PERSONAL INSOLVENCY LAW AND THE CHALLENGES OF A DYNAMIC, ENTERPRISE-DRIVEN ECONOMY

Many jurisdictions across the globe are reviewing their personal insolvency law regimes. The worldwide "credit crunch" will accelerate this process. As part of this exercise, there is a natural desire to use personal insolvency law reform to encourage entrepreneurs to undertake risky commercial ventures without fear of excessively draconian consequences. In considering reforms designed to promote that goal, it is standard practice to undertake comparative law investigations. There are, however, inherent dangers here in adopting mechanistic solutions developed in other jurisdictions, because the cultural background may differ. "Legal transplants" do not always work. The potential impact of change must be carefully investigated in each local jurisdiction by making use of empirical evidence. The potential downside of liberalising bankruptcy law should also be borne in mind in that it could encourage irresponsible attitudes towards credit. Most bankrupts these days in Western countries are consumer debtors rather than failed traders. Bearing in mind these caveats, this article reviews the process of transition in personal insolvency law in English law and considers what lessons may be drawn by other jurisdictions from this pattern of evolution.

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I. Introduction

1 The purpose of this article is to offer insights to any enterprise-driven jurisdiction (including Singapore), operating a bankruptcy model originally based upon English law, which might be considering revision of its regime of personal insolvency law. This particular regulatory regime has undergone considerable modification in the UK over the past 30 years and valuable comparative insights may be

1 I am grateful for the assistance I have received from David Brown, Christina Lim, Paul Omar, Elizabeth Sheares and Adrian Walters. Responsibility for errors is mine alone.

garnered from that evolution. That English law experience may record successes worth emulating, but inevitably there have been disappointments. Recent reforms introduced in other Commonwealth jurisdictions may also offer constructive insights.

2 There is no doubt that having an effective bankruptcy law model can aid enterprise; in general terms, this is because fear of the consequences of bankruptcy can deter-risk taking.[2] Our brief review of historical developments will seek to illustrate that assertion. In particular, it can aid enterprise because many individuals still operate in business in the UK using the unincorporated sole trader model; bankruptcy is the inevitable consequence of business failure in such instances. Directors of companies may, therefore, find themselves facing bankruptcy if their company becomes insolvent and they have guaranteed its debts. Business failure in such instances may be due to the inadequacies of the individual entrepreneur concerned, or it may be caused by macro-economic failure in the system, such as was experienced by many Asian jurisdictions in 1997–1998. Personal insolvency law should be sufficiently responsive to deal in an appropriate fashion with both such cases.[3] Having supported our primary assertion, we need to enter a note of caution. The precise way in which that facilitation of enterprise occurs is sometimes misunderstood, particularly when the enterprise-focused reform of personal insolvency law collides with other policy objectives.

II. Historical overview

3 The history of the reform of personal insolvency law in England has been one of an almost continuous tradition of *liberalisation* in the treatment of debtors.[4] With one or two hitches along the way, we have moved from a state of affairs where debtors were imprisoned, to a situation where debtors could reasonably expect to lose virtually all of their assets, to a modern scenario where many assets may be preserved and the bankrupt's future economic prospects not irreparably damaged. During the course of that evolutionary process, the social stigma associated with bankruptcy has been reduced, but not completely

2 See J Armour & D Cumming, *Bankruptcy Law and Entrepreneurship* (ESRC Centre for Business Research Working Paper No 300, 2005) for economic analysis of this thesis. Note also J Armour (2004) 5 EBOLRev 87 stressing the impact of bankruptcy laws on demand for venture capital. In the EU, the Commission has supported a study of the links between bankruptcy and enterprise – see *Final Report of the Expert Group: Best Project on Restructuring, Bankruptcy and a Fresh Start* (September 2003).

3 Singapore responded with reforms of its bankruptcy legislation in 1999.

4 See D Milman, *Personal Insolvency Law, Regulation and Policy* (Ashgate, 2005) at pp 5–12.

eliminated. Undoubtedly, one reason for this liberalisation has been the perceived need to assist traders who incur debt.

4 Ironically, the introduction of the first English law bankruptcy regime in Tudor times[5] was meant to be an aid for trade creditors who were concerned with the growing problem of debtors in default. The problem was becoming more vexed because of the growth of the economy; the downside of such development is market default producing unpaid debt. The Tudor law moved the focus away from restraining the individual debtor in person towards a policy based upon the control of the bankrupt's assets with a view to realisation. Quickly, however, reforms were developed that offered comfort to bankrupts, particularly those debtors who could be classified as "traders".[6] This use of the trader concept was to become a characteristic of English bankruptcy law for several centuries thereafter. Thus, discharge from the status of bankruptcy was made available for the first time in 1705 largely in response to the difficulties caused to commercial men operating in testing wartime conditions.[7] The discriminatory treatment of non-traders, having been progressively eroded by court decisions which extended the trader concept to its maximum potential, was finally ended in 1861.[8] Prior to that date, personal insolvents, who could not be fitted into the trader category, continued to face the risk of imprisonment for debt. This discrimination was officially justified because non-traders were not seen as contributing directly to the economy.

5 Disputes about who should administer insolvent estates raged throughout the 19th century but these debates were ended in 1883 with a classic British compromise brokered by Joseph Chamberlain[9] under which the control of the estate was vested partly in public hands (via the Official Receiver)[10] and partly in private hands (through the agency of a trustee in bankruptcy). Although trustees were to some extent answerable to creditors, they did enjoy professional independence and the protection of being accorded the status of officers of the court. That compromise has persisted in spite of pressures from the private sector to eliminate the public input altogether. The compromise was necessary

5 The first bankruptcy statute was enacted in 1542 (34 and 35, Hen VIII c 4) but it was the 1571 legislation (13 Eliz I, c 7) that was crucial in the evolution of bankruptcy law for the next three centuries.

6 The "trader" distinction was introduced in 1571. The concept of "trader" was extended over time as the courts recognised the need to make bankruptcy available to all types of entrepreneur – see D Milman, *supra* n 4, at p 8.

7 See 1705 Act (4 and 5 Anne, c 17).

8 See Act 1861 (24 and 25 Vict, c 134).

9 46 and 47 Vict, c 52. For an excellent account of the background leading up to this milestone, see V M Lester, *Victorian Insolvency* (Clarendon Press, 1995).

10 The term Official Assignee is used in Singapore in Pt III of the Bankruptcy Act (Cap 20, 2000 Rev Ed). It is also the preferred terminology in jurisdictions such as Malaysia, New Zealand and Northern Ireland.

because it would have been disruptive for trade creditors to find their time expended in realising insolvent estates. They lacked the skill and the motivation to be engaged in this form of activity. The 1883 Bankruptcy Act was, therefore, an important milestone in the growth of a new profession, that of the insolvency practitioner.[11]

6 For the first 70 odd years of the 20th century, a period of stability ensued. The foundation stone was the Bankruptcy Act 1914, which, apart from some minor modifications in 1926, had stood the test of time. The 1914 Act had been based upon Chamberlain's legislation of 1883. Problems with this structure then began to emerge. Most notable amongst these was the large rump of bankrupts who had failed to seek their discharge.[12] This was a social embarrassment. There was also the problem of the increasing lack of utility of the Deeds of Arrangement Act 1914. Deeds of arrangement were developed as a model in the 19th century and were intended to offer a viable alternative to bankruptcy. Unfortunately, the statistics showed that their impact was minimal.[13] Although there were some difficulties with the system, the general feeling was that the bankruptcy system worked, a consensus reflected by the Blagden Committee[14] in the late 1950s.

7 The first of the residual concerns about the fitness for purpose of modern bankruptcy law was addressed by the introduction of an automatic discharge facility for bankrupts by the Insolvency Act 1976 (see ss 7 and 8). All first-time bankrupts would prima facie be granted a discharge from bankruptcy after five years, whether they applied or not. The 1976 Act did nothing about the deeds of arrangement issue. We concede that these reforms were not closely related to any desire to promote enterprise; rather they can be regarded as a social tidying up exercise. But they also are closely linked to the idea of the consumer society and the social problems that it can create.

8 Shortly after this legislation was enacted, the Government set up the Cork Committee to undertake a fundamental review of insolvency

11 Under the 1986 insolvency regime, all trustees in bankruptcy must be qualified and properly licensed insolvency practitioners. Apart from formal disciplinary procedures, many insolvency practitioners have developed their own complaints-handling protocols – see Complaints Handling in the Insolvency Practitioner Profession (January 2008) – a report produced for the Insolvency Practices Council by A Walters and M Seneviratne of the Nottingham Law School. In Singapore, private trustees can be appointed by the court (Bankruptcy Act (Cap 20, 2000 Rev Ed) s 33) but they must have the requisite qualifications (s 34).

12 For comment on this problem of undischarged bankrupts, see I Fletcher (1977) 40 MLR 192.

13 For deeds of arrangement statistics, see the Insolvency Service webpage which has statistics running back to 1960. From these, we can see that there were only 128 deeds of arrangement in 1975 compared to over 7,000 bankruptcies.

14 Cmnd 221, 1957.

law and practice in English law. That review, headed by the leading practitioner Sir Kenneth Cork, produced its final Herculean prognosis on the state of UK insolvency law in 1982.[15] That report was then used as the basis of major reforms introduced in the Insolvency Act 1985 and quickly consolidated in the Insolvency Act 1986. The starting point for these reforms was the premise that English law was too strict on personal insolvents – the humiliation associated with public examination was offered up as an exemplar. On a more sophisticated level, there was the explicit recognition that bankrupts were sometimes the victims of over-generous credit provision, a facility on which the modern economy depended.[16] This is an important observation that has come to dominate personal insolvency law reform for the past 25 years; bankrupts aid enterprise because they incur credit and the economy depends increasingly upon credit-based consumption. Armed with this philosophy, the policymakers went about liberalising the law – public examinations became the exception rather than the norm, automatic discharge periods were reduced to three years, bankrupts and their families were given greater protection with regard to continued occupancy of the family home. A less draconian regime was introduced for bankrupts owing less than £20,000 – summary administration was made available in such instances (see the now repealed Insolvency Act 1986 s 275). There was also an acknowledgment that there needed to be a change in emphasis away from "selling up" the bankrupt to a strategy based upon constructive use of future income and adoption of models that avoided bankruptcy altogether. Thus, the income payments order was revitalised,[17] and, more importantly, the individual voluntary arrangement ("IVA") was born. Again, these reforms can be linked to a desire to protect enterprise and to the influential "fresh start" philosophy.[18] If a debtor can with some assistance from the law repay his debts and continue as a productive economic player in society, then what is the point in the law undermining that possibility? The reforms of income payments and IVAs were thus intended primarily to benefit the self-employed.

9 The 1986 reforms appeared to work well in practice with one or two notable exceptions. There were concerns that the IVA procedure was not as popular as had been anticipated. This lack of take up was explained away by technical deficiencies, including the fact that an IVA required an interim order from the court in every case.[19] This problem was addressed by the Insolvency Act 2000. What was not appreciated

15 Cmnd 8558, 1982. On the background to, and follow up on, the Cork Committee, see I Fletcher (1981) 44 MLR 77 and [1989] JBL 365.

16 *Ibid*, paras 23–25.

17 On income payments orders, see G Miller (2002) 18 IL & P 43.

18 On the "fresh start" philosophy, see D Milman, *supra* n 4, ch 7.

19 See *Fletcher v Vooght* [2000] BPIR 435.

was that there needed to be a change in culture in the insolvency profession and that such transitions do not occur overnight. So the IVA was initially pioneered by a few of the smaller firms of insolvency practitioners. This is a pattern of behaviour well know to those who study enterprise – innovation often comes from SMEs rather than from their larger counterparts.

10 A more radical rethink provided the backdrop to the major reforms introduced via the Enterprise Act 2002. The government reasoning[20] here was based upon insights gained by a visit to the US by the then Secretary of State for Trade and Industry, Peter Mandelson, in the late 1990s. The Government was impressed by the enlightened attitude towards bankrupts taken in the US and determined upon a further liberalisation of the law. It was believed that bankruptcy was the downside of enterprise risk in any modern economy and, therefore, it should be treated sympathetically. This reasoning, which as we have seen has been used previously in English law, ignored the fact that most bankrupts these days in the UK are not failed traders but rather individuals who cannot manage consumer credit obligations. That reality was not made explicit in the policy documents underpinning the 2002 reforms and was only grudgingly accepted later when it was obvious to all that the composition of the population of bankrupts on the ground had changed considerably in recent decades. Adopting a US perspective on bankruptcy also ran the risk of ignoring the fact that the liberal approach to bankruptcy in the US is tied up with the lack of a welfare state safety net. That said, the inclusion of insolvency liberalisation in the "Enterprise" Act 2002 nevertheless provides the clearest linguistic expression of the perceived link between enterprise and personal insolvency law reform in the UK.

11 The Enterprise Act 2002 accordingly reduced the automatic discharge period to a maximum of one year[21] and further protected the interest of the bankrupt and his family in the family home.[22] The use of investigations by the Official Receiver was further limited.[23] Certain forms of unacceptable conduct by a bankrupt were decriminalised[24] and

20 See the White Paper, *Enterprise and Productivity – Insolvency: A Second Chance* (Cm 5234) (2001).

21 Enterprise Act 2002 s 256, which substituted a new IA 1986 s 279. There is no automatic discharge in Singapore; instead there is an innovative procedure involving application to the Official Assignee after three years. Debts must not exceed S$500K. The position in Malaysia is somewhat similar – see J B Hussain [1999] Ins Law 257. In New Zealand, there is a three-year automatic discharge rule – Insolvency Act 2006 s 290.

22 Enterprise Act 2002 s 261 which introduced a new s 283A into the IA 1986.

23 Enterprise Act 2002 s 258 which substituted a new s 289 into the IA 1986.

24 See, for example, s 263 of the Enterprise Act 2002 which removed the criminal stigma from gambling and from failure to keep proper accounts – instead such conduct could be relevant for the purposes of a bankruptcy restrictions order.

the range of disqualifications to which bankrupts were subjected was reduced.[25] To compensate for these changes and also to rebut allegations that the law was "going soft" on bankrupts, a bankruptcy restrictions regime was introduced to deal with abusive/unfit bankrupts with an expectation that this regime might be applied to some 10% of bankrupts.[26] In view of the general liberalisation of the bankruptcy institution, summary administration was abolished.[27] A new form of IVA was introduced, the fast track post-bankruptcy IVA,[28] based upon a successful model used in the US. The policy was still very much designed to steer personal insolvents away from the rigours of bankruptcy.

12 In the wake of these reforms, the number of recorded personal insolvencies rose sharply and exceeded 100,000 in England and Wales for the first time ever in 2006.[29] From official figures produced in February 2008, we now see that of the 64,480 bankruptcies recorded in 2007, no less than 83% were debtor-initiated. It is also interesting to note that only some 11,000 individual bankrupts in 2006 were classified as self-employed. Bankruptcies grew in number over the course of that year, but a greater rate of increase was recorded in the area of IVAs. On closer analysis, these were, however, IVAs used by debtors wishing to avoid bankruptcy in the first place and not the much-vaunted post-bankruptcy IVAs.[30] This explosion in recorded personal insolvencies attracts a number of observations. The overall increase is difficult to judge because many debtors had previously been using debt management plans, which were not officially recorded. The real surprise was that IVAs suddenly became more popular than bankruptcies, which does not appear to be a rational development. Most IVAs are scheduled to last for a period of five years, a serious commitment, when compared with the possibility of discharge from bankruptcy after one year. The explanation for this behavioural curiosity was that IVAs were being

25 On the reduction in disqualifications, see Enterprise Act 2002 ss 265–268.

26 This figure was quoted in the Insolvency Service Consultative Document, Bankruptcy – A Fresh Start (2000). On bankruptcy restrictions, see Enterprise Act 2002 s 257 – inserting a new Sched 4A into the IA 1986. It is believed that there were some 1,700 bankruptcy restrictions in operation in 2006; still well short of a 10% "target".

27 By Enterprise Act 2002 s 269 and Sched 23.

28 By Enterprise Act 2002 s 264 – inserting ss 263A–263G into the IA 1986.

29 In 2006, there were 62,956 bankruptcies recorded and 44,332 IVAs logged. The IVA figure had doubled on the previous year, whereas bankruptcies had increased by 50%. The figures for 2006 can be found on the Insolvency Service website. As far as 2007 is concerned, there appears to have been a move back to bankruptcy and away from the IVA. In Singapore, there were 2,983 bankruptcies recorded in 2006 with this figure reducing to 2,767 in 2007.

30 Hardly any fast track post-bankruptcy IVAs have been recorded – it is estimated that they make up barely 3% of the overall IVA total.

advertised to debtors[31] in the mass media and IVA "factories" were set up to process hundreds of cases with minimal insolvency practitioner input.[32] In a perverse way, personal insolvency law had generated a new form of entrepreneurial activity in the form of a parasitic professional debt management "industry".

13 This growth in the IVA phenomenon upset the repeat consumer credit suppliers (such as the banks and credit card providers) who felt cheated that customers were being allowed to escape their obligations. Having encouraged people to take on excessive debt through dubious marketing practices and (arguably) via irresponsible lending, the major personal finance providers were finding that debtors were now benefiting from media campaigns to enable them to get "debt-free". In response, these creditors eventually co-ordinated their efforts to block IVAs and to control professional fees, much to the ire of the professional bodies co-ordinating insolvency practitioners.[33] Suggestions were made in some quarters that this co-ordinated campaign by creditors might infringe competition law,[34] though this contention has never been tested.

14 Whilst this was happening, the Government was also concerned that IVAs were becoming inefficient[35] in the sense that the quantum representing professional fees appeared to be disproportionate to the total amount of indebtedness and recoveries. The problem was particularly acute in small insolvencies. What was intended to be a simple scheme was becoming hidebound with technicality. Any observer of the evolution of legal mechanisms over time would recognise that syndrome. Accordingly, in 2006, it recommended a simplified IVA (or "SIVA") which could be approved by a simple majority of creditors without the need for a formal meeting and which was based upon a proposal that could not be modified. In other words, it represented a "take it or leave it" proposition. This reform proposal has attracted a positive response from interested stakeholders and is expected to be

31 The marketing of IVAs has attracted the ire of the Advertising Standards Authority. No one was advertising the "benefits" of bankruptcy. See, generally, T Holt (2007) 23 IL & P 82 and N Sabin [2007] (Spring) Recovery 19.

32 IVA factories first surfaced in 2004. A number of these are listed public companies.

33 The Insolvency Exchange (or TiX) took effect in September 2007. Its purpose is to set a creditor-approved standard in terms of professional fees to be charged for an IVA. Proposed IVAs that depart from this standard may have difficulty in being approved, unless there are special circumstances. See G Rumney [2007] (Winter) Recovery 34.

34 For an appraisal of the position here, see J Skilbeck (2007) 23 IL & P 184.

35 There is some evidence of these concerns raised by D Flynn in [2000] (July) Recovery 18. Others have a more reassuring view of the IVA – see M Green, *Individual Voluntary Arrangements: Over-Indebtedness and the Insolvency Regime* (November 2002) for empirical data on this. This report is available on the Insolvency Service website. For a more recent perspective, see M Green [2007] (Spring) Recovery 24.

introduced via a legislative reform order in 2009. This change, which might also involve a general makeover for the IVA regime,[36] has been delayed to coincide with a general reconsolidation of insolvency secondary legislation.[37] The SIVA initiative is interesting in that the rhetoric of aiding enterprise has become muted. We are thus beginning to see an explicit recognition of the needs of consumer debtors with relatively modest debts.

15 Equally, the Government became concerned with the cost to the public exchequer arising from the application of bankruptcy laws and procedures to bankrupts who were hopelessly insolvent but not in major debt, unfortunate individuals who had "no income and no assets". Accordingly, it floated the idea of a new alternative to bankruptcy nicknamed "NINA"[38] – this would be a simple debt relief scheme which could be administered by bureaucrats at the Insolvency Service without requiring the use of court procedures. After consultation, this scheme (albeit under a different acronym) was enacted in the Tribunals, Courts and Enforcement Act 2007 and is expected to come into effect in 2009. We discuss this innovation later. Again, it is difficult to see a significant link with encouraging enterprise in this reform. Rather the dominant motivation is efficiency in the use of public finance.

16 Cutting across these reforms are a number of outside influences. Throughout the past decade, there have been concerns about whether insolvency laws were consistent with the requirements of the European Convention on Human Rights and Fundamental Freedoms ("ECHR") (introduced into English Law by the Human Rights Act 1998).[39] When this legislation took effect in English law in 2001 it was argued that major changes in insolvency practice would be necessitated. That has not happened for the simple reason that the courts have found that most rules of UK insolvency law are ECHR-compliant.

17 Another phenomenon that has had to be faced up to in recent years has been the growing problem of cross-border insolvency. Facilitating effective cross-border insolvency rules is undoubtedly of

36 This is hinted at in the Insolvency Service Consultative Document – see Press Notice 4 May 2007. See also K Pond [2007] 20 Ins Intell 136.

37 At the time of writing, this date has not been finally determined.

38 On NINA see D Milman, *supra* n 4, at p 153. In Singapore, a slightly different approach is being considered under proposals for a debt repayment scheme which were floated by the Ministry of Law and Insolvency and Public Trustee's Office ("IPTO") in April 2007. This involves a possibility of rescheduling consumer (not trade) debts up to S$100K. Essentially, it is a staged repayment scheme. Persons entering this scheme are not disqualified from the extensive range of activities that a bankrupt would be banned from. Feedback on the consultation on this proposal has been positive and draft legislation is expected to be published early in 2008.

39 For a seminal article on the human rights angle in insolvency law, see C Gearty [2000] Ins Law 68.

importance to enterprise in an era where national barriers are disappearing. The 1986 Act contains in s 426 a judicial comity provision that enabled the English courts to offer assistance in insolvency cases to courts in a number of Commonwealth jurisdictions (but strangely not Singapore). That provision clearly has limitations and a deficit exists for insolvency assistance generally. That has been addressed at EU level via the EC Regulation on Insolvency Proceedings 2000[40] which determines jurisdiction priority in the EU states. On a more global level, in 2006, the UK signed up to the 1997 United Nations Commission on International Trade Law ("UNCITRAL") Model Law on Cross-Border Insolvency via the Cross-Border Insolvency Regulations 2006.[41] For jurisdictions outside the catchment of these legislative facilities, there is always the possibility of assistance being offered through processes of the common law, which have shown themselves to be as inventive as ever.[42]

18 Having completed the historical overview, it is apparent that many of the major reforms in personal insolvency law over the past 500 years have been enterprise-driven in some way or another. The really interesting change of emphasis in the past few years is the explicit recognition of the needs of consumer debtors, who in some cases have been enticed into insolvency by the way in which the UK economy has become dependent on consumer expenditure fuelled by unsustainable personal unsecured credit.

III. The current models in English law

19 We have talked up to now in fairly general terms. It is now necessary to map out the options available in English personal insolvency law.[43] Each of these options has emerged and evolved in some way or another in the light of perceived needs and priorities of the State. One of those priorities is the need to protect commerce and in particular the institution of credit.

40 (1346/2000).

41 (SI 2006/1030).

42 See *Cambridge Gas Transport v Official Committee of Unsecured Creditors of Navigator Holdings* [2006] UKPC 26.

43 See D McKenzie Skene & A Walters (2006) 80 Am Banky Jo 477 for an illuminating general UK review.

A. Bankruptcy

20 The fundamentals here are still governed by the Insolvency Act 1986 ("IA 1986") (as amended).[44] The Insolvency Rules 1986 (as amended)[45] also provide essential working principles.

21 Bankruptcy is commenced either by a creditor petition to the court or through act of self-determination by a debtor petitioning the court under s 272 of the IA 1986. Most bankruptcies these days are self-generated and all that the debtor needs to show when petitioning the court[46] is that he is insolvent. A liquidity test is used for these purposes. The court could in theory stay the petition (under IA 1986 ss 273–274) in order for the possibility of an IVA to be investigated by an insolvency practitioner but that rarely happens. A modest deposit is required to cover administration costs;[47] it has been held that by requiring such a deposit English law does not infringe the ECHR by unfairly blocking access to the courts.[48]

22 Any creditor wishing to use bankruptcy must first serve a statutory demand upon the debtor (IA 1986 ss 267–268). This is an *exclusive* entry mode (unlike in the case of winding up of debtor companies). Prior to the reforms in 1985–1986, any error in the demand would prove fatal.[49] Rather like in a game of "snakes and ladders" the creditor would be forced to retrace its steps and begin the process from square one if a procedural irregularity, no matter how minor, had occurred. With the gentler view of bankruptcy as exemplified by the new Act, this was no longer felt necessary. Thus, in *Re a Debtor (No 1 of 1987), ex parte Lancaster*,[50] the Court of Appeal laid down the principle that provided there was no injustice to the debtor the procedure could continue notwithstanding the irregularity. Since then, few creditor

44 See L S Sealy & D Milman, *Annotated Guide to Insolvency Legislation* (Sweet and Maxwell, 10th Ed, 2007) for the full annotated text. In Singapore, the main legislation is the Bankruptcy Act (Cap 20, 2000 Rev Ed) – see IPTO website and Singapore Academy of Law Annual Reviews produced by Lee Eng Beng for expert commentary.

45 SI 1986/1925.

46 At the moment there can be a delay of up to three months between presentation of debtor petition and the making of a bankruptcy order. This and the cost to the public purse of using the court to admit debtor petitions is persuading policymakers of the need for change. Thus, in a consultative document released in October 2007 (*Bankruptcy: Proposals for Reform of the Debtor Petition Process*), it was suggested that in future debtor petitions should be dealt with by the Official Receiver and not the court.

47 See for deposit details, Insolvency Proceedings (Fees) (Amendment) Order 2007 (SI 2007/521). The current deposit on a debtor's petition is £335.

48 *R v Lord Chancellor, ex parte Lightfoot* [2000] QB 597.

49 For a comparison of the position before and after the Insolvency Act 1986, see D Milman [1994] Conv 289.

50 [1989] 1 WLR 271.

petitions have been frustrated by the debtor seizing upon procedural glitches.

23 Normally, a statutory demand would be utilised by an unsecured creditor, but secured creditors may exploit the bankruptcy regime if their security is vulnerable to attack. It is no abuse of process for secured creditors to use this tactical approach.[51] Again, we see the desire to protect creditors.

24 Where a statutory demand is presented, a common response from debtors is to make a set aside application. Set aside can be granted on a variety of grounds and most commonly because the debt is disputed.[52] For such an argument to succeed, the dispute must be substantial, genuine and must be of such a nature as to reduce the creditor's claim to a figure below the minimum bankruptcy threshold (currently £750[53] but likely to be increased in the near future). The courts have emphasised that bankruptcy is not to be used to collect on trivial or disputed debts.

25 If there is no set aside application, or such an application proves unsuccessful, the court can proceed to hear the petition. Its starting point is that a creditor with an undisputed debt is entitled to seek a bankruptcy order as a matter of right (*ex debito justitiae*). Again, we see a preference for supporting the creditor interest. But that does not mean that the court lacks residual discretion. Section 271 of the IA 1986 makes it clear that discretion is the order of the day. It can refuse an order if, for example, there is evidence of an offer from the debtor being unreasonably refused,[54] or an ulterior motive on the part of the creditor, or if other creditors object. In so deciding, the courts are recognising that bankruptcy is not merely a crude debt collecting device. It is a collective regime designed to offer distributive justice to all concerned. But such refusals are rare. Conversely, it can still grant the order where it is apparent that the debtor has no assets to realise.[55]

26 If the court makes a bankruptcy order that order may, of course, be appealed. Alternatively, if the order was made improperly or if the bankrupt can show that all debts will be paid the court can annul the

51 *Zandfarid v BCCI* [1996] BPIR 501; *Alliance and Leicester v Slayford* [2004] BPIR 70.

52 See Insolvency Rules 1986 r 6.5(4)(b) and cases such as *Kellar v BBR Graphics* [2002] BPIR 544.

53 See s 267(4). Taking account of exchange rate differences, the comparable figure in Singapore of S$10,000 is much higher.

54 On the reluctance of the courts to treat a creditor's refusal as unreasonable, see *John Lewis plc v Pearson Burton* [2004] BPIR 70.

55 *Re Field* [1978] Ch 371 recently followed in *Shepherd v Legal Services Commission* [2003] BCC 728.

order (IA 1986 s 282).[56] Annulment applications are not uncommon and where the debtor is able to show that all debts will be paid it is important to factor in professional costs (which might be a significant item). Although it is not a requirement that statutory interest be paid, the payment of such interest may affect the discretion whether to annul. As a long stop, the court retains jurisdiction under s 375 of the IA 1986 to rescind any bankruptcy order, though it has said repeatedly that this is not to be seen as a third option once appeal and annulment possibilities have been exhausted. In practice, the review jurisdiction is rarely exercised for these reasons.[57]

27 On the making of the bankruptcy order, the Official Receiver's jurisdiction is activated and a trustee will be appointed. If no private practitioner can be found willing to assume the responsibilities of trustee (*eg*, because the estate is hopelessly insolvent) the Official Receiver will act in that capacity. The bankrupt will become subject to a range of new obligations[58] and will be subject to disqualifications (*eg*, a bankrupt is disqualified from being a company director without the leave of the court).[59]

28 On the commencement of bankruptcy – which is backdated by virtue of s 284(3) of the IA 1986 to the time when the successful petition was first presented – the estate enjoys immediate protection. Any hostile actions against it require the permission of the court (s 285) and any disposition of assets by the debtor is void unless the assent of the court is obtained (s 284). Proceedings continued without leave are void.[60] Estate protection is seen as important to reassure creditors.

29 The central function of bankruptcy law is to identify, protect and then liquidate the bankrupt's estate.[61] The policy of the law, as exemplified by case law and by statute, is to be as inclusive as possible so as to maximise recoveries for creditors. All assets, whether they be tangible or intangible are as a rule included within the estate, as the statutory definition of property in s 436 of the IA 1986 makes clear. Private pensions used to be automatically included within the estate,[62]

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56 The comparable provision in Singapore is Bankruptcy Act (Cap 20, 2000 Rev Ed) s 123.

57 See *Papanicola v Humphreys* [2005] 2 All ER 418.

58 On the duty to co-operate with the Official Receiver, see s 291.

59 On a similar disqualification for undischarged bankrupts in Singapore, see Companies Act (Cap 50) s 148.

60 *Seal v Chief Constable of South Wales* [2007] UKHL 31 – see also *Re Taylor* [2007] 1 Ch 150.

61 See D Brown (2007) 11 Jo of South Pacific Law 89 for an illuminating account of this aspect of bankruptcy law.

62 *Re Landau* [1998] Ch 223 – confirmed in *Krasner v Dennison (Lesser v Lawrence)* [2001] Ch 76 and *Rowe v Sanders* [2002] EWCA Civ 242.

but these were partially excluded[63] when it was realised that this might discourage self-employed people from taking out such pension, a move that would run counter to a high priority government policy of encouraging self-employed people to make adequate provision for their retirement. Exceptions are provided for in s 283(2) for basic necessities, tools of the trade[64] and personal injury compensation. These exceptions can be explained away by the need to protect productive capacity and also by common humanity. The trustee's options with regard to realisation of the family home have been ostensibly limited, particularly in the initial 12 months after bankruptcy has commenced, but thereafter creditor rights remain potent and generally take priority over family claims unless there are "exceptional circumstances".[65] Having said that, a trustee who fails to take any form of realisation action against the family home within the three years after the commencement of the bankruptcy may find that his options are constrained.[66]

30 The role of the trustee is to get in the assets with a view to realisation. This process may involve consideration of what should be done with causes of action vested in the bankrupt. Basically a trustee may decide to pursue these on behalf of the estate, or sell them, or compromise them. A policy of doing nothing is not recommended and may trigger a court challenge under s 303 of the IA 1986.[67] It is not uncommon to find the bankrupt offering a nominal sum to take back the claim; such an offer may appear derisory but if the trustee is planning not to pursue the claim the offer should be given serious consideration.[68] Onerous items may be disclaimed under procedures specified in s 315 without the need for recourse to the court.[69]

63 Welfare Reform and Pensions Act 1999 ss 11,12 and 15 inserting ss 342A–342F into the IA 1986. This reform was not extended retrospectively to benefit old bankrupts going bankrupt before 29 May 2000 – but this cut off policy decision was supported by the courts in *Malcolm v Benedict Mackenzie* [2005] 1 WLR 1238.

64 Similar exceptions are provided for in Singapore – Bankruptcy Act (Cap 20, 2000 Rev Ed) s 78(2)(b).

65 IA 1986 ss 335A, 336. There is a growing jurisprudence here, most of which supports the position of the creditor. See cases ranging from *Re Citro* [1991] Ch 142 to *Avis v Turner* [2007] EWCA Civ 748. The courts have affirmed that to sell the house over the head of the family does not infringe Art 8 of the ECHR. For discussion see P Omar [2006] Conv 157 and M Pawlowski [2007] Conv 78.

66 IA 1986 s 283A introduced by s 261 of the Enterprise Act 2002. For comment on the use it or lose it innovation, see S Frieze [2004] 17 Ins Intell 106.

67 Challenges under s 303 rarely succeed because the court asks itself whether the trustee was acting in such a way that no reasonable trustee would act. That test creates an onerous burden of proof on the party challenging the trustee.

68 See, for instance, *Faryab v Smith* [2001] BPIR 246.

69 On the effect of disclaimer on third parties (such as guarantors of the debtor), see *Hindcastle v Attenborough Ltd* [1997] AC 70. Disclaimer in Singapore is covered by the Bankruptcy Act (Cap 20, 2000 Rev Ed) s 110.

31 The trustee and official receiver enjoy broad powers to investigate the conduct of the bankrupt whether by private (IA 1986 s 366) or public examination (s 290). Such investigations may be a precursor to litigation against the bankrupt, or to the commencement of proceedings seeking bankruptcy restrictions, or even to a criminal prosecution. These provisions are again part of the veneer designed to bolster the institution of credit.

32 As s 328(3) of the IA 1986 makes clear, assets are distributed *pari passu* amongst unsecured creditors who prove their debts. Crown preferential debts were abolished by s 251 of the Enterprise Act 2002 with effect from 15 September 2003.

33 On discharge, all debts provable in bankruptcy are released (see IA 1986 ss 281 and 382). Fines are not provable and, therefore, remain unaffected by discharge (s 281(4)). Lump sums payable on divorce are now provable[70] as are claims in tort.[71] Moreover, liabilities incurred in connection with student loans survive discharge.[72] For a knowledge-based economy, this latter exception seems irrational, but this perversity is not restricted to English law.[73] The explanation lies in the need to protect the public exchequer.

34 How has bankruptcy sought to fulfil the needs of an enterprise-driven economy? Firstly, it has handed a powerful weapon to the creditor lobby which can be used *in terrorem* to extract repayment from a debtor. In reality, although bankruptcy law has done its utmost to maximise the scope of the estate to enhance realisations, it has failed to provide an efficient return. Increasingly, the legitimate expectations of creditors have come under attack from social influences and the demands of other stakeholders. There is more than a degree of disillusionment on the part of creditors.

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70 Lump sums were made provable debts by SI 2005/527 amending Insolvency Rules 1986 r 12.3.

71 For the position on tort claims, see IA 1986 s 382(2) – tort claims may be bankruptcy debts.

72 On student loans, see Higher Education Act 2004 s 42. For background, see D Milman, *supra* n 4, at p 125.

73 Student loans are not discharged on bankruptcy in Canada, Australia and in many US states – on the latter, see R Salvin (1996) 71 Tul L Rev 139. In New Zealand, they will be discharged on bankruptcy, but curiously a debtor in New Zealand cannot use the no assets procedure nor the summary instalments order (see ss 340–360 of the Insolvency Act 2006) regime to clear student loans.

B. Individual voluntary arrangements[74]

35 As originally envisaged, the IVA procedure would operate in the following way. Firstly, the debtor would approach a licensed insolvency practitioner and outline his financial problems. If that practitioner thought that a viable proposal could be put to creditors with some prospect of success he would first approach the court for an interim order. The purpose of such order was to protect the debtor's position from hostile actions by individual creditors pending the calling of creditor meetings. Essentially, the interim order was designed as a utilitarian tool operating in the interests of creditors collectively. The interim order would not be granted if the proposal appeared to the court to be unworkable; a quality control mechanism thus existed.

36 In the wake of the Insolvency Act 2000 ("IA 2000"), it would no longer be a requirement to seek an interim order (see IA 2000 s 3). Most IVAs in recent years in the UK have been set up without the assistance of an interim order. Although insolvency practitioners are supposed to check for the viability of proposals, intuition suggests that the removal of the judicial quality control stage (which has reduced costs) has led to a greater number of unworkable IVAs getting off the ground.

37 Whether an interim order is employed or not, the critical stage in the process involves securing the consent of creditors. Notices should have been sent to creditors informing them of the proposed meeting. In order to approve an IVA, creditors holding more than 75% of the debt must vote in favour of it and this majority must include the majority of the independent creditors.[75] Changes were made by the IA 2000 to deal with the position of creditors who by inadvertence had not been notified of the meeting – such individuals could no longer jeopardise an approved arrangement but are entitled to special protection.[76]

38 Once the creditors have approved the IVA by the required majority, the arrangement forms a statutory contract between debtor and creditors (see IA 1986 s 260). Depending upon its wording, it may have implications for third parties, such as guarantors of the debtor's financial obligations. Like all contracts, issues of construction may fall to be determined; the courts adopt standard contractual techniques in the sense that they will strive for a commercial interpretation.[77] This

74 The procedure in Pt V of the Bankruptcy Act (Cap 20, 2000 Rev Ed) ss 44–56 bears some similarity.

75 Insolvency Rules 1986 r 5.23. A 75% threshold is used in Singapore for the purposes of Pt V voluntary arrangements (see s 51 as supplemented by s 2).

76 See IA 1986 s 260(2A) now.

77 On the interpretation of IVAs, see *Welburn v Dibb Lupton Broomhead* [2002] EWCA Civ 1601. R3 has produced a model set of IVA terms but they are not mandatory – see C Boardman (2003) 19 IL & P 75.

contractual aspect of IVA is completely missing from bankruptcy law, making the IVA institution more enterprise friendly.

39 Creditors who voted against the arrangement will be bound by it unless they can launch a successful challenge under s 262 of the IA 1986. Such a challenge might focus on some material irregularity in procedure. The irregularity must be such as to have affected the outcome of the vote.[78] The alternative ground for challenge is that the arrangement operates in an unfairly prejudicial manner against the complainant. Until recently, this was thought to be dead letter because the courts had indicated that discriminatory treatment might be justified on commercial grounds. For example, certain strategic creditors might merit a higher rate of return. However, in a case[79] dealing with company voluntary arrangements, the High Court has upheld a challenge on unfair prejudice grounds.

40 On approval of the arrangement, the nominee will usually become the supervisor. His function is to ensure that the debtor keeps to his promises. The supervisor has the right to apply to the court for directions (IA 1986 s 263(4)). There is also the right to make an application to the court for bankruptcy in the event of default by the debtor or in other cases where the arrangement is simply not delivering (s 276). This is an important creditor reassurance mechanism. It should be stressed that supervisors cannot guarantee the success of any IVA – there may be factors at work (*eg*, in the general economy) that make a promising IVA proposal non-viable several years down the line.[80]

41 Individual voluntary arrangements are typically scheduled to run for five years. It is a sad fact of life that a number of IVAs fail to deliver and bankruptcy ensues.[81] One of the most vexed issues in the law of voluntary arrangements concerns the fate of the sums of money collected by the supervisor of a failed arrangement. Do these sums belong to the debtor and form part of his estate for distribution amongst general creditors on bankruptcy or do they belong exclusively to those creditors participating in the now defunct IVA? In *Re NT Gallagher & Sons Ltd*,[82] the Court of Appeal plumped for the latter view; in effect a residual trust was generated in their favour thereby isolating these funds from the bankruptcy estate. Here we see the courts doing their utmost to encourage creditors to sign IVAs by offering some reassurance that their interests will be protected.

78 That is because it must be "material" – see s 262(1)(b).
79 *Prudential Assurance v PRG Powerstore* [2007] EWHC 1002 (Ch); [2007] BCC 500.
80 *Pitt v Mond* [2001] BPIR 624.
81 See M Green *supra* n 35.
82 [2002] 1 WLR 2380.

42 Before leaving IVAs, we should say a few words about fast track post-bankruptcy IVAs as regulated by ss 263A–263G of the IA 1986. These were introduced by the Enterprise Act 2002. Apparently, similar models work well in the US and they are used extensively in that jurisdiction. The idea is that when an individual becomes bankrupt the official receiver will be able to identify a suitable case for an IVA and will be able to put such an arrangement in place using a truncated procedure. This did not materialise in practice for the simple reason that IVAs were so well known through media exposure that it is highly unlikely that a person would become bankrupt without considering the IVA possibility.

43 How has the IVA contributed to the promotion of enterprise? It has helped a number of self-employed people to benefit from a chance to reschedule their debts without the loss of their basic pool of assets. Returns for creditors were initially good, but professional costs have risen. One great attraction of the IVA is that it has allowed certain debtors (*eg*, prison officers) to remain in productive employment in circumstances where their employment would have been terminated had they become bankrupt. In more recent times, the IVA has been seized upon by consumer debtors and indeed has generated a secondary service "industry".

IV. Models on the horizon

44 The most radical of these is the so-called "no income, no assets" ("NINA") alternative to bankruptcy. The mechanics of this model, now renamed as the debt relief order ("DRO"), are mapped out in Pt 7A of the IA 1986, which was introduced by s 108 of the Tribunals, Courts and Enforcement Act 2007. Under the 2007 Act, the procedure (to be located in ss 251A–251X and Scheds 4ZA and 4ZB of the IA 1986) works as follows. It is likely only to be available to creditors who owe less than £15,000 and they must have low surplus income of less than £50 per month and few assets (worth less than £300).[83] These preconditions which are dealt with by Sched 4ZA are very restrictive and there have been suggestions that only 14% of would-be bankrupts might qualify. If a debtor qualifies he must apply *via* an approved intermediary to the Official Receiver who will evaluate the case and make a decision on whether a debt relief order should be made. Such an order places a moratorium on debt enforcement for qualifying debts (s 251G). After one year, the debtor is discharged. There are a number of quality controls written into the procedure. These make it an offence to procure a DRO by false pretences (s 251O) and allow creditors who feel

83 These financial criteria have not been finalised and may well change before the scheme is brought into effect.

prejudiced to raise challenges (ss 251K and 251M). The debtor is under a duty to co-operate with the official receiver (s 251J) and investigations may be ordered (ss 251K and 251N). Finally, abuse can be dealt with by a debt relief restrictions order authorised by s 251V, the mechanics of which are outlined in Sched 4ZB. Further details will depend upon secondary legislation, which has not yet been published.

45 Such debt relief schemes have been used on the continent of Europe for several years and the European Court of Human Rights[84] has ruled that they do not necessarily involve a disproportionate infringement of the property rights of creditors. A similar model, the No Assets Procedure, was introduced into New Zealand in the Insolvency Act 2006.[85] Key points to note about this New Zealand regime is that it offers a once and for all opportunity and, if successfully completed, will release debts after one year.

46 As mentioned above, the year 2009 should also see a new IVA-variant hit the market – the so-called SIVA (simplified IVA).[86] Details of this have not yet been finally determined, but it is likely to be available only to debtors whose debts do not exceed £75,000. In order to get such a proposal approved, only a simple majority of creditors voting in favour will be required. Postal voting will be used instead of formal meetings and there will be no opportunity to modify the proposal once it has been put to the vote.

47 The newest proposed innovation in this field is the Enforcement Restriction Order ("ERO").[87] The bare outlines of this reform were mapped out in s 107 of the Tribunals, Courts and Enforcement Act 2007. Under the latest proposals published by the UK Ministry of Justice in January 2008, this ERO in effect offers a breathing space from the need to make repayments by enabling a debtor, who is experiencing a sudden and unforeseen change in his financial circumstances, to apply to the court for a short-term moratorium. During the currency of an ERO (which can last for up to 12 months), creditor enforcement rights are frozen. The focus is very much upon the consumer debtor by excluding business debts from the procedure, though there is no limit on the amount of debt involved.

48 It is too early to speculate on how these initiatives might aid enterprise.

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84 *Back v Finland* [2005] BPIR 1.

85 Insolvency Act 2006 ss 361–377. On the New Zealand reform, see the website of the New Zealand Ministry of Economic Development.

86 On SIVA, see S Barc (2005) 21 IL & P 168 and K Pond [2007] 20 Ins Intell 136.

87 Full details are on the Ministry of Justice website.

V. OVERVIEW OF OPTIONS AVAILABLE IN ENGLISH LAW

49 Once the 2009 reforms have come into force a debtor in English law will have a wide range of options in dealing with his distress. Each will have its own peculiar pros and cons. Bankruptcy could lead to the loss of one's major capital assets, but that embarrassing status could be over quickly. IVAs rely more upon future income streams, but can result in bankruptcy if they fail to deliver as promised. Early indications are that the criteria for the new debt relief scheme will be so restricted so as to rule out many debtors. SIVAs have potentially a wider catchment area, but do depend on securing creditor approval (an increasingly testing challenge in modern conditions). This range of options must in theory be a positive thing by providing solutions for a range of debtor "customers".

50 How will creditors respond to this *a la carte* menu for debtors? One suspects that in the wake of the 2007 credit crunch they will look to alternatives outside formal insolvency procedures. Mortgage repossessions will soar.[88] Creditors will increasingly exploit alternatives such as attachment of earnings orders[89] or charging orders[90] or third party debt orders.[91] The changes introduced for these regimes by the Tribunals, Courts and Enforcement Act 2007 are unlikely to dent their growing popularity. All of these mechanisms are geared towards the interests of creditors and do not for the most part reflect the pro-debtor liberalising trends we have witnessed in bankruptcy law. By deregulating bankruptcy law to promote the position of creditors, the Government may well have driven creditors to use these alternative methods of recovery.

VI. Lessons to be learned from reforms adopted in English law

51 Bearing in mind our overriding theme of the link between personal insolvency law reform and the needs of an enterprise-driven economy, what conclusions can we draw?

88 Latest indications from the Council of Mortgage Lenders suggest there will be a big rise (possibly as high as 50%) in mortgage repossessions in the UK in 2008 – see *The Times* (8 January 2008).

89 See Attachment of Earnings Act 1971 and Tribunals, Courts and Enforcement Act 2007 ss 91–92.

90 Charging Orders Act 1979 as amended by Tribunals, Courts and Enforcement Act 2007 ss 93–94.

91 Formerly garnishee orders – see now Civil Procedure Rules r 72.2.

A. Transplants do not always work

52 Most developed jurisdictions will undertake some comparative research before opting for significant reform. That makes sense in a shrinking world with increasingly interlocking economies. But it is dangerous to assume that simply because a legal mechanism works well in one jurisdiction that it can always be effectively "exported". Underlying cultural considerations may prove decisive.[92] For example, moral attitudes to debt or reluctance to have recourse to the law can come into the equation. Even in the context of two advanced economies, that note of caution needs to be borne in mind. Witness the failure of the fast track IVA to take root in English law. Even similar economies/legal systems may have different economic/social priorities at any particular point in history.

53 Moreover, a jurisdiction may wish to consider whether it would benefit from the cultural trappings often associated with legal reform. The UK's reforms of insolvency law are heavily influenced by US cultural attitudes towards debt which have been traditionally permissive. Ironically, we liberalised our law just when retrenchment was setting into the US.[93] Are they the most appropriate attitudes to inculcate in a civilised state that wishes to place a premium on personal responsibility? The sub-prime lending crisis has forced lenders, borrowers and governments to reconsider their positions in this area over the past six months. That will be a salutary experience.

B. Research and data must be collected beforehand

54 This point follows on from the above observation. It is particularly important to get a full understanding of the topography of debtors and creditors within one's own national territory before embarking upon misconceived reform. Until five years ago, there was a black hole in data capture with regard to the nature of insolvency and the population of insolvents in English law. The Insolvency Service, to its credit, has done much to fill that void with a number of invaluable empirical studies.[94] Policymakers need to know how insolvency reform may aid enterprise by getting to grips with the current profile of insolvents. This is a critical first step to effective insolvency reform.

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92 Professor Kahn-Freund made this point in his famous piece "Uses and Misuses of Comparative Law" in (1974) 37 MLR 1.

93 President Bush signed the Bankruptcy Abuse Prevention and Consumer Protection Act 2005 which had the effect of tightening US bankruptcy laws.

94 See, for instance, its study of "The Characteristics of a Bankrupt" (March 2006).

C. The position of creditors must be given appropriate consideration

55 In our provisional conclusions above, we noted that creditors are far from being a passive constituency. Their recent intervention in the IVA field has certainly had a sobering effect. Their voices are influential in policy debates. They can use alternative procedures if they do not like the formal insolvency regimes. Notwithstanding this, creditors naturally wish to recover their debts, but they also recognise that it may be more efficient for them to look at alternatives to fully-fledged bankruptcy in order to preserve the infrastructure of a potential future customer.

D. The courts have a role to play

56 Even with the best will in the world no legislative reforms can work effectively without a fair wind from the courts. Having said that, the courts are fully acquainted with the nuances of bankruptcy policy. They appear committed to the fresh start policy in appropriate cases, whilst generally recognising the need to protect the economic interests of creditors.[95]

E. Interaction between insolvency reforms and other areas of social policy requires careful thought

57 Insolvency law reform does not operate in a vacuum. This article has explained how it can be intimately connected with macro-economic policy by encouraging or discouraging trade, borrowing and retail spending. But its relationship with family policy and pensions strategy needs to be taken on board. The question for any jurisdiction to determine is how to prioritise these competing policy goals in a defined set of circumstances.

F. Do not be seduced completely by the idea of rehabilitation

58 The "fresh start" mantra is indisputably tied up with a perceived need to foster enterprise. It is a concept that scores well with image-conscious politicians and with practitioners. In a utopian world, rehabilitation is a goal that no one would wish to argue against. But to develop insolvency law reform policies without regard to the fact that many debtors will (as experience indicates) never be rehabilitated is foolhardy. Lessons can be learned from the initial failure of income

95 See D Milman in *Commercial Law and Commercial Practice* (S Worthington ed) (Hart Publishing, 2003) ch 13 at pp 373–399.

payment orders in English law[96] and from the potential problem of serial bankrupts.[97] The move towards debt relief innovations does at least suggest that the policymakers are now aware that aiming for rehabilitation by a staged repayment of a proportion of debt may be an unduly optimistic goal in many cases.

G. Prevention is better than cure

59 For too long English law had concentrated on the consequences of insolvency rather than its causes. The fresh start idea, although it has its limitations as we suggested above, has at least broken the mould in that respect. More thought now needs to be given to raising financial awareness among young people,[98] debt counselling[99] for those who have already fallen foul of the system and encouraging responsible lending practices on the part of financial institutions.[100]

H. The pros and cons of choice

60 English law has recognised that in terms of personal insolvency regimes, a policy of "one-size-fits-all" will simply not provide a solution to the different constituencies of distressed individuals. Thus, the policy of English law over the past 20 years has been to produce a range of models that can be used by a distressed debtor. That strategy has accelerated in the past five years. That in itself is commendable, but the knock on effect has been to produce an overall system that may be too complex. There are transaction costs involved in making choices. The need for objective sources of information and constructive advice is

96 For confirmation of this lack of utility in the early years, see JUSTICE, *Insolvency – An Agenda for Reform* (1994) para 4.30. Having said that, income payment agreements rose substantially in 2006 – see M Norris [2007] (Spring) Recovery 20.

97 There is still a dearth of information on this issue but it is likely to rear its ugly head in the years to come.

98 The UK Financial Services Authority has launched an educational initiative here. INSOL in a report in 2001 also supported better education – see D Milman, *supra* n 4, at p 154. The IPTO website in Singapore contains valuable guidance on financial awareness, including a mathematical checklist on healthy debt levels.

99 Mandatory debt counselling has been used in Canada and in some US states for a while. The Bankruptcy Abuse Prevention and Consumer Protection Act 2005 extended its usage on a federal level in the US. Regrettably, it has not been introduced in English law.

100 Singapore is alert to this issue – see, for example, the Consultative Document issued by the Monetary Authority of Singapore in December 2007. In the UK, the latest version of the Banking Code which takes effect in March 2008 stresses the need for responsible lending by requiring lenders to advise borrowers to prioritise debt repayments in favour of mortgage commitments. The general issue has also been taken on board by the EU.

acute.[101] Matters have been exacerbated by leaving on the statute book redundant models (such as deeds of arrangement)[102] and introducing others that have manifestly failed (*eg*, fast track post-bankruptcy IVAs). On the positive side, this complexity may offer enterprise opportunities to professional financial advisers even if the reforms were not intended to achieve that effect.

I. There is a public interest at work

61 We saw above that this was a live issue way back in the 19th century. Insolvency practitioners have been most vociferous in seeking to persuade the Government that it has no role to play and therefore it should withdraw from servicing personal insolvency cases. But the regulation of insolvency lies at the heart of the economy and cannot be abandoned by the State. Private sector practitioners will simply not take on work that is unprofitable. A limited amount of *pro bono* activity cannot disguise that reality. A mixed economy in terms of the supply of services for insolvency work by public and private providers is surely the best way forward in any enterprise-driven economy.

J. Insolvency procedures may place a drain on the public exchequer

62 Increasing demands upon the exchequer in theory will lead to higher taxation, a consequence unwelcome in any enterprise-driven economy. A recognition of this factor has been one factor behind the reducing role of the State in bankruptcy and in attempting to divert "bankruptcy" cases into the orbit of alternative insolvency regimes. The use of agreements and undertakings in lieu of court orders has been manifested in the income payments field[103] and also with regard to bankruptcy restrictions.[104] Most recently, under proposals[105] published in October 2007, debtor petitions will no longer be disposed of in court but will be processed by the Official Receiver. At the moment, the net cost to the State of the court dealing with each debtor petition is some £165 and, therefore, some significant savings could be made by that change.

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101 Singapore since 2002 has run a Pre-Bankruptcy Advisory and Mediation Service through IPTO. This is an example of an initiative that might be adopted in other jurisdictions.

102 There has only been a single deed of arrangement recorded since 1999. Deeds of arrangement will finally be abolished when the SIVA is introduced.

103 See Insolvency Act 1986 s 310A (income payment agreements).

104 See Insolvency Act 1986 s 281A and Sched 4A para 7.

105 See *supra* n 46.

K. Beware of the message conveyed about consumer debt

63 Liberalisation of the law on personal insolvency carries with it the danger of influencing personal attitudes to the advisability of taking on too much debt. There are parallels with the debate about liberalising drug laws.[106] Once citizens receive the message that being heavily in debt is not perceived to be an unacceptable form of behaviour, it becomes doubly difficult for a government to preach austerity on the part of borrowers and prudence by lenders. The UK, in the author's opinion, has got the emphasis wrong here. Personal insolvency reform designed to encourage individuals to engage in enterprise without undue fear of the possibility of debt is a positive strategy. But liberalising personal insolvency law in such a way as to encourage the certainty of unsustained personal debt, although providing a short-term boost for the retail sector, will ultimately end in tears. That is exactly the situation that confronts the UK in 2008. Citizens must be reminded of their own personal responsibility with regard to debt and by continually liberalising the law that message will become confused.

L. Personal insolvency is no longer an exclusively local problem

64 Any reforms in a modern insolvency law regime must take on board the fact that cross-border insolvency is a feature of modern commerce and 21st century life. Debtors are mobile and assets are more likely to be portable and/or held in a number of jurisdictions. Singapore has developed an impressive portfolio of comity provisions, but it does not as of yet appear to have adopted the UNCITRAL Model Law on Cross-Border Insolvency.

M. Insolvency practice contributes to the economy

65 We have noted above that in the UK, the private sector insolvency practitioner does play a significant role in the administration of insolvency cases. That is not always the case in other jurisdictions where the public sector predominates (as in Singapore). Where the private sector is active, it should be borne in mind that it carries out a form of enterprise activity that employs workers and pays tax.[107] Reforms in personal insolvency law may take that issue into account and, in particular, the need to ensure that there is adequate competition in the market for insolvency services, that fees are transparent, whilst

106 The UK Government has learned this lesson through its impending *volte face* on the classification of the drug cannabis.

107 R3 is currently commissioning research on this matter to be carried out by the Centre for Economics and Business Research. See the R3 Press Archive for 20 September 2007 for details of this project.

ensuring that unnecessary regulatory burdens are not imposed on practitioners to the detriment of their role in managing debtors' assets.

N. Utilise modern technology

66 For the most part, bankruptcy and other personal insolvency regimes are still paper-based, as they were in Victorian England. This is perverse in modern conditions, but there are welcoming signs of change both in English law[108] and in other Commonwealth jurisdictions.[109] In October 2007, an Insolvency Service Consultative Document, which recommended that debtor petitions be removed from the purview of the courts, also suggested that an online procedure for presenting such petitions to the Official Receiver be introduced as an option. Such a reform would put the UK on a par with Australia, Canada and New Zealand in this respect.

VII. Final observations

67 It has been established that reform of personal insolvency law can aid enterprise. But it can have unfortunate side effects if not properly evaluated in the local cultural context. In some senses, the experience of personal insolvency law reform in the UK in recent years might suggest undue haste on the part of politicians initiating policy reform. This haste is borne out of a major social crisis of personal indebtedness, which earlier reform arguably may have contributed to. In fairness, other factors, such as the need to keep public expenditure under control and the desirability of making good use of new technology, have added to the stimuli for change. Policymakers in Singapore will be aware of the need for measured reform in the light of these considerations and are in the fortunate position of not being engaged in crisis management. That combination of factors bodes well for future revision of personal insolvency law in Singapore.

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108 For example, debtors can now secure all relevant documentation online from the Insolvency Service website. Once completed, however, this paperwork is still largely dealt with by traditional methods.

109 Under the New Zealand Insolvency Act 2006 s 93 electronic creditor voting is a possibility.