its

See also Korczak, *supra* note 153, at 4.

[155] Joyce, *supra* note 144, at 66; *See also* OIREACHTAS LIBR., *supra* note 147, at 16 (reporting that the project was terminated in 2006, with no report of its success).

[156] *IBF-MABS Operational Protocol: Working Together to Manage Debt*, IRISH BANKING FEDERATION § 1 (2009), http://www.ibf.ie/pdfs/IBF-MABS-Protocol-June09.pdf.

[157] *Interim Report: Personal Debt Management and Debt Enforcement*, LAW REFORM COMMISSION 46 (2010), http://www.lawreform.ie/_fileupload/Reports/irDebt.pdf (reporting that "the Protocol has delivered generally positive results in terms of agreed repayment arrangements between IBF creditors and MABS clients").

[158] *Id.* at 45-46.

[159] *See* Spooner, *supra* note 143, at 288-96 (explaining the process leading to the reform of Irish personal insolvency law).

[160] *Overview*, LAW REFORM COMMISSION, http://www.lawreform.ie/law-reform/overview.445.html.

periodic Programmes of Law Reform, which are developed by the LRC and subsequently approved by the Government and placed before the legislature (both Houses of the Oireachtas).[161] Since its inception in 1975, the LRC has developed and pursued three such Programmes.[162] It has produced over 160 consultation papers and reports making proposals for law reform, and as a clear testament to the LRC's influence on Irish law, "[m]ost of these proposals have led to reforming legislation."[163]

After a public consultation process that drew a significant number of submissions calling for reform of the law related to personal debt enforcement, the LRC included this topic in its Third Programme of Law Reform, approved by the Government in 2007.[164] Like the World Bank *Report*, the LRC's project on "Personal Debt Management and Debt Enforcement" drew heavily on two other European sources:[165] a European Commission report on personal over indebtedness[166] and the Council of Europe's Recommendation on legal solutions to debt problems.[167] Unsurprisingly, these common sources led the LRC

---

[161] *Id.*

[162] *Programmes of Law Reform,* LAW REFORM COMMISSION, http://www.lawreform.ie/law-reform/law-reform/ourprogrammes-of-law-reform.127.html.

[163] *Report: Personal Debt Management and Debt Enforcement,* LAW REFORM COMMISSION ii (2010), *available at* http://www.lawreform.ie/_fileupload/Reports/r100Debt.pdf. [*hereinafter,* LRC Report].

[164] *Id.* at ii, 1; *Consultation Paper: Personal Debt Management and Debt Enforcement,* LAW REFORM COMMISSION 1, 3 (2009), http://www.lawreform.ie /_fileupload/consultation%20papers/Consultation%20Paper%20on%20Person al%20Debt%20Management%20and%20Debt%20Enforcement_FINAL%20D RAFT.pdf [*hereinafter,* LRC Consultation Paper] (commenting that the Commission's "primary focus … is on … personal insolvency laws and legal debt enforcement proceedings").

[165] LRC Consultation Paper, *supra* note 164, at 1-3; LRC Report, *supra* note 163, at 1.

[166] *Towards A Common Operational European Definition of Over-Indebtedness*, EUROPEAN COMMISSION (2008), *available at*ec.europa.eu/social/ BlobServlet?docId=5093&langId=en (also cited as a primary source in the World Bank's *Report*, *supra* note 1, at ¶ 21(c)).

[167] *Commission Recommendation to Member States on Legal Solutions to Debt Problems*, COM (2007) 999bis final (Jun. 20, 2007) (explaining the World Bank Report cited and relied on the expert report on which the Council's Recommendation was based); Johanna Niemi-Kiesiläinen & Ann-Sofie Henrikson, Bureau of the European Committee on Legal Co-Operation (CDCJ-BU), *Report on Legal Solutions to Debt Problems In Credit Societies*

and the World Bank Working Group to similar conclusions.

The LRC's initial Consultation Paper echoed the criticisms that have long been levelled at the Irish bankruptcy system;[168] *i.e.,* that it was far too expensive[169] and far too parsimonious in its offer of relief[170] to be of any use to the overwhelming majority of debtors.[171] For the few cases that made it past the opening phase, the LRC bristled at the 12-year discharge period, which it characterized as "excessively long and contrast[ing] sharply with the fresh start principle which characterizes modern consumer insolvency codes."[172] While the LRC concluded that "a comprehensive review of bankruptcy legislation lies outside the scope of" its reform agenda,[173] its final Report nonetheless offered a detailed analysis of key proposed bankruptcy reforms; concentrating on the introduction of an automatic discharge after a three-year period during which the debtor might be called upon to make payments to creditors from surplus income.[174] While the amount of these payments in the bankruptcy context was not expressly addressed, similar payments were considered in the context of out-of-court settlements, including the necessity of leaving sufficient income with debtors to support a reasonable standard of living.[175] But no specific approach was suggested here, as the LRC conceded "the calculation of reasonable living expenses is an issue lying far outside the competence of a law reform body."[176] The clear concentration of the

(2005), http://www.coe.int/t/dghl/standardsetting/cdcj/CJSDEBT/CDCJ-BU_2005_11e%20rev.pdf; *See* WB Report, *supra* note 1, at ¶ 21(b).

[168] *See, e.g.,* OIREACHTAS LIBR. & RES. SERV., *supra* note 147, at 3, 16.

[169] LRC Consultation Paper, *supra* note 164, at 113, 116 (criticizing the requirements that debtors seeking relief prove that a liquidation of their assets will produce at least 1900 Euros, and that they deposit 650 Euros with the bankruptcy administrator, along with any further sums necessary to cover ongoing administrative costs of fees).

[170] LRC Consultation Paper, *supra* note 164, at 113-14 (criticizing the requirements for a discharge as "severely onerous by international standards.")

[171] LRC Consultation Paper, *supra* note 164, at 114 (observing the miniscule numbers of bankruptcy petitions filed and cases opened in recent years, *e.g.,* only 20 petitions in 2007 with only four leading to opened cases).

[172] LRC Consultation Paper, *supra* note 164, at 117.

[173] LRC Consultation Paper, *supra* note 164, at 122.

[174] LRC Report, *supra* note 163, at 145-86, 319-21, 413-16 (allowing the court to require payments for up to 5 years).

[175] LRC Report, *supra* at 93-95, 314, 372-73.

[176] LRC Report, *supra* at 94.

LRC's review and final Report was on a new system of non-judicial debt settlements, along the lines of the MABS-IBF initiatives,[177] but overseen by a central government regulator, extending to all creditors, and resting on a broader and more formalized institutional foundation.[178] Thus, the three themes of the World Bank's *Report* appeared prominently at this early stage in the reform process, advanced with the considerable persuasive force of the national institution most responsible for driving forward Irish law reform.

An equally if not more powerful law reform force, would exert its influence in the wake of the devastating impact of the global financial crisis in Ireland. A collapse in property values and bank balance sheets led to a cascade of negative effects on state revenue collection, credit availability and unemployment, plunging Ireland into a particularly severe recession from 2008 to 2010.[179] Ireland's GDP suffered a cumulative decline of more than 20% between the first quarter of 2008 and the third quarter of 2010.[180] Though the treasury was bringing in fewer tax receipts, the Irish Government resorted to heavy deficit spending to bail out the banking sector and attempt to reign in the exploding economic crisis.[181] This undermined the nation's credit reputation in international markets, effectively shutting off a vital source of financing.[182] The massive scope of the problem required large-scale external assistance.

In November 2010, Irish authorities formally requested

---

[177] Joyce, *supra* at 29, 66-67 (describing on pages 66-67 the details of the projects); Korczak, *supra* note 153 at 4, 13; OIREACHTAS LIBR. & RES. SERV., *supra* 16, (reporting that the project was terminated in 2006, with no report of its success); *IBF-MABS Operational Protocol: Working Together to Manage Debt*, IRISH BANKING FEDERATION § 1 (2009), *available at* http://www.ibf.ie/pdfs/IBF-MABS-Protocol-June09.pdf; LAW REFORM COMMISSION, *supra* note 157 at 46 (reporting that "the Protocol has delivered generally positive results in terms of agreed repayment arrangements between IBF creditors and MABS clients).

[178] LRC Consultation Paper, *supra* note 164, at 122; LRC Report, *supra* note 163, at 5-110, 307-16, 349-73.

[179] Philip R. Lane, *The Irish Crisis*, THE WORLD FINANCIAL REVIEW (2011) http://www.worldfinancialreview.com/?p=874.

[180] Lane, *supra* note 179.

[181] Representation in Ireland, *Ireland's economic crisis: how did it happen and what is being done about it?,* EUROPEAN COMM'N, (Feb. 22, 2012), http://ec.europa.eu/ireland/economy/irelands_economic_crisis/index_en.htm.

[182] Representation in Ireland, *supra*.

financial assistance from the European Union, the European Central Bank and the International Monetary Fund (often referred to colloquially as "the Troika").[183] This assistance was made contingent on Irish authorities' undertaking several steps to reform the financial sector and increase growth potential. In an initial Memorandum of Economic and Financial Policies, the Council of the European Union outlined several steps that Ireland was expected to take as part of the assistance program.[184] One of these, related to the primary goal of restoring financial sector viability, was to "reform the personal insolvency regime … [to] balance the interests of both creditors and debtors."[185] These reforms would "include a non-judicial debt settlement and enforcement mechanism as an alternative to court-supervised proceedings."[186] The European Commission was charged with monitoring progress toward these reforms,[187] and it laid out quarterly goal for their achievement, including in the very first quarter of the program "[a]n in-depth review of the personal debt regime,"[188] which was forthcoming within days from the LRC, as described above.[189] By the first quarter

[183] Economic and Financial Affairs, Council agrees on joint EU-IMF financial assistance package for Ireland, EUROPEAN COMM'N, (Jul. 12, 2010), http://ec.europa.eu/economy_finance/articles/eu_economic_situation/2010-12-01-financial-assistanceireland_en.htm.

[184] Council of the European Union, *Memorandum of Economic and Financial Policies* 1 (Dec. 7, 2010),http://ec.europa.eu/economy_finance/articles/eu_economic_situation/pdf/2010-12-07-mefp_en.pdf.

[185] Council of European Union, *supra* at 4 ¶ 16.

[186] Council of European Union, *supra* at 4 ¶ 16.

[187] Council Implementing Decision 2011/77/EU, on Granting Union Financial Assistance to Ireland, 2010 O.J. (L 30), 34, ¶ 8, http://ec.europa.eu/economy_finance/articles/eu_economic_situation/pdf/2010-12-07-council_imp_decision_en.pdf.

[188] European Commission, *Ireland Memorandum of Understanding on Specific Economic Policy Conditionality* 6 (Dec. 3, 2010), http://ec.europa.eu/economy_finance/articles/eu_economic_situation/pdf/2010-12-07-mou_en.pdf.

[189] LRC Report, *supra* note 163 at 93-95, 145-86, 314, 319-21, 372-73, 413-16 (allowing the court to require payments for up to 5 years); LRC Consultation Paper, *supra* note 164, at 122; Joyce, *supra* at 29, 66-67 (describing on pages 66-67 the details of the projects); Korczak, *supra* note 153 at 4, 13; OIREACHTAS LIBR. & RES. SERV., *supra* 16, (reporting that the project was terminated in 2006, with no report of its success); *IBF-MABS Operational Protocol: Working Together to Manage Debt*, IRISH BANKING FEDERATION § 1 (2009), *available at* http://www.ibf.ie/pdfs/IBF-MABS-Protocol-June09.pdf; LAW REFORM COMMISSION, *supra* note 157 at 46 (reporting that "the Protocol

of 2012, reform legislation was expected to be presented to the Irish legislature.[190]

With the internal political process already primed for reform of the personal insolvency regime, the Troika's external goading simply increased the pace of progress already well underway. In January 2012, the Minister for Justice and Equality announced a draft bill, in large part implementing the LRC's recommendations discussed above,[191] for reforming the bankruptcy law and implementing several non-judicial debt settlement schemes.[192] A conforming Government bill was introduced into the legislature in June 2012.[193] The virtually unchanged bill was eventually adopted before being signed into law on 26 December 2012.[194] The Personal Insolvency Act 2012 became effective at various points in 2013, with the final piece, the bankruptcy reforms, becoming effective on 3 December 2013.[195] While still subject to substantial criticism,[196] the Irish

has delivered generally positive results in terms of agreed repayment arrangements between IBF creditors and MABS clients).

[190] European Commission, *Ireland Memorandum of Understanding on Specific Economic Policy Conditionality* 11 (Dec. 3, 2010), http://ec.europa.eu/economy_finance/articles/eu_economic_situation/pdf/2010-12-07-mou_en.pdf.

[191] *See supra* notes 173-77 and accompanying text. LRC Consultation Paper, *supra* note 164, at 122; LRC Report, *supra* note 163, at 145-86, 319-21, 413-16 (allowing the court to require payments for up to 5 years); *See Id.* at 93-95, 314, 372-73; *Id.* at 94; *see* Joyce, *supra* note 144, at 29, 66-67 and accompanying text; Korcak, *supra* note 153, at 4, 13 and accompanying text; OIREACHTAS LIBR.., *supra* note 147, at 16 (reporting that the project was terminated in 2006, with no report of its success) and accompanying text; IRISH BANKING FEDERATION, *supra* note 156, § 1 and accompanying text; LAW REFORM COMMISSION, *supra* note 157, at 46 and accompanying text.

[192] Department of Justice and Equality, *Minister Shatter and Minister Noonan publish Scheme of Personal Insolvency Bill* (25 Jan. 2012), http://www.justice.ie/en/JELR/Pages/PR12000013.

[193] Personal Insolvency Bill 2012 as initiated and Explanatory Memorandum, HOUSE OF THE OIREACHTAS, *available at* http://www.oireachtas.ie/viewdoc.asp?fn=/documents/bills28/bills/2012/5812/b58112d.pdf.

[194] Personal Insolvency Act 2012 (Act No. 44/2012) (Ir.) [*hereinafter,* PIA 2012], *available at* http://www.isi.gov.ie/en/ISI/Personal%20Insolvency%20Act.pdf/Files/Personal%20Insolvency%20Act.pdf.

[195] *See Commencement Orders*, INSOLVENCY SERV. OF IR. (2013), http://www.isi.gov.ie/en/ISI/Pages/Legislation; Julie Murphy-O'Connor et al., *Commencement of reformed bankruptcy laws announced by Minister Shatter* (4 Dec. 2013), http://www.matheson.com/news-and-insights/article/commencement-of-reformed-bankruptcy-laws-announced.

[196] *See, e.g.*, Free Legal Advice Centers, *21st century law needed for 21st*

personal insolvency regime has been thoroughly modernized very much in line with the World Bank *Report*'s three main themes.

The changes to the discharge requirements represent a real innovation, essentially introducing effective relief where none had existed before. The much-maligned twelve-year waiting period and requirement that the court find it "reasonable and proper" to grant a discharge have been relegated to the past. Debtors are now entitled to an automatic, non-discretionary discharge on the third anniversary of the date of the order opening their bankruptcy case.[197] Unlike the Colombian discharge,[198] however, relief under the new Irish law is neither immediate nor necessarily cost-free. Irish debtors *may* have to earn their discharge by making years of imposed payments to their creditors, as discussed below.[199]

Also, the new Irish law implements and clearly favors a new regime for negotiated arrangements among creditors and debtors. The new Irish law prioritizes these out-of-court solutions, likely just as effectively if not as emphatically as the Colombian law.[200] While negotiation with creditors is not absolutely required as a prerequisite to seeking a discharge in bankruptcy, debtors petitioning for bankruptcy relief must swear that that they have "made reasonable efforts to reach an appropriate arrangement with … creditors" by negotiating one of these out-of-court plans "to the extent that the circumstances

---

century over-indebtedness!, http://www.flac.ie/campaigns/current/21st-century-law-needed-for-21st-century-overindebtedness/ (collecting materials critical of many aspects of the personal insolvency scheme as proposed and ultimately adopted); Charlie Weston, *Insolvency deals not open to poorer families, says study*, IRISH INDEPENDENT (26 Sept. 2013), http://www.independent.ie/business/personal-finance/insolvency-deals-not-open-to-poorer-families-saysstudy-29611510.html.

[197] *See* PIA 2012 § 157 (amending Bankruptcy Act 1988 § 85(1)). Of course, administrators and creditors can object to the entry of a discharge if the debtor has failed to cooperate or hidden assets, but this is the exception rather than the norm now. *See also* PIA 2012 § 157 (adding a new section 85A to Bankruptcy Act 1988).

[198] *See supra* note 99 and accompanying text. Citation ok, cannot find English version of the CODE OF CIVIL PROCEDURE, *supra* note 82, art. 553 ("*Acuerdo de pago*").

[199] *See infra* notes 220-23 and accompanying text.

[200] *See supra* note 89 and accompanying text.

of the debtor would permit him to enter into such an arrangement."[201]

An analysis of the details of the complex system of so-called Debt Settlement Arrangements[202] and Personal Insolvency Arrangements[203] is beyond the scope of this paper,[204] but suffice it to say that these schemes represent negotiation platforms very similar to the conciliation regime in Colombia,[205] especially in two essential respects. First, they build on an existing institutional framework supporting consumer debt negotiation—MABS[206]—just as the Colombian system leveraged the existing conciliation centers.[207] Indeed, somewhat like the Ital-

---

201 *See* PIA 2012 § 145 (amending and supplementing Bankruptcy Act 1988 § 11(4)). A similar preference for out-of-court arrangements is expressed in the amended sections 14 and 15 of the Bankruptcy Act 1988, which now invites the court to adjourn any hearing on a creditor- or debtor-initiated bankruptcy petition if the debtor's situation might "be more appropriately dealt with by means of" one of the negotiated solutions. *See* PIA 2012 §§ 147, 148.

202 *See* PIA 2012 §§ 55-58.

203 *See* PIA 2012 §§ 89-125.

204 For lucid and detailed descriptions of the operations of these arrangements, including as applied to hypothetical debtors of various kinds, the Insolvency Service has made several pamphlets available on its website. *See Guide to a Debt Settlement Arrangement,* INSOLVENCY SERV. OF IR. (2013),

http://www.isi.gov.ie/en/ISI/DSA%20final%20pdf.pdf/Files/DSA%20final %20pdf.pdf; *Guide to a Personal Insolvency Arrangement,* INSOLVENCY SERV. OF IR. (2013), http://www.isi.gov.ie/en/ISI/PIA-Revised%2016%20August %202013.pdf/Files/PIARevised%2016%20August%202013.pdf; *Debt Solutions Scenarios Pack,* INSOLVENCY SERV. OF IR. (2014),http://www.isi.gov.ie/ en/ISI/ScenariosPackMarch2014.pdf/Files/ScenariosPackMarch2014.pdf.

205 *See* Proyecto, *supra* note 56, at 4-9; *see* MINISTERIO DEL INTERIOR Y DE JUSTICIA, CONCILIACION Y ARBITRAJE, *supra* note 63; *see also* Law 1380 of 2010, *supra* note 64; Email from Diana Lucia Talero, *supra* note 73 and Email from Diana Lucia Talero; *see* Informe de Ponencia, *supra* note 76; *see* WB Report, *supra* note 30: *see* WB Report, *supra* note 31; *see* KILBORN, supra 28, at 18; *see also* Statement on the Report on the Treatment of the Insolvency of Natural Persons, *supra note* 34; *see* Block-Lieb, *supra* note 5 §1: *see* WB Report, *supra* note 19; *see also*

WB Report, *supra* note 1, at ¶ 129; Law 3/2012, *supra* note 3; *see* London Economics, *supra* note 104; *see* Joyce, *supra* note 144, at 29 and accompanying text.

207 Proyecto *supra* note 56, at 4-7; *see also* MINISTERIO DEL INTERIOR Y DE JUSTICIA, CONCILIACION Y ARBITRAJE, *supra* note 63 at 145-46, 175. On the national conciliation program, spearheaded by the Ministry of Justice and Law, see http://www.conciliacion.gov.co/; *see also* CODE OF CIVIL PROCEDURE, *supra* note 82, art 533 (assigning responsibility for debt negotiation proceedings first to the existing conciliation centers "expressly authorized by the Ministry

ian approach of Crisis Composition Bodies,[208] but much more developed, the Irish law creates an entire new industry of "Personal Insolvency Practitioners," enticing professionals like lawyers and accountants to represent individual debtors in negotiating and administering these debt settlement schemes.[209] These PIPs are regulated by an entirely new public institution, the Insolvency Service, set up to oversee the entire Irish personal insolvency regime and ensure its smooth and effective operation.[210] This impressive new framework provides vital institutional support for the sensitive process of negotiating these out-of-court arrangements, an essential ingredient for greater success identified in the World Bank *Report*.[211]

Second, though not as aggressive as either the Colombian[212] or Italian[213] laws, the new Irish law contains a mecha-

of Justice and Law to facilitate [advance] this type of proceedings, via conciliators registered in their lists" as well as to notary offices, who also have registered conciliators with the proper training required by regulation); Ministry of Justice and Law, Decree no. 2677 of 21 December 2012, art. 13-15 (requiring specialized training for personal debt conciliators); Ministry of Justice and Law, Resolution no. 21 of 15 June 2013 (outlining the minimum content of training programs for conciliators). Both of these regulations are available, in Spanish only, online at http://www.conciliacion.gov.co/paginas_detalle.aspx?idp=173.]

[208] *See* Cherubini at 36, 37 n. 4.; Cherubini, *supra* note 106 and accompanying text; Law 3/2012, *supra* note 103, art. 15 (establishing that these bodies' qualifications and permissible fees will be regulated by the Ministry of Justice in consultation with the Ministry of Economic Development and Ministry of Economy and Finance); Law 3/2012, *supra* note 103, arts. 7(1), 9, 11, 13, 15.

[209] *See* PIA 2012 §§ 48-54, 64, 75, 98, 112, 159-86; *What is a personal insolvency practitioner?,* INSOLVENCY SERV. OF IR., http://www.isi.gov.ie/en/ISI/Pages/Practitioner (providing numerous links with further information).

[210] *See* PIA 2012 §§ 7-24. (The Insolvency Service has a very useful website *available at* www.isi.gov.ie).

[211] WB Report at 135, 137.

[212] CODE OF CIVIL PROCEDURE, *supra* note 82, art. 553(2). The expected duration of such plans is five years, though longer terms are allowed with the assent of 60% of creditors or for claims with an original maturity period exceeding five years; *Id.* art. 553(10); *Id.* art. 558.

[213] Law 3/2012, *supra* note 103, art. 11(1); *Id.* arts. 11(2), 12(3). Alternatively, a consumer debtor can submit a proposal for court approval without soliciting creditor support, in which case the court may confirm such a plan (binding on all creditors) so long as it is feasible and the debtor has not undertaken obligations without a reasonable prospect of being able to satisfy them and has not engaged in borrowing disproportionate to his or her financial capacity; *Id.* arts. 12-bis, 12-ter. These subjective requirements seem

nism for overcoming holdouts. Here again, agreement is not required from 100% of a debtor's creditors; rather, both of the new settlement arrangements can be imposed on dissenting creditors with the support of a majority of creditors holding at least 65% of the debts due to voting creditors.[214] The Insolvency Service has already begun to take further steps to encourage the establishment of the new statutory debt settlement agreements by developing a protocol, or template, for "standard" or "straightforward" proposals.[215]

Finally, Ireland joined Italy[216] in rejecting the Colombian unconditional discharge,[217] adopting an approach more in line with the World Bank *Report*'s third theme: The Irish bankruptcy law envisions at least *some* debtors being called on to earn their fresh start by making payments from surplus income over a period of time. The Irish approach here raises similar concerns as under the Italian law,[218] though the Irish regime takes important steps to mitigate these concerns. The Irish law takes the highly criticized approach[219] of vesting the court with discretion in deciding whether, for how long, and

likely to be seldom established; *see* Panzani, *supra* note 109, at 17 (noting that it is "a notion of common experience" that over-indebtedness arises from consumers' excessive recourse to credit and their lack of adequate financial education).

[214] *See* PIA 2012 §§ 73,110 (additionally requiring approval by creditors holding at least a majority of both unsecured and secured debts, separately calculated, in Personal Insolvency Arrangements).

[215] *Protocol*, INSOLVENCY SERV. OF IR., http://www.isi.gov.ie/en/ISI/Pages/Protocol_Team (describing the creation of a Debt Solutions Protocol Steering Group to formulate this template).

[216] WB Report, *supra* note 1, ¶¶ 267-268, 274, 285-290, 292, 357; Relizone 179/2012, *supra* note 107, at 44; Law 3/2012, *supra* note 103, art. 14-ter 1(f), 2, 6(b), art. 14-quinquies 2(f), 9(2) (discussing in art. 14-ter 1(f), but so long as courts interpret the law to keep this "part" within very modest bounds, one would expect any debtor to be able to pay one or two ceremonial Euros to creditors over the course of four years)(discussing in art. 14-quinquies 2(f), containing an obviously erroneous reference to art. 14-ter (5)(b), intended to refer to art. 14-ter (6)(b), as art. 14-ter (5) has no subsections).

[217] CODE OF CIVIL PROCEDURE, *supra* note 82, arts. 563-71 and accompanying text.

[218] WB Report, *supra* note 1, ¶¶ 267, 285-290, 292; Law 3/2012, *supra* note, art. 14-ter 2, 6(b), 6(d), 14-quinquies 9(2) (discussing 14-quinquies, containing an obviously erroneous reference to art. 14-ter (5)(b), intended to refer to art. 14-ter (6)(b), as art. 14-ter (5) has no subsections). .

[219] WB Report, *supra* note 1, ¶¶ 267, 285-89, 290 and accompanying text.

how much payment to demand of debtors.[220] If the case or system administrator[221] makes an application for an order requiring the debtor to make payments to creditors from surplus income, the court "may" condition the discharge on the debtor's compliance with a "bankruptcy payment order."[222] Only time will tell how often such applications will be made, how often courts will elect to impose such "bankruptcy payment orders," and what kinds of burdens they might impose on debtors in the bankruptcy process.[223]

The court's discretion, however, is not totally unfettered. If the court chooses to impose a bankruptcy payment order, the law at least prescribes or suggests limits for the length and calculation of such payments, consistent with the World Bank *Report*'s caution against overly burdensome expectations.[224] The duration of the payment obligation is capped at five years, thus potentially extending beyond the automatic grant of discharge relief three years after the bankruptcy case is opened.[225] This again is in line with the *Report*'s observations on "normal" payment terms.[226]

As for the amount of payment to be expected, the Irish law again hews carefully to the preferred approach in the World Bank *Report*, focusing on the reasonableness of the burden imposed on the debtor rather than the expected return to creditors.[227] While leaving the amount of required payments to the discretion of the court, the law prescribes that courts "shall

[220] *See* PIA 2012 § 157 (adding a new section 85D(1) to the Bankruptcy Act 1988).

[221] Creditors are apparently not allowed to make such applications. *See Id.*

[222] *Id.*

[223] In the parallel system in England and Wales, courts enter so-called "income payment orders" in only about one-fifth of bankruptcy cases. The Insolvency Service, *Profiles of bankrupts: 2005/6 to 2007/8* § 2.9 (2009), http://www.bis.gov.uk/insolvency/~/media/24110E1C3E434BB2B10006E2019 F0046.ashx; A.J. NOORDAM ET AL., SCHULDSANERING (EX)ONDERNEMERS 333 (2013).

[224] WB Report, *supra* note 1, ¶¶ 262-301, 312, 357-58 and accompanying text.

[225] *See* PIA 2012 § 157 (adding a new section 85D(3) to the Bankruptcy Act 1988).

[226] WB Report, *supra* note 1, ¶ 268 (noting a standard of 3 to 5 years, with a convergence around 5 years).

[227] WB Report, *supra* note 1, ¶¶ 49-50 and accompanying text.

have regard for the reasonable living expenses of the bankrupt and his or her dependants."[228] Further, the law suggests that courts look for guidance to a uniform standard developed by policymakers, proposing that the court "may" also have regard to "any guidelines on reasonable living expenses issued by" the new Insolvency Service.[229]

The Insolvency Service has already developed such guidelines, and both the process of their development and the final product are models of good practice. As required by the law,[230] the Insolvency Service consulted a wide variety of indicators and experts on the subject of household income and expenses, including very sensitive and detailed guidelines developed over twelve years of extensive research by the Vincentian Partnership for Social Justice.[231] The Insolvency Service conducted a "consensual budgeting" project using focus groups to identify appropriate categories and amounts of expenditures for a minimum standard of living for various household types.[232] The result is a budget that "is neither a survival standard nor a standard for people in poverty; rather it is a standard of living that should allow for people to engage in activities that are considered the norm for Irish society."[233] These guidelines will be updated at least annually to reflect changing costs of living.[234] They represent an extraordinary example of standards for a modest but dignified lifestyle, perfectly consonant with

---

228 *See* PIA 2012 § 157 (adding a new section 85D(4) to the Bankruptcy Act 1988).

229 *Id.;* see also *id.* § 23 (requiring the Insolvency Service to develop such guidelines).

230 *Id.* § 23(2)-(3).

231 Insolvency Service, *Guidelines on a reasonable standard of living and reasonable living expenses* 5-7, 16-20 (2013), http://www.isi.gov.ie/en/ISI/Guidelines_under_section%2023_June_13.pdf/Files/Guidelines_under_section %2023_June_13.pdf [hereinafter, ISI Guidelines].

232 *Id.* at 21-30. This consensual budgeting process is one specifically identified example of an effective process for creating a basic budget for bankruptcy payment requirements. WB Report, *supra* note 1, ¶ 297.

233 ISI Guidelines, *supra* note 231, at 24.

234 *Id.* at 7; PIA 2012 § 23(6); *Reasonable Living Expenses Guidelines,* INSOLVENCY SERV. OF IR. http://www.isi.gov.ie/en/ISI/Pages/Reasonable_living_expenses, (announcing that "[i]t is the intention of the [Insolvency Service] to reissue these guidelines annually, reflecting the CPI adjustments").

the third theme of the World Bank *Report* and the Council of Europe's Recommendation for protecting the human rights of insolvent debtors.[235]

IV. CONCLUSION

While all three of these newest systems confirm the tendencies identified in the World Bank *Report*, they also confirm another key observation: Reasonable minds can and will differ on the best policies and the best ways of implementing those policies in this area.[236] World lawmakers will continue to differ in how they extend relief to over indebted individuals, and that diversity is generally healthy. The *Report* expressly disavows any desire to "mainstream" world legislation or to impose a one-size-fits-all approach in all regions.[237] But it is satisfying to see that the *Report* has had both direct and indirect influence in sensitizing policymakers to the benefits of offering this kind of relief to individuals, and that many of the now-obvious missteps of the past are being more or less deftly avoided by current lawmakers. As more countries follow Colombia, Italy, and Ireland down the difficult path toward adopting legislative relief for personal insolvency, I hope the lessons of the *Report* spread around the globe and help millions more debtors to escape from hopeless over indebtedness, in turn helping their countries to enjoy maximal productivity and healthy levels of social inclusion. We, legal academics, seldom get a chance to see our work having a direct, positive influence on the lives of others. I have seen that here, and the World Bank project has been extraordinarily satisfying in that regard.

[235] *See supra* notes 26-27 and accompanying text.
[236] WB Report, *supra* note 1, at ¶¶ 12, 29, 53-54.
[237] WB Report, *supra* note 1, at ¶¶ 53-54.