A COMPARATIVE APPRAISAL OF DEBT RELIEF MEASURES FOR NO INCOME NO ASSET (NINA) DEBTORS IN NIGERIA

by

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SUMMARY

Nigeria currently has a non-functioning insolvency system; it is yet to record a successful insolvency case. This failure principally is attributable to the weak laws and enforcement policies in existence. The problem is exacerbated by burgeoning consumer debt in the formal sector. The causal factors for this increase in debt are negative economic growth indices such as rising inflation, interest rates and unemployment. With these indices predicted to worsen, a new Bankruptcy and Insolvency Act (BIA) was proposed in 2016. The BIA seeks to regulate individual insolvency proceedings in Nigeria. However, the BIA (as currently conceptualized) does not make provision for debtors with neither income nor assets, often referred to as No Income No Assets (NINA) debtors who, it can be argued, are in the majority in the Nigerian state.

The aim in this thesis is to propose debt relief measures that cater for NINA debtors in Nigeria. This proposal aims to prevent further discrimination against these debtors in terms of the current law and the proposed BIA. It envisages that catering for NINA debtors in Nigeria will boost the Nigerian government's drive to encourage entrepreneurship. In providing for NINA debtors it will provide a safe landing for poor debtors in the event of entrepreneurial failure.

The thesis achieves its stated aim by studying international principles and guidelines as espoused by leading bodies. Furthermore, the thesis performs a comparative analysis of relevant NINA provisions in South Africa, Sweden, France, Ireland and Canada.

The thesis proposes amendments to the proposed BIA in light of the aforementioned analysis and posits that procedures that are formal and extra-judicial, which have no financial requirements and are easily accessible to debtors should be incorporated.

Annexure G

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Declaration of originality

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CHAPTER 1

INTRODUCTION

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1.1 Background information, topic introduction and research motivation

The importance of an effective natural person insolvency system cannot be over-emphasised as it is closely linked to the economic strength and stability of a country.[1] An effective and well-organised system of insolvency of natural persons is said to help combat poverty, especially in developing countries.[2] Recent research into modern insolvency systems shows an increased focus on a group of consumer debtors who popularly are referred to as the No Income No Asset (NINA) debtors.[3] This group of debtors forms the subject of this research in relation to Nigeria.

Nigeria popularly is referred to as the giant of Africa because it is the most populous nation on the continent with a population of over 180 million people[4] and has the largest economy in Africa.[5] Since Nigeria became an independent nation in 1960, achieving

[1] Boraine and Roestoff 2013 *The World Bank Legal Review* 92.
[2] *Ibid*. See also Coetzee and Roestoff 2013 *Int Insolv Rev* 188.
[3] See International association of restructuring insolvency and bankruptcy professionals (Insol) international 2001 *Consumer debt report: Reports of findings and recommendations* (hereafter referred to as the Insol *Report* 2001). See also World Bank *Report* 2011: *Report on the treatment of insolvency of natural persons* (hereafter referred to as the World Bank *Report*). European Union *Final report* 2003: *Report on consumer over-indebtedness and consumer law* (hereafter referred to as the IFF *Report*).
[4] The World Bank 'Data Bank' 2018 http://bit.ly/2BRnfZv (accessed 27/08/2019).
[5] International Monetary Fund (IMF) World Economic Outlook 2018 https://bit.ly/2QDOKZn1 (accessed 27/08/2019).

economic maturity through speedy industrialisation remains mostly a mirage. This goal has been the principal focus of various administrations. In line with this focus different economic expansion policies have been adopted by past governments. However, although the Nigerian economy is the largest in Africa as yet it is not industrialised or developed.[6]

The major pillars of the Nigerian economy are agriculture and oil,[7] with agriculture contributing about 20.8 per cent to the Gross Domestic Product (GDP)[8] and oil contributing about 70 per cent of the Nigerian government's revenue.[9] The agricultural sector employs approximately two-thirds of the country's total labour force and provides a livelihood for about 90 per cent of the rural population.[10] Despite Nigeria's bounteous agricultural resources and oil affluence, unemployment and poverty[11] remain prevalent in the country and have been on the increase since the late 1990s.[12]

A number of factors such as corruption and mismanagement are said to be the main causes of abject poverty in the country.[13] The abuse of the profits of the nation's oil resources and the poor management of oil pay-outs[14] have contributed to the decline in Nigeria's economy over the past two decades and significantly contribute to rising levels of poverty in the country.[15] The rate of poverty in Nigeria is said to be more severe in the rural areas where about 44.9 per cent of the population live below the poverty line.[16] Limited social services and infrastructure are prevalent in these areas.[17]

In 2018 the World Bank poverty clock data show that Nigeria has more people living in extreme poverty than any other country in the world.[18] According to reports Nigeria had a total of about 87 million people living in extreme poverty, compared to India which

[6] Iwuagwu 2009 *African economic history* 151.
[7] Nigerian Economic Outline 2019 http://bit.ly/2lVnnzp (accessed 17/09/2019).
[8] See World Bank 2015 http://bit.ly/2EXuePu (accessed 04/03/2016). See also Nigerian Economic Outline 2019 (accessed 17/09/2019).
[9] Organization of the Petroleum Exporting Countries (OPEC) 2017 http://bit.ly/2wNZLic (accessed 24/12/2018). See also Nigerian Economic Outline 2019 http://bit.ly/2lVnnzp (accessed 04/03/2016).
[10] International Fund for Agricultural Development (IFAD) 20019 http://bit.ly/2kNLM9O (accessed 17/09/2019).
[11] Ajisafe 2016 *JETEMS* 156. See also Economic Outline 2019 http://bit.ly/2lVnnzp (accessed 04/03/2016).
[12] Consumer News and Business Channel (CNBC) Africa 2014 http://bit.ly/2KEQkK8 (accessed 04/03/2016).
[13] Ajisafe 2016 *JETEMS* 156.
[14] Oil pay-outs can be defined as the revenue obtained from the sale of crude oil and remitted to the federal account.
[15] Oshionebo 2017 *JWELB* 329.
[16] IFAD 2019 http://bit.ly/2kNLM9O (accessed 17/09/2019).
[17] *Ibid*.
[18] World data lab poverty clock 2018 http://bit.ly/2klJ8YR (accessed 17/09/2019).

formerly was the capital of poverty with a statistic of 73 million people living in extreme poverty.[19] The number of Nigerians living in extreme poverty is said to grow by six people every minute.[20]

In addition to the staggering rate of poverty in Nigeria the country is faced with high levels of unemployment.[21] There is general consensus that unemployment is a major problem confronting the Nigerian populace and it has been identified as the main cause of poverty.[22] The unemployment rate in Nigeria was at an all-time high of 23.9 per cent in 2011, 9.9 per cent in November 2015[23] and 23.10 per cent in the third quarter of 2018.[24] There was a vociferous debate among academics and policy makers about the methodology used to obtain the recent figures because experts argue that the unemployment figure is much higher.[25]

Yet another problem bedevilling the Nigerian economy is that of mounting consumer debt, which is of special significance to this study.[26] The Central Bank of Nigeria estimates that total consumer debt in Nigeria stands at 400 billion naira (approximately $2 billion United States dollars) in the formal sector alone.[27] A number of reasons have been advanced for the large amount of consumer debt in the country. These range from high interest rates, slow economic growth, high unemployment and fuel price hikes to increasing inflation. Simply put, this means that the worsening economic climate likely will further increase total consumer debt. In the informal sector of the economy it is difficult accurately to gauge the debt level, suffice to say that this sector of the economy is larger than the formal sector. The informal sector of the economy is made up of an informal (unregulated) financial system, with non-governmental organisations (NGOs),

[19] World data lab poverty clock 2018 http://bit.ly/2klJ8YR (accessed 17/09/2019). See also Kharas, Hamel and Hofer *The Start of a new poverty narrative* Brookings (Washington D.C) 2018 https://brook.gs/2kqCG2Q (accessed 7/09/2019).
[20] Kharas, Hamel and Hofer *The Start of a new poverty narrative* Brookings (Washington D.C) 2018 https://brook.gs/2kqCG2Q (accessed 7/09/2019).
[21] Trading Economics Nigeria unemployment rate 2018 http://bit.ly/2XyvOOV (accessed 17/09/2019).
[22] *Ibid*.
[23] See Nigerian National Bureau of Statistics 2015 Unemployment/ Under-Employment Watch 5.
[24] Trading Economics Nigeria unemployment rate 2018 http://bit.ly/2XyvOOV (accessed 17/09/2019).
[25] Trading Economics 2016 http://bit.ly/2XyvOOV (accessed on 12/03/2016). The recent statistics of 9.9 per cent unemployment in Nigeria was informed by the current International Labour Organisation (ILO) definition of unemployment. The current ILO definition states that those that work for at least 20 hours per week as against the required 40 hours (full time) would be referred to as being under-employed and not unemployed. Therefore, the statistics of unemployment in Nigeria dropped in 2015 because a large number of Nigerians who used to be classified as unemployed fell under the under-employment statistic when the ILO definition was implemented in 2015. However, this new definition has been heavily criticised by various writers and stakeholders.
[26] Ujah 2015 http://bit.ly/31oJfUi (accessed 23/05/2016).
[27] *Ibid*.

micro-finance institutions (MFIs), money lenders, friends, relatives and credit unions forming part thereof.[28] The general consensus among practitioners and experts is that there is a huge level of debtor default and over-indebtedness in this sector .[29]

In Nigeria there is a toxic combination of unemployment, underemployment, poverty and over-indebtedness which contributes to the poor economic outlook of the country.[30] Furthermore, these factors in no small measure contribute to a large army of jobless individuals who have racked up massive debts in their quest for survival.[31]

Nigeria obtained her independence in 1960 from Great Britain, which explains a significant British influence on the Nigerian legislative framework.[32] It is the reason the Nigerian legal system largely is based on the English common law.[33] The other sources of Nigerian law are judicial precedent and local statutes. In a situation where there is a lacuna in the local law, the laws of England apply,[34] which essentially means that English law serves as an influential authority and complements possible shortfalls in the Nigerian legal system.

The concept of insolvency law and practice is unfamiliar to a regular Nigerian.[35] The general idea of insolvency in Nigeria is simply the financial failure of either a business or an individual, but there is more to insolvency law than the concept of failure.[36] The word "bankruptcy" is used to refer to the insolvency of natural persons or partnerships in Nigeria, as is the case in England[37] and the first legislation to regulate bankruptcy proceedings in Nigeria is the 1990 Bankruptcy Act (BA) which still is in operation.[38]

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[28] Nkamnebe and Idemobi 2011 *Management Research Review* 238.
[29] *Ibid*.
[30] World data lab poverty clock 2018 http://bit.ly/2klJ8YR (accessed 17/09/2019).
[31] CIA World Fact Book 2013 http://bit.ly/2F06jz8 1 (accessed 08/02/2016). See also Nigerian National Bureau of Statistics 2015 Unemployment/ Under-Employment Watch 5. See also Nigerian National Bureau of Statistics *labor force statistics - volume I: Unemployment and underemployment report* 2017/2018 9.
[32] See Dina Akintayo and Ekundayo 2005 http://www.nyulawglobal.org/globalex/nigeria.htm 1 (accessed 02/12/2015).
[33] See Ezera *Constitutional developments in Nigeria* 12. See also Obilade *The Nigerian legal system* 17.
[34] *Ibid*.
[35] Hallmark News Why bankruptcy law is difficult to enforce in Nigeria *Business Hallmark News* (Lagos 2015) https://bit.ly/2KQJvli (accessed 04/03/2019).
[36] See Agbakoba and Fagbohunlu1992 https://bit.ly/2OxebKG (accessed 30/05/2019).
[37] Insolvency Act 1986. See also Insolvency Rules 1986.
[38] Laws of the Federation of Nigeria 1990 (hereafter referred to as BA).

However, there is no recorded instance of a successful natural person debtor bankruptcy application or any judgment on bankruptcy in Nigeria to date.[39] The primary reasons for this remarkable fact are the ambiguous nature of the bankruptcy law and the ignorance of the Nigerian people and legal practitioners with regard to bankruptcy law.[40] Furthermore, the challenge caused by societal belief among Nigerian people (stigma) has been identified as one of the causes.[41]

These challenges identified have rendered the bankruptcy practice system in Nigeria ineffective for decades and led to the process of reform which brought about the proposed 2016 Nigerian Bankruptcy and Insolvency Act (BIA).[42] The proposed BIA is a piece of legislation that will help regulate insolvency proceedings relating to natural persons and partnerships in Nigeria.[43] The primary aim of the BIA is to make provision for individual insolvency, to provide for the rehabilitation of the insolvent debtor and to create the office of the supervisor of insolvency for matters connected thereto.[44]

The BIA is said to have the dual role of protecting debtors from harassment or threats from creditors through the available debt relief channels and simultaneously ensuring that the rights of creditors are safeguarded. Consequently, avenues are created through which such rights can be enforced.[45]

A brief look at the proposed Nigerian BIA shows that there are three procedures by means of which a debtor in Nigeria can obtain relief and a discharge from indebtedness.[46] These debt relief measures include receiving orders, instituted by way

[39] *Ibid.*
[40] Hallmark News "Why bankruptcy law is difficult to enforce in Nigeria" *Business Hallmark News* (Lagos 2015) https://bit.ly/2KQJvli (accessed 04/03/2016).
[41] Agbakoba and Fagbohunlu 1992 https://bit.ly/2OxebKG 2 (accessed 30/05/2019). See also Akinwunmi and Busari http://www.akinwunmibusari.com/images/documents/ 3 (accessed 02/12/2019).
[42] Bankruptcy and Insolvency Act 2016 (hereafter referred to as BIA or the Act).
[43] The first Bankruptcy Act is the Nigerian Bankruptcy Act Cap 30 Laws of the Federation of Nigeria (LFN) 1990, which was amended in 1992 by the Bankruptcy (Amendment) Decree No 109 of 1992. As a result of these amendments the Nigerian Bankruptcy Act Cap B2 Laws of the Federation of Nigeria (LFN) 2004 came to be. In the course of this thesis, the 2004 Bankruptcy Act will be referred to (hereafter referred to as "the BA").
[44] See the long title of the proposed BIA 2016. The long title of the proposed BIA shows an improvement on the repealed BA of 1979, because the aim of the repealed BA was to provide for "situations whereby a person who is unable to pay his debt can be professed bankrupt and also to debar such persons that have been established as bankrupt from holding certain elective and public offices or from practising any regulated profession except as an employee". This aim can be said to be punitive in nature wheras the new Act appears to be more forward looking. See also s 126 of the BA.
[45] Opara, Okere and Opara 2014 *Canadian Social Science Journal* 62.
[46] See ss 5, 25 and 26 of the BIA.

of a petition,[47] assignment and proposal. The latter includes a composition and arrangement mechanism which can be explored by a consumer debtor as an alternative to bankruptcy.

Receiving orders can be likened to creditor's bankruptcy proceedings (involuntary bankruptcy proceedings), whereas assignments can be likened to debtor's bankruptcy proceedings (voluntary bankruptcy proceedings).

Receiving orders may be instituted by a creditor by way of petition[48] and an assignment may be made by a bankrupt or insolvent through leave of the court.[49] With regard to receiving orders the BIA provides that the creditor must prove an act of bankruptcy committed by the debtor while assignment does not require such proof because the application for assignment by a debtor constitutes an act of insolvency.[50] Receiving orders and assignments basically entail asset liquidation proceedings.

A proposal (composition and schemes of arrangement) is an alternative debt relief measure to bankruptcy which is available to a debtor. The BIA provides this procedure as an independent alternative debt relief procedure which may be explored by a debtor either after he is declared bankrupt or by an insolvent person who is yet to be declared bankrupt.[51] In nature proposals are negotiated repayment plans. These procedures available under the BIA (that is the asset liquidation proceedings and repayment plans) do not seem appropriate to NINA circumstances where there is a lack of assets and income.

The legislative framework of the current BA was criticised[52] on the grounds that the procedures were expensive and time consuming and that Nigerians usually prefer to pursue out-of-court resolutions (that is informal ways) to their financial problems.[53] This practice further contributes to there being no record of any successful instance of

[47] S 5 of the BIA.
[48] See s 5 of the BIA.
[49] See s 25 of the BIA.
[50] See s 4(a)−(h) of the BIA
[51] S 26(1)(a)–(e) of the BIA.
[52] See Agbakoba http://bit.ly/2Pst7tv 8 (accessed 30/05/2016).
[53] Hallmark News "Why bankruptcy law is difficult to enforce in Nigeria" *Business Hallmark News* (Lagos 2015) https://bit.ly/2KQJvli (accessed 04/03/2019).

voluntary bankruptcy proceedings filed before the court and consequently no recorded judgment thus far even though the statute has been in existence for decades.[54] Furthermore, the unpopular nature of bankruptcy proceedings stems from the problem of societal beliefs.[55]

Societal beliefs have been identified as a root cause of the unpopular nature of the proceedings.[56] Societal beliefs refer to a common thought process whereby insolvent or over-indebted debtors in society are viewed as "outcasts" that should be ostracised.[57] Consequently, insolvency proceedings have been in disuse, because no debtor wants to be subjected to societal discrimination. On the other hand, creditors (especially friendly creditors, such as relatives or friends who make up a large segment of the enormous informal sector) are not in the habit of enforcing debts because of the fear of subjecting the debtor to societal discrimination.[58] Thus, the parties resort to an out-of-court settlement or to writing off such debt in a worst case scenario when it cannot be recovered.[59]

This challenge posed by societal beliefs can be likened to the problem of "stigma" expounded by the World Bank *Report on the treatment of insolvency of natural persons*,[60] which it identified as a challenge faced by many nations. The World Bank carried out formal and informal surveys on debtors in a number of insolvency systems. The surveys showed that respondents believed that the idea of announcing one's indebtedness (voluntary insolvency) either in writing or by appearing before a public or private administrator in person is deemed a personal failure. Respondents found the process deeply embarrassing and stigmatising.[61] Consequently, a number of debtors experienced persistent and intense feelings of guilt, stigma and shame. The World Bank

[54] See Agbakoba and Fagbohunlu 1992 https://bit.ly/2OxebKG 4 (accessed 30/05/2019).
[55] *Ibid*.
[56] See Akinwunmi and Busari http://www.akinwunmibusari.com/images/documents/ 3 (accessed 02/12/2015).
[57] See Agbakoba and Fagbohunlu 1992 https://bit.ly/2OxebKG 2 (accessed 30/05/2019).
[58] *Ibid*.
[59] *Ibid*.
[60] See World Bank *Report* 43.
[61] *Ibid*. See Sousa *Bankruptcy Stigma: A socio-legal study* 30.

Report identified stigma as a key problem that hinders the effective and successful implementation of an operational personal insolvency system.[62]

Furthermore, the use of debtor and creditor bankruptcy proceedings, composition and schemes of arrangement as debt relief measures under the BA is unpopular as a result of the ignorance of the Nigerian people and legal practitioners with regard to bankruptcy law.[63] Hallmark Business News in Nigeria carried out an investigation into the reasons for the ineffectiveness of bankruptcy practice in Nigeria by interviewing a number of legal practitioners. The results of the investigation show that many lawyers are not aware of the existence of the law, and those who were aware were not abreast of the BA. Lawyers were asked to give their opinion as to why the BA is not effective in Nigeria and many opined that they needed time to study the BA before they could comment on it. One lawyer interviewed said that "many people don't go into it because they feel it is very cumbersome and it gulps a lot of money and time".[64] This remark shows that even trained legal minds do not properly understand bankruptcy law, making it more difficult for the average Nigerian to comprehend let alone file for bankruptcy.

When the BIA is carefully considered it seems there is little improvement on the BA. Therefore, it is possible that some of the challenges experienced under the BA may persist under the proposed BIA. Furthermore, looking at the BIA in light of recent global trends in insolvency law, the debt relief measures still seem inadequate, most importantly with regards to NINA debtors who are the focus of this research.

Considering the three new procedures provided for by the BIA (that is receiving orders, assignments and proposals) it appears that NINA debtors will not be able to make use of any of them because they require that the debtor has assets or income. Receiving orders and assignments for example require the debtor to have assets in order to obtain a discharge.[65] These procedures are also court-related which renders them cumbersome and expensive, further making them inaccessible to NINA debtors.

[62] *Idem* 40.
[63] Hallmark News "Why bankruptcy law is difficult to enforce in Nigeria" *Business Hallmark News* (Lagos 2015) https://bit.ly/2KQJvli (accessed 04/03/2019).
[64] *Ibid.*
[65] See ss 160 and 161 of the BIA.

Alternative debt relief measures also are not feasible for NINA debtors because composition and schemes of arrangement require that a debtor has income which can be used to satisfy the creditors and pay for the required administrative fees.

As is elaborated in subsequent chapters, it appears that the BIA does not cater to NINA debtors. The rate of indebtedness and the characteristics of the Nigerian economy (namely the high rate of unemployment, under-employment,[66] poverty,[67] over-indebtedness[68] and other economic hardships), clearly reveal a need for insolvency reforms to cater for NINA debtors.

Furthermore, bankruptcy reform is needed in this direction as a tool to spur entrepreneurship through which economic growth and recovery can be attained. The Nigerian government is making attempts to curb the high rate of unemployment and poverty through the provision of entrepreneurial programmes for citizens,[69] by organising empowerment/skills acquisition programmes for unemployed citizens and specialised entrepreneurship programmes to empower and encourage women.[70] The purpose of these programmes is to ensure that unemployed and indigent citizens have the opportunity to acquire skills from which they can earn a living.[71] Furthermore, credit is made available to those who successfully complete these programmes to start up sole proprietorships. These loans often are made without collateral and require only warranty by upstanding citizens.[72]

In light of the various attempts made by the government to encourage entrepreneurship it is important that there are safety nets (that is, among others, debt relief measures) available to individuals in the event of entrepreneurial failure as well. Their provision is vital to securing a fresh start for failed entrepreneurs, most especially those who rely solely on the entrepreneurial programme and do not have personal assets or income to offset the credit that was granted. This requirement is essential in promoting a vibrant

[66] World data lab poverty clock 2018 http://bit.ly/2klJ8YR (accessed 17/09/2019). See also Kharas, Hamel and Hofer *The Start of a new poverty narrative* Brookings (Washington D.C) 2018 https://brook.gs/2kqCG2Q (accessed 17/09/2019).
[67] *Ibid.*
[68] Ujah 2015 http://bit.ly/31oJfUi (accessed 24/05/2019).
[69] Ihugba Odii and Njoku 2013 *Academic Journal of Interdisciplinary Studies* 25.
[70] Nkamnebe and Idemobi 2011 *Management Research Review* 238.
[71] Bank of Industry 2016 http://bit.ly/31h223L 1 (accessed 24/05/2019).
[72] Ihugba Odii and Njoku 2013 *Academic Journal of Interdisciplinary Studies* 25.

enterprise culture by encouraging responsible risk-taking and which consequently will help to alleviate poverty.[73] A number of economic experts have opined that the best way to create wealth is to assist and encourage sole proprietorships, which can be achieved by spurring entrepreneurship.[74]

To proffer solutions to the challenges bedevilling the Nigerian insolvency system it is necessary to peruse international standards of insolvency as espoused by relevant international organisations and think tanks. Also, it will be beneficial to examine the insolvency systems of other countries to glean underlying insights into the operational efficiency of these systems. The international reports to be considered are the Insol International Consumer debt *report*: *reports of findings and recommendations*,[75] the World Bank *Report on the treatment of insolvency of natural persons*[76] and the European Union *final report on consumer over-indebtedness and consumer law in the European Union*.[77]

These reports serve as guidelines for insolvency regimes all over the world and detail international best practice guidelines in the area of individual consumer debt relief. Particular consideration will be given to ways in which NINA debtors can be better catered for by drawing insights from these reports and the comparative jurisdictions considered.

The Insol *Report*[78] serves as the foundation for the two other reports on consumer over-indebtedness. This report was first published in 2001 and later modified with the same principles entrenched in a second report in 2010.[79] The Insol *Report* takes cognisance of the fact that a high level of domestic consumption is required for the growth and stability of an economy[80] and for this reason consumer debtors should not be penalised but offered some form of protection.[81] The Insol *Report* emphasises the need for an

[73] Mann 2009 http://bit.ly/2QYuhzs 1 (accessed 02/03/2016).
[74] Berrebi D 2012 http://bit.ly/2WwG1ug (accessed 04/03/2016). See also Akinyemi and Adejumo 2018 *JGER* 2–3.
[75] Insol *Report* 2001.
[76] World Bank *Report*.
[77] IFF *Report*.
[78] Insol *Report* 2001.
[79] Insol international consumer debt *report II: Report of findings and recommendations* 2010 (hereafter referred to as Insol Report). The 2010 Insol *Report* would be used in the course of this research work.
[80] Insol *Report* 4.
[81] *Idem* 6.

insolvency regime that caters for the discharge of a consumer debtor. The *Report* states that an insolvency law that seeks to provide for a discharge of the consumer debtor generally is regarded as the solution to their financial difficulties. Therefore, in order to ensure a discharge of the consumer debtor's debt the barriers to obtaining a discharge should not be so high that the debtor is discouraged from using the procedure. However, it also must be that society is willing to forgive and to allow a fresh start.[82] The Insol *Report* did not seek to promote a simple discharge because it may not be the solution to the problem of consumer indebtedness. The Insol *Report* emphasises that to ensure that further debts are not incurred and the risk of recidivism is tackled[83] effective solutions should be made available to the consumer debtor. It proposes that a discharge should not be structured solely through bankruptcy proceedings, but also be made available through a broad discharge approach subject to certain exceptions such as taxes and fines.[84]

In the same vein the IFF *Report*'s recommendations on insolvency legislation mirrors those in the Huls *Study*[85] and the Insol *Report*. This study combines the two approaches to consumer indebtedness, namely prevention and rehabilitation. The IFF *Report* carried out an overview of European countries and showed that the laws of consumer insolvency in European countries differ.[86] However, the rehabilitation of debtors as economic actors is said to be the core philosophy of all these consumer insolvency laws. The essential focus of the European rehabilitation concept is that the discharge of debtors should be as broad as possible.[87] Therefore, in order to offer a real opportunity of rehabilitation it is important that discharge covers almost all of the debtor's debts.

The IFF *Report* sees discharge as the primary goal of every insolvency law. In light of this view the IFF *Report* goes further than the Insol *Report* with regard to arguing for a broad discharge.[88] It is argued that every insolvency system should guarantee a

[82] *Ibid*.
[83] Insol *Report* 7.
[84] *Ibid*.
[85] See Huls 1993 *J Consum Policy* 215.
[86] *Ibid*.
[87] *Ibid*.
[88] IFF *Report* 7.

maximally broad discharge for consumer debtors and further proposes that "exceptions for taxes, fines, and damages should be eliminated".[89]

The World Bank *Report* is more recent than the Insol and IFF reports. This *Report* is built on numerous sources for the insolvency of natural persons around the world and benefited from both the Insol and IFF reports.[90] The World Bank *Report* states that the insolvency of natural persons is intertwined with social, political and cultural issues, which makes it difficult to propose uniform rules. However, it is advisable that policymakers are well informed of these differences.[91] Nevertheless, the primary and vital goal of every natural person insolvency system, irrespective of the country in question, should be to ensure the discharge of debts and the rehabilitation of consumer debtors.[92] The World Bank *Report* adopts a balanced approach between the debtor and the creditor, ensuring that discharge and rehabilitation policies are formulated with care and sensitivity. Although the World Bank *Report* recognises the Insol *Report* as a source material, it holds a more liberal approach in comparison to that of the Insol *Report* with regard to discharge (fresh start). As regards the concept of a "fresh start", the World Bank *Report* consistently emphasises that there should be a moderate balance between debt recovery and over-burdening the debtor. The World Bank *Report* advocates that a debtor's human dignity must always be respected.[93]

These reports reflect the core focus of international trends with regards to natural person insolvency. In light of the various reports mentioned above a common denominator is the emphasis on the discharge and rehabilitation of a debtor.[94] This provision must be incorporated into the insolvency systems of nations, irrespective of the varying social, political and cultural differences that exist from country to country. The discharge and rehabilitation of debtors must include NINA debtors because care must be taken to avoid their disenfranchisement.

[89] *Idem* 8.
[90] World Bank *Report* 6.
[91] *Idem* 4.
[92] *Idem* 115.
[93] Kilborn 2005 *Pace Int'l L. Rev* 314.
[94] See Insol *Report* 6, IFF *Report* 7 and World Bank *Report* 6.

The insolvency acts of various countries provide for different types of debt relief procedures for natural person debtors. Some countries have realised in time that there are special classes of debtors who have neither income nor assets to fulfil their financial obligations and that special provision should be made for them. As was mentioned these groups of debtors are popularly referred to as NINA debtors and, as highlighted earlier, they presumably constitute a large segment of over-indebted Nigerians. Therefore, provisions should be made for this class of debtors whereby they can obtain a fresh start, since alienating them does not bode well for the economy of a country.[95] It is said that excluding debtors from discharge is costly to the economy for the reason that when debtors are tied down in debt it becomes difficult for them to re-enter the formal sector of the economy, thereby impairing economic expansion.[96] Therefore, this thesis examines a number of jurisdictions and their provisions for NINA debtors in order to draw lessons from them and to make recommendations for the case in Nigeria.

Other vital issues addressed in this thesis are those identified with the repealed BA as affecting the entire bankruptcy practice system such as ignorance, beliefs and stigma. These are addressed in light of the proposed BIA to determine if these issues have been settled in the proposed Act. There should be educational programmes and debt counselling sessions to sensitise Nigerian debtors as to available debt relief measures and possible avenues for discharge that can be explored. This requirement is important because laws are made for the people and not people for the law. If the laws are not utilised, they in essence are non-existent. Therefore, the issue of stigma and the ignorance of Nigerian debtors and practitioners need to be addressed in order to produce a workable system.

As stated earlier this research peruses international standards of insolvency as espoused by relevant international organisations and think tanks and makes recommendations suitable to the Nigerian situation. This research does not advocate transplanting legal systems and frameworks from other jurisdictions into Nigeria, but submits that deliberate thought must be given to the peculiarity and nature of Nigeria

[95] Coetzee and Roestoff 2013 *Int Insolv Rev* 189.
[96] *Ibid*.

when adopting reforms established in other countries. It has been observed that legal transplantation must be carefully considered and well thought through as it stands a chance of not producing the desired results when not properly conceptualised and applied.[97]

In summary, it seems as though the reforms in terms of the BIA did not consider specifically the plight of the large number of NINA debtors and it is the focus of the thesis to consider this lack. Therefore, it is clear that there is a need for an overhaul of the Nigerian natural person insolvency system to ensure that all debtors are catered for by the system – most importantly the NINA debtors. Some measure of debt relief should be granted to debtors who cannot afford to offset their debts because an efficient regime for the insolvency of natural persons is of vital importance for the growth of the economy and financial inclusion.[98]

1.2 Problem statement and research objectives

The Nigerian natural person insolvency system is ineffective under the operations of the BA, as explained earlier.[99] This failure is attributed to the orientation of the people[100] and the impractical nature of the relevant laws.[101] In light of these concerns a recent reform has been implemented which culminated in the proposed BIA. However, in light of recent international developments in insolvency law and the recent focus on the NINA group of debtors (who also form the largest part of over-indebted Nigerians) there is still a need to consider the plight of this group for which the new proposed BIA does not cater. This need is the focus of this research. Also, the Nigerian president has stalled the BIA's introduction to contemplate its domestication, which offers a golden opportunity to consider a NINA procedure.[102]

[97] Martin 2005 B.C. Int'l & Comp. L. Rev 75. See also, Calitz 2008 Obiter 352.
[98] Kilborn 2015 PILR 312.
[99] See ch 1 par 1.1.
[100] *Ibid*.
[101] *Ibid*.
[102] See Iroanusi Buhari rejects five bills, gives reasons *Premium Times* (Abuja 2019) http://bit.ly/31L3CKw (accessed 21/09/2018).

The main research objective is to evaluate the proposed natural person insolvency law in Nigeria with a focus on NINA debtors. To reach this main objective, the related aims of the study are to:

a. investigate the key guidelines for an effective and sound natural person insolvency law as highlighted by researchers, policy makers, the World Bank *Report*, Insol *Report* and the IFF *Report* with attention to provisions for NINA debtors;
b. evaluate the state of natural person insolvency law in Nigeria with specific focus on the debt relief measures available to NINA debtors. This evaluation is accomplished by critically reviewing the proposed Nigerian BIA. Therefore, where reference is made to sections of the BIA in this thesis it should be inferred as proposed sections of the BIA;
c. conduct a comparative investigation by researching a number of jurisdictions that make provision for NINA debtors or jurisdictions that have reformed their laws or proposed a reform to accommodate NINA debtors, such as South Africa, France, Ireland, Sweden and Canada; and
d. determine and propose a practical natural person insolvency model for NINA debtors in Nigeria, considering the shortcomings that are revealed in the course of this research and the unique needs and realities of the jurisdiction.

1.3 Methodology

The proposed research is based on a detailed literature review of books, reports, legislation, journal articles, theses and case law. The study primarily is a critical analysis of the existing and proposed Nigerian natural person insolvency systems with a focus on debt relief measures available to NINA debtors.

A comparative study of more advanced jurisdictions will be undertaken. In this respect conditions in South Africa,[103] France,[104] Ireland,[105] Sweden[106] and Canada[107] will be researched.

South Africa is chosen even though the South African Insolvency Act[108] does not contain debt relief measures for NINA debtors. However, South Africa recently adopted a specialised NINA procedure that is not yet effective but forms part of the National Credit Act.[109] Furthermore, an investigation into South Africa's natural person insolvency law is beneficial because important lessons can be learnt from the South African experience as a fellow African and developing country as is Nigeria.

On the other hand, the choice of France, Ireland, Sweden and Canada is informed by their unique provisions for NINA debtors. It is important to examine the insolvency laws of these prominent countries to learn the various avenues through which NINA debtors can gain access to debt relief. This research is made more imperative by virtue of the fact that these developed countries, with lower rates of poverty and thus a lesser need for relief of such debtors, all have safety nets available for NINA debtors. Therefore, it is essential that a developing country such as Nigeria, with higher rates of poverty and a greater number of NINA debtors provide relief for this group of debtors. In fact, excluding NINA debtors from relief deters them from entering the formal sector of the economy, thereby impairing much needed broader economic growth.[110]

1.4 Delineation and limitations

The scope of this work does not cover debt prevention mechanisms although they are relevant to the topic at hand. The work rather pays attention to the alleviation of the NINA debtors' plight. Furthermore, this research does not cover any aspect of corporate insolvency law.

[103] See the South African Insolvency Act 24 of 1936, National Credit Act 34 of 2005 (hereafter referred to as NCA) and Magistrates' Courts Act 32 of 1944 (hereafter referred to as MCA).
[104] Consumer Code Order No 2006-346 of 2006.
[105] Irish Personal Insolvency Act No 44 of 2012.
[106] Swedish Bankruptcy Act of 1987. See also the Debt Relief Act of 1994.
[107] Bankruptcy and Insolvency Act of 1985.
[108] Act 24 of 1936.
[109] See the National Credit Amendment Act 7 of 2019.
[110] See Roestoff and Coetzee 2013 *Int Insolv Rev* 2.

1.5 Proposed structure

a) **Chapter 1** is an introduction, background to and motivation of the study.

b) **Chapter 2** is an overview of international best practices and guidelines on insolvency systems for natural persons with specific reference to the United States of America, which is the front runner for the "fresh start" idea.[111] However, the discussion of the United States will focus only on the philosophy of the "fresh start" principle and will not constitute a full investigation into the system. Further, the World Bank *Report,* the Insol *Reports* and the IFF *Report* will be considered. The analysis of these reports is motivated by the need to juxtapose international consumer insolvency guidelines and the Nigerian insolvency system.

c) **Chapter 3** evaluates the Nigerian natural person insolvency system pertaining to debt relief measures with particular focus on the NINA debtor. This aim entails a detailed evaluation of the proposed BIA which is the main focus of this research and an identification of its shortcomings. The Nigerian system will be analysed with respect to best practices and policies extracted in chapter two.

d) **Chapter 4** examines the South African natural person insolvency system pertaining to debt relief measures. Specific focus is placed on how the NINA debtors are being managed by the system and on lessons that could be drawn from the strengths and weaknesses of South African natural person insolvency law.

e) **Chapter 5** constitutes a review of the French and Swedish insolvency laws with specific focus on the procedures pertaining to debt relief, specifically the procedures for NINA debtors. These jurisdictions are selected in a bid to evaluate the European approach to natural person insolvency with a keen interest in NINA debtors.

[111] Ferriell and Janger *Understanding bankruptcy* 1.

f) **Chapter 6 evaluates** the Canadian and Irish insolvency laws with attention to the procedures pertaining to NINA debtors. These jurisdictions were chosen to glean insights and learn from an Anglo-American approach to natural person insolvency.

g) **Chapter 7** is a compilation of the most significant findings of the study, together with concluding remarks and recommendations for a better and more effective insolvency law that caters for NINA debtors in Nigeria.

1.6 Reference methods, key references, terms and definitions

a. The full titles of sources in this thesis and abbreviated mode of citations used in the footnotes are provided in the bibliography.
b. For the sake of uniformity and convenience the masculine form is used throughout.
c. Where reference is made to the BIA it should be inferred as proposed BIA and sections of the BIA should be inferred as the proposed sections of the BIA.
d. The law as stated in this thesis reflects the position as at the 30th of August 2019.
e. The NCA Amendment Act, which introduces debt intervention, has been signed into law by the President on the 13th of August 2019. However, it is not in operation as yet.
f. Terms and definitions:
    i. The terms “insolvent natural person” and “consumer debtor” are used interchangeably in the course of this thesis;
    ii. “Insolvency” and “over-indebtedness” are used as synonyms in this study;
    iii. The terms “insolvency” and “bankruptcy” are used as synonyms in this study and are used depending on what is in use in the jurisdiction under consideration.

CHAPTER 2

PHILOSOPHICAL CONSIDERATIONS AND MODERN TRENDS IN NATURAL PERSON INSOLVENCY SYSTEMS IN LIGHT OF NINA DEBTORS

Summary

> Throughout the world as consumer credit becomes ever more easily available to more individuals many become overly indebted and fall into financial debt. Continuing and persistent pursuit by creditors hoping to collect demoralizes many financially-troubled debtors and at times reduces their desire to remain productive contributors to the economy. Faced with overwhelming pressure many despondent debtors see no other choice but to resort to personal bankruptcy protection.[1]

2.1 Introduction

One of the main goals of a modern insolvency system is to provide indebted natural persons with the opportunity of a fresh start, irrespective of their financial state.[2] This relief should be available to all honest but unfortunate debtors,[3] since the events that often lead to the over-indebtedness of most debtors are beyond their control and thus cannot be prevented. Among these are loss of work, ill health and divorce.[4]

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[1] Efrat 1999 *ABI Law Review* 555.
[2] See Howell 2014 *QUT Law Review* 29.
[3] See Litchtash 2011 *Loy LA Int'l & Comp L Rev* 170.
[4] See Ssebagala 2016: Centre for social science working paper on ''Relieving consumer over-indebtedness: the need for a 'fresh start' in South Africa'' 1.

Although insolvency laws developed as collective debt enforcement measures, modern credit societies having observed the predicament facing natural person debtors have developed legal measures to alleviate the debt distress of such persons. Generally, debt relief is achieved by discharging them of their problematic debts and offering them an opportunity to regain financial health through a fresh start.[5]

However, in the developing world insolvency laws for natural persons are relatively new and legislative reforms generally are modest in offering relief to debtors. Greater emphasis is still placed on the satisfaction of creditors' claims, from which insolvency law originally developed, and there are strict requirements for the payment of debt with punitive implications for debtors.[6] In contrast, insolvency laws for natural persons in developed countries have advanced beyond the mere regulation of the satisfaction of creditors' claims. These countries guarantee adequate relief to natural person debtors in order to ensure a fresh start.[7]

Recently, the Issue of debt relief measures with regard to natural person insolvency has attracted the attention of governments and researchers all over the world. Probably, it partially can be attributed to the 2007/2008 worldwide financial crisis which had a disproportionate negative effect specifically on natural persons. Consequently, active research has been carried out into the core requirements for a contemporary responsive insolvency system for natural persons.[8] The goal has been to investigate what constitutes an effective bankruptcy system which would satisfy the needs of all stake holders; debtors, creditors and society.[9]

In this chapter the philosophy underlying the American insolvency system for natural persons is evaluated, most importantly in relation to No Income No Asset (NINA) debtors. This focus is essential as that system birthed the "fresh start" policy, which has attracted the attention of several governments seeking to emulate this solution to over-

[5] *Ibid*.
[6] *Idem* 2.
[7] Litchtash 2011 *Loy LA Int'l & Comp L Rev* 170.
[8] See World Bank Report 2013: *Report on the treatment of insolvency of natural persons* 4 (hereafter referred to as the World Bank *Report*).
[9] See Haines *Maximising stakeholders value* 16. See also Connor 2010 *Business Law Today* http://bit.ly/2YRUsy5 (accessed 16/05/16).

indebtedness.[10] On these grounds the United States of America is referred to as the founder of the "fresh start".[11]

Further, three prominent reports on natural persons insolvency systems are considered in relation to NINA debtors in order to extract from these examples international best practices and guidelines which will serve as a benchmark in the chapters to follow. The first of these reports is the Insol[12] International *consumer debt report of findings and recommendations*;[13] the second is the European Union *Final report on consumer over-indebtedness and consumer law in the European Union*;[14] and the third is the World Bank *Report on the treatment of insolvency of natural persons*.[15]

The purpose in evaluating the philosophy behind the American system and the various reports is to make recommendations in subsequent chapters as to how Nigeria can adopt a good natural persons insolvency system. This system should cater for all classes of debtors, including NINA debtors. In this chapter the building blocks for such a system are identified.

2.2 The American system

2.2.1 The "fresh start" philosophy

The United States of America has one of the most liberal debt-forgiving systems for insolvent natural persons.[16] Gross explains the American system of forgiveness as giving[17]

> the wrongdoer (the debtor) the opportunity to regain self-esteem and become once again a productive member of society. In a capitalistic economy, we want debtors to reintegrate into the system for their sake and our own. For debtors, reintegration allows the taking of new risks. For society, taking risks is exactly what we want individuals and businesses to do. This enables the wheel

[10] Huls 1992 *J Consum Policy* 125.
[11] Whitford 1999 *J Consum Policy* 179. See also Ramsay 2014/2015 *Temp L Rev* 947.
[12] International association of restructuring insolvency and bankruptcy professionals.
[13] Insol international 2001 *consumer debt report: Reports of findings and recommendations* (hereafter referred to as the Insol *Report* 2001).
[14] European Union *final report* 2003: *Report on consumer over-indebtedness and consumer Law* (hereafter referred to as the IFF *Report*).
[15] World Bank *Report* 2011: *Report on the treatment of insolvency of natural persons* (hereafter referred to as the World Bank *Report*).
[16] Evans 2010 *CILSA* 337. See also Evans 2003 *JBL* 173.
[17] Gross *Failure and forgiveness: Rebalancing the bankruptcy system* 93.

> of commerce to turn; individuals fend for themselves and do not become a drain on scarce societal resources.

Van Apeldoorn describes the liberal American system of debt relief as providing an almost automatic right to a discharge for all debtors as opposed to debt relief being seen as a favour.[18]

This view is illustrated in the United States *locus classicus* case of *Local Loan Co. vs Hunt* where the court stated: "[t]he Act gives to the honest but unfortunate debtor a new opportunity in life and a clear field for future effort, unhampered by the pressure and discouragement of pre-existing debts".[19]

It provides a "swift fresh start for the debtor without the need for income payment as a condition for discharge" in certain instances.[20] This possibility has an implication that the American system provides for a discharge for all classes of insolvent consumer debtors whether or not they have income or assets to offer in return to creditors.

The American ''fresh start'' doctrine has influenced debtor alleviation regulations in various countries.[21] This doctrine is characterised by three elements:[22] (a) a proper legal procedure by which the citizen is discharged from his indebtedness at the end of the procedure; (b) exemptions of debtor's property, such as portions of the debtor's property which are not subject to insolvency proceedings and (c) a prohibition on discriminating provisions against a person who is bankrupt.[23]

The idea behind the ''fresh start'' not only is to secure the emergence of the debtor from bankruptcy debt free but also to ensure that the debtor is left with sufficient assets that would enable him to function creatively as a member of society.[24] This provision is important because a realistic amount of household furnishings and clothing inevitably are tied to the necessities of human existence and retention of these assets affords the

[18] Van Apeldoorn 2008 *Int Insolv Rev* 57.
[19] *Local Loan* Co. *vs Hunt* 292 U.S. 234 (1934).
[20] Ramsay 2014/2015 *Temp L Rev* 947.
[21] See Ssebagala 2016: Centre for social science working paper on ''Relieving consumer over-indebtedness: the need for a 'fresh start' in South Africa'' 2.
[22] Huls 1992 *J Consum Policy* 127.
[23] See *Perez V. United States*, 402 U.S. 146, (1971).
[24] Whitford 1999 *J Consum Policy* 180. See the case of *Patterson v. Shumate*, 504 U.S. 753 (1992) where the decision of the Supreme Court vastly upgraded the extent to which the law sees exempted properties as a way of enhancing the fresh start for a debtor. In the *Patterson* case, the debtor was allowed to retain employee pension rights to the tune of $250,000.

debtor an opportunity to begin a new economic life without having to incur further debt in acquiring them.[25]

Kilborn declares that three traditional rationalisations validate the ‘‘fresh start’’ policy: the collection theme (which is the oldest),[26] the mercy theme[27] and the rehabilitation theme.[28]

The “collection theme” seeks to protect creditors by ensuring that the prospect of a debtor obtaining a discharge is embedded in the debtor’s cooperation with his creditors. A debtor’s cooperation is shown by ensuring that the debtor’s properties are available for equal distribution amongst his creditors.[29] On the other hand, the “mercy theme” advocates that laws should show compassion and mercy to honest debtors in order to ensure that they do not suffer for reasons beyond their control. Lastly, the “rehabilitation theme” seeks to ensure that a debtor is discharged from his indebtedness and repercussions and consequently is reabsorbed into commercial society. [30]

In light of the United States ‘‘fresh start’’ policy Kilborn notes that the collection theme is not popular because most natural debtors have little to give in the way of collection and distribution among creditors.[31] In relation to the mercy theme he states that it has been viable in the past, most especially during the period of slavery and imprisonment for debt, but no longer is needed in the developed world as there have been several advancements which seek to protect debtors.[32] In terms of the development of social security and in light of the existence of judgment proof debtors in developed countries such as the United States the need for the ‘‘mercy theme’’ has been eroded.[33] With regard to the rehabilitation theme Kilborn is of the opinion that as is the case with ‘‘collection’’ and ‘‘mercy’’ themes it has lost much of its essence over the years in

[25] *Ibid*. See also Litchtash 2011 *Loy LA Int & Comp L Rev* 170.
[26] Kilborn 2003 *Ohio St LJ* 862.
[27] *Idem* 863.
[28] *Ibid*.
[29] *Idem* 862.
[30] *Ibid*.
[31] *Idem* 865–866.
[32] *Idem* 866–876.
[33] In developed countries, where judgment proof debtors exist, it appears that there would be little or no need for provisions to protect NINA debtors.

consequence of modern laws of debtor protection[34] which provide for the organisation of businesses in a manner that protects individuals from financial risk in order to encourage entrepreneurship.[35] Therefore, the value in contemporary America of the rehabilitation theme is perceived as exaggerated.

The United States Bankruptcy Code[36] provides for the most generous debt relief procedures for natural person insolvents in the world.[37] The system is regarded as outstanding in comparison with other legal systems,[38] despite it being amended to temper its initial ultra-liberal stance, which is discussed hereunder. The United States Bankruptcy Code provides a consumer debtor mainly with two channels of relief which offer a NINA debtor discharge of debt. These channels are chapter 7 and chapter 13 reliefs respectively.[39]

2.2.2 Chapter 7 procedure

Chapter 7 bankruptcy procedure is the most common bankruptcy procedure employed in the United States and commonly is referred to as ‘‘straight bankruptcy’’.[40] This procedure provides for “nearly unfettered consumer access to debt discharge”[41] and is available to all honest debtors. A chapter 7 procedure aptly has been summarised “as a curtain falling on the debtor’s affairs at filing”.[42]

In order to commence a chapter 7 bankruptcy procedure a debtor[43] or a creditor[44] files a petition to the Bankruptcy Court by a lawyer. The debtor’s insolvency is not a requirement for filing[45] and a debtor who files a petition surrenders all non-exempt assets to the trustee. The process basically entails that the trustee[46] liquidates the

[34] Kilborn 2003 *Ohio St LJ* 876.
[35] *Idem* 877.
[36] Bankruptcy Reform Act Pub. L. 95-598 of 1978 (hereafter referred to as ‘‘the Bankruptcy Code’’).
[37] Kilborn 2005 *Mich J Int’l L* 632.
[38] *Ibid*.
[39] See ch 7 and ch 13 of the Bankruptcy Code. See also Huls 1992 *J Consum Policy* 128.
[40] See s 30(1) of the Bankruptcy Code. See also Evans 2010 *CILSA* 341.
[41] *Local Loan* Co. *vs Hunt* 292 U.S. 234 (1934).
[42] Whitford 1999 *J Consum Policy* 179.
[43] See s 303(a) of the Bankruptcy Code.
[44] See s 301 of the Bankruptcy Code.
[45] Huls 2012 *J Consum Policy* 498–499. See also Kilborn 2005 *Mich J* Int’l *L* 632.
[46] A “chapter 7 trustee” has been defined as either a local bankruptcy lawyer or accountant who has been appointed by the United States government agent who administers the bankruptcy system.

debtor's non-exempt properties and distributes the proceeds amongst the creditors. In turn, the debtor receives an immediate and unfettered discharge of debts.[47]

A Chapter 7 bankruptcy procedure does not require that a debtor has assets before filing which makes it accessible to all debtors including a NINA debtor. If a debtor has no assets or has only exempt assets which cannot be liquidated, an immediate discharge is granted.[48] In essence it means that a NINA debtor, who has no assets or is left with only exempt assets, can obtain a discharge under a chapter 7 liquidation procedure.

The implication of the discharge is that creditors cannot look to any property that is later acquired by the debtor for repayment of debt.[49] The debtor begins his financial life with a clean slate, which is referred to as the "fresh start".[50] For this reason a chapter 7 procedure is referred to as a "shield" which protects a debtor once he hands over all his non-exempt properties to an appointed trustee for liquidation.[51]

The reports of trustees made under a chapter 7 procedure reveal that in the majority of bankruptcy cases filed under chapter 7 the debtor owns no property that may be lawfully liquidated. Therefore, the case concludes with the discharge without having to proceed through the liquidation phase.[52]

It is pertinent that debtors who do not have assets to be liquidated, whose income is less than 150% of the poverty level (as defined in the Bankruptcy Code) and who are unable to pay the chapter 7 fees (in instalment or in lump sum) will not be required to pay any fees.[53] The court may decide to waive the requirement which expects a debtor applying for discharge via chapter 7 to bear the costs of bankruptcy for debtors who face a serious financial challenge such as NINA debtors.[54]

[47] Ss 725–726 of the Bankruptcy Code. Huls 1992 *J Consum Policy* 128.
[48] Ss 725–726 of the Bankruptcy Act.
[49] S 727 (a) of the Bankruptcy Act. Evans 2010 *CILSA* 339.
[50] Whitford 1999 *J Consum Policy* 179.
[51] See Kilborn 2005 *Mich J* Int'l *L* 632. See also Kilborn 2006 *Vand J Transnat*'l L 83.
[52] Kilborn 2005 *Mich J* Int'l *L* 632.
[53] See s 1930(f) of the United States Code 2016. See also the official website of the United States Courts on Chapter 7 - Bankruptcy Basics http://bit.ly/2JgM9of accessed 13/05/2019.
[54] *Ibid*.

Although a NINA debtor in the United States may access the chapter 7 procedure as many times as possible as there are no access requirements, the provisions of Section 727(a)8 of the Bankruptcy Code restricts debtors (including NINA debtors) from obtaining discharge in situations where a NINA debtor previously obtained a discharge via chapter 7 bankruptcy within a period of 8 years prior to the date of filing of the petition.[55]

2.2.3 Chapter 13 procedure

A chapter 13 procedure avails debtors of the opportunity to obtain relief from indebtedness through a re-payment plan[56] which lasts between three and five years.[57] From a debtor's perspective this procedure has advantages as it affords a debtor who has a steady source of income[58] with the opportunity to secure eventual relief from indebtedness through a convenient re-payment schedule.[59] In essence, a debtor who does not have a steady source of income cannot qualify for a chapter 13 procedure.

Under a chapter 13 bankruptcy procedure a debtor is not required to surrender his assets as is the case under chapter 7. The procedure simply requires that a payment plan is initiated and this plan allocates to the creditors of the estate all the debtor's "disposable income". This allocation includes the total income of the debtor after deductions have been made for maintenance and support of the debtor, his dependents and his business.[60] This "disposable income" is referred to by the Bankruptcy Code as income "not reasonably necessary" for the debtor's household expenses.[61] After the debtor complies with the payment plan a chapter 13 discharge is granted to the debtor, thereby discharging him from all pre-bankruptcy obligations (except those specifically exempted from discharge).[62]

[55] See s 727 (a) 8 of the Bankruptcy Code.
[56] Evans 2010 *CILSA* 341. See also Kilborn 2006 *Vand J Transnat*'l L 83.
[57] See s 1322(d)(1)(C). See also Kilborn 2005 *Mich J* Int'l *L* 633.
[58] See s 101(30) of the Bankruptcy Code. See also the title of ch 13 which reads ''Adjustment of debts of an individual with regular income''.
[59] Whitford 1999 *J Consum Policy* 183.
[60] See s 1322(a)(1) of the Bankruptcy Code.
[61] See s 1325(b)(2) of the Bankruptcy Code.
[62] S 1328 of the Bankruptcy Code.

There is an entry requirement of a ‘‘steady income’’ for a debtor in order to access the chapter 13 procedure as this ensures that the debtor fulfils the payment obligations. A NINA debtor would not be able to fulfil the entry requirements of the chapter 13 bankruptcy procedure and would not qualify for a chapter 13 discharge because of the requirement of fulfilling all payment obligations. However, the chapter 13 bankruptcy procedure provides a ‘‘hardship discharge’’, which comes into play when a debtor enters into a chapter 13 procedure and somewhere along the line cannot keep up with fulfilling his obligations under the payment plan. When this possibility occurs the debtor may request a chapter 13 ‘‘hardship discharge’’. An immediate discharge is granted by the court if:[63]

a) the court is convinced that the debtor’s failure to complete the plan is due to circumstances beyond his control;
b) the creditors have been paid at least the liquidation value of their unsecured claims; and
c) the amendment of the plan is not practicable.

A debtor who enters into a chapter 13 bankruptcy procedure and along the line loses the capacity to keep up with the payment plan and becomes a NINA debtor thus has the option of taking the ‘‘hardship discharge’’ route to obtain relief. However, it has been observed that about 70% of debtors who filed for bankruptcy in the United States opted for the chapter 7 procedure, whereas only 30% opted for chapter 13 relief.[64] Of the 30% that opted for chapter 13 relief only about one-third successfully completed the plan and consequently received a discharge.[65] A good number of those that filed for a chapter 13 payment plan reverted to chapter 7 upon the failure of the plan.[66]

[63] S 1328(b) of the Bankruptcy Code.
[64] See Kilborn 2005 *Mich J Int’l L* 632. See also Kilborn 2006 *Vand J Transnat*’l L 84.
[65] Kilborn 2006 *Vand J Transnat*’l L 84.
[66] See Elul and Gottardi 2001 “Personal bankruptcy and incentives in a dynamic model of entrepreneurship” 1.

2.2.4 The enactment of the Bankruptcy Abuse Prevention and Consumer Protection Act (2005 BAPCPA)

2.2.4.1 General

The United States suffered from a sharp increase in consumer bankruptcy filings years later after the adoption of the Bankruptcy Code in 1978.[67] Empirical evidence shows that amidst a robust economy the rate of filing for consumer bankruptcy was impressive,[68] especially for a chapter 7 bankruptcy procedure.[69] There was a need to strike an appropriate balance between the ready availability of relief and restriction on its use. Consequently, policy makers began to consider reform.[70]

As a result, there were discussions and consultations between pro-creditor and pro-debtor exponents. The pro-creditor exponents were of the opinion that the cause of the rise in bankruptcy filings was as a result of an abuse of the discharge by debtors;[71] they argued that many debtors file for chapter 7 bankruptcy in order to obtain discharge from their entire debt when in fact they had the capacity to file a chapter 13 repayment plan to offset some or all of their debt.[72] Pro-creditor exponents maintained that consumer access to discharge should be restricted. The pro-debtor exponents disagreed and maintained that the reason for the rise in chapter 7 filing was procedural abuse. They argued that this was due to consumers' strong reliance on credit,[73] which resulted in making chapter 7 bankruptcy a necessary safety-net, particularly for debtors in the middle class. They stated that an attempt to restrict the discharge would leave debtors defenceless against the threat of being indefinitely indebted.[74]

Credit card lenders and their conservative political allies agreed with the pro-creditor exponents in respect of their view of abuse and they formed a single-minded movement for curbing alleged abusers. Their efforts targeted debtors who can afford to pay their debts but who are looking for an easy way out.[75] Consequently, a major credit card

[67] Litchtash 2011 *Loy LA Int'l & Comp L Rev* 173.
[68] See Kilborn 2006 *Vand J Transnat'l* L 109.
[69] Kilborn 2012 *Loy Consumer L Rev* 3.
[70] See Warren *Bankruptcy* 507.
[71] See Kilborn 2006 *Vand J Transnat'l* L 109.
[72] Litchtash 2011 *Loy LA Int'l & Comp L Rev* 173.
[73] *Ibid*.
[74] See Warren *Bankruptcy* 516–517. See also Litchtash 2011 *Loy LA Int'l & Comp L Rev* 173.
[75] Kilborn 2012 *Loy Consumer L Rev* 3.

issuing bank drafted a reform bill which was sponsored by a conservative member of Congress.[76] Subsequently, the reform bill was passed into law, which altered the commitment by the United States commitment to the "fresh start". The law is known as the Bankruptcy Abuse Prevention and Consumer Protection Act'[77] (often referred to as bapsee-pah).[78] The purpose of this law was to ensure a balanced movement in American bankruptcy policy from an ultra-debtor friendly approach towards a more creditor-friendly policy approach and to ensure that bankruptcy procedure was not made too easy for debtors and insolvency practitioners to file.[79]

The purpose of this amendment was to curb the alleged abuse of the chapter 7 procedure and to deal with debtors who had the means of paying their debts but took advantage of the system to obtain a discharge. This change did not affect NINA debtors, as a group of debtors they genuinely do not have the means to pay their debts.

The core of the 2005 reforms is to curb abuse by introducing pre-filing credit counselling and the "means test", the outcome of which channels the debtor to the most suitable procedure. Therefore, debtors cannot self-select a procedure anymore.[80]

2.2.4.2 Required pre-filing credit counselling

The 2005 reforms incorporated an added a duty of pre-filing credit counselling for any individual seeking relief under any chapter of the Bankruptcy Code. Therefore, within 180 days before filing a chapter 7 or a chapter 13 application a debtor must attend an individual or group briefing (this includes a briefing conducted by telephone or on the internet).[81]

The promotion of alternative measures to bankruptcy in America has been described as a "complete failure".[82] Credit counselling agents report that the percentage of pre-

[76] The main purpose of the reform bill was to help reduce the number of chapter 7 filings by identifying "can-pay" debtors. The purpose of this is to ensure that debtors who have the capacity to pay back all or some of their debts are denied access to chapter 7 liquidation. Such debtors can access relief only through a five-year payment plan under chapter 13. See Kilborn 2012 *Loy Consumer L Rev* 3 and 4. See also Kilborn 2006 *Vand J Transnat*'l L 109.
[77] Bankruptcy Abuse Prevention and Consumer Protection Act Pub. L. No. 109–8 of 2005 (hereinafter referred to as BAPCPA). See also Ramsay 2014/2015 *Temp L Rev* 948.
[78] Kilborn 2006 *Vand J Transnat*'l L 110.
[79] Evans 2010 *CILSA* 339.
[80] *Ibid*. See also Kilborn 2012 *Loy Consumer L Rev* 4–9.
[81] S 109(h)(1) of the Bankruptcy Code.
[82] Kilborn 2012 *Loy Consumer L Rev* 6.

bankruptcy debtors who find a solution to their indebtedness through counselling and budgeting procedures without the need to proceed to bankruptcy proceedings is only about 3 percent of all debtors.[83] In essence, it means that the required pre-filing credit counselling has not achieved the purpose for which it was adopted which is to reduce "excessive" chapter 7 filings.

2.2.4.3 The "means test"

The core focus of the 2005 consumer bankruptcy reforms is the "means test". The ''means test'' aims to prevent debtors from receiving an immediate discharge under chapter 7 bankruptcy if they have the "means" to pay a statutorily required dividend to their creditors in a five-year plan. This requirement applies to debtors who can afford to proceed in terms of the chapter 13 procedure.[84]

The "means test" was incorporated into the existing chapter 7 procedure.[85] It functions by analysing the debtor's finances in order to determine if the debtor can or cannot afford to pay the debts.[86] The ''means test'' is divided into two stages and it is assumed that if the debtor passes any of the stages of the means test there is no abuse and the case proceeds under the pre-reform law. [87]

The compliance and monitoring costs incurred in carrying out the means test have not delivered substantial benefits and the entire initiative of means testing has been referred to as "a fool's errand".[88] Five years after the adoption of the reform only a minute

[83] *Ibid*.
[84] S 102(h) of the BAPCPA.
[85] See s 707(b) of the Bankruptcy Code.
[86] See s 707(b)(1) of the Bankruptcy Code. See also Kilborn 2012 Loy C*onsumer L Rev* 6.
[87] An overwhelming majority of debtors have been found to have "passed" one or both steps of this test in each of the first five years. The debtor would be considered to have passed the first step of the means test if the debtor's (and spouse's) "current monthly income" (CMI) falls below a defined threshold. The debtors (and spouse's) "current monthly income" (CMI) has been defined as the average of the debtor's monthly income over the past six months. In order to determine the threshold (the median income) the debtors and their spouses "current monthly income'' would be multiplied by twelve. This amount would be compared with the inflation-adjusted median family income of a similar household of the same size as the debtor's. Therefore, debtors who do not have up to the threshold income (median income) are allowed to go through chapter 7 relief at this stage. Therefore, debtors with income at or below the applicable median are automatically presumed not to be abusive, and therefore allowed into chapter 7 procedure. See ss 101(10A) and 102 of the Bankruptcy Code. See also Kilborn 2012 Loy C*onsumer L Rev* 6–7 and Kilborn 2006 *Vand J Transnat*'l L 117–118.
[88] See Kilborn 2012 Loy C*onsumer L Rev* 6.

percentage of debtors have been found to have sufficient means to make significant payments to their creditors.[89]

About 90% of all debtors that filed under chapter 7 since the operation of the "means test" passed the first "median-or-below income test".[90] The remaining 10% of the debtors proceed to stage two of the means test which factors in deductions and allowances. It has been observed that given the standard of living in the United States only a small fraction of debtors failed at this second stage of the means test. In the first five years after reform less than 10% of the debtors subjected to the second stage of the means test were recorded to have failed it.[91]

Debtors are expected to file a comprehensive account of how the "means test'' applies to them in every chapter 7 case. The trustee has a duty to review applications for every chapter 7 bankruptcy application and file a statement stating whether the debtor passed or failed the "means test".[92] If the debtor fails the "means test", the trustee is expected to file a motion to dismiss the debtor's case or provide an explanation in the form of a written statement explaining why a dismissal should not be enforced.[93]

The adoption of the ''means test'' does not affect a NINA debtor because a NINA debtor does not have any income and the issue of an abuse of the chapter 7 procedure does not arise.

2.2.4.4 Summary

The United States initially was ultra-liberal in its straight discharge approach but of late has migrated to a more conservative system of debt relief by adopting an earned discharge approach through the enactment of the BAPCPA. However, in spite of the enactment of the BAPCPA in October 2005 in order to curb excessive filings in terms of

[89] *Ibid*.
[90] See Kilborn 2012 Loy C*onsumer L Rev* 8.
[91] *Ibid*.
[92] See ss 704(b)(1) and 707(b)(1), (2)(c) of the Bankruptcy Code.
[93] See s 704(b)(2) of the Bankruptcy Code.

a chapter 7 procedure[94] this remains the most filed bankruptcy procedure in the United States.[95]

The enactment of the BAPCPA has been said to be futile as the amount of chapter 7 bankruptcy filing remains high in the United States. A good number of debtors genuinely are over-indebted and are in need of relief which they seek in good faith. The means test is not intended to prevent debtors from seeking relief but simply to prevent the dishonest ones (debtors who can afford to pay their debts but who want to take advantage of the system) from exploiting the chapter 7 procedure.[96]

As noted, the United States still offers liberal debt relief procedures for an insolvent natural person. Therefore, an honest but unfortunate NINA debtor can seek relief through chapter 7 bankruptcy irrespective of the "means test".[97] A natural person who filed under the chapter 13 re-payment plan and later becomes a NINA debtor also can obtain relief through the hardship discharge.[98] Hence, despite the introduction of more conservative reforms honest but unfortunate debtors in the United States are not without recourse.

2.3 INSOL international consumer debt reports

2.3.1 General background

Insol International held its inaugural world congress in 1997, at which it reflected on the challenges that over-indebted natural persons face in pursuit of debt relief. This event led Insol International to carry out a survey on insolvency dispensations for individual debtors in nations from all over the world. In carrying out this survey, the opinions of professionals, judges, insolvency practitioners and academics were obtained. This survey spanned developed, developing and underdeveloped countries and led to the publishing of the Insol *Report* in 2001 which dealt with consumer over-indebtedness.[99] The aim of the *Report* was to provide information to countries that are undergoing or that have the intention to undergo reform. A second edition of the Insol *Report* was

[94] See Kilborn 2006 *Vand J Transnat'l L* 109.
[95] See Kilborn 2005 *Mich J Int'l L* 632. See also Kilborn 2006 *Vand J Transnat'l L* 84.
[96] See par 2.2.3 above.
[97] See par 2.2.1 above.
[98] See par 2.2.2.
[99] Insol *Report* 2001.

published in 2011, which reaffirmed the basic principles that were recognised in the first report.[100] The fact that the principles expressed in the reports stayed the same, even though the first was written in fair economic times and the second in bad times, speaks to the objectivity of the survey. The 2011 *Report* is considered in this work.

The Insol *Report* defines over-indebted consumer debtors as natural persons or individuals who have incurred debts which exceed their ability to repay.[101] The debts incurred stem from private or commercial transactions.[102]

Various types of consumer debts have been identified and are listed below:[103]

a) Survival debts: These are debts incurred as a result of the need for survival. Examples include debts incurred for food, housing, clothing, shelter, electricity bills and so on. This type of debt appears to be that which would be incurred by a NINA debtor in an attempt to survive without an income or source of living.
b) Over-consumption debts: These are incurred as a result of extravagant living or lack of financial management skills.
c) Compensation debts: These are debts incurred by a debtor who suffers social rejection and deficiency. This may be incurred by the debtor through alcoholism, gambling and illness which have arisen in an attempt to achieve social class and power to compensate for other losses.
d) Relational debts: This can be incurred through a spouse in the course of a marriage. For example, if a spouse who is married under community of properties goes insolvent, the liabilities incurred rests on the estate of both parties.
e) Accommodation debts: This can be incurred due to unforeseen circumstances such as a sudden job loss, a drop in income, and a sudden increase in house rent. A NINA debtor may also incur this type of debt as a result of the sudden loss of income.

[100] International association of restructuring insolvency and bankruptcy professionals (INSOL) international 2011 *consumer debt Report: Reports of findings and recommendations* (hereafter referred to as Insol *Report* II).
[101] Insol *Report* II 3.
[102] *Ibid*.
[103] *Idem* 4.

f) Fraudulent debts: These are debts incurred as a result of fraudulent dealings with creditors.

The Insol *Report* identifies a number of reasons for the indebtedness of natural persons such as the expansion of the economy, high rates of unemployment and access of consumers to large amounts of credit which is not commensurate with their income.[104] The challenge of a high rate of unemployment often results in the high rate of NINA debtors in the system because unemployed individuals incur debt in order to survive.

The crux of the Insol *Report* is the formulation of four main principles[105] to help resolve the problems identified with natural person insolvency systems across countries. The principles are:[106]

a) fair and equitable apportioning of consumer credit risks;
b) discharge, rehabilitation or "fresh start" for the debtor;
c) provision for extra-judicial rather than judicial proceedings where there are equally effective options available to different classes of debtors; and
d) prevention mechanisms to reduce the need for intervention.

The first three principles only are discussed in the sub paragraphs below as this thesis is not concerned with debt prevention measures.[107]

2.3.1 Fair and equitable allocation of consumer credit risks

The Insol *Report* advocates placing a fair share of blame on debtors and creditors. Society should avoid allocating all blame to debtors and must also hold creditors accountable.[108] This consideration is particularly relevant to debtors who did not deliberately incur debts which they cannot afford, but rather found themselves over-indebted due to circumstances beyond their control. Consequently, such debtors acted in good faith.[109] In essence, it means that a pro-creditor approach to insolvency is not particularly favoured but rather a balanced system which is sensitive to the plight of the

[104] *Idem* 1.
[105] *Idem* 11.
[106] *Idem* 15.
[107] See ch 1 par 1.5 above.
[108] Insol *Report* II 14.
[109] *Ibid*.

debtors is indicated. The Insol *Report* does not favour a system that supports the interests of creditors only but focuses on balancing the interests of creditors and debtors. In order to achieve this goal the *Report* states that society and legislators must:[110]

a) determine the property that should be exempted from the insolvent estate;
b) eliminate acts which are not in the interest of all the creditors;
c) provide for a moratorium (an automatic stay) which would stop creditors from instituting action against the debtor where a process to obtain relief has been instituted;
d) develop a humane approach to handling consumer indebtedness by avoiding prejudiced provisions in the insolvency legislation and ensuring the laws are non-discriminatory. This means that no class of debtor should be disadvantaged or discriminated against, including a NINA debtor who has no income or assets.

In guaranteeing a fair and equitable apportionment of consumer credit risks, the Insol *Report* recommends that legislators should enact laws that guarantee fair treatment, equality and in the end, a discharge of debts. These laws should provide for an effective, accessible and transparent debt relief system with cost effective procedures.[111]

Furthermore, legislators should provide for a variety of debt relief procedures which take cognisance of the varying conditions of individual indebted natural persons. For instance, a debtor who is battling with survival debt and has no hope that his financial situation can improve[112] should be treated differently from a debtor who is struggling with accommodation debt.[113] The latter is in a better financial position than the former because the former has no hope of repaying his debts. Moreover, the latter stands the chance of being able to offset his debts upon their rescheduling. The former appears to be debtors in the NINA category whose financial state is a lot more difficult. A separate

[110] *Idem* 15.
[111] *Ibid*.
[112] These debtors can be classified under the NINA group of debtors.
[113] It is clear that a NINA debtor's situation differs and should have a separate procedure which is tailor made for his specific needs.

procedure that takes into consideration their unique state thus is inevitable and legislators should provide alternative debt relief procedures for consumer debtors which would cater for more debtors.[114]

2.3.2 Some form of discharge of indebtedness, rehabilitation or a "fresh start" for the debtor

The Insol *Report* identifies discharge and rehabilitation as vital principles that can help solve the over-indebtedness of natural persons.[115] Providing for the discharge of a consumer debtor who cannot repay his debts is an indication that society has understanding for the over-indebtedness of natural persons. The end result of every debt relief procedure should be to ensure that the consumer debtor secures a discharge from his indebtedness and consequently is rehabilitated.[116] A discharge of the debtor should release the debtor from all debts and liabilities in order to ensure that a debtor does not suffer indefinitely.[117] It is this practice that marks the distinction between punishment in the past and the economic reality of the twenty-first century.[118]

In guaranteeing a discharge of indebtedness, rehabilitation or a "fresh start" for the debtor, the Insol *Report* recommends that legislators should ensure that the end result of every liquidation or rehabilitation procedure is to offer a discharge of indebtedness and a ''fresh start''. A debtor's chances of obtaining a ''fresh start'' should not be tied to his future earnings and the discharge must cover as many debts as possible.[119] This is encouraging for NINA debtors who do not have an income to commit to paying their debts.

2.3.3 Extra-judicial rather than judicial proceedings

Extra-judicial or out-of-court proceedings are identified as being faster and more cost effective than court-related judicial proceedings. Therefore, the Insol *Report* recommends that the system should encourage debtors and creditors to opt for extra-

[114] Insol *Report* II 19.
[115] *Idem* 22.
[116] *Idem* 18.
[117] *Ibid*.
[118] *Ibid*.
[119] *Idem* 23 and 24.

judicial or out-of-court proceedings (either formal or informal).[120] These proceedings are usually brief which saves time and costs that would have been expended in drawn-out court proceedings.

The Insol *Report* recommends that the inputs of professional and independent debt counsellors who specialise in consumer debt-negotiated arrangements should be employed. These professionals would see to it that a debtor is assisted to get out of his indebtedness and also assist the debtor with other related matters as required by the debtor. Professionals and independent counsellors can provide information and advice on all matters pertaining to budgeting-aid, debt settlement and welfare laws. Governments and quasi-governmental or private organisations should create bodies that train, finance and supervise experts in order to ensure quality service delivery.

Considering the fact that extra-judicial proceedings are time saving and cost effective, extra-judicial proceedings may be a better option for some categories of debtors, such as NINA debtors, who cannot afford expensive proceedings. However, since this group of debtors is predominant in developing countries, setting up non-judicial institutions might be unrealistic. The use of existing administrative structures may help to alleviate the challenge of the costs in setting up non-judicial institutions.[121]

2.3.4 Summary

The essence of the Insol *Report* is to motivate the realisation that systems need to recognise indebted natural persons as worthy of equal treatment in relation to creditors.[122] The crux of the Insol *Report* is the recommendation that there should be a discharge for all debtors.[123] The Insol *Report* recognises the existence of different classes of debtors and the need to consider their varying economic circumstances. For example, a debtor who has a regular source of income and owes mostly over-consumption debt should not go through the same process for discharge as a debtor who has no assets and no income and is struggling with survival debt.[124] In order to

[120] *Idem* 26.
[121] Coetzee *A Comparative Reappraisal of Debt Relief Measures* 72.
[122] See par 2.3.1.
[123] See par 2.3.2.
[124] See par 2.3.1.

achieve this aim the report proposes that legislators should provide a variety of debt relief procedures which take cognisance of the varying conditions of individual indebted natural persons.[125]

The end result of providing for a variety of procedures is to ensure that there is a discharge for all honest but unfortunate debtors, irrespective of their financial situation.[126] Furthermore, the Insol *Report* states that this discharge must not be tied to the debtor's future earnings.[127] This opinion strengthens the plight of NINA debtors who do not have income. A lack of income should not restrict a debtor from obtaining a discharge in an ideal situation.

2.4 The IFF *Report*

2.4.1 General background

The law review committee on insolvency law and practice in the United Kingdom published a report in 1982, known as the Cork *Report*.[128] The Cork *Report* was the first comprehensive report on insolvency law and practice in the United Kingdom. This report addressed the issue of the balance of interests of all the parties involved in bankruptcy such as creditors, debtors and society[129] and observed that the interest of these parties should be considered during the process of law reform.[130]

In the early 1990s a deep economic depression hit European countries which caused a heavy setback to the economic fortunes of most of the European Union member nations. Consequently, there was an increase in the indebtedness of private households as many low income families and middle class households ran into grave economic distress.[131] The increase in indebtedness was as a result of home mortgages, business loans, private loans and consumer debt becoming unmanageable.[132] Consequently, governments in the affected jurisdictions were prompted to evaluate the existing

[125] *Ibid*.
[126] See par 2.3.2.
[127] *Ibid*.
[128] The United Kingdom insolvency law review committee *Final Report on insolvency law and practice* 1982 (hereinafter referred to as the Cork *Report*).
[129] Cork *Report* para 20–30 and 187–191. See also Boraine 2003 *De Jure* 236.
[130] Cork *Report* para 20–25 and 191–192.
[131] IFF *Report* 14.
[132] *Ibid*.

safeguards relating to over-indebtedness of natural persons and the need to find new solutions to this challenge.[133]

For the first time a large scale investigation into consumer over-indebtedness was commissioned by the Directorate General of the consumer policy services of the European commission.[134] This investigation was conducted in November 1991 by Huls and a group of academics[135] who were experts in the field of debt relief across Europe.[136] The investigation led to the so-called Huls *Study*[137] on over-indebtedness which was commissioned by the European community in 1991 and published in 1994.[138]

Ten years later the Directorate General of the consumer policy services of the European Commission commissioned a second study which was led by Reifner.[139] The result of the study culminated in the consumer over-indebtedness and consumer law in the European Union Final *Report* known as the IFF *Report*.[140] The IFF *Report* is considered in this thesis as it is the most comprehensive recent European report that addresses issues relating to the insolvency of natural persons.

According to Kilborn the IFF *Report*'s recommendations on insolvency legislation lean heavily on the Huls *Study* and the Insol *Report* I.[141] The IFF *Report* refers to the Insol *Report* I as "the common core of consumer bankruptcy policies for the near future" and adds that the Insol *Report* "presents the international consensus about sound law and policy in insolvency matters".[142]

The IFF *Report* carries out a form of comparison between the Anglo-American[143] and continental European approaches to consumer debt relief.[144] A major difference, as

[133] *Ibid*.
[134] See Kilborn 2011 http://bit.ly/2krEmJo 2 (accessed 04/05/2019).
[135] IFF *Report* 16.
[136] *Ibid*.
[137] Huls *Report* 1994: *Report on over-indebtedness of consumers in the EC member states: facts and search for solutions* (hereafter referred to as Huls *Report*). See Huls 1993 *J Consum Policy* 215.
[138] IFF *Report* 15.
[139] Kilborn 2011 http://bit.ly/2krEmJo 6 (accessed 04/05/2019).
[140] This report is further referred to as the IFF *Report*.
[141] Kilborn 2011 http://bit.ly/2krEmJo 7 (accessed 04/05/2019).
[142] IFF *Report* 45. See also Kilborn 2011 http://bit.ly/2krEmJo 7 (accessed 04/05/2019).
[143] See par 2.2 above.
[144] IFF *Report* 14. See also, Kilborn 2011 http://bit.ly/2krEmJo 6 (accessed 04/05/2019).

observed by the IFF *Report,* is the fact that European countries have a different policy approach to the over-indebtedness of natural persons to that in Anglo-American countries. The European approach focuses on preventive mechanisms rather than curative mechanisms whereas the Anglo-American approach places emphasis on the discharge of unmanageable debt.[145] The IFF *Report* investigated the two approaches, which are prevention or a curative (rehabilitation) method of treating over-indebtedness.

As regards the European approach the IFF *Report* emphasises that the "European model of consumer debt relief requires that a debtor earns an economic start through a lengthy and arduous payment plan".[146]It states that the rationale behind these payment plans appears ''to be more of a manifestation of the importance of 'good payment morals' than of economic interest of the creditors''.[147] A number of studies reveal that the average payment made to creditors at the end of the payment plan is about 15 per cent of the total outstanding debt.[148] Furthermore, the administrative and judicial work required to draw up a plan and to monitor it is onerous and the yield of the payment plans in most cases is modest, therefore the economic basis of such payment plans is questionable.[149]

The IFF *Report* reflects that an overview of European and Anglo American insolvency law shows that the principles applied in formulating insolvency laws vary from one jurisdiction to the other.[150] For example, access to discharge at some stage was more restricted in countries such as France, the United Kingdom and to some extent Sweden compared to jurisdictions such as the United States and Canada.[151]

Nevertheless, a discharge is the end result of all systems even though it is achieved through various mediums. It has been observed that European insolvency laws generally share common principles and these have been enumerated in the IFF *Report*.

[145] IFF *Report* 7 and 15. S
[146] IFF *Report* 255
[147] *Idem* 167.
[148] *Ibid*.
[149] *Ibid*.
[150] *Idem* 7 and 15.
[151] *Idem* 247.

The five basic principles of European consumer insolvency laws according to the IFF *Report* are:[152]

a) Rehabilitation by means of a broad discharge.
b) An earned "fresh start" through a payment plan procedure.
c) Open access to debt adjustment proceedings with no excessive costs. This is only available to debtors acting in "good faith", and the purpose is to ensure discharge, rehabilitation or "fresh start" for the debtor.
d) Budgeting and debt counselling; and
e) Preference for out-of-court or pre-court proceedings.

A brief explanation of these principles is provided below.

2.4.1.1 Rehabilitation by way of a broad discharge

The IFF *Report* referred to the rehabilitation of debtors as the core aim of every insolvency law or system. This aim can be achieved through the discharge of excessive impending debt.[153] The IFF *Report* goes further than its predecessors (Huls *Study* and Insol *Report* I) to advocate a broad discharge. It states that a discharge must cover as much debt as possible and only debts related to alimony, which often is excluded by most countries, or tort-related claims generally are excluded.[154] According to the IFF *Report* a discharge should cover almost all the debtors debts in order ''to offer a real chance of rehabilitation''.[155]

According to the IFF *Report* a discharge may be partial, covering only a part of the debt. A payment plan should be initiated according to the debtor's income and the debtor would be required to pay only a part of the total debt. On the other hand, a discharge of total debt is recognised and should be "allowed in cases of hardship"[156] such as when "zero plan situations" are relevant.[157] A discharge of a debtor's total debt is particularly

[152] Kilborn 2011 http://bit.ly/2krEmJo 7 (accessed 04/05/2019). See also IFF *Report* 247–248.
[153] IFF *Report* 247. This is also a core principle of a good natural person insolvency system enumerated by the Insol *Report* and most importantly is the core philosophy of the Insol *Report*. See par 2.3.2 above.
[154] IFF *Report* 247.
[155] *Ibid*.
[156] *Idem* 250.
[157] *Ibid*. Zero plan situations are situations whereby a debtor has nothing to offer his creditors in exchange for his discharge. Debtors in this category are often referred to as NINA debtors.

useful for NINA debtors who are unable to fulfil a payment plan providing for a partial discharge.

2.4.1.2 Earned "fresh start" through a payment plan

At the time the *Report* was drafted none of the member states of the European Union provided a quick ''fresh start'' without a compulsory payment plan.[158] Thus, a payment plan was a criterion for obtaining a ''fresh start'' in European countries. At the time the duration of a payment plan usually spanned five years.[159] During this period the debtor is expected to show a commitment to paying his debts by committing all his income, except the portion he needs to survive, to the repayment of his debts. The IFF *Report* aligns with the Huls *Report* recommendation of a period of five years. However, the IFF *Report* suggests a preferable shorter period of three years.[160] The purpose of the earned ''fresh start'' is to refute claims that consumer insolvency is an easy way out of debt.[161]

It appears that the earned ''fresh start'' through a payment plan does not favour the plight of the NINA debtor as a debtor in such a situation cannot fulfil the payment plan conditions required to earn a ''fresh start''. However, the IFF *Report* takes notice of debtors who fall sick or lose their jobs during the period when the payment plan is operational.[162] In these situations provisions should be made for a plan modification to alleviate their payment obligations when debtors become ill or are laid off from their place of work. This factor may include a debtor who in the course of a payment plan procedure becomes a NINA debtor.[163]

2.4.1.3 Open access to insolvency proceedings with no excessive costs

Open access to insolvency proceedings generally is an acceptable principle among European countries in order to render adequate assistance to an over-indebted

[158] *Idem* 248.
[159] IFF *Report* 248. The European approach of obtaining a discharge through a payment plan (earned fresh start) is in contrast to the United States "fresh start" policy which offers a straight discharge. See par 2.2 for discussion on the United States fresh start policy.
[160] IFF *Report* 253. See also Kilborn 2011 http://bit.ly/2krEmJo 8 (accessed 04/05/2019).
[161] *Idem* 248.
[162] *Idem* 254.
[163] This appears similar to the United States chapter 13 hardship discharge provision. See ch 2 par 2.2.3.

individual.[164] The purpose of this principle is to ensure that as many debtors as possible are granted access to debt relief without prejudice to their financial state.[165] For example, debt counselling programmes are provided at little or no cost as often they are supported by state funds. Furthermore, free legal aid is available to debtors.[166] The purpose in providing this support is to ensure that the cost of obtaining relief is not an impediment for debtors who are financially challenged. Access to proceedings clearly is connected to the eventual discharge of the debtor because a debtor who cannot access proceedings obviously cannot obtain discharge through it. Providing open access devoid of the excessive costs of proceedings thus clearly is preferable for the NINA debtor.

2.4.1.4 Budget and debt counselling

Debt counselling should be readily available to any indebted consumer and be available at little or no cost. Most of these programmes are funded by government or the private sector.[167] The report suggests that counselling should be handled by independent professionals[168] and that the role of a debtor's counsellor should be separated from that of the trustee who would take care of the debtor's estate.[169]

Charging a debtor for debt counselling would only add to the debtor's indebtedness, therefore provision for debt counselling at little or preferably no cost is to the advantage of debtors, most especially NINA debtors who cannot afford to incur additional costs.

2.4.1.5 Preference for out-of-court or pre-court proceedings

A good number of member states of the European Union have a clear preference for out-of-court or pre-court proceedings over court proceedings.[170] A few exceptions as

[164] IFF *Report* 248.
[165] *Ibid*.
[166] See Kilborn 2011 http://bit.ly/2krEmJo 7 (accessed 04/05/2019).
[167] The introduction of the BAPCPA in the United States revealed that the introduction of pre-filing credit counselling was not effective as the majority of cases were not resolved at this level but rather proceeded to bankruptcy. See par 2.2.3 above.
[168] IFF *Report* 256.
[169] IFF *Report* 254.
[170] This is similar to one of the core principles of a good natural person insolvency system as enumerated by the Insol *Report*. See par 2.3.3 above.

noted by the IFF *Report* include Denmark and the United Kingdom which did not require a pre-court attempt at settlement.[171]

A distinction is drawn between contractual voluntary settlements and institutionalised pre-court arrangements.[172] The European countries appear to be divided in terms of these two approaches. However, no preference whatsoever has been associated with either one. Nevertheless, the key factor enhancing voluntary settlement has been identified as institutional protection, in other words voluntary settlements should be institutionally regulated so that the parties are able to enforce settlement agreements. Therefore, the IFF *Report* advocates informal and out-of-court proceedings should be explored before resorting to court. This type of procedure fosters the early resolution of debt issues[173] and should be consciously regulated.[174]

There are a number of reasons why out-of-court or pre-court proceedings usually are preferred. For example, usually they are cheaper than judicial proceedings and save time. For these reasons they are considered more suitable for debtors who are in a dire financial situation such as NINA debtors where it is obvious that the debtor does not have anything to give back.[175] However, there is a need to ensure that the proceedings are regulated and enforceable in order to ensure compliance with the agreement reached, for example so creditors do not turn their back on prior agreements.

2.4.2 Summary

The IFF *Report* carried out a survey on over-indebtedness in European countries but failed to give preference to a particular system as reflecting the optimal legislative framework.[176] Therefore, the IFF *Report* remains essentially descriptive in nature as it

[171] IFF *Report* 249.
[172] The difference between pre-court arrangements or negotiations and voluntary settlement is that pre-court arrangements or negotiations typically are initiated by a debtor before the initiation of court proceedings in order to ensure a compromise is reached. On the other hand, a voluntary settlement can take place before or during a court proceeding and in this instance, some form of institutional protection is needed to ensure compliance. See IFF *Report* 249.
[173] See IFF *Report* 250–251.
[174] IFF *Report* 249.
[175] IFF *Report* 249 and 255.
[176] *Idem* 255.

seeks to evaluate the various evolving systems in the European Union as the "European model" of insolvency law.[177]

The IFF *Report* identified that the core aspect of the European approach is that "European insolvency laws require a new economic start for consumer debtors to be earned through a long and demanding payment plan (earned discharge) unlike the Anglo-American which seem to favour a straight discharge".[178]The European approach favours the ''earned discharge'' as opposed to the immediate discharge in the United States which encourages the "get-out-of-jail-free" immediate discharge in Chapter 7.[179]

The philosophy of the earned discharge primarily is to "manifest the European moral attitude towards payment of debts" and is not based on economic considerations.[180] The idea behind a payment plan requirement is to establish a debtor's best efforts and is not targeted at denying relief. Therefore, the discharge is the core of the European approach and the IFF *Report* states that the discharge must be broad enough to accommodate as many debts as possible.[181] This discharge should be broad enough to accommodate a partial discharge of debts under payment plan arrangements and a total discharge of debts in cases of extreme hardship when there are zero-plans.[182] Therefore, NINA debtors who are likely to qualify for the extreme hardship route are recognised by the system.

Furthermore, in order to ensure there is access to discharge the IFF *Report* opines that the entry thresholds into the rehabilitation systems should be lowered in order to ensure that these procedures are more accessible to debtors.[183] The high cost of rehabilitation has been identified as an obstacle to debtors in seeking relief through formal insolvency proceedings. Therefore, the IFF *Report* recommends that the procedures for rehabilitation should be made easier. Furthermore, the procedure should be less costly

[177] Kilborn 2011 http://bit.ly/2krEmJo 7 (accessed 04/05/2019).
[178] IFF *Report* 167. See also Kilborn 2011 http://bit.ly/2krEmJo 7 (accessed 04/05/2019).
[179] Kilborn 2011 http://bit.ly/2krEmJo 32 (accessed 04/05/2019).
[180] See ch 2 par 2.4.1.
[181] See ch 2 par 2.4.1.1.
[182] IFF *Report* 167.
[183] European Commission *Final report of the expert group* 2003: *Report on best project on restructuring, bankruptcy and a fresh start* 14 and 27 (hereafter referred to as EC Best Project Report).

in order to make it accessible to all debtors including those in a dire financial hardship situation.[184]

2.5 The World Bank *Report*

2.5.1 General background

The World Bank created a working group to consider matters relating to the insolvency of natural persons for the first time in 2011, prior to that the World Bank group focused mainly on business bankruptcy and restructuring systems.[185] Its focus on the latter had been due to the financial crisis that hit financial markets between 1997 and 1998 which led to a global recession. In this respect the World Bank together with the International Monetary Fund[186] offered guidelines to policy makers which were intended to help formulate policies that would see to it that effective bankruptcy and restructuring systems are in place.[187]

The economic recession affected the household sector, particularly individuals, which in turn affected economic development and stability.[188] Financial observers from the World Bank acknowledged that the intensity of macro-economic pressure, resulting from personal insolvency at that time, posed a systemic risk to economic development and a threat to international financial stability.[189]

The 2007/2008 financial crisis necessitated a focal change for the World Bank and prompted the creation of the World Bank working group tasked with examining matters relating to the insolvency of natural persons.[190] This group comprised capable intellectuals such as policy-making experts, academics, judges and practitioners.[191] The primary responsibility of the working group was to carry out a detailed study of issues relating to the insolvency of natural persons and to come up with a "reflective document"

[184] *Idem* 15 and 27.
[185] Kilborn 2014 *PILR* 307.
[186] IMF.
[187] World Bank *Report* 2.
[188] World Bank *Report* 2. See also Kilborn 2014 *PILR* 307.
[189] Kilborn 2014 *PILR* 308.
[190] *Ibid*.
[191] World Bank *Report* 1.

which details guidelines for the treatment of issues relating to the insolvency of natural persons.[192]

The World Bank working group carried out a survey of 59 nations, they selected 34 low and middle income economies and 25 high income economies.[193] A striking outcome of the survey revealed that a good number of countries characterised as low and middle income earners did not have legislative structures dealing with the insolvency of natural persons at all.[194] The working group took into consideration varying features and idiosyncrasies of the various countries under examination and came up with findings and recommendations that were put together as the first World Bank *Report* that deals with the insolvency of natural persons.[195] The World Bank *Report* has already influenced reforms in a number of jurisdictions such as Colombia, Italy and Ireland.[196]

The World Bank *Report* has been referred to as a guide for identifying policies that need to be considered in building a workable insolvency system for natural persons.[197] The report is not a prescriptive document containing best practices relating to the insolvency of natural persons but is intended merely as a guide, which explains why the report is referred to as a "reflective document".[198] It proposes guidelines for the treatment of various issues on the insolvency of individuals taking cognisance of varying policies and sensitivities.[199]

The World Bank *Report* adopts an approach which balances the interests of debtors and creditors by ensuring that discharge and rehabilitation policies are formulated with care and sensitivity. Therefore, an attempt is made to ensure that a debtor obtains a "fresh start" and at the same time a debtor should be made to fulfil conditions for relief as opposed to a straight discharge.[200]

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[192] See also Kilborn 2014 *PILR* 308.
[193] World Bank *Report* 2.
[194] *Ibid*.
[195] World Bank *Report* 2011. See also Kilborn 2014 *PILR* 308.
[196] See also Kilborn 2011 http://bit.ly/2krEmJo 315 (accessed 04/05/2019).
[197] World Bank *Report* 3.
[198] Kilborn 2014 *PILR* 309.
[199] World Bank *Report* 4.
[200] World Bank *Report* 4. This is similar to the European approach to consumer indebtedness as stated by the IFF *Report*. See par 2.4.2 above.

The World Bank *Report* first identified a number of challenges usually encountered by natural person's insolvency systems, namely the challenge of moral hazard, fraud perpetrated by dishonest debtors and the challenge of stigma which usually discourages the use of insolvency proceedings.[201] Furthermore, the report enumerated a number of benefits and purposes in an insolvency regime, namely[202] to render benefit to creditors, to benefit debtors and their dependants and finally to benefit society as a whole as it is in the interest of society if more debtors are relieved of their indebtedness.

Kilborn[203] enumerates three main core attributes of the World Bank *Report* for a functioning insolvency system,[204] which can be used to evaluate an existing insolvency system or an insolvency system which is yet to be effected. The core attributes are a formal legal mechanism, informal alternative procedures and a discharge. These are discussed below.

2.5.2 Formal legal mechanism

The vital legal issues that arise with regard to the insolvency of natural persons have been summarised as stemming from two major contractual obligations. These are the rights and obligations of debtors as they relate to their creditors and the rights and obligations of creditors as a whole in relation to the insolvent estate.[205] These rights and obligations generally are decided and enforced by the courts therefore the role of the courts in insolvency matters is recognised.[206]

The World Bank *Report* observes that the legislative frameworks of a good number of insolvency systems provide for court-related procedures (formal legal mechanisms) such as bankruptcy procedures, which are procedures through which an insolvent natural person can secure relief from his indebtedness.[207]

[201] See World Bank *Report* 40–44. The issue of stigma is a major challenge that has been identified as one of the causes of the in effectiveness of bankruptcy programmes in Nigeria. See ch 1 par 1.1.
[202] World Bank *Report* 19.
[203] See Kilborn 2014 *PILR* 309.
[204] See World Bank *Report* 45–116. See also Kilborn 2014 *PILR* 309.
[205] See World Bank *Report* 49.
[206] *Idem* 50.
[207] *Idem* 51.

The report also states that because court-related procedures rely on the debtor's assets as the main resource of a debt settlement there is a need to exclude some of the debtor's assets for the maintenance of self and family.[208] Therefore, in the process of liquidating the debtor's property the issue of the exemption of assets should be borne in mind in order to ensure that when a debtor is discharged there is enough property available to meet the immediate needs of his family and, most importantly, to ensure that the debtor is not left destitute. The purpose of excluding some of the debtors' property is to encourage the "fresh start".[209] Excluding some of the debtors' property is beneficial to all classes of debtors, including a NINA debtor who probably has only bedding and clothes. These basic assets should be exempt from liquidation so that the NINA debtor is not left destitute.

After a survey had been carried out, the working group came up with three methods by which exempted property can be determined. These methods are enumerated as follows:[210]

a) Exemption of a narrow range of assets: After all the assets of the insolvent estate vested in the insolvency practitioner have been assessed, a limited number of assets are exempted. This approach of exemption permits the exemption of only crucial assets such as the working tools of the debtor, bedding and apparel. This method of exemption generally is applied when insolvency law is retributive in nature as it places a debtor at a level close to poverty.[211]
b) Exemption of particular assets: This method of exemption affords the debtor exemption of certain classes of assets up to a maximum specified amount. The factors to be considered are the debtor's profession and whether he has a family or not. This assessment is done after the insolvent estate is vested in the insolvency representative. The exemption of particular assets has been referred to as a modern version of the former approach (exemption of a narrow range of assets) and has the

[208] *Idem* 75
[209] *Ibid*. See also par 2.2 as regards the American fresh start policy.
[210] *Ibid*.
[211] See World Bank *Report* 76.

"advantage of general fairness", which makes it a preferable approach.[212] It is broader in nature as it exempts a wider range of assets.[213]

c) Standard based approach: This is absolutely different from the first two methods as all of the debtor's assets are exempted. The onus then is on the insolvency representative to petition for the repossession of specific items which are of excess value. This system is most effective where the majority of insolvent debtors have a limited amount of personal assets.[214]

Formal legal procedures mainly deal with the assets of debtors as a means to a discharge and this situation often makes them inappropriate for NINA debtors. However, some jurisdictions, such as the United States, offer discharge to a debtor who does not have assets to be liquidated under a formal procedure.[215] This procedure happens before liquidation and in situations where a debtor has only a few assets (which qualify as exempted assets) which would be exempted. Consequently, in such instances a discharge would be granted irrespective of the fact that there were no assets that could be liquidated.

Further, with regard to formal procedures the World Bank *Report* mentions the need for lawmakers to avoid legislation that uses judgmental language, punitive measures and which places restrictions on the debtor.[216] For example, the use of "acts of bankruptcy" as a trigger for insolvency applications has been opined to be a misfit in contemporary insolvency law as the focus of contemporary insolvency law is on "inability to pay" rather than "wrongful acts".[217] It has been observed that some systems use the bankruptcy procedure as a threat ''in the collection efforts of creditors, and the threat is more intense where the stigma attached to bankruptcy is greater''.[218]

[212] *Idem* 77.
[213] *Ibid*.
[214] *Idem* 78. This described category fits the NINA class of insolvents.
[215] See par 2.2.2.
[216] See World Bank *Report* 41–44.
[217] World Bank *Report* 63.
[218] See World Bank *Report* 62.

2.5.3 Informal alternative insolvency procedures

Informal procedures generally are encouraged because they are cost effective (eliminates costs incurred in seeking formal settlements such as the cost of filing or engaging a counsel) and faster in comparison with regular court proceedings. This fact makes it a more appropriate procedure for debtors such as NINA debtors who are in a dire financial situation and cannot afford expensive and long processes.[219] Also, informal procedures afford debtors and their creditors the opportunity to come together to resolve their financial issues which eliminates the expenses generally incurred in filling for formal procedures and the cost of paying for lawyers. This informality also affords both parties an opportunity to have an input into whatever agreement is arrived at.[220]

Informal procedures also can help reduce the fear of stigmatisation that comes with insolvency and the consequent registration of matters relating thereto in credit information data banks.[221] The challenge of stigmatisation has been identified by the World Bank *Report* as a major challenge facing countries[222] and this situation can undermine a well-thought-out insolvency system.[223] Stigmatisation has been identified as a major problem that hinders the effectiveness of the insolvency system in Nigeria.[224]

Legislators backed up these findings by emphasising the need to prioritise informal procedures. The World Bank *Report* points out that in some countries an informal procedure is a prerequisite for filing an application for a formal insolvency procedure.[225]

However, the World Bank *Report* is not an open-hearted supporter of informal procedures because of the possibility that debtors feel pressurised to settle for "onerous payment plans" that are impractical.[226] The World Bank *Report* states that a very few cases are resolved through voluntary settlements. Therefore, in order for out-of-court,

[219] See World Bank *Report* 46. See also Kilborn 2014 *PILR* 309.
[220] See World Bank *Report* 46.
[221] See World Bank *Report* 46 and 129.
[222] See World Bank *Report* 46.
[223] See World Bank *Report* 44.
[224] See ch 1 par 1.1.
[225] See Kilborn 2014 *PILR* 313.
[226] The fact that the World Bank *Report* is not generally in favour of informal procedures is in contrast with earlier reports (Insol *Report* and IFF *Report*) discussed. See para 2.3.3, 2.4.1.4 and 2.4.1.5.

negotiated settlements to succeed there is the need for "some institutional support and incentives".[227] Institutional support and incentives are important most especially in situations where a debtor does not have assets or income to use in negotiations, such as NINA cases, because creditors may be reluctant to negotiate with zero plan debtors if no institutional support or incentives compel them to negotiate.

Institutional support should provide for[228] an experienced skilled advisor or negotiator at little or no cost. Furthermore, it should provide a formal legal mechanism in the form of a moratorium which serves as an automatic stay on debt enforcement while informal negotiations are taking place. Finally, it should provide laws that would bind both creditors and the debtor to any settlement agreed upon.

It has been observed that in jurisdictions where informal settlements are successful the negotiation generally was spearheaded or facilitated by a specific persuasive government regulator, such as a central bank or a government-supported counselling agency. These government regulatory bodies have developed a cordial and friendly relationship with creditors and consequently were better positioned than the courts to extract favourable terms or concessions from them.[229]

2.5.4 Discharge

According to the World Bank *Report* a principal goal of an insolvency system for natural persons should be to grant a discharge to the debtor. The purpose of such discharge is to ensure that the debtor is set free from indebtedness and consequently is reinstated in his pre-insolvency state. This relief would be extended to "honest but unfortunate" debtors primarily to ensure their ''fresh start''.[230] The process of reintegrating debtors into the system helps combat the challenge of losing such debtors to the informal system where their further financial dealings are not known and consequently do not remit any form of tax or benefit to the formal economy. Therefore, reintegrating debtors

[227] See World Bank *Report* 48.
[228] *Ibid*.
[229] *Ibid*.
[230] *Idem* 12. See also, Howell 2014 *QUT Law Review* 33.

(including NINA debtors) into the formal system encourages and possibly stimulates economic growth.[231]

A debtor generally is expected to fulfil certain conditions in order to receive the discharge. These conditions vary from one jurisdiction to another, and include partial payment of debts or the presentation of a well-planned payment plan.[232] The payment plan states the period within which the debt would be paid, which usually spans three and five years. However, it is observed that most "honest but unfortunate" debtors find it difficult to meet such conditions as they do not have assets or income to fulfil such obligations either through a payment plan or partial payment.[233] Consequently, these conditions deny them access to a discharge.[234]

However, the World Bank *Report* states that discharge must be available to every class of debtor, without exception. Furthermore, the report states that the system should ensure that a debtor obtains relief from as much debt as possible as the more debts that are excluded from the discharge the less effective the insolvency regime will be.[235] Therefore, provision for the discharge for every debtor without discrimination is essential to every insolvency system.

The World Bank *Report* considers the solutions to a challenged insolvency process, namely[236] there should be provision for a liquidation procedure which caters for an exemption of certain properties,[237] provision for a payment plan procedure which provides for debtors who have some form of disposable income to commit towards the fulfilment of their financial obligations in exchange for discharge[238] and consideration for debtors with no income or assets (NINAs).[239]

[231] See World Bank *Report* 22, 23, 25 and 35.
[232] This condition reminds one of conditions for an "earned discharge" or ''earned fresh start'' under the European system; See par 2.4.1.2.
[233] NINA debtors for example do not have assets or income.
[234] See World Bank *Report* 16.
[235] *Idem* 19.
[236] *Idem* 74.
[237] See para 2.2.2 and 2.3.1 for a discussion of exempt assets of an insolvent estate.
[238] See para 2.4.2 and 2.4.6 for an explanation of the earned start and jurisdictions that favour the approach.
[239] World Bank *Report* 56 and 136.

As regards the latter group the World Bank *Report* acknowledges the existence of a certain group of debtors who cannot afford to seek relief from their indebtedness through a liquidation or payment plan.[240] This group of debtors does not have income as generally they do not have work. They also do not own assets that can yield value to fulfil their financial obligations to their creditors.[241] The *Report* observes that NINA debtors are not catered for in a number of jurisdictions, thereby creating a form of discrimination. The reason some jurisdictions fail to cater for this group of debtors is because of the notion that such debtors offer no economic benefit to their creditors as there is economic benefit only when dividends are paid to creditors.[242] However, the World Bank *Report* specifically states that it is important that this group of debtors is not excluded from relief because a good number of them exist in all insolvency systems for natural persons.[243] Consequently, the report posits that efforts should be made to help this class of distressed debtors to beat their indebtedness by making relief accessible to them as well.[244]

2.5.5 Summary

The World Bank *Report* surveys developing and developed countries in order to identify policies that need to be considered in building a workable insolvency system for natural persons.[245]

The major objective of the World Bank *Report* is to enumerate a number of principles which can be used to evaluate existing or yet to be implemented individual insolvency systems. These principles have been summarised by Kilborn, they are the availability of formal legal mechanisms for debt relief, the availability of informal procedures (although the World Bank *Report* does not favour informal proceedings which is a departure from earlier reports)[246] and the availability of discharge for all debtors.[247]

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[240] *Idem* 56.
[241] *Idem* 136.
[242] *Idem* 56.
[243] *Idem* 136.
[244] *Ibid*.
[245] See par 2.5.1.
[246] See par 2.5.3.
[247] See para 2.5.2, 2.5.3 and 2.5.5 for discussions on the three core procedures as expressed by Kilborn.

Furthermore, and most importantly as regards this thesis, the World Bank *Report* recognises the existence of a group of NINA debtors.[248] This group of debtors is said to suffer survival debt, and cannot afford to pay off their debts as they do not have assets that can be liquidated or income to qualify for a payment plan. Therefore, each consumer insolvency system must cater for them by making available debt relief measures that best suit them. [249]

The World Bank *Report* is the first report that specifically mentions NINA debtors and the need for a good insolvency law to accommodate them. The World Bank *Report* acknowledges that this group of debtors often is excluded from the system and that there is a need to ensure that NINA debtors also are discharged from indebtedness.[250]

The crux of the World Bank *Report* is to provide for discharge for all debtors. The essence to providing formal and informal procedures is to ensure that all honest but unfortunate debtors, including NINA debtors, obtain a discharge from their indebtedness.

The World Bank *Report* concludes that no one set of approaches can be identified as "best" practice, as an attempt to enforce an insolvency standard on widely varying cultures and socio-economic contexts would be fruitless.[251] Nevertheless, the report identifies some approaches which have made existing systems less efficient and less useful,[252] as well as the core principles which can serve as a guide to achieving a viable insolvency system.[253]

2.6 Conclusion

It appears that all international instruments agree that there must be some form of a discharge for debtors who genuinely cannot pay their debts. Although the mode of relief granted varies from country to country, the basis of all the reports discussed in this chapter is to ensure that all natural persons insolvency systems provide some form of

[248] World Bank *Report* 56—57 and 99.
[249] *Idem* 99.
[250] *Ibid*.
[251] *Idem* 3.
[252] Kilborn 2010 http://dx.doi.org/10.2139/ssrn.1663108 6 (accessed 04/05/2016).
[253] *Idem* 2.

discharge for debtors. This provision is important as the systems cannot hold debtors in a perpetually financially distressed situation.

As mentioned bankruptcy laws vary from country to country. A good example of a modern system of bankruptcy is that of the United States. The United States system is characterised by a ‘‘fresh start’’ policy which provides for a discharge of debts.[254] On the other hand, and in contrast to the American system, the European countries have a more conservative approach to discharge, which is the earned discharge principle. The European approach as expressed in the IFF *Report* seeks to ensure that a debtor does not walk away from his indebtedness without making an effort to pay back and showing good cause why discharge should be granted. [255]

The American system initially was ultra-liberal but gradually moved closer to the European earned discharge stance through the introduction of the BAPCPA.[256] However, the introduction of the BAPCPA aims to curb debtors who may be taking advantage of the system and are not genuine cases such as NINA debtors. Europe, on the other hand, subscribes to an earned discharge approach but has become more liberal in gradually reducing the payment plan period and in considering discharge for zero plan debtors such as NINA debtors.[257] However, the common ground for these systems is rendering a discharge for all debtors irrespective of their financial state.

The aim in this chapter is to extract guidelines for a Nigerian insolvency system from the international consumer insolvency provisions. Consequently, the purpose ultimately is to determine what Nigeria can glean from the American ‘‘fresh start’’ policy and the guidelines described in the reports discussed above.

Various guidelines have been laid down by the Insol, IFF and the World Bank reports. Furthermore, the American system being the first to subscribe to a liberal approach has had an influence in other countries. The nature of this influence informs the reasons for considering the American system and these reports (which have surveyed a number of

[254] See par 2.2.
[255] *Ibid*. See also par 2.4.
[256] See par 2.2.4.
[257] See par 2.4.1.1.

countries) in this chapter. It is important that Nigeria learn from international standards on debt relief for consumer debtors, especially the NINA class of debtors who are perceived to form a large section of consumer debtors in Nigeria.[258]

Consequently, from the discussion of the American system and the various reports in this chapter a summary of the identified essential elements in a functioning natural person insolvency system is offered. As these elements are universal principals they apply in all jurisdictions and to all NINA estates. The extracted elements are as follows:

a. Access to all honest but unfortunate debtors

In terms of the various reports and the American philosophy with reference to insolvency access to debt relief is an important element in every natural person insolvency system. This element is a non-negotiable feature that must be present. Access should not be determined by the financial capability of a debtor and can be guaranteed by ensuring that every insolvency system makes provision for multiple procedures whereby all honest but unfortunate debtors, irrespective of their financial circumstances, find a debt relief procedure that best suits their financial situation.[259] Also, access must be ensured by seeing to it that the provisions in the law are not punitive or restrictive by nature by focusing on the inability of a debtor to pay a debt rather than on wrongful acts such as in the description “acts of bankruptcy”.[260]

Furthermore, access should be guaranteed by ensuring that procedures for debt relief are available at little or no cost depending on the debtor’s financial state.[261] It is an important feature because it makes no sense technically to grant access to a wide range of debtors by providing for different debt relief procedures but practically limiting access by providing procedures which can be accessed only at high cost. For example, in the case of NINA debtors, who do not have assets or income, it is expected that

[258] See ch 1 par 1.1.
[259] See para 2.2, 2.3.2, 2.4.1.3, and 2.5.4.
[260] See par 2.5.2.
[261] See par 2.4.1.3.

procedures should be made available at no or very low cost to avoid denying NINA debtors access to debt relief which amounts to discrimination on financial grounds.[262]

b. Discharge

As stated earlier discharge is the essence of every natural persons insolvency system, but different approaches have been employed in various systems to ensure a discharge. For example, the European position for discharge favours an "earned discharge" approach[263] whereas the Anglo-American approach to discharge is through a "straight discharge." However, the end result of every insolvency system is discharge.

From a summary of the various reports discussed in this chapter the core attribute of these reports is to ensure there is some form of a discharge for a debtor irrespective of his financial situation.[264] The World Bank *Report,* the most recent report, specifically states that the plight of the NINA debtor should be taken into consideration.[265] Thus, every insolvency jurisdiction should cater for them as their exclusion amounts to discrimination. Each insolvency system should provide for a broad discharge which ensures that debtors obtain relief from as much debt as possible as the more debts that are excluded from the discharge the less effective the insolvency regime.[266]

c. Formal versus informal procedures

It appears that in the past informal procedures were favoured above formal procedures for apparent reasons; informal procedures are deemed to be fast, cost effective and curb the challenge of stigmatisation.[267] For these reasons informal procedures as a means to debt relief appear to be a good option for debtors (such as NINA debtors) who cannot afford the cost of insolvency proceedings.

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[262] *Ibid*.
[263] See para 2.4.1 and 2.4.1.2 where the IFF *Report* contrasts the European approach with the Anglo-America approach to discharge.
[264] See para 2.2, 2.3, 2.4 and 2.5.
[265] See par 2.1. A discharge must be made available to all classes of debtors. The discharge may be granted after a payment plan procedure has been executed in cases of debtors who have assets or some form of income. Furthermore, a discharge may also be granted to a debtor without having to pay back any portion of his debt (in situations of NINA debtors who do not have assets or income).
[266] See par 2.5.4.
[267] See para 2.3.3 and 2.5.3.

The Insol *Report* appears to favour informal procedures such as negotiations and it also advocates that these should be a prerequisite to entering into formal proceedings.[268] On the other hand, the IFF *Report* and World Bank *Report,* which are more recent, do not support informal procedures because of the associated challenges.[269] The World Bank *Report* most especially frowns on informal procedures because of their ineffectiveness. The modern trend (showcased in the IFF *Report* and World Bank *Report*) is inclined to reduce a wasteful procedure which is not effective and that is why formal procedures are preferred.

Taking into consideration that informal procedures are cost effective, faster and have been said to curb the challenge of stigma experienced in some jurisdictions, the World Bank *Report* does not absolutely condemn them. The World Bank *Report* states that in order for informal negotiated settlements to be effective there is a need to introduce "some institutional support and incentives" as few cases are resolved through voluntary settlements.[270] The World Bank *Report* further states that a number of factors would enhance the success of informal negotiating procedures and these are the availability of experienced skilled advisors or negotiators at little or no cost; the provision of a form of moratorium which serves as an automatic stay on debt enforcement and the right to enforce decisions reached.[271]

The IFF *Report* agrees with the World Bank *Report* that the primary factor in enhancing informal voluntary settlement is to ensure that there is some form of institutional protection which provides the opportunity for enforcement of the settlement.[272] The IFF *Report* further states that these informal procedures should be consciously regulated. [273] The suggestions of the IFF and World Bank reports are vital as they touch on factors that would enhance the effectiveness of informal procedures and ensure that parties comply with settlements reached. For example, in situations where a creditor in the course of negotiations observes that a debtor is a NINA debtor and agrees to write-off

[268] See par 2.3.3.
[269] See par 2.5.3.
[270] *Ibid*.
[271] *Ibid*.
[272] See para 2.4.1 and 2.4.1.5.
[273] World Bank *Report* 48.

the debts. When there are informal negotiations it is important that the parties (especially the creditor) do not go back on an agreement that was made informally.

d. Judicial versus extra-judicial procedures

Generally speaking, an ideal insolvency system should have a variety of procedures, judicial and extra-judicial, in order for the insolvency system to be effective enough to cater for different classes of debtors. Extra-judicial or out-of-court proceedings are identified as being faster and more cost effective than court-related judicial proceedings. A good number of member states of the European Union favor out-of-court or pre-court proceedings over court proceedings (extra-judicial). [274]

The Insol *Report* recommends that debtors and creditors should be encouraged to enter into extra-judicial proceedings before exploring judicial procedures.[275] The IFF *Report* also advocates out-of-court proceedings, which should be explored before resorting to court. These procedures often result in the early resolution of debt issues and are encouraged [276]

The courts cannot be excluded totally from the insolvency process because insolvency procedures deal with the determination of rights (human rights issues and obligations) and these cannot be determined except by a court. If not excluded, the involvement of the court may be reduced to the barest minimum. Instead of the courts being involved in the entire insolvency process the court may be referred to as recourse only at the latter stage of the proceeding for the purpose of enforcing rights. The main process can be channelled largely through administration (non-judicial procedures), which reduces costs and shortens delay that is associated with court proceedings.[277]

Non-judicial procedures may be the better option for NINA debtors. However, the cost of setting up non-judicial institutions may be an issue in developing countries. For that

[274] See par 2.4.1.5.
[275] *Idem* 26.
[276] See par 2.4.1.5.
[277] See para 2.3.3 and 2.4.1.5.

reason, it has been suggested that the use of existing administrative structures such as local government or councils may be considered.[278]

[278] See par 2.3.3.

CHAPTER 3

DEBT RELIEF MEASURES IN NIGERIA

Summary

> It is an empirical understanding that human needs are unlimited but resources are limited and thus borrowing and lending are central to economic transactions. A person unable to pay his debts is judged by society as a chronic debtor and traditionally is not highly regarded.[1]

3.1 Introduction

The Nigerian scholar, Oke, exemplifies the causes of bankruptcy in his statement that humans have constant needs and that these needs drive humans into constant acquisition,[2] inevitably they incur debts in order to satisfy their needs. Oke states that, in an ideal situation the debtor is expected to fulfil his obligations to his creditors within an agreed time frame. However, there is a possibility of debtors defaulting when things do not go as planned. The default of a debtor leads to the deposition of the debtors' estate in order for his financial obligations to be fulfilled or it may lead to the re-

[1] See Oke 1998 *Current Jos Law Journal* 2.
[2] *Ibid*.

arrangement of his affairs in such a way that the debt is paid over a longer period of time, which is referred to as composition or schemes of arrangement.[3]

Nwobike[4] opines that proceedings instituted against a bankrupt in Nigeria, such as bankruptcy and proposals, can be referred to as tools for the recovery of debt. He states that the relationship that exists between a debtor and a creditor before the bankruptcy stage is one in which the interests of the parties are antithetical in the sense that if the debtor's primary interest is securing credit facilities, the creditor's primary interest is to tread cautiously in granting credit to the debtor. For this reason it is important for the creditor to ensure that all the necessary defence mechanisms and safeguards are in place to ensure that the credit which has been extended can be repaid.[5]

In Nigeria the bankruptcy of an individual has been described as a grave issue in light of the fact that a debtor may have to surrender his assets.[6] A further implication is that bankruptcy may involve the foreclosure of any business owned by the debtor. Subsequently, the proceeds realised from the debtor's assets including a foreclosed business are shared among the creditors.[7] For these reasons, bankruptcy is seen as a very serious issue.

The need for debt relief measures for all classes of indebted natural persons in Nigeria is greater than in developed jurisdictions, because the majority of indebted natural persons in Nigeria are from the lowest tier of the economy with a good number qualifying as NINA debtors.[8] This group of debtors (debtors in a grave financial situation) are not judgment proof[9] and so continue to languish in debt unlike the situation in developed countries such as the United States where the system provides for judgment proof debtors.[10]

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[3] See Oke 1998 *Current Jos Law Journal* 3.
[4] See Nwobike 2013 https://bit.ly/2w49VL9 2 (accessed 12/07/2019).
[5] *Ibid*.
[6] See Oyedepo 2008 http://bit.ly/2G9rjGw 1 (accessed 30/05/2019).
[7] *Ibid*.
[8] See ch 1 par 1.1.
[9] See National Bankruptcy Forum 2014 HTTP://BIT.LY/2SGOUEJ (accessed 25/05/2019). A judgment proof debtor is recognised by the law in some jurisdictions as a debtor that does not have any valuable property or income against which the court can issue a judgment. Such a debtor is immune from a court judgment for collection because the court can issue an order for collection against the income or property of the debtor.
[10] See ch 2 par 2.2.

In consideration of the economic challenges facing Nigeria such as rising unemployment, poverty and indebtedness,[11] the Nigerian government has attempted to find solutions by organising empowerment or skills acquisition programmes for those who are unemployed and granting loans to the successful candidates to assist them in starting sole proprietorships.[12] This initiative is intended to help cushion the effects of the economic challenges.[13] Economic experts have suggested that the best way to create wealth is to assist and encourage sole proprietorships and by spurring on entrepreneurship.[14] To encourage entrepreneurship there is a need to establish an effective bankruptcy system which provides a soft landing for entrepreneurs in cases of entrepreneurial failure.

The Nigerian bankruptcy regime is in a process of reform as a result of the ineffectiveness of the Bankruptcy Act (BA).[15] Bankruptcy proceedings in Nigeria under the BA are described as punitive in nature because of the restrictions on persons who are bankrupt. These include restrictions on holding public offices, occupying managerial positions or practising in regulated professions except as an employee.[16] However, these restrictive provisions are to be abolished by the proposed Bankruptcy and Insolvency Act (BIA).[17]

In this chapter the debt relief procedures available to natural person debtors in Nigeria under the proposed BIA are discussed with reference to international guidelines and principles examined in chapter 2 to determine if Nigeria's proposed system conforms. Throughout this chapter, the debt relief procedures are discussed in light of the situation as it applies to NINA debtors. The measures range from conventional bankruptcy procedures (receiving orders and assignments) to alternative bankruptcy proceedings (proposals). The challenges that have been identified under the old system are highlighted and briefly discussed.

[11] See ch 1 par 1.1 above.
[12] *Ibid*.
[13] *Ibid*.
[14] *Ibid*.
[15] Cap 30 Laws of the Federation of Nigeria (LFN) 1990 (hereafter referred to as BA). The BA happens to be the first Bankruptcy Act in Nigerian which was amended in 1992 by Bankruptcy (Amendment) Decree No 109 of 1992.
[16] See See s 126(1)(b) of the BA. See also Agbakoba and Fagbohunlu 1992 https://bit.ly/2OxebKG 2 (accessed 12/07/2019).
[17] See the Bankruptcy and Insolvency Act 2016 CAP B2 LFN (hereafter referred to as the BIA) <https://bit.ly/2KTl4n (accessed 27/08/2019).

3.2 Historical overview

By an order of His Majesty King George V on 22 November 1913,[18] in exercising his powers vested by the foreign Jurisdiction Act,[19] the country of Nigeria came into being.[20] This order was effective from 1 January 1914.[21]

The Lagos colony was created in 1862 and among the earliest actions of the British authorities was to introduce into the Lagos colony the main body of the English Law[22] in 1863[23] through section 2(1) of the Laws of Lagos State[24] which provided that

> subject to the provisions of this section and except in so far as other provision is made by any federal or state enactment, the common law of England and the doctrines of equity, together with the statutes of general application that were in force in England on the first day of January, 1990 shall be in force in Lagos state.

After the amalgamation of the Northern and Southern protectorates in 1914 English law was then extended to the rest of Nigeria.[25] Prior to amalgamation a system of local customary law was in force. It was well-established British policy to preserve the institutions of newly-dependent territories as far as this was compatible with imperial rule.[26]

The Nigerian legal system is greatly influenced by English law[27] as a result of historical ties. The Nigerian legal system is based on the English common law as a consequence of a process of legal transplantation[28] and English law is listed as a main source of Nigerian law. There are other sources of law which influence the framework of Nigerian laws such as Islamic law and customary law.[29]

[18] Nigeria Protectorate Order in Council 1913.
[19] Foreign Jurisdiction Act of 1890.
[20] Olong *The Nigerian legal system* 1.
[21] *Ibid*.
[22] Park *The sources of Nigerian law* 1.
[23] Adesanya and Oloyede *Business law in Nigeria* 7.
[24] Cap 65, 1973 (miscellaneous provisions).
[25] Olong *The Nigerian legal system* 12.
[26] *Ibid*.
[27] See Obilade *The Nigerian legal system* 17. See also Dina Akintayo and Ekundayo 2005 http://bit.ly/2QkmPBA 9 (accessed 21/07/2019).
[28] See Ezera *Constitutional developments in Nigeria* 12. See also Obilade *The Nigerian legal system* 17.
[29] See Ezera *Constitutional developments in Nigeria* 12.

The term "sources of law" is defined as "the ultimate origin of the whole body of a legal system"[30] and is the inspiration for that system. The sources of Nigerian law are:[31]

a) English law;
b) The Nigerian Constitution;
c) Nigerian legislation;
d) Customary law;
e) Islamic law; and
f) Judicial precedents.

These sources can be grouped in three main sources:[32]

a) The English law which is the major source. Mostly, it consists of the general law of England which was introduced and "received" into Nigeria through a number of English Acts or Orders in Council before Nigerian independence on 1 October, 1960.
b) The products of the local institutions established by British authorities. These consist of local legislation and Nigerian case law.
c) Customary law, also known as the native law and custom, the most commonly used alternative to the English law.

Opinions on the incorporation of English law in Nigeria predominantly claim it was not received but rather imposed on the country.[33] Nevertheless, the great influence of English law is a notable characteristic of the Nigerian legal system. This historical link of the country to the English system seemingly has left an indelible mark upon the system.[34]

Another notable characteristic of the Nigerian legal system is its complexity,[35] said to be the consequence of what has been referred to as legal pluralism.[36]

[30] Obilade *The Nigerian legal system* 55.
[31] See Obilade *The Nigerian legal system* 55 and Olong *The Nigerian legal system* 11. See also Mwalimu *The Nigerian legal system* 19.
[32] See Park *The sources of Nigerian law* 1 and 2.
[33] Anyebe *Customary law: War without arms* 7.
[34] *Idem* 4.
[35] Obilade *The Nigerian legal system* 4.
[36] Akintayo and Ekundayo 2005 http://bit.ly/2QkmPBA 9 (accessed 21/07/2019). Legal pluralism is defined as the "existence of multiple sources of law (both state and non-state) within the same geographical area". See Roseveare 2013 http://bit.ly/2Ebgzoj

Nigeria consists of 36 states, excluding the federal capital territory, and is home to over 300 ethnic groups.[37] Each of these states has its own legal system and in addition there is the general federal legal system which is applicable throughout the country.[38] The complexity of the legal system is exacerbated further by the application of local customs as law in each state. Each state comprises a number of smaller towns and each town has its customary laws which in some respect differ from the customary law system of a neighbouring town.[39] Despite the complexity of the Nigerian legal system, there is a form of uniformity at the state and federal level because at that level the system is influenced by the same factors. [40]

Before independence, from 1941 to 1951 Nigeria practiced a unitary system of government and a number of laws passed at that time continue to apply in various territories until they are repealed.[41] Even though some English laws have been repealed by Nigerian legislation, a number of such laws (such as probate law)[42] are still applicable in Lagos state and the Northern and Eastern regions of Nigeria.[43] There is no specific figure as to the number of English statutes still applicable in Nigeria but it is a goodly number.[44] Another vital indicator of the influence of the English law is the fact that Nigerian legislation allows the courts to apply English laws that are still in force in Nigeria.[45] For example, the High Court law[46] states that the courts would ensure that "subject to the provisions of any written law (to apply) the common law, the doctrines of equity and statutes of general application in force in England on the 1st day of January 1990 would be applied".

As regards insolvency in Nigeria prior to independence its regulation was informally practiced.[47] The informal practice drew inspiration from the English system as a result of

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31 (accessed 24/05/2019).
[37] Mwalimu *The Nigerian legal system* 5.
[38] See Obilade *The Nigerian legal system* 4.
[39] *Ibid*.
[40] *Ibid*.
[41] *Ibid*.
[42] Probate law is the law that deals with administering the estate of a deceased person, resolving all claims and distributing the deceased persons' property under a will.
[43] See Obilade *The Nigerian legal system* 22.
[44] *Ibid*.
[45] *Idem* 23.
[46] Laws of the Federation of Nigeria (LFN) Ch. 49 1963.
[47] See Kalu 2010 *JILJ* 44.

the influence of English law.[48] Consequently, the English laws applicable at that time also regulated insolvency matters.

The first Nigerian legislation to regulate bankruptcy law is the Bankruptcy Act of 1979 (BA) which substantially was influenced by the English law.[49] The BA regulates bankruptcy of natural persons and partnerships till date, as it has for the past forty years. The BA has been criticised for being ineffective because it is characterised by a number of challenges[50] originating from the legislative framework, the judicial system and from society in general.[51] The challenges identified are:

a) A lack of unified legislation: The Nigerian insolvency system lacks unified legislation pertaining to corporate and natural person insolvency.[52] This lack motivated one of the proposed reforms that there should be a unified Act that caters for both natural and corporate debtors. Consequently, there was a call for "a harmonization of the laws governing corporate and individual insolvency".[53]
b) Judicial laxity: Congestion in the courts in Nigeria affects judicial proceedings in general. Judicial proceedings linger in the courts for many years which is a reason Nigerian debtors have been discouraged from filing for bankruptcy proceedings.[54]
c) Societal beliefs (stigma): In Nigeria debtors are seen as outcasts that should be ostracised. Relatives and friends of debtors do not report such cases but rather find a way to settle or to write off debts.[55] The issue of societal beliefs is recognised as a root cause of the unpopular nature of bankruptcy proceedings in Nigeria.[56]
d) Restrictions on a bankrupt: The BA places some restrictions on a bankrupt which affect the status of the bankrupt and send a wrong signal.[57] Oyedepo,[58] points out

[48] *Ibid*.
[49] See Oke 1998 *Current Jos Law Journal* 1.
[50] See Oyedepo 2008 http://bit.ly/2G9rjGw 12 and 14 (accessed 18/07/2019). See also Agbakoba 1992 https://bit.ly/2MnwPHq 8 (accessed 2/08/2019).
[51] Agbakoba 1992 https://bit.ly/2MnwPHq 8 (accessed 2/08/2019).
[52] See Insol International *Report*: *Africa round table on insolvency reform* 3. See also Oyedepo 2008 http://bit.ly/2G9rjGw 5 (accessed 21/07/2019).
[53] See Oyedepo 2008 http://bit.ly/2G9rjGw 12 and 14 (accessed 18/07/2019).
[54] See Agbakoba and Fagbohunlu 1992 https://bit.ly/2OxebKG 7 (accessed 12/07/2019). See also Agbakoba 1992 https://bit.ly/2MnwPHq 9 (accessed 20/07/2019).
[55] See Agbakoba and Fagbohunlu 1992 https://bit.ly/2OxebKG (accessed 12/07/2019). See ch 1 par 1.1 for an extensive discussion of the World Bank Report 2013: *Report on the treatment of insolvency of natural persons* with respect to stigma (societal belief of the Nigerian people).
[56] See Agbakoba and Fagbohunlu 1992 https://bit.ly/2OxebKG 2 (accessed 12/07/2019).
[57] See s 126(1)(b) of the BA. See also par 3.4.2.
[58] See Oyedepo 2008 http://bit.ly/2G9rjGw 3 (accessed 18/07/2019).

that a debtor occupying any of the offices or positions mentioned in the BA automatically relinquishes this position when declared bankrupt.[59] Bankruptcy confers a stigma on the bankrupt expressing the incapability of the debtor to conduct his private and financial affairs. It is observed that the issue of societal stigma not only is visible during the bankruptcy process but even after debtors have been discharged and the situation has returned to the *status quo ante*.[60] Despite the fact that a debtor has been discharged, the fact that he was once bankrupt subjects him to stigmatisation and is perceived as someone incapable of conducting his affairs both now and in the future.[61] The idea of restrictions on a bankrupt appears to have evolved from the English law as a number of English law jurisdictions such as England and Wales, Australia, and New Zealand have similar provisions.[62]

e) Ignorance: Another challenge bedevilling the natural person insolvency system is the ignorance of the Nigerian people and legal practitioners with regard to bankruptcy laws.[63] This conclusion was drawn after an investigation in Nigeria was carried out by Hallmark Business News,[64] which had been necessitated by the ineffectiveness of the bankruptcy (natural person insolvency) system. The investigation revealed that a good number of legal practitioners in the country were not aware of existing bankruptcy laws. Legal practitioners who were aware of the existence of the BA did not know how the procedures worked and demanded time to study the BA before answering questions; one practitioners added that the reason little attention is paid to bankruptcy law in Nigeria is because there is the notion that the procedure is cumbersome in nature and consequently would be expensive and time-consuming to employ.[65]

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[59] See s 126 BA.
[60] See Sousa *Bankruptcy stigma: A socio-legal study* 30.
[61] See Agbakoba and Fagbohunlu 1992 https://bit.ly/2OxebKG 2 (accessed 12/07/2019).
[62] See ss 154 and 155 New Zealand Insolvency Act No 55 of 2006 and O'Keefe and Farrands *Introduction to New Zealand Law* 567. See s 77, 80 and 269 Australian Bankruptcy Act of 1966 (Cth) and Mason 1999 *Osg Hall LJ* 465—466. See also ss 31 and 51 England and Wales Insolvency Act of 1986 and part 11 Insolvency (England and Wales) Rules 2016 No.1024.
[63] Hallmark News "Why bankruptcy law is difficult to enforce in Nigeria" *Business Hallmark News* (Lagos 2015) https://bit.ly/2KQJvli (accessed 04/03/2019). Business Hallmark News formerly known as Business Hallmark, which specialises in business, policy and Finance-related issues. Since 2009 Business Hallmark News has been the watchdog and mouth-piece of the business community in Nigeria, through its well-researched analysis and projections and through the analytical scrutiny of annual reports. It was able accurately to forecast the collapse of Nigeria's banking and financial sectors that occurred in 2009.
[64] Hallmark News "Why bankruptcy law is difficult to enforce in Nigeria" *Business Hallmark News* (Lagos 2015) https://bit.ly/2KQJvli (accessed 04/03/2019).
[65] *Ibid*.

f) High cost of the proceedings:[66] Bankruptcy proceedings are costly, especially a creditors' bankruptcy procedure. A creditor first has to establish debt[67] in a separate proceeding before filing for bankruptcy under a creditors' bankruptcy procedure which makes it costly and time consuming.[68]

g) Lack of adequate debt relief procedures:[69] Relying on bankruptcy proceedings as the major debt relief procedure available in Nigeria to a natural person who is insolvent has been criticised. Although the composition and schemes of arrangement are other avenues of debt relief, they are not independent of the bankruptcy procedure.[70] It was proposed that the available procedures were inadequate and that there was a need for alternative debt relief procedures. In this regard, non-judicial procedures were suggested such as alternative dispute resolution (ADR) procedures in order to circumvent the challenge of cost identified with bankruptcy and also the delays experienced in court.[71] Most important of all the challenges is the lack of specialised debt relief measures for NINA debtors. Although the bankruptcy procedure does not specifically exclude NINA debtors, the costs involved effectively and indirectly exclude them.[72]

Prior to 2015 a number of suggestions were made concerning reforming Nigerian bankruptcy law and there were calls for an overhaul of the basic framework of the repealed BA.[73] Several commentators proposed reducing the creditor's bankruptcy process to a single procedure.[74] It was suggested the requirement of establishing debt first before initiating bankruptcy proceedings (which reduces the bankruptcy process to a secondary procedure for debt recoveries) be removed. This proposal is vital as Nigerians cannot afford the luxury of the requirement of multiple proceedings and a

[66] See Nwobike 2013 https://bit.ly/2w49VL9 33 (accessed 18/07/2019).
[67] *Ibid*.
[68] See Agbakoba and Fagbohunlu 1992 https://bit.ly/2OxebKG 5 and 6. See also Wilson *Bankruptcy proceedings as a tool for debt recovery* 7 (accessed 18/07/2019).
[69] See Agbakoba 1992 http://bit.ly/2Pst7tv 2 (accessed 20/07/2019).
[70] See par 3.5.1 below.
[71] See Opara, Okere and Opara 2014 *Canadian Social Science Journal* 69.
[72] *Ibid*. See Osunlaja *A Comparative Analysis* 7–14.
[73] See Insol International Report: *Africa round table on insolvency reform* 2 (hereafter referred to as Insol African round table *Report*). See also Nwobike 2013 https://bit.ly/2w49VL9 33 (accessed 18/07/2019).
[74] See Agbakoba and Fagbohunlu 1992 https://bit.ly/2OxebKG 7 (accessed 12/07/2019). See also Nwobike 2013 https://bit.ly/2w49VL9 33 (accessed 18/07/2016).

need to establish debt in a separate proceeding before initiating bankruptcy proceedings.[75]

Suggestions were offered that there should be a unified piece of legislation that caters for both natural persons and corporate insolvency to encourage uniformity.[76] Because the courts are congested, a proposition was made that there should be provision for alternative channels of debt relief in order to ease the pressure on conventional debt relief methods (court related procedures).[77]

In 2010 the World Bank carried out a survey on insolvency reform in twelve countries from the Sub-Sahara African region, including Nigeria, in which they reported on their various insolvency regimes.[78] The results of the survey were discussed at the Insol International round table that took place in Abuja in October 2010.

The surveyed countries were scored and weighted on eight elements considered best practice for effective and functioning insolvency systems. The eight elements are whether:[79]

a) the insolvency laws are contained in a single, comprehensive piece of legislation (unified insolvency Act);
b) there are expedient and cost effective bankruptcy procedures such as pre-packs or re-organisation procedures available;
c) provision is made for out-of-court debt negotiations;
d) provision is made to ensure that an informal procedure can be converted easily into a formal procedure;
e) the insolvency law also applies to unincorporated entities such as sole proprietorships;
f) there are regulated bodies for insolvency practitioners;

[75] See Agbakoba and Fagbohunlu 1992 https://bit.ly/2OxebKG 7 (accessed 12/07/2019).
[76] See Oyedepo 2008 http://bit.ly/2G9rjGw 14 (accessed 18/07/2019).
[77] See Agbakoba 1992 https://bit.ly/2MnwPHq 2 (accessed 20/07/2019). See also Opara, Okere and Opara 2014 *Canadian Social Science Journal* 69.
[78] Insol African round table *Report* 2.
[79] Insol African round table *Report* 1.

g) the law provides for these bodies that see to the monitoring, oversight and discipline of insolvency practitioners; and
h) there are law imposed deadlines for the duration of different stages of insolvency cases.

The Nigerian insolvency system was measured in terms of these eight elements and on the graph that was plotted Nigeria was adjudged to have just two out of the eight elements proposed for an effective system.[80] The two elements are that Nigeria provides for a means whereby an informal procedure can be converted easily into a formal procedure through the bankruptcy and composition procedures[81] and the current insolvency law also applies to unincorporated entities such as sole proprietorships.[82]

Other countries such as Kenya, Malawi and Zambia were found not to have any of the eight elements. However, Botswana, Mauritius and Rwanda were found to have a minimum of five elements, which signifies they enjoy robust insolvency regimes.[83]

The elements that were absent in the Nigerian insolvency system were regarded as challenges, such as lack of

a) unified legislation;
b) expedient procedures;
c) a frame work for out-of-court debt negotiations and proceedings;
d) laws regulating insolvency regulatory bodies that see to the monitoring, oversight and discipline of insolvency practitioners;
e) regulatory bodies for insolvency practitioners; and
f) law imposed deadlines for the duration of different stages of insolvency cases.

In order to ensure an effective and efficient insolvency system for natural persons the Insol Africa *Report* proposed that all eight elements listed above should be provided. Consequently, the need was established for debt restructuring procedures, out-of-court

[80] *Idem* 2.
[81] See Osunlaja *A Comparative Analysis* 7 and 14–15.
[82] See s 5 of the BA.
[83] *Ibid*.

procedures, a greater effectiveness of the courts and for the regulation of insolvency practitioners.

Furthermore, in ensuring a more effective system the Insol Africa *Report* expressed the need for effective court systems and took note of the move to implement ADR mechanisms in Nigeria through the passing of the Alternative Dispute Resolution (ADR) Regulatory Commission Bill[84] and the Financial Ombudsman Bill.[85] The purpose of these bills is to ensure that disputes relating to finance are taken out of courts as a means of reducing the pressure on the courts.[86] The shortcomings identified in relation to insolvency practice in Nigeria over the years necessitated the 2015 reforms which brought about the proposed BIA.

The challenges identified with the BA led to calls for a total review of the insolvency system. The Nigerian National Assembly began the process of reforming the insolvency system in 2015 in response.[87]

The Nigerian senate invited submissions from academics, legal practitioners and concerned stakeholders for the reform of the BA.[88] The senate carried out research into bankruptcy and insolvency laws in other jurisdictions.[89] This process led to the proposed Bankruptcy and Insolvency Act of 2016 (BIA). The newly proposed BIA is a unified piece of legislation which seeks to regulate both the insolvency of natural persons and corporate entities.[90]

The proposed BIA was at the final stage of being passed into law (which is the stage of awaiting presidential signature) in late 2018.[91] However, in early 2019 the president of Nigeria returned the proposed BIA back to the law makers for amendment.[92] One

[84] The National Alternative Dispute Resolution Regulatory Commission (Establishment) Bill, C2599 2010.
[85] Office of the Nigerian Financial Ombudsman Bill C2591, 2010.
[86] See Insol International Report: *Africa round table on insolvency Reform 3*.
[87] National Assembly Debate (Senate) 26th May 2016 https://nass.gov.ng/document/download/9515 11 (accessed 21/09/2019).
[88] Olaniyonu 2016 http://bit.ly/2EbdRzc 2 (accessed on 26/09/2019). Mr Yusuf Olaniyonu is the chief of staff and special adviser to the senate president on media and publicity.
[89] *Ibid*.
[90] See the long title of the proposed BIA.
[91] See the Policy and Legal Advocacy Official Website <https://bit.ly/2MkfGOX> accessed 12 August 2018 as regards the status of the proposed BIA.
[92] See Iroanusi Buhari rejects five bills, gives reasons *Premium Times* (Abuja 2019) http://bit.ly/31L3CKw (accessed 21/09/2019).

reason given is that there is lack of clarity in the wording of some sections of the BIA, which deters a proper understanding of the bill and may impede the effective operation of the bill.[93] For example, the President stated that the relationship between the corporate insolvency provisions of the proposed BIA and the existing provisions of the Companies and Allied Matters Act (CAMA), which deals with corporate insolvency, needs to be clarified to avoid confusion.[94]

The President refused to sign the proposed BIA into law because there is a lack of proper domestication of the law.[95] For instance, he observed that there are certain sections where United States dollars were used and other sections referred to the Nigerian naira. He suggested that Nigerian naira should be used consistently in the BIA.[96]

It is important to note that where reference is made to sections of the BIA in this thesis, it should be inferred as the proposed sections of the BIA.

3.3 Proposed Bankruptcy and Insolvency Act (BIA)

3.3.1 Nature of Bankruptcy under the BIA

According to the report of the committee on banking and other financial institutions[97] "bankruptcy" is a term used to depict a state of insolvency and is regulated by a statute that provides for the "equitable distribution of available assets among creditors in such a manner that a honest debtor is discharged from future liabilities".[98] The objective of a bankruptcy procedure is to ensure that a debtor in financial difficulty is given the opportunity to start over.

Generally, bankruptcy law in Nigeria over time has developed to perform the dual function of protecting both debtors and creditors.[99] Debtors are protected from all form of harassment and duress by their creditors and at the same time creditors' rights are

[93] *Ibid*.
[94] *Ibid*.
[95] *Ibid*.
[96] *Ibid*.
[97] The committee on banking and other financial institutions is the committee that worked on the BIA. See National Assembly Debate (Senate) 26th May 2016 http://bit.ly/2YRaYdC (accessed 21/09/2019).
[98] *Ibid*.
[99] Opara Okere and Opara 2014 *Canadian Social Science Journal* 62.

protected by ensuring that their right to enforce the payment of debts against the debtor is guaranteed.[100]

The Nigerian Court of Appeal in *Sugar Co. Ltd V. Mojec International Ltd*[101] defines a debt "as a sum of money due by certain and express agreement; a specific sum of money owing to one person from another, including not only obligation of debtor to pay but right of creditor to receive and enforce payment; a fixed or certain obligation to pay money or some other valuable thing or things either in the present or in the future".

The primary aim in the BIA is to provide for individual insolvency and for the rehabilitation of the insolvent debtor, as well as to create the office of the supervisor of insolvency[102] and for other matters connected therewith.[103] This aim is stated in the introduction of the Act.

According to the BIA an insolvent natural person is a person[104] "who resides, carries on business or has property in Nigeria, whose liabilities to creditors provable as claims under the BIA amount to not less than one million naira".[105] A bankrupt is ''a person who has made an assignment or against whom a receiving order has been made under section 5(10)'' of the BIA.[106] The process of adjudging a debtor bankrupt in Nigeria has been defined as "a proceeding in the high court for the distribution of the property of a person who is insolvent amongst his creditors and to relieve him of the unpaid balance of his liabilities".[107]

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[100] *Ibid*.
[101] (2005) 17 WRN 71 at 98.
[102] S 175 (1)(2) of the BIA. The supervisor of insolvency for the purpose of this Act would be responsible to the minister for the general administration of this Act and the office shall be a public office. The supervisor according to the Act would help supervise the administration of all estates.
[103] The long title of the BIA shows some form of improvement over the repealed BA. See the long title of the BA 2016 read along with sec 126 of the BA. The long title of the BA provides for situations whereby a person who is unable to pay his debt can be professed bankrupt and also to debar such persons who have been declared bankrupt "from holding certain elective/public offices or from practising any regulated profession (except as an employee)". These restrictions do not exist under the BIA which indicates a positive development as it would help with rehabilitation.
[104] S 3 of the BIA.
[105] 1 000 000 Nigerian Naira was the equivalent of approximately 3,289.5 United States dollars on 28.09.2016.
[106] S 3 of the BIA.
[107] See Oke 1998 *Current Jos Law Journal* 4.

Also, this process has been defined as a legal process or procedure by which an individual or a partnership firm is divested of the right to administer his or its property and business on the ground that it is unable to pay its debts.[108]

In summary, the BIA provides for specialised legal proceedings which can be employed either by a creditor for the purpose of recovering financial obligations from the debtor or by a debtor as a means to obtain relief from financial troubles through a judicial process.[109]

3.3.2 Philosophy of the new Nigerian BIA

The philosophy underlying the enactment of the BIA as stated by the senate president in a news release is to help reposition the Nigerian economy in light of recent economic challenges, and more importantly to help weather the challenges of the 21st century.[110] The major problem facing the current Nigerian economy is the challenge of attracting new investors and the retention of old ones in order to ensure that employment opportunities are created for the populace.[111] The primary philosophy behind the enactment of the BIA is that it is not targeted at natural persons but rather at businesses by ensuring that they are healthy and attract foreign investment.[112] However, an end goal is to encourage entrepreneurship in order to drive economic growth. This would be achieved by guaranteeing a quick discharge and fresh start for natural persons. As a matter of urgency the senate has given priority to bankruptcy and insolvency laws, among other law reform, to help reform the business environment.[113]

The senate president further states that the decision to reform the bankruptcy and insolvency law was taken as a result of lessons drawn from global best practices which teach that[114] “the bedrock of modern competitive economies is based on free entry and

[108] See Agbakoba and Fagbohunlu 1992 http://olisaagbakobalegal.law/wp-content/uploads/ 2 (accessed 30/05/2016).
[109] See Nwobike 2013 https://bit.ly/2w49VL9 2 (accessed 12/07/2016).
[110] National Assembly Debate (Senate) 26th May 2016 https://nass.gov.ng/document/download/9515 24 (accessed 21/09/2018)
[111] *Ibid*.
[112] *Ibid*.
[113] *Ibid*.
[114] *Ibid*.

free exit. The role of an effective bankruptcy and insolvency system in delivering this cannot be over-emphasised".

He admits that Nigeria needs a stronger bankruptcy and insolvency law considering the challenges facing the Nigerian economy and the lessons drawn from global best practices. The senate president concluded that[115] "insolvency systems and practice play important roles in attracting both domestic and foreign investments as well as promoting innovation and entrepreneurial development. Given these opportunities, there is urgent need for us to repeal and re-enact this Act which has become obsolete and out-dated".

Olaniyonu[116] states that the key objective of the new law is to ensure the protection of small and medium scale industries as they are the bedrock of a developing economy such as in Nigeria. Consequently, the main objective of the new BIA is to[117]

> create an efficient and effective bankruptcy and insolvency regime that are necessary for the smooth running of a modern economic system and guarantees the fundamental rights, privileges and responsibilities of individuals and corporate entities engaged in contracts and financial relationships. The law is also expected to facilitate the remodelling of the financial and administrative structure of debtors in financial distress in order to allow the rehabilitation and continuation of the business. The law also seeks to enable the use of technology to analyse data, thereby accelerating procedures on bankruptcy and insolvency.

The aim in the newly-enacted BIA is to balance the interest of debtors and creditors by ensuring there is provision for a bankruptcy regime and at the same time a reorganisation procedure.[118]

3.3.3 Debt relief measures in terms of the BIA

3.3.3.1 Background

The BIA provides a number of debt relief procedures which can be explored by a debtor or a creditor. The debt relief measures available in terms of the BIA are:[119]

[115] *Ibid*.
[116] Olaniyonu 2016 https://www.pressreader.com/nigeria/thisday/20160818/281633894644302 1 (accessed on 26/09/2016).
[117] *Ibid*.
[118] *Ibid*.
[119] See ss 5, 15 and 26 of the BIA.

a) Receiving orders: They are similar to creditors' bankruptcy proceedings as provided under the repealed BA.[120]
b) Assignments: Assignments can be likened to debtor's bankruptcy proceedings under the repealed BA.[121]
c) Proposals: They include ccomposition and schemes of arrangement as provided under the BA. They can be explored by a consumer debtor as an alternative to bankruptcy.[122]

Receiving orders and assignments are asset liquidation procedures and can be referred to as bankruptcy procedures.[123] Receiving orders are available to creditors as a means of recovering debts from debtors, whereas assignments can be used by debtors to obtain relief from indebtedness. A NINA debtor thus would not qualify for discharge under these procedures.

Apart from the bankruptcy procedures the BIA provides alternative debt relief procedures known as proposals. These debt relief procedures include compositions and schemes of arrangement.[124]

3.3.3.2 Receiving orders under the BIA

A petition for a receiving order against a debtor may be filed by one or more creditors before the court. The petition for receiving orders must show that:[125]

a) The debt being owed by the debtor to the petitioning creditor amounts to not less than one million naira;[126] and

[120] See s 4(1) BA.
[121] *Ibid*.
[122] See s 18 BA. The major difference in proposal under the BA and BIA is that proposal under the BIA is an independent debt relief procedure unlike under the BA where it could be accessed only under a bankruptcy procedure.
[123] These procedures require that a debtor has some form of assets that can be liquidated for the benefit of the creditors of the estate before a discharge can be granted. This means that a NINA debtor would not qualify for discharge under these procedures.
[124] S 8 of the BIA.
[125] S 5(1)(a) and (b) of the BIA. These acts of bankruptcy are regarded as being ''out dated'' and negates the international principle of access as espoused in ch 2 par 2.6. See also ch 2 par 2.5.2 for a discussion on ''acts of bankruptcy''.
[126] Under the repealed BA the criterion was that the debt amount being owed by the debtor to a petitioning creditor or an aggregate being owed, when there is more than one creditor, should amount to not less than 2 000 Nigerian naira which was equivalent of approximately 6.7912 United States dollars on 21.07.2016. However, it appears that this requirement of the law would limit the number of debtors that would be able to obtain relief through this procedure. This situation is in contravention of the international principle of access as espoused in ch 2 par 2.6. However, this requirement will contravene the principle only if there are no adequate alternative procedures in place.

b) The debtor has committed an act of bankruptcy within the period of six months prior to the filing of the petition for a receiving order.[127]

The BIA recognises certain acts as constituting "acts of bankruptcy". They are if a debtor:[128]

a) gives notice to any of his creditors that he has or is about to suspend payment of his debts and files a declaration of his inability to pay debts in the court;
b) assigns, removes, disposes of or is about to assign, remove, or dispose of his properties with the intent to defraud, defeat or delay his creditors;
c) makes an assignment of his property in Nigeria or elsewhere to the trustee[129] for the general benefit of his creditors whether it is an assignment authorised by the Act or not;
d) makes a fraudulent conveyance, gift, delivery or transfer of his property or any part of the property;
e) makes a fraudulent transfer or conveyance of his property or any part thereof either in Nigeria or elsewhere or created a charge thereon which is void under the BIA as a fraudulent preference;
f) intends to defeat or delay the claims of his creditors in wise intent and departs from Nigeria, or is already absent from Nigeria and decides to remain out of Nigeria, or departs from his dwelling place;
g) does not allow the execution of a process issued against his property to be satisfied for twenty-one days after issue or does not have property to satisfy the execution of

[127] In light of the fact that international principles regard the use of "acts of bankruptcy" as being outdated it is strange that the BIA retains it being a new legislation.
[128] See s 4(a)–(h) of the BIA.
[129] A trustee is defined as a person who is licensed or appointed under the BIA; see s 3 BIA. The functions of a trustee according to the BIA are numerous and as follows: A trustee receives properties on behalf of a debtor, disposes or sells properties of the insolvent estate that are perishable or likely to depreciate, initiate court proceedings on behalf of insolvent estate, insures all insurable properties in the insolvent estate, deposit all monies received for an estate in a trust account, keeps books and records of the administration of estates, make reports in writing to creditors, inspectors and supervisors of the insolvent estate when necessary, conduct the eventual sale of assets of the insolvent estate for the benefit of the creditors and other necessary actions that may need to be taken in favour of the insolvent estate. See ss 200—221 of the BIA for functions of a trustee. On the other hand, inspectors are those appointed under s 107 of the BIA to oversee the estate of the trustee bankrupt. Inspectors perform a number of functions such as examining the trustees account, verifying the balance of insolvent estate see (s111(3)), granting prior approval for a proposal made in respect of a bankrupt see (s 26(10) , 53(9)(c)) convening meeting of creditors (94(2)). Also, a supervisor means the office of the supervisor of insolvency according to s 3 of the BIA which office is created in accordance with s 175 of the BIA.

a process issued and such process has been returned by the marshal and endorsed as unexecuted due to a lack of property; [130]

h) exhibits his statement of assets and liabilities at a creditors' meeting, which shows he is insolvent or simply presents a written admission of inability to pay debts; or

i) defaults on any proposal made under the BIA and ceases to meet his obligations generally as they fall due.

In the case the petitioning creditor is a "secured creditor" the law expects that such a creditor state in the petition that he is willing to give up his security for the collective benefit of creditors in the event that a receiving order is made against the debtor. The alternative is for the secured creditor to give an estimate of the value of his security in the petition.[131] In situations where the secured creditor gives an estimate of his security he would be admitted as a petitioning creditor to the extent of the balance due to him (which means he would be admitted as if he were an unsecured creditor) after the value of the security has been deducted.[132]

The petition for a receiving order should be verified by an affidavit of the petitioner or by a person who has been duly authorised by the petitioner to do so. The duly authorised person must have personal knowledge of the facts alleged in the petition.[133] In situations where two or more petitions for receiving orders are filed against the same debtor or against joint debtors the court may consolidate the proceedings or any of them on such terms as the court deems fit.[134]

At the hearing of the petition the court requires that the petitioner presents proof of the facts alleged in the petition and also proof that the petition has been served.[135]

[130] A marshal includes a bailiff and any officer charged with the execution of a writ or any other proceeding with respect to any property of a debtor. See s 3 of the BIA for the definition of a bailiff.
[131] S 5(2) of the BIA.
[132] S 5(3) of the BIA. There was a similar requirement for creditors' bankruptcy under the repealed BA in s 4(2).
[133] S 5(4) of the BIA. The witness to the attestation of the petition should be an attorney at law if the petition is attested to within Nigeria or a judge, magistrate, notary public, consul or consular officer if attested to outside Nigeria; See s 5(5)(a) and (b) of the BIA.
[134] See s 5(10) of the BIA.
[135] *Ibid*.

Thereafter, the court may make a receiving order if satisfied by the proof of service and proof of facts.[136]

The court may decide to dismiss a petition for a receiving order if:[137]

a) the court is not satisfied with the proof of facts alleged in the petition; or
b) it is not satisfied with the proof that the petition has been duly served on all parties;[138] or
c) the debtor has adduced sufficient evidence to show that he is able to pay his debts, and therefore not insolvent; or for other sufficient cause no order ought to be made.

If the debtor denies the facts alleged in the petition, the court may decide to stay all proceedings instead of dismissing the petition. This stay may be done on such terms as the court may deem fit in order to take the disputed facts to trial.[139] The court may decide to appoint a licensed trustee as an interim receiver of all or part of the debtors' property after a petition for a receiving order was filed but before a receiving order is granted. Therefore, the interim receiver will take over all or part of the estate of an insolvent if it is for the protection of the debtors' estate or in the interest of the creditor(s).[140] For example, where the court deems it fit to protect the estate of the debtor pending the time the receiving order is made. This protection may occur when there are assets in the debtor's estate that are perishable or likely quickly to depreciate in value.[141] Alternatively, it may occur when a notice of intention to file a proposal has been filed under section 30 of the BIA or a proposal in itself has been filed under section 44(1) of the BIA.[142]

After the petition has been granted and a receiving order has been made against the debtor's estate, meaning when the debtor is adjudged bankrupt,[143] the court will appoint a licensed trustee for the property of the bankrupt.

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[136] *Ibid*.
[137] S 5(11) of the BIA
[138] *Ibid*.
[139] S 5(14) of the BIA.
[140] See s 9(3)(a) and (b) of the BIA. See also s 10(3)(a) and (b) of the BIA.
[141] S 8(1) and (2) of the BIA.
[142] S 10(1) of the BIA.
[143] This is similar to the provision for bankruptcy in the repealed BA where a person can be pronounced bankrupt only through the order of the court after a petition with regards to that has been considered by the court. See Oyedepo

In order to commence the administration of the insolvent estate the trustee inquires as to the names and addresses of the creditors of a bankrupt in order to send a notice of bankruptcy and notice of the first meeting of creditors to every known creditor and to the supervisor.[144] The notice of the first meeting of creditors is sent within five days after the date of the trustee's appointment and the first meeting of creditors shall be held within the twenty-one day period after the day of the trustee's appointment.[145] The purpose of the first meeting of creditors is to consider the affairs of the bankrupt individual, to substitute or affirm the appointment of the trustee, to appoint one or more (not exceeding five) inspectors[146] who would oversee the administration of the estate as stated in section 107 and for the creditors to give necessary directions to the trustee as they may deem fit.[147]

It is pertinent to note that the costs of the petitioner will be taxed and paid out of the bankrupt's estate unless the court provides otherwise.[148] The court may decide otherwise in situations such as when the proceeds of the estate are not sufficient to pay the costs incurred by the trustee. In such situations the court may order that the costs be paid by the petitioner.[149]

3.3.3.3 Assignments under the BIA

An insolvent person or an insolvent's legal representative (in the case of a deceased person) with the leave of the court may make an assignment of all his property for the collective benefit of creditors and for the ultimate purpose of obtaining relief from indebtedness.[150] When the court grants leave the insolvent person may proceed to file

2008 http://bit.ly/2G9rjGw 1 (accessed 18/07/2016).
[144] See s 93(1) of the BIA.
[145] *Ibid*.
[146] See s 93 and 107(1) of the BIA. The role of inspectors with regard to the administration of the insolvent estate includes verifying the bank balance of the estate from time to time, examining the trustee's accounts, giving approval on the trustee's final statement of receipts, disbursements, dividend sheet and dispositions of properties that are unrealized. See s 111(3) and (4) of the BIA.
[147] See s 93(6)(a)—(d) of the BIA.
[148] S 7(1) of the BIA.
[149] S 7(2) of the BIA.
[150] See s 25(1) of the BIA. This implies that a debtor who does not have assets or income to be liquidated (a NINA debtor), would not be able to access the discharge under the assignment procedure.

an assignment with the supervisor[151] that is accompanied by a sworn affidavit which should show:[152]

a) the property of the debtor that may be divided amongst his creditors;
b) the names and addresses of all creditors;
c) the amount of each creditors' claim; and
d) the nature of the claims (whether it is a secured, preferred or unsecured claim).

An assignment becomes operative only when filed with the supervisor. The supervisor may refuse an assignment if it has not been filed in the prescribed form as stated above.[153] After the supervisor accepts the assignment filed, the insolvent is regarded as bankrupt.[154] The supervisor then appoints a licensed trustee and the appointment of the trustee is taken into consideration along with the wishes of the creditors who have the greatest interest.[155] In situations where the supervisor is unable to find a licensed trustee who is willing to act, he gives the bankrupt five days' notice after which the assignment is cancelled.[156]

The BIA provides that every copy of an assignment that has been certified by the supervisor must be registered by or on behalf of the trustees in the designated registry and according to the laws which regulate it.[157]

In situations where the bankrupt is not a corporation and the realisable assets of the bankrupt's estate[158] are worth ten thousand dollars or less the provisions of the BIA in respect of a summary administration apply.[159] Summary administration in terms of the BIA is not an independent procedure but a compressed/simplified process for handling

[151] S 25(3) BIA. A supervisor means the office of the supervisor of insolvency according to s 3 of the BIA which office is created in accordance with s 175 of the BIA. The office of the supervisor functions majorly as the regulator of the assignment procedure s 25(3)—(8). Furthermore, the office of the supervisor regulates the proposal procedure most especially with regards to insolvent persons who are expected to serve a prior notice of intention to file a proposal at the office of the supervisor of insolvency before notifying the trustees or creditors s 30(1). The office of the supervisor regulates the proposal filed by an insolvent person whereas a proposal filed by a bankrupt is handled by an inspector. Therefore, in situations where a proposal filed by an insolvent person is not approved, it would be assumed that the insolvent has made an assignment. Consequently, the office of the supervisor would issue the insolvent a certificate of assignment in the prescribed form. See s 38(b) of the BIA.
[152] See s 2(a)–(d) of the BIA.
[153] See s 25(1)–(3) of the BIA.
[154] See s 3 of the BIA for definition of bankrupt.
[155] See s 25(4) of the BIA.
[156] S 25(5) of the BIA.
[157] S 64(1) of the BIA.
[158] After the claims of the secured creditors have been paid.
[159] See s 25(6) of the BIA. See s 145 of the BIA for provisions pertaining to summary administration.

estates that are worth ten thousand dollars or less under the assignment procedure. In situations where a bankrupt individual has realisable assets worth more than ten thousand dollars the provisions of the law in respect of a bankrupt apply.[160] In determining the realisable assets of a bankrupt for the purpose of section 25(6) any property that may be acquired by the bankrupt or devolve on the bankrupt before discharge is not considered.[161]

Notices, statements and other necessary documents are required to be sent by ordinary mail and at this point a first meeting of creditors is called.[162] The services of inspectors are not engaged unless the creditors decide to appoint them and in situations where inspectors are not appointed, the trustee is expected to carry out all duties permitted to inspectors[163] and is entitled to receive such fees as provided by the law.[164]

The provision of the BIA with regards to summary administration sets a maximum amount of ten thousand dollars but does not set a minimum amount and as such it is not clear if a NINA debtor who has zero assets can be considered under the summary administration procedure. It seems that the intention of the BIA is not to accommodate a zero assets debtor considering that there is a compulsory counselling requirement for all bankrupts[165] and the cost of counselling is expected to be paid out of the bankrupt's estate. The NINA debtor does not have assets therefore the summary administration procedure is unavailable unless there is a possibility that the government bears the cost of counselling in cases of NINA debtors.

The BIA provides for counselling services for all bankrupts and their immediate family[166] as is the case in the United States[167] and the cost of counselling paid out of the bankrupt's estate is a cost of administration of the estate. It is important to note that counselling is a criteria for obtaining an automatic discharge under section 160(1)(g),[168]

[160] See s 149 of the BIA.
[161] See s 25(7) of the BIA.
[162] See s 145(d) and (e) of the BIA.
[163] S 145(f) of the BIA.
[164] S 146 of the BIA.
[165] See s 148(1) of the BIA.
[166] *Ibid*.
[167] See ch 2 par 2.2.4.2.
[168] S 148(3) of the BIA. See also par 3.3.3.4.

which may create a limit on the bankrupt's access to a discharge considering that the cost of the counselling is paid out of the bankrupt's estate. Certain classes of debtors such as the NINA debtor will not have access to an automatic discharge under section 160(1)(g) as they have no assets that may be liquidated for the benefit of creditors let alone pay for counselling. The Act states that a debtor may apply for the assignment of his estate for the general benefit of his creditors.[169] Consequently there must be some sort of advantage for creditors before an application for assignment can be granted, which means that a NINA debtor who does not have assets or income cannot file an application for an assignment of his estate.

3.3.3.4 Discharge provisions under the BIA

The BIA provides for two routes to a discharge: an automatic discharge for first time bankrupt individuals and a discharge via court order.[170]

The automatic discharge applies to first time bankrupt individuals at the end of nine months immediately after bankruptcy.[171] It comes into effect only if a supervisor, trustee or creditor does not oppose the automatic discharge for a first time bankrupt[172] within the nine month period.[173] The trustee gives notice of the imminent automatic discharge of a debtor in a prescribed form to the supervisor, bankrupt and creditor(s) who have proved a claim not less than fifteen days before the date on which the automatic discharge will take place.[174] The supervisor, trustee and creditor are awarded an opportunity to oppose the discharge by giving notice of the intended opposition and stating the grounds for opposition.[175]

The grounds of opposition can be based on noncompliance of the bankrupt with procedural requirements of the law or payments obligations expected by the law.[176] The debtor is expected to fulfil all payment obligations imposed by the trustee, which

[169] See par 3.3.3.3.
[170] See ss 160 and 161 of the BIA.
[171] See par 3.3.3.1. An automatic discharge under the repealed BA comes into effect five years after bankruptcy whereas an automatic discharge under the new BIA comes into effect nine months after bankruptcy. Therefore, the automatic discharge provision of the BIA is an improvement on the provision in the repealed BA. See s 31 of the BA.
[172] A first time bankrupt, as recognised by this provision of the BIA, is an individual bankrupt who has never been bankrupt under the laws of Nigeria or of any prescribed jurisdiction. See s 160(3) BIA.
[173] S 160(1)(g) of the BIA.
[174] S 160(10)(b) of the BIA.
[175] S 160(1)(c)–(e) of the BIA.
[176] See s 53(2)(c) and 163(2)(a) of the BIA.

establishes some form of commitment on the part of the bankrupt towards rehabilitation. The BIA provides that in order for the court to determine whether or not a debtor has met his payment obligations the total amount paid to the estate by the bankrupt is considered in relation to the debt owed and the financial resources available to the debtor.[177] It appears as though these financial requirements apply only to debtors who have excess income.

The application for opposition may be filed at any time prior to the expiration of the nine-month period immediately after bankruptcy. Thereafter, the trustee applies to court for a date for the hearing of the application to oppose the discharge of the debtor.[178] In situations where an automatic discharge of a debtor is unopposed or if the application for opposition is unsuccessful the trustee issues a certificate[179] to the discharged bankrupt in the prescribed form. The certificate declares the bankrupt discharged and released from all debts.[180] This form is regarded as an automatic discharge and deemed to be an absolute and immediate discharge.[181]

Also, the BIA provides for a discharge via court order. Generally speaking, a first time bankrupt individual may apply to court for a discharge before the expiration of the nine-month period after bankruptcy.[182] In this situation the automatic discharge provision in the BIA ceases to apply to the bankrupt individual.[183] Also, a debtor who is not a first time bankrupt may apply to the court for discharge. Subject to section 160 of the BIA, an application for a discharge in this category is deemed to have been made when a receiving order is made against a debtor's estate or when a debtor makes an assignment of his estate. Therefore, a receiving order or an assignment is deemed an application for a discharge via court order.[184] An exception to this position is when a bankrupt individual serves a notice in writing to the court and the trustee in which he

[177] S 163(2)9b) of the BIA.
[178] *Ibid*. See also s 160(1)(f) of the BIA.
[179] S 167(1) BIA.
[180] See s 160(1)(g)(i) and (ii) of the BIA. See also s 170(2) BIA. The primary purpose of a discharge provision as stated by international guidelines is to ensure that at the end a debtor is released from all debts and liabilities incurred preceding bankruptcy and also rehabilitated. The purpose is to protect a debtor from suffering indefinitely and to be reinstated in his former status. See ch 2 par 2.3.2.
[181] S 160(4) of the BIA.
[182] S 160(2) of the BIA.
[183] *Ibid*.
[184] See s 161(1) of the BIA.

waives his right to this provision of the law and is deemed to have waived the right that automatically considers a receiving order made against his estate or an assignment made by him as an application for discharge via court order.[185] Although it is not clear what is the intention of the BIA in regard to this provision but it appears that a bankrupt individual may waive his right in situations where there is a debt reaffirmation agreement between him and his creditor(s), such as the case in Canada.[186] However, if this is the case, it has been argued that reaffirmation agreements undermine the "fresh start" principle because the essence of the "fresh start" principle is to ensure a speedy rehabilitation.[187]

After an application for a discharge via court order has been made according to the provisions of the law, that is after a receiving order or assignment has been made, the trustee of a bankrupt's estate applies to the court at any time (not earlier than three months and not later than one year after bankruptcy)[188] for a date for hearing the application for a discharge and after giving five days' notice to the bankrupt.[189]

After the trustee secures an appointment for the hearing of the discharge application, he sends a notice of the application in the prescribed form to the supervisor, bankrupt and all creditors not later than fourteen days before the hearing of the application.[190] The trustee must prepare a report in the prescribed form as it is required by the court at the hearing of the discharge application. The report states the affairs of the bankrupt, the causes of his bankruptcy and the manner in which the bankrupt has performed the duties imposed by the BIA or obeyed the orders of the court. Furthermore, the conduct

[185] See s 161(1) of the BIA.
[186] A debt reaffirmation occurs when a bankrupt revives or reaffirms personal responsibility for liabilities that have been or will be released upon discharge of the bankrupt. See Personal insolvency task force *Final Report 2002*: *Final Report of the Office of the Superintendence of bankruptcy (OSB) Personal insolvency task force* (hereafter referred to as Personal insolvency task force *final report* 2002). See also Ben-Ishai 2015 *CBLJ* 240.
Reaffirmation agreement may occur in two different ways which are through conduct or express agreement. See Senate standing committee on banking, trade and commerce *Report on debtors and creditors sharing the burden: A review of the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act* 33 (hereafter referred to as Senate, standing committee on banking trade and commerce *Report* 2003). See also Ben-Ishai 2015 *CBLJ* 240.
[187] See Marketplace framework policy branch *Report* 2002: *Report on the operation and administration of the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act* (hereafter referred to as Marketplace framework policy branch *Report* 2002). See also Ben-Ishai 2015 *CBLJ* 240.
[188] This applies in situations where there is a need for a discharge before the expiration of nine months (before the time frame for automatic discharge sets in) or where a debtor is not a first time bankrupt and does not qualify for an automatic discharge).
[189] See s 161(2) BIA. In cases of a discharge via court order it is not necessary that the debtor applies to court, no court order is needed for entry but a court order is necessary for a discharge. This implies that access to discharge under this provision is not restricted.
[190] S 161(6) of the BIA.

of the bankrupt both before and after the date of the initial bankruptcy is considered, including whether or not the bankrupt has been convicted of any offence under the BIA. The trustee's report is accompanied by a resolution of the inspectors stating if they approve or disapprove of the report.[191]

The trustee's report includes a recommendation as to whether the bankrupt must be discharged considering his conduct after bankruptcy and his financial ability to make the payments imposed on him.[192] The trustee in making a recommendation considers the following:[193]

a) Whether the bankrupt has complied with the procedural requirements and payments imposed by the law under section 53.
b) The total amount that has been paid to the estate by the bankrupt (financial commitment), having considered the bankrupt's indebtedness and available financial resources.[194]
c) Whether the bankrupt decided to opt for bankruptcy as a means to obtain relief from indebtedness even though he could have made a viable proposal.

The court, having heard an application for the discharge of a bankrupt, may decide either to grant or refuse an absolute order of discharge, suspend the operation of the discharge order for a specified period of time or grant an order of discharge subject to certain terms or conditions.[195]

The court refuses an application for discharge in situations where the assets of the bankrupt are not of a value equal to thirty-three and one-third cents on the dollar on the amount of the bankrupt's unsecured liabilities. An exception to this stipulation is if the bankrupt satisfies the court of the fact that the assets are not to the required value due to circumstances for which the bankrupt cannot justly be held responsible.[196] Also, the

[191] See s 162(1) of the BIA.
[192] S 163(1) of the BIA.
[193] S 163(2)(a)–(c) of the BIA.
[194] It is uncertain the extent of this provision of the BIA in considering the financial state of the bankrupt. It is unclear whether a trustee's report at this stage can motivate for a discharge for NINA debtors who have no assets and as such have not fulfilled any payment obligation. It seems as though an advantage for creditors' may be a consideration even though it is not an explicit requirement.
[195] See s 164(2) of the BIA.
[196] See ss 165(a) of the BIA. See also s 166 of the proposed BIA which states as follows:

court refuses an application for discharge in situations where the bankrupt continued to carry on trading activities despite his insolvent state[197] and if the bankrupt fails to keep books of accounts of business carried on by him or books of financial information for the period of three years preceding his bankruptcy[198] and the bankrupt fails satisfactorily to account for any loss of assets or deficiency of assets.[199] A further exception is if the bankrupt is found to be responsible for his going bankrupt due to, for instance, wrong financial decisions, gambling and an unwarranted wasteful life.[200]

In situations where the court grants an application for discharge the bankrupt is issued a certificate of discharge by the court which has the same effect as the certificate issued under the automatic discharge provision.[201] An order of discharge releases the bankrupt from all claims provable in bankruptcy.[202]

An order for discharge under the BIA does not release a non-dischargeable bankrupt from certain responsibilities set out in the Act, such as debts or liabilities arising from:[203]

a) An award of damages by a court in civil proceedings in respect of bodily harm, sexual assault and wrongful death resulting from bodily harm.
b) A fine, penalty or restitution order imposed by court in respect of an offence or debt arising from a bail application.
c) Liabilities under a support, maintenance or affiliation order or agreement for maintenance and support of a spouse, cohabitant or child.
d) Properties obtained by false pretense or fraudulent misrepresentation.

For purposes of section 165, the assets of a bankrupt shall be deemed of a value equal to thirty-three and one-third cents on the dollar on the amount of his unsecured liabilities when the Court is satisfied that the property of the bankrupt has realized, is likely to realize or, with due care in realization, might have realized an amount equal to thirty-three and one-third cents on the dollar on his unsecured liabilities.

Looking at the requirement of "thirty-three and one-third cents on the dollar on the amount of his unsecured liabilities" it appears that there is a form of advantage requirement under the BIA for debtors who may seek to obtain discharge under the proposed bankruptcy procedure. However, the latter part of s 165(a), which states that "unless the bankrupt satisfies the Court that the fact that the assets are not that value, has arisen from circumstances for which the bankrupt cannot justly be held responsible" shows that there is an exception to the requirement of "thirty-three and one-third cents on the dollar". Exceptions to the rule only cover situations where there is a shortfall and not in the case of no assets debtors (NINA) Also, there are no clear cut prescriptions as to the circumstances that the court would consider the debtor not to be justly responsible for the shortfall.

[197] S 165(c) of the proposed BIA
[198] S 165 (b) of the proposed BIA.
[199] S 165 (d) of the proposed BIA.
[200] S 165 (e) of the proposed BIA.
[201] S 167(1) of the BIA.
[202] S 170(2) of the BIA.
[203] See s 170(1) of the BIA for a list of such responsibilities that are exempt from the discharge.

e) Fraud, embezzlement, misappropriation or defalcation while acting in fiduciary capacity.
f) A loan made under the Revolving Loans Fund Act[204] or any other law which provides for loans or guarantees of loans to students.
g) Debt for interest owed in relation to any amount referred to in paragraphs (a) – (e) above.

Sureties are not affected by the discharge of a debtor but remain liable in accordance with the accessory contract.[205] Also, where the discharge of a bankrupt is obtained by fraud the court on application of the trustee or creditors may annul his discharge.[206] An annulment of a discharge cancels the discharge of a debtor from his indebtedness, thereby making it ineffective. However, the annulment would not prejudice the validity of any sale, disposition of property or payment made before the revocation and annulment of the discharge.[207]

Discharge via court order appears to be costly and inappropriate for a NINA debtor as he cannot afford to pay the costs involved, such as preparing a trustee's report and securing an appointment and the hearing process of the discharge application in court.

3.4 Proposals (composition and schemes of arrangement)

A debtor can make a proposal as a means of obtaining relief from his indebtedness. The BIA fails to state the essence of a proposal procedure which comprises the composition procedure or scheme of arrangement. However, it seems a proposal is the making of an offer of payment to the creditors to accept in full settlement which is a payment less than full payment of all debts. The payment offered under the proposal may be an immediate payment or payment made over a period of time. According to the BIA a proposal may take the form of a composition for a time extension to satisfy his debts or a scheme for the arrangement of his affairs.[208] Proposals can be utilised by

[204] Revolving Loans Fund for Industry Act Cap R7 Laws of Federation of Nigeria (LFN) 2004.
[205] See s 171 of the BIA.
[206] S 172(1) of the BIA.
[207] See s 172(3) of the BIA.
[208] See s 3 of the BIA. Even though these procedures are alternative debt relief measures, they also require a repayment plan whereby a debtor pays back his debts over a period of time. For this reason, it is inaccessible to a NINA debtor.

debtors as an alternative debt relief measure to the assignment procedure under the BIA.[209] The proposal procedure can be explored by:[210]

a) An insolvent person;
b) A receiver[211] (in relation to an insolvent estate);
c) A liquidator of an insolvent estate;
d) A bankrupt; and
e) A trustee[212] of an estate of the bankrupt.

A proposal under the BIA is an independent procedure that can be explored without having to go through bankruptcy proceedings as was the case under the BA.[213] A proposal under the new BIA is better structured as an independent alternative debt relief measure and signifies a reform of a problem identified with the repealed BA.[214]

The BIA provides that a proposal must be made to the creditors generally, either as a group or separated into classes as provided in the proposal. A proposal may also be made to secured creditors in respect of any class of secured claims.[215] In order to commence proceedings for a proposal by an insolvent a notice of intention in the prescribed form should be filed at the supervisor's office. The notice of intention should state the following:[216]

a) The intention of the insolvent person or debtor to make a proposal.
b) The name and address of the licensed trustee who has consented in writing to act as a trustee under the proposal (a copy of the trustees' consent letter should be attached to the notice of intention).
c) The names of creditors who have claims that amount to at least two hundred and fifty dollars or more.

[209] See ss 3 and 26 of the BIA. This is also the same as under the repealed BA, see s 18 of the BA.
[210] See s 26(1)(a)–(e) of the BIA.
[211] A receiver is a person appointed to take possession or control of the properties and estate of a debtor pursuant to an agreement or order of court. See s 3 of the BIA.
[212] A trustee means a person who is licensed or appointed under the BIA to act in relation to the debtors' estate; See s 179–199 of the BIA.
[213] See par 3.2.
[214] It is important to note that the BIA specifically states that a proposal made in respect of a bankrupt should first be approved by the inspectors before any further action can be taken on the proposal. See s 26(10) BIA. See also fn 172 for the definition and functions of inspectors according to the BIA. See par 3.2.
[215] See s 26(2) of the BIA.
[216] See s 30(1)(a)–(c) of the BIA.

After the notice of intention to file a proposal is successfully lodged at the supervisor's office the insolvent individual is required to lodge the proposal with a licensed trustee.[217] In addition, a statement showing the financial position of the insolvent at the date the proposal was made is required by the trustee within the period of ten days after filing the notice of intention. This financial statement shall be verified by an affidavit to show that the details are to the best knowledge of the person making the proposal.[218] The statement showing the financial position of the insolvent should be signed by the insolvent and the trustee.[219] A report on the reasonableness of the cash flow statement shall be prepared and signed by the trustee in a prescribed form.[220]

The BIA requires that the trustee files a copy of the proposal with the supervisor (in situations where an insolvent makes an application for a proposal)[221] or with an inspector for approval (in the case where a bankrupt applies for a proposal).[222] Where the trustee defaults in filing a proposal of an insolvent person within a period of thirty days after the notice for proposal has been lodged, the trustee is deemed to have made an assignment[223] and the trustee shall file a report in the prescribed form with the receiver. Subsequently the receiver issues a certificate of assignment in the prescribed form.[224] In the same vein, if creditors dissent to a proposal made by an insolvent, the insolvent person is deemed to have made an assignment.[225] An assignment made under these provisions of the BIA has the same effect as an assignment filed under section 25 of the BIA.[226]

In addition to the proposal filed, a statement that shows the details of the bankrupt's assets and liabilities, the names and addresses of his creditors, the securities held by each creditor and the dates in which the securities were issued is required in terms of

[217] S 26(9) of the BIA.
[218] See s 26(9)(b) of the BIA.
[219] S 30(2) of the BIA.
[220] *Ibid*.
[221] See s 44(1) of the BIA.
[222] See s 26(10) of the BIA.
[223] S 30(8)(a) of the BIA.
[224] S 30(8)(b) of the BIA.
[225] See s 38(a) BIA.
[226] S 26(8)(a) and (b) of the BIA. See par 3.3.3.3.

section 149(e).[227] In situations where a bankrupt lodges a proposal the inspectors[228] are required to approve the proposal before any further action is taken on the proposal.

After a proposal has been filed with the supervisor or inspector as the case may be, the trustee calls a creditors' meeting. The meeting is held within twenty one days after the proposal has been filed with the supervisor or inspector.[229] The creditors have the choice of accepting or rejecting the proposal.[230] A proposal is deemed to be accepted by creditors[231] if a majority in number and two-thirds in value of all classes of the creditors (excluding secured creditors) present at the meeting or by proxy vote for acceptance.[232] After a proposal has been accepted by the creditors the court may approve the proposal[233] and a proposal approved by the court is binding on all the creditors in respect of all claims made.[234] Also, the court shall refuse to approve a proposal in situations "where the court is of the opinion that the terms of the proposal are not reasonable or are not calculated to benefit the general body of creditors".[235]

If the court approves the proposal of a bankrupt, the approval shall serve as an annulment to bankruptcy. The implication is that all the rights, titles and interests of the trustee in the property of the debtor under bankruptcy are revested in the debtor or in another person the court may approve unless the terms of the proposal provide otherwise.[236]

Pending the decision of the creditors and the court on a proposal, the BIA provides that a proposal or any security or guarantee tendered with the proposal may not be withdrawn.[237] This stipulation should not be interpreted to mean that an insolvent person in respect of whom a proposal has been made cannot make an assignment.[238] Also, the

[227] See s 26(9)(a) of the BIA.
[228] See s 26(10) of the BIA. See also s 3 of the BIA, which defines inspectors as those appointed under s 107 of the BIA.
[229] S 32(1) of the BIA.
[230] See s 35(1) of the BIA.
[231] The creditors referred to include both unsecured and secured creditors in respect of whose secured claims the proposal was made.
[232] See ss 35(2)(d) and 44(4) of the BIA.
[233] This can be referred to as a non-judicial debt relief procedure because it is partly administrative. However, as international principles in ch 2 par 2.6 dfeclare the courts cannot be totally eliminated from the debt relief system.
[234] See s 44(4)(a) and (b) of the BIA.
[235] See s 41(2) of the BIA.
[236] See s 43(1) of the BIA.
[237] See s 26(11) of the BIA.
[238] S 26(12) of the BIA.

BIA provides that on the filling of a notice of intention to make proposals under section 30(1) of the BIA a creditor has no remedy against the insolvent person or his properties; and shall not commence or continue any action, execution or other proceedings for the recovery of a claim provable in bankruptcy until the insolvent person is declared bankrupt.[239] In essence, the BIA provides for a moratorium.

The proposal procedure in the BIA does not state specifically what will happen in the case of a zero plan. However, the wording of section 41(2) suggests that the court would not approve a proposal which does not show some form of advantage to the creditors. This possibility indicates that a debtor who falls within the category of a NINA debtor may not be able to access this alternative procedure. Considering that creditors have a right to dissent, it is most unlikely that a majority in number and two-thirds in value of all classes of creditors will agree to a zero plan proposal unless there are incentives for them to do so.

The BIA does not have a comprehensive provision in respect of discharge under the proposal procedure. The wording of section 44(5) of the BIA states that "the acceptance of a proposal by a creditor does not release any person who would not be released under this Act by the discharge of a debtor," which suggests persons such as those providing sureties will not be released under this Act by the discharge of a debtor. Also, debts stemming from fraud, bail applications and spousal or child support are excluded from the discharge provisions under proposal just as they are exempted under bankruptcy.[240] Therefore, debtors who are not bound by these exceptions will obtain a discharge as is the case under the bankruptcy procedure.

3.5 Conclusion

After twenty-nine years of ineffective regulation Nigeria took a giant stride by amending the BA through the enactment of the BIA. The primary aim of the reform is not to ensure a better environment for indebted natural persons but rather to create a better environment for investors. An additional goal of the reform is to help facilitate the

[239] See s 55(1) of the BIA.
[240] See s 171 of the proposed BIA in relation to bankruptcy and s 44(5) and as regards the proposal procedure. See also par 3.3.3.4 for an extensive list of debts excluded from discharge under the proposed BIA.

re−modelling of the financial and administrative structure of debtors in financial distress in order to advance their rehabilitation and allow the continuation of their businesses.[241]

In terms of the proposed BIA an indebted natural person in Nigeria can obtain relief from his indebtedness through three procedures, namely receiving orders,[242] assignments[243] and proposals.[244] Receiving orders and assignments can be likened to creditor's and debtor's bankruptcy proceedings in the BA and as a form of a liquidation procedure require that the debtor has some form of assets or income in order to obtain discharge.[245] These three procedures were considered in light of the international principles and guidelines discussed in chapter 2, which are access, discharge, formal versus informal and judicial versus extra-judicial procedures.

With reference to the principle of access for a debtor to enter the receiving orders and assignment procedure the BIA provides that the debtor must be insolvent.[246] The definition in the proposed BIA is an "insolvent person means a person who is not bankrupt and who resides, carries on business or has property in Nigeria, whose liabilities to creditors provable as claims under this Act amount to not less than one million naira."

From the above definition a wide range of natural persons are excluded from relief because the BIA recognises only debtors who owe a million naira and above as being insolvent. [247] Nigeria harbours a large number of NINA debtors, so this provision of the BIA limits access because most NINA debtors grapple with debts tied to survival (such as debts incurred on food, housing, clothing, shelter or electricity) that often might not involve large sums of money.[248]

The BIA retains "acts of bankruptcy" as one of the requirements for accessing bankruptcy procedures even though the international principle of access does not

[241] See para 3.3.1 and 3.3.2.
[242] See par 3.3.3.2.
[243] See par 3.3.3.3.
[244] See par 3.4.
[245] See par 3.3.3.4.
[246] See par 3.3.1.
[247] See s 3 of the BIA. See also par 3.4.
[248] See ch 2 par 2.3.1 for discussion on survival debts.

favour it.[249] "Acts of bankruptcy" is regarded as being outdated terminology because the term restricts the access of debtors to the insolvency system and focuses on alleged wrongful acts of debtors instead of on an inability to pay. Therefore, the BIA provisions are not aligned to international principles in this regard.

The receiving orders and assignment procedures in the BIA strictly are asset liquidation procedures because they require that the assets of the estates are liquidated for the benefit of the creditors of the estate.[250] Also, these procedures are expensive and can be accessed only by debtors who have assets. The proposal procedure is a repayment plan procedure that can be accessed only by debtors who have some sort of income or assets to fulfil their payment obligations.[251] Therefore, none of these procedures can be accessed by a NINA debtor who has no assets or income, which leaves a NINA debtor with no access to debt relief.

It is uncertain if a NINA debtor might be able to explore the summary administration procedure as explained earlier.[252] Aside from the summary administration procedure not providing specifically for a NINA situation, there is a compulsory counselling requirement for a bankrupt and their family members under the summary administration procedure.[253] The cost of such counselling would be borne by the debtor's assets and this provision obviously does not factor in a NINA debtor who has no assets.[254] The summary administration procedure is a compressed procedure that seeks to simplify and speed up bankruptcy proceedings. However, some costs still are involved such as the service of notices, filing and trustees fees.[255] It is unclear who bears the costs of implementing these procedural requirements in the case of a NINA debtor.

It is important to note that access of debtors to debt relief is a non-negotiable feature of a good insolvency system and to bear in mind that access should be guaranteed by every insolvency system through the provision of multiple procedures. The purpose is to

[249] See ch 2 para 2.5.2 and 2.6.
[250] See para 3.3.3.2 and 3.3.3.3.
[251] See par 3.4.
[252] See par 3.3.3.3.
[253] *Ibid*.
[254] *Ibid*.
[255] *Ibid*.

ensure that all honest but unfortunate debtors irrespective of their financial circumstances can find a debt relief procedure that best suits their financial situation. Access to these procedures should not be determined by the financial capability of a debtor.[256] From the above discussion of the principle of access in respect of the proposed BIA it is apparent that it does not satisfy the international guiding principle on access and further that none of the proposed procedures caters for NINA debtors.

In terms of the international principle of discharge[257] the BIA demonstrates positive movement with regards to access to discharge in comparison with the BA. The BIA provides for an automatic discharge of a debtor nine months after a receiving order or assignment has been made, which is an improvement on the discharge provision of the repealed BA which was set at five years. The BIA seeks to ensure that discharge is made accessible to a debtor as soon as possible in order to secure a fresh start and to facilitate the re-entry of bankrupt individuals into the economy once again.[258]

The position of the BIA appears to be magnanimous as all debt relief procedures (including the proposal procedure)[259] provide for a discharge. The fact that an automatic discharge is available for a first time bankrupt after nine months of bankruptcy aligns the BIA with the international principle that a discharge should be available to debtors in the not too distant future.[260] Discharge via a court order is available to other debtors who are not first time bankrupts or are first time bankrupts who have decided to waive their rights to an automatic discharge and apply for discharge before the expiration of nine months.[261] This discharge provision does not require an application as the mere making of a receiving order or an assignment by any individual serves as an application for discharge.[262] There is easy access to discharge in line with international principles.[263]

[256] See par 2.6.
[257] See par 3.3.3.4.
[258] *Ibid*.
[259] *Ibid*.
[260] See ch 2 par 2.6.
[261] See par 3.3.3.4.
[262] See par 3.3.3.4.
[263] See ch 2 par 2.6.

The BA placed certain restrictions on a bankrupt.[264] These restrictions appear to have evolved from the English law as earlier mentioned.[265] Nigeria has moved away from these restrictions under the proposed BIA. However, the compulsory counselling requirement for a bankrupt and his family members as a prerequisite for discharge under the BIA may pose a challenge to the discharge of a NINA debtor in Nigeria.[266]

In measuring the Nigerian bankruptcy system against the principle expressed in the selection of formal versus informal procedures, it should be noted that international guidelines prescribe the use of informal procedures above formal procedures. The reason for the preference is that informal procedures are deemed to be faster, more cost effective and also help curb the challenge of stigmatisation encountered in many countries (mostly developing countries). Stigmatisation is a major challenge and has been identified as the cause of the ineffectiveness of the BA.[267] Therefore, informal procedures as a means to debt relief appear to be a good option for debtors in Nigeria (such as NINA debtors) who would like to avoid stigmatisation but cannot afford the cost of insolvency proceedings. The World Bank *Report* states that in order for an informal procedure to be effective there is need for some form of "institutional support and incentives" because very few cases are resolved through voluntary settlements.[268]

In terms of the three procedures provided in the BIA, receiving orders, assignment and the proposal procedure, clearly it does not provide an informal procedure because they are all formal procedures. Therefore the BIA does not conform to international guiding principles in this regard.[269]

Finally, with regard to the international principle of judicial versus extra-judicial procedures the international guidelines favour extra-judicial or out-of-court proceedings above judicial proceedings because they are faster and more cost effective. The courts cannot be totally excluded from insolvency matters because insolvency matters involve

[264] See par 3.2.
[265] See par 3.2.
[266] See par 3.3.3.3.
[267] See ch 2 par 2.6.
[268] *Ibid*.
[269] *Ibid*.

declaration and the enforcement of rights, which is the responsibility of the courts.[270] However, it is advisable that the involvement of the courts is reduced to the barest minimum to eliminate the challenge of delay and the cost of judicial proceedings.

Bankruptcy proceedings under the BIA (receiving orders and assignments) are strictly judicial proceedings, which are usually expensive to file and time consuming in nature. The proposal procedures, on the other hand, can be regarded as extra-judicial. Prior to the enactment of the BIA the BA also provided a proposal (composition and arrangement) as a debt relief procedure which can be explored by a debtor in the course of bankruptcy proceedings. Under the BA the proposal was majorly a judicial proceeding, however the proposed BIA's proposal procedure (still comprising composition and arrangement mechanisms) has been made an independent alternative debt relief procedure to bankruptcy, which is structured to commence in the supervisor's office and end in the courts.[271] This proposition means that as an extra-judicial proceeding the major part is handled outside the court and the latter part of the proceedings is referred to the court. This proposal appears to be in conformity with international guidelines.[272]

There are large numbers of NINA debtors in Nigeria,[273] so the need for a NINA provision cannot be over-emphasised and recent international guidelines specifically address this need.[274] A high number of countries exclude NINA debtors from the system, as is the case in Nigeria.[275] The World Bank *Report* opines that the advantage of providing for NINA debtors is to ensure that this group of debtors is not discriminated against.[276] An added advantage is that providing a discharge for this group of debtors reintegrates them into the formal economy (rather than losing them to the informal

[270] *Ibid*.
[271] See par 3.3.3.4.
[272] See ch 2 par 2.6.
[273] See ch 1 par 1.1.
[274] See ch 1 par 1.1 and ch 2 par 2.5.1.
[275] Ch 2 par 2.5.5.
[276] *Ibid*.

sector of the economy where they offer a lesser benefit), thereby stimulating economic growth.[277] It is important to Nigeria as it will boost economic growth.

In terms of the three procedures the BIA repeats the error of the BA by excluding the NINA debtors. The proposed BIA does not explicitly exclude a NINA debtor from making use of debt relief procedures because all the debt relief procedures technically are available to all types of debtors to explore, however a NINA debtor may not get a discharge from any of the proposed procedures as explained earlier.[278] The debtor covers the fees for the administration of the estate, which include the cost of counselling as counselling is a prerequisite for obtaining discharge.[279]

The economic challenges facing Nigeria, such as increasing un-employment, poverty and indebtedness,[280] indicate a need to have a good debt relief procedure for NINA debtors. Its introduction would serve as a safety net for the unemployed and financially-challenged individuals who enrolled in the Nigerian government's entrepreneurship programmes in the eventuality of entrepreneurship failure and bankruptcy. [281] The act of providing for NINA debtors as a measure to boost the Nigerian economy addresses the issue of domestication of the BIA which is of concern to the Nigerian president.[282]

A debt relief procedure for Nigerian NINA debtors equally helps to achieve one of the aims of the BIA which is to promote a vibrant enterprise culture. Furthermore, it will help to encourage responsible risk taking and provide an opportunity for a fresh start for entrepreneurs who go bankrupt. It would help the unemployed to secure work, help alleviate poverty and facilitate the eventual growth of the economy which are the aims of the BIA.[283]

The proposed BIA addresses some of the challenges the Nigerian bankruptcy system faces by providing an independent alternative debt relief procedure, namely the proposal procedure, and also addresses the challenge of stigmatisation by eliminating

[277] See ch 2 par 2.5.4.
[278] See par 3.3.3.4.
[279] See par 3.3.3.3.
[280] See par 3.1.
[281] *Ibid*.
[282] See par 3.2.
[283] See par 3.1.

the legislative restrictions currently placed on bankrupt individuals. On the other hand, some challenges persist such as a lack of adequate debt relief procedures, most especially cost effective procedures, which reflects the issues pertaining to NINA debtors identified above. It remains uncertain whether the introduction of the BIA will deal significantly with the challenges of stigma, ignorance and judicial laxity. Its success will become clear only once the BIA has been effective for a number of years.

CHAPTER 4

DEBT RELIEF MEASURES IN SOUTH AFRICA

Summary

> Improving the economic lot of their citizens is a priority for many governments. Insolvency law can play a significant role. Were the penalties for failure lowered from their current levels in South Africa, citizens and companies would entertain taking greater economic risk to succeed. More businesses would start, more jobs would be created and society as a whole would benefit. Those who fail would not become modern lepers but instead would be allowed another chance to be productive for themselves and society.[1]

4.1 Introduction

As early as 1996 South Africa was identified as a jurisdiction where individuals were highly exposed to the risk of over-indebtedness.[2] The priority of government should be

[1] Rochelle 1996 *TSAR* 315.
[2] *Ibid.*

to improve economic conditions. Attention should be paid to insolvency law because it plays a significant role in achieving this goal.[3]

This chapter critically discusses the South African natural person insolvency system with a focus on NINA debtors and considers it in relation to the international guiding principles enumerated in chapter two.[4] A comparative study of the South African and Nigerian debt relief systems is presented with a focus on NINA debtors.

The choice of the South African insolvency system for comparison is informed by the fact that South Africa, as is Nigeria, is an African nation and because South Africa is more developed in the practice of individual insolvency.[5] South Africa and Nigeria are the two largest economies in Africa and are categorised as developing nations, and share similar economic challenges.

The overarching purpose in this chapter is to determine if Nigeria can draw lessons from the South African experience in terms of achievements and shortcomings in the field of natural person insolvency law.

4.2 Nature and purpose of the system

Insolvency law in South Africa has its roots in Roman-Dutch law.[6] In simple terms, an insolvent person is defined as someone whose estate has been sequestrated.[7]

The term 'insolvency' in South Africa is used for both natural person insolvency and corporate insolvency, this situation is different in common law jurisdictions (for example, Nigeria and the United States) where the term "bankruptcy'' often is used in relation to natural person insolvency[8] and the term ''insolvency'' in relation to corporate or juristic entities.[9]

[3] *Ibid.*
[4] See ch 2 par 2.6.
[5] In contrast with the position in Nigeria, there are numerous decided cases, research outputs and reform initiatives in South Africa. See ch 1, par 1.1.
[6] Wessels *History of Roman Dutch Law* 663.
[7] See s 2 of the Insolvency Act 24 of 1936 (hereafter referred to as the IA).
[8] See ch 1 par 1.1.
[9] See ch 2 par 2.2.1 and ch 3 par 3.3.

The primary law that regulates insolvency law for natural persons in South Africa is the IA. The definition section of the IA states that it applies to "natural persons and partnerships or estates of a person or partnership".[10] The insolvency of non-natural persons such as a body corporate or company is regulated by the 1973 Companies Act.[11] In turn, the legal provisions pertaining to the winding-up of close corporations are contained in part 9 of the Close Corporations Act[12] and chapter 14 of the 1973 Companies Act.[13] The South African insolvency system does not operate under a unified piece of legislation as is the case in Nigeria.[14]

South African insolvency law is popularly described as "largely creditor orientated",[15] which means that the interests of a creditor are considered above those of a debtor in South Africa.[16] The IA makes provision for a sequestration procedure which can be explored by a creditor or an indebted individual.[17] There are two types of sequestration applications, namely compulsory sequestration applications[18] and voluntary surrender applications.[19] Once a sequestration order is granted, irrespective of the type of application that was used, similar consequences follow and mostly relate to the liquidation of assets. The National Credit Act[20] and the Magistrates' Courts Act[21] in turn make provision for repayment plans in terms of the debt review[22] and administration order procedures.[23]

[10] See s 2 of the IA for the definition a debtor.
[11] A new Companies Act came into operation on 1 May 2011, namely the Companies Act 71 of 2008, which repealed the 1973 Act. However, ch XIV of the 1973 Act, which deals with bankruptcy, remains in force until repealed.
[12] Close Corporations Act 69 of 1984.
[13] See Delport *New entrepreneurial law* 344.
[14] See ch 3 par 3.2.
[15] Roestoff and Coetzee 2013 *Int Insolv Rev* 2. See also Bertelsmann *et al Mars: The law of insolvency in South Africa* 4 and Evans and Haskins 1990 *SA Merc LJ* 246.
[16] *Ibid*.
[17] See ss 3 and 9 of the IA. The sequestration procedure is an assets liquidation procedure and it is similar to the Nigerian bankruptcy procedure. See ch 3 para 3.3.3.1, 3.3.3.2 and 3.3.3.3.
[18] See s 9 of the IA. The compulsory sequestration procedure is similar to the administration order procedure in Nigeria, because they both can be referred to as a creditor's bankruptcy application.
[19] See s 3 of the IA. Voluntary surrender in South Africa is similar to the assignment procedure in Nigeria. Both procedures entail a debtor's bankruptcy application.
[20] 34 of 2005 (hereafter referred to as the NCA).
[21] 32 of 1944 (hereafter referred to as the MCA).
[22] See s 86 of the NCA.
[23] See s 74 of the MCA.

As soon as an order for sequestration is granted a c*oncursus creditorum* is formed[24] that considers the collective interest of the creditors of an estate above that of an individual creditor.[25]

4.3 Debt relief measures in terms of the IA

4.3.1 Process of sequestration

4.3.1.1 Voluntary surrender

The voluntary surrender application is one way to access sequestration under the IA; it creates an avenue whereby an indebted individual may apply to the court for approval to surrender his estate in exchange for relief from indebtedness.[26] It should be noted that discharge is not the goal of the sequestration procedure but is simply the end result.[27]

An application for voluntary surrender can be made either by the debtor in person or by the debtor's agent (a *curator bonis* in the case of persons who are unable to manage their affairs, for example a minor or a mentally unstable person)[28] or any one entrusted with the administration of the insolvent estate of a deceased person.[29]

There are certain legal requirements that must be adhered to before a debtor can bring an application for the voluntary surrender of his assets.[30] These are classified into substantive and procedural requirements. The procedural requirements are as follows:[31]

a) The debtor must publish a notice of surrender within a specified timeframe prior to the date he applies for the surrender of his estate to the court. This timeframe is at least fourteen days and not greater than thirty days. This notice of surrender must be published in the *Government Gazette* and in a newspaper circulating in the district where the debtor resides (or if the debtor is a trader, the notice must be published in the district in which his principal place of business is situated).[32]

[24] *Walker v Syfret* 1911 AD 141 166.
[25] *Ibid*.
[26] Boraine and Roestoff 2002 *Int Insolv Rev* 3.
[27] See *Ex parte Ford* 2009 (3) SA 376 (WCC) 383.
[28] See s 3(1) and (2) of the IA.
[29] See s 3(1) of the IA.
[30] Ss 4 and 6 of the IA.
[31] See s 4 of the IA.
[32] S 4(1) of the IA.

b) Within seven days after publication of the notice of surrender in the Government Gazette, a copy must be posted to the South African Revenue Service,[33] every creditor with a known address, registered trade unions representing the debtor's employees and the debtor's employees.[34]
c) A statement of the applicant's affairs must be prepared in duplicate and lie open for inspection at the office of the Master. Where there is no Master's office, it must be prepared in duplicate and lie open at the office of the Magistrate for a period of fourteen days from the date mentioned in the notice of surrender.[35]

These procedural requirements must be complied with before the court will attend to any application for voluntary surrender. The primary purpose of the procedural requirements is to bring to the notice of the creditors the voluntary surrender application of the debtor and to provide an opportunity for objections.[36] Furthermore, it gives the creditors important information about the debtor's estate.[37]

The IA also requires that substantive requirements under section 6(1) of the IA be satisfied.[38] These requirements are that the court must be satisfied that section 4 has been complied with, that the estate of the debtor is insolvent[39] and that there is sufficient free residue in the estate to cover sequestration costs.[40] Lastly, sequestration of the estate should be to the advantage of the creditors of the estate.[41]

Among the requirements listed the "advantage to creditors" requirement is the most stringent and important substantial requirement.[42] In *Ex parte Bouwer*[43] the court

[33] Hereafter referred to as SARS.
[34] S 4(2) of the IA.
[35] S 4(3) of the IA.
[36] Bertelsmann *et al Mars: The law of insolvency in South Africa* 79. Ss 3—5 of the IA. See the case of *Ex parte Henning* 1981 (3) SA 842 (O) 843.
[37] Boraine and Roestoff 2002 *Int Insolv Rev* 3.
[38] S 6 of the IA.
[39] See s 6(1) of the IA.
[40] See s 2 of the IA where "free residue" is defined as the portion of the estate which is not being subjected to any right of preference by virtue of the fact that there is an existing special mortgage, legal hypothec, pledge or right of retention.
[41] See s 6(1) IA. See also the case of *Ex parte Smith* 1958 (3) SA 568 (O) 570–571 where the court stated that: an "application for voluntary surrender must contain a specific allegation which is supported by facts, unless figures speak for themselves, that the sequestration will be to the advantage of the creditors of the estate and not merely a blunt allegation to show a desire to surrender the estate for the benefit of the creditors of the estate".
[42] See *Ex parte Arntzen (Nedbank Ltd intervening)* 2013 (1) SA 49 (KZP) 49–52.
[43] 2009 (6) SA 386 (GNP) 393.

affirmed the fact that the ‘‘advantage to creditors’’ requirement is a “key consideration” in determining whether or not a sequestration order is granted.[44]

While the IA fails to explicitly define the ‘‘advantage to creditors’’ requirement, the courts have attempted to define what constitutes an ‘‘advantage to creditors’’ in a number of cases.[45] In this respect the “advantage to creditors” requirement has been interpreted to mean some form of pecuniary benefit accruing to the general body of creditors.[46]

In the case of *Ex parte Ford* the court used the word “monetary” to qualify the “advantage to creditors” requirement.[47] Also, the “advantage to creditors” requirement is said to connote “financial advantage”, which entails establishing that there is a minimum advantage for the concurrent creditors “at a dividend of 10 cents in the Rand”.[48]

In the case of *Ex parte Ogunlaja*, (which was decided in the High Court of North Gauteng Pretoria), the ‘10 cents in the Rand’ minimum was considered insufficient and “a dividend of 20 cents in the Rand” was regarded as the minimum benefit required. Consequently, a debtor is required to establish a dividend of 20 cents in the Rand before a voluntary surrender application will be accepted in the High Court of North Gauteng.[49]

Bertelsmann J, in the case of *Ex parte Ogunlaja*, in considering the effect of the “advantage to creditors’ requirement” on sequestration procedures remarked that

> [u]nless and until the Insolvency Act is amended, the South African insolvency law requires an advantage to creditors before the estate of an individual can be sequestrated. Much as the troubled economic times might engender sympathy for debtors whose financial burden has become too much to bear, the insolvency law seeks to protect the interests of creditors at least to the extent that a

[44] *Ex parte Bouwer* 393.
[45] See *Ex parte Ogunlaja* 2011 JOL 27029 (GNP) par 36.
[46] See *Meskin & Co v Friedman* 1948 (2) SA 559 (W) 559. See also the case of *BP Southern Africa (Pty) Ltd v Furstenburg* 1966 (1) SA 717 (O) at 720 where Erasmus J opined that
> The whole tenor of the Act, in as much as it directly relates to sequestration proceedings, is aimed at obtaining a pecuniary benefit for creditors’.
[47] *Ex parte Ford* 389.
[48] See the case of *Nieuwenhuizen v Nedcor Bank Ltd* 2001 (2) All SA 364 (O) 370. See also the rather recent case of *Ex parte Snooke* 2014 (5) SA 426 (FB) par 16 where the Free State High Court stated that a dividend of 10cents in the Rand would be required to show that the sequestration would be to the benefit of creditors.
[49] See *Ex parte Ogunlaja* par 9.

> minimum advantage must be ensured for the concurrent creditors when the hand of the law is laid on the insolvent estate.[50]

In the case of *Ex parte Mattysen et Uxor*[51] it was held that the crux of the ‘‘advantage to creditors’’ requirement is that the court must make a judgment on the evidence presented in determining if there are sufficient assets in the estate that can be realised for the purpose of paying the costs of sequestration and a not-negligible dividend to creditors.[52]

According to Smith[53] the “advantage to creditors’ requirement” is a golden thread running through the Act, which means it is an unavoidable requirement for sequestration. Smith explains as follows:

> In considering the provisions of the Act it becomes apparent that there is a recurrent motif or dominant thread (if ‘‘thread’’ is used in the sense of something that runs a continuous course through anything) and that is the advantage of creditors, not one creditor, or some creditors but the creditors as an entity or the *concursus creditorum*.

It is required that a debtor bringing an application for voluntary surrender should make a full and frank disclosure of his financial dealings (such as income, assets, liabilities, expenditures, and value items) in his application for voluntary surrender. The court infers from the disclosure whether or not there would be an advantage to creditors.[54]

Where all the requirements of a voluntary surrender application have been met, including the advantage to creditors, the court still has discretion to accept the surrender of a debtor’s estate.[55] This discretion should be exercised judicially and in favour of the debtor when a dividend can be realised in favour of the creditors.[56]

In conclusion, the voluntary surrender application normally leads to a sequestration order. In turn, sequestration represents an asset liquidation procedure and as such,

[50] See *Ex parte Ogunlaja* par 36.
[51] 2003 (2) SA 308 (T).
[52] *Ex parte Mattysen et Uxor* 316.
[53] See Smith 1985 *Modern business law* 27. In this article Smith observes that the term “advantage of creditors” can be found in several sections of the IA, although not all the sections used the actual phrase “advantage of creditors”.
[54] *Ex parte Bouwer* 384.
[55] See s 6(1) of the IA.
[56] See *Ex Parte Anthony* 2000 (4) SA 116 (C) par 11.

requires that a debtor has some form of assets.[57] These assets are liquidated for the benefit of creditors', which translates as the "advantage to creditors" requirement. The requirement of establishing an advantage to creditors (through assets) in sequestration procedures coupled with the fact that sequestration procedures are initiated in the High Court[58] makes the sequestration procedure expensive. The consequence of this is that the voluntary surrender procedure is inaccessible to a wide range of debtors, most of who resort under the No Income No Assets (NINA) group of debtors in South Africa. The inaccessibility of the voluntary surrender procedure to a wide range of debtors does not render it non-compliant with the principle of access of all debtors to debt relief as proposed by international guiding principles as long as there are other procedures available for other groups of debtors.[59]

The inaccessibility of the sequestration procedure by means of a voluntary surrender application results in the exclusion of certain debtors from discharge of debts because the sequestration procedure is the only South African debt relief measure resulting in a discharge of debt.[60] "Discharge" is a vital element in good natural person insolvency law as espoused by international instruments[61] and the purpose of a discharge is to ensure that there is an end relief from debt for every debtor irrespective of their financial situation.[62] The end result of a debt relief measure should be to provide a discharge to ensure a fresh start for all debtors.[63]

Lastly, considering the challenge of the high cost associated with the sequestration procedure and the consequent lack of access that results, international guiding principles favour the use of non-judicial procedures as more affordable.[64]

[57] See par 4.3.1.
[58] Boraine and Roestoff 2014 *THRHR* 542.
[59] See ch 2 par 2.6 where access has been identified as one of the vital principles espoused by international reports on insolvency for natural persons. The principle of access states that access is a non-negotiable feature that must be present in the laws and a debtor should not be denied access to relief by virtue of his financial status.
[60] See ss 124 and 127A of the IA.
[61] See ch 2 par 2.6.
[62] *Ibid*.
[63] *Ibid*.
[64] See ch 2 par 2.6.

4.3.1.2 Compulsory and friendly sequestrations

The compulsory sequestration application is another way of accessing the sequestration procedure.[65] In essence, as is the case in the voluntary surrender application the actual estate of a debtor is an important factor to be considered. The compulsory sequestration procedure does not result in the discharge of NINA debtors' debts because there is not an estate to liquidate and to distribute the result among the creditors of the insolvent estate.

The compulsory sequestration procedure is not designed primarily to offer debt relief because it is a creditor's insolvency channel to recover debts.[66] However, compulsory sequestration applications indirectly offer relief and therefore friends or family members in some instances apply for the sequestration of the debtor's estate.[67] Consequently, the only difference between compulsory sequestrations and friendly sequestrations is the person who brings the application.

Compulsory sequestration has been referred to as a special collective debt retrieval procedure and the primary aim is to guarantee the impartial distribution of the proceeds from the debtor's estate among the creditors.[68] The purpose of this special collective debt retrieval procedure is to prevent an individual creditor from collecting proceeds from the insolvent's estate to the detriment of other creditors.[69]

As is the case with voluntary surrender there are certain preliminary procedural requirements that the court must be satisfied of before the application will succeed, namely: [70]

a) the applicant creditor must provide security to the Master of the High Court to cover all costs of sequestration until a trustee is appointed for the insolvent estate;[71]and

[65] See s 9 of the IA.
[66] *Walker v Syfret* 166. The compulsory sequestration procedure is similar to receiving orders under the proposed BIA, because it is an asset liquidation procedure which can be explored by creditors as is the case with receiving orders in Nigeria. See ch 3 par 3.3.3.2.
[67] *Ibid*.
[68] Sharrock *et al Hocklys' insolvency law* 4.
[69] Roestoff and Renke 2005 *Int Insolv Rev* 95. See also the words of Innes JA's in the case of *Walker v Syfret* 166.
[70] S 9(3)–(5) of the IA. See also s 9(4A)(a)–(iv) of the IA.
[71] See s 9(3)(b) of the IA.

b) the application presented to court by the applicant creditor must be served on prescribed parties.[72]

Upon the fulfilment of these requirements the applicant creditor(s) are expected to prove compliance with the substantive requirements of section 10 of the IA, after which an order for the provisional sequestration of the estate may be granted. The requirements are that:

a) the applicant creditor has a liquidated claim of not less than R100 or in situations where there are two or more creditors they must not have an aggregate claim of less than R200 against the debtor;[73]
b) the applicant creditor needs to prove that the debtor is insolvent or has committed an act of insolvency;[74] and
c) there is reason to believe that the sequestration of the debtor's estate would be to the advantage of creditors.[75]

Under the compulsory sequestration procedure a creditor appears twice before the court, first, to apply for a provisional order after the preliminary requirements have been met and, secondly, to secure a final order when the court is satisfied that there is substantive compliance with the necessary requirements of the law.[76]

After the provisional order is granted the court orders that a rule *nisi* be served on the debtor, which states that the debtor should appear in court on a certain date to show reasons why his estate should not be sequestrated finally.[77] On the return date, which is the second and final stage of the application, the court grants a final order of sequestration if satisfied that the applicant creditor has complied with the requirements of section 12.[78] The requirements of section 12 are that there is a liquidated claim, that the debtor is insolvent or has committed an act of insolvency and that there is reason to

[72] The parties to whom it must be sent are the employees, the registered trade unions representing any of the debtor's employee, SARS and the debtor. See s 9(4A)(a)–(iv) of the IA.
[73] S 9(1) of the IA.
[74] See s 8 of the IA.
[75] S 10(c) of the IA.
[76] See ss 3—7 of the IA. See also ss 10 and 12 of the IA.
[77] See s 11 of the IA.
[78] See s 12(1) of the IA.

believe that the sequestration of the debtor's estate would be to the advantage of the creditors.[79]

The major difference between the substantive requirements relating to a provisional order and a final order for sequestration is the "degree of proof required".[80] In the case of a provisional order a mere *prima facie* case will suffice whereas in the case of a final order the court must be satisfied on a balance of probabilities that there is reason to believe that the sequestration of the debtor's estate is to the advantage of the creditors.[81]

In the recent case of *Stratford v Investec Bank Limited*,[82] the Constitutional Court held that the "advantage to creditors" requirement in the context of compulsory sequestration applications means a reasonable likelihood that some pecuniary benefit will accrue. The court opined that the word "advantage" has a broad meaning and should not be ''rigidified''.[83] Consequently, the court should exercise its guided discretion in assessing whether the sequestration will result in some payment to the creditors as a body.[84] Therefore, the idea of specifying the cents in the rand as benefit is unhelpful, especially in situations where there are many creditors.[85]

The compulsory sequestration application also can be accessed by a debtor as a channel of debt relief through a friendly sequestration as earlier stated.[86] A friendly sequestration is a compulsory sequestration application initiated in a situation where the debtor is eager to be sequestrated and as such approaches a friendly creditor (a relative or a friend) to apply for the compulsory sequestration of his estate.[87] The friendly creditor, whose main objective is to come to the assistance of the debtor by

[79] S 12 of the IA.
[80] *Braithwaite v Gilbert* 1984 (4) SA 717 (W) 717.
[81] *Ibid*.
[82] 2015 (3) SA 1 (CC) 22.
[83] See the case of *Stratford v Investec Bank Limited* 22.
[84] *Stratford v Investec Bank Limited* 22.
[85] *Ibid*.
[86] See Mabe and Evans 2014 *SA Merc LJ* 658. In essence, friendly sequestrations are thus compulsory sequestrations.
[87] *Esterhuizen v Swanepoel* 2004 (4) SA 89 (W) 89–91.

virtue of friendly considerations, approaches the court and files a petition for the compulsory sequestration of the debtor's estate.[88]

Even though friendly sequestrations technically do not exist in the IA, this recourse has evolved as a result of consumers' pursuit of debt relief.[89] It has been necessitated by the inability of debtors to initiate the voluntary surrender application due to its more stringent formalities and stricter burden of proof in comparison with compulsory sequestration applications.[90] According to Evans, friendly sequestrations typically are used in order to evade the preliminary formalities required by section 4 of the Act for a voluntary surrender and to avoid the more rigorous task of proving an advantage to creditors.[91]

The practice of using friendly sequestration applications to "assist debtors" has been condemned, some consider it an abuse of the process of the court.[92] This abuse is said to occur when the costs of sequestration exceed the supposed shortfall between assets and liabilities or where the costs incurred in sequestration reduce the amount available for distribution to creditors or where the costs favour administrators rather than the creditors of the insolvent estate.[93]

In *Ex parte Snooke*[94] the court observed the desperate moves of friendly parties to convince the court to grant a friendly application and stated that

> the averments under oath in so-called friendly sequestration and voluntary surrender applications in order to prove advantage to creditors are far from the truth in many instances. My own experience, that sequestration in the majority of cases eventually turns out not to be to the advantage of creditors is no surprise at all.

In the case of *Ex parte Cloete*[95] Daffue J commented on the issue of collusion between parties to abuse friendly sequestration applications stating that in friendly sequestration applications "there is often doubt, or uneasiness, as to the relationship between the

[88] *Ibid*.
[89] Evans 2001 *SA Merc LJ* 485.
[90] See Mabe and Evans 2014 *SA Merc LJ* 656.
[91] Evans 2001 *SA Merc LJ* 491.
[92] See *Mthimkhulu v Rampersad* 2000 (3) All SA 512 (N) 513.
[93] See *Ex parte Shmukler-Tshiko* 2013 JOL 29999 (GSJ) 10 and *Ex parte Arntzen* 49.
[94] 2014 (5) SA 426 (FB) par 25.
[95] 2013 ZAFSHC 45 par 12.

attorney and valuator or between the debtor and the valuator".[96] Consequently, questions were raised as to the validity of valuations arrived at. As such the court stated that "the valuations of the assets were either doubtful, or the sequestration costs and the administration costs pertaining to the liquidation and distribution of the estates were incorrectly calculated, presenting a false picture of the actual costs and the probable dividends payable to concurrent creditors".

I In the recent case of *Botha v Botha*[97] Daffue J reaffirmed his judgment in the case of *Ex parte Cloete* with regard to the veracity of assets valuations and stated that "it must always be remembered that the court is not a rubber stamp for the acceptance of an expert's opinion".[98] The court was of the opinion that the applicant failed to prove that there was reason to believe that sequestration of the estate would be to the advantage of creditors,[99] most especially concurrent creditors who "suffer severely".[100] Consequently, the friendly sequestration application in question was rejected.[101]

A number of guidelines were laid down by the court in 2000 in the case of *Mthimkhulu v Rampersad*[102] to dissuade the abuse of the process of friendly sequestration applications and recent cases have relied on these principles.[103] The practice guidelines are that the debtor must make a full and frank disclosure and provide proof of necessary facts and information such as: [104]

a) Proof of indebtedness which gives the creditor *locus standi*;
b) Full disclosure of the debtor's entire assets (movable and immovable), which establishes advantage to creditors;
c) A valuation report which states the value of assets and proof of authenticity of the valuation arrived at. This valuation must be done by a qualified valuer.

[96] See *Ex parte Cloete* par 15.
[97] 2016 ZAFSHC 194.
[98] *Botha v Botha* par 22.
[99] *Idem* par 33.
[100] *Idem* par 32.
[101] *Idem* par 32–34.
[102] See *Mthimkhulu v Rampersad* 512.
[103] See for example the case of *Ex parte Cloete* par 16 where the principles laid down in *Mthimkhulu v Rampersad* were considered.
[104] See *Mthimkhulu v Rampersad* 514–517.

In conclusion, evaluating the compulsory sequestration procedure in light of international guiding principles on access of debtors to debt relief procedures and a consequent discharge, the same commentaries that were offered in respect of voluntary surrender applications apply here. Both the compulsory sequestration application and the voluntary surrender application lead to the sequestration procedure.[105]

4.3.2 Rehabilitation of the insolvent

The IA provides for the rehabilitation of a debtor who has been sequestrated. The main effect of rehabilitation from a debt relief perspective is that sequestration is terminated and all pre-sequestration debts automatically are discharged, consequently giving the debtor a fresh start.[106] Rehabilitation in terms of the IA can take place automatically after ten years from the date of sequestration of the debtor's estate (also known as rehabilitation by effluxion of time or automatic rehabilitation)[107] or by means of a court order which can be obtained by application to the court within the period of ten years after sequestration.[108]

A debtor is deemed to be automatically rehabilitated after ten years from the date that his estate was sequestrated if there had been no rehabilitation by the court within the ten year period.[109] On the other hand, rehabilitation by means of a court order always is granted subject to the court's discretionary power[110] and when certain conditions of the law are met.[111] The court will grant the order only if the court is persuaded that the debtor can be allowed to transact business with other honest members of society.[112] Also, the order is granted if the court is convinced that the debtor has learnt the lessons of the entire insolvency process and can appreciate the hardship that he has caused the creditors.[113]

[105] See the conclusion of par 4.3.1 above.
[106] S 129(1) of the IA.
[107] S 127A of the IA.
[108] S 124 of the IA.
[109] S 127A(1) of the IA.
[110] *Ex parte Hittersay* 1974 (4) SA 326 (SWA) 328.
[111] See s 124(2)(a–c), s 124(3)(a) and s 124(5) of the IA.
[112] *Greub v* The *Master* 1999 (1) SA 746 (C) 749.
[113] *Ex parte Hittersay* 328.

In the recent case of *Ex Parte Snooke* it was established that the court may decline an application for rehabilitation when the court is convinced that sequestration of the insolvent estate is not to the advantage of the creditors of the insolvent estate.[114] From this case it appears that of late presiding officers are considering (or reconsidering) access requirements and more specifically the "advantage to creditors" requirement at the rehabilitation stage of the procedure.[115]

An insolvent debtor can apply for rehabilitation within the period of ten years after sequestration in the following circumstances:

a) After twelve months from the confirmation of the first trustee account by the master, unless the debtor falls within the provisions of paragraphs (b) and (c) below;[116]
b) In situations where the insolvent debtor had previously been sequestrated an application for rehabilitation can be made only after three years from the confirmation of the first trustee account by the master, unless the matter falls within the provisions of (c) below;[117]
c) If the insolvent debtor has been convicted of a crime in relation to the existing or previous insolvency or other specific offences[118] in terms of the IA, such a debtor may apply for rehabilitation five years after the conviction.[119] The proviso to section 124(2) suggests that an insolvent person may (within a period of four years) apply for a rehabilitation order only under the circumstances listed above in (a—c) where it has been recommended by the master.
d) Where no creditor has proved a claim against an insolvent debtor and the insolvent debtor has not been sequestrated previously or committed any offence in connection to sequestration, he (the insolvent debtor) can apply for rehabilitation six months after the date of sequestration;[120]

[114] See *Ex parte Snooke* para 19 and 41–48.
[115] *Idem* 25.
[116] See s 124(2)(a) of the IA.
[117] See s 124(2)(b) of the IA.
[118] See ss 132, 133 and 134 of the IA for other offences.
[119] See s 124(2)(c) of the IA.
[120] See s 124(3)(a) of the IA.

e) When the insolvent debtor has paid all claims in full and has levied all interest, the debtor immediately can proceed to apply for rehabilitation after the master has confirmed the distribution;[121]
f) An insolvent can apply immediately for rehabilitation if the insolvent debtor and the creditors of the insolvent estate have agreed to a composition and the master has issued a certificate of composition, which states that payment of 50 cents in the Rand of all claims has been paid from the insolvent estate.[122]

Rehabilitation puts an end to the sequestration process, re-instates the status of a debtor prior to sequestration[123] and grants a debtor a discharge from all debts incurred prior to sequestration.[124] A debtor's rehabilitation has no effect on a debtor's sureties or any fine(s) the surety incurred under the IA.[125]

In South Africa a number of impediments rest on an unrehabilitated insolvent after sequestration. These restrictions can be referred to as "the trade-off" to eventually acquiring the discharge of debts.[126] Examples of such restrictions are that an insolvent[127] may not conclude valid contracts without obtaining the prior consent of the trustee if the contract adversely affects or is likely to adversely affect his estate[128] and that an insolvent may not carry on business or be employed in any capacity in the business of a trader who is a general dealer or a manufacturer without the written consent of his trustee.[129] Furthermore, an insolvent is disqualified from being a member of the National Assembly, the Provincial Legislature, Municipal Council or National Council of Provinces[130] and cannot be the director of a company[131] or a business rescue practitioner[132] or partake in the management of a close corporation of which he

[121] See s 124(5) of the IA.
[122] See s 119(7) and s 124 of the IA.
[123] See s 129(1)(a) of the IA.
[124] S 129(1)(a–c) of the IA.
[125] S 129(1)(c) of the IA.
[126] See Roestoff 2018 *THRHR* 2.
[127] Similar restrictions existed under the repealed BA in Nigeria. However, under the proposed BIA a bankrupt person is not faced with such restrictions anymore. See ch 3 par 3.1.
[128] S 23(2) of the IA. See also Nagel *et al Commercial Law* 542.
[129] S 23(2) of the IA.
[130] See s 47(1)(c), s 62, s 106(1)(c) and s 158(1)(c) of the Constitution of the Republic of South Africa Act, 1996.
[131] See s 218(1)(d)(i) of the Companies Act 71 of 2008.
[132] S 69(8)(b) read with s 69(11) and s 138(1)(d) of the Companies Act 71 of 2008.

is a member except with the leave of the court.[133] An unrehabilitated insolvent also is disqualified from being a member of the board of the Land and Agricultural Development Bank of South Africa[134] and several other boards.[135]

These impediments may discourage debtors from taking the sequestration route as a medium for debt relief as is assumed to be the case under the Nigerian BA.[136] It is opined that the restrictions under the BA led to the stigmatisation of insolvent individuals which discouraged them from seeking debt relief via the bankruptcy procedure.[137] The restrictions contributed to the ineffectiveness of the Nigerian BA.[138]

The World Bank *Report* identifies stigma as one of the reasons insolvency proceedings are discouraged in developing countries.[139] Stigma may be in form of a restrictive provision for indebted individuals.[140] Therefore, the World Bank *Report* advises that lawmakers should avoid legislation that uses judgmental language, includes punitive measures and places restrictions on debtors. The purpose of this recommendation is to ensure that debtors are not treated differently from non-debtors in society and to avoid discrimination against debtors who have initiated insolvency proceedings.[141]

4.4 Composition

A debtor in South Africa has the option of making an offer for composition through the common law composition route[142] or via the statutory composition under the IA.[143] A composition in the context of insolvency law has been defined as[144] "an agreement between the insolvent and his or her creditors in terms of which the parties agree that

[133] S 47(1)(b)(i) of the Close Corporations Act 69 of 1984.
[134] Ss 1 and 10 of the Land and Agricultural Development Act 15 of 2002.
[135] See Roestoff 2018 *THRHR* 1–11 and 21–22 for further discussion of restrictions that rest on an insolvent in South Africa and an analysis of the untold hardship these restrictions may cause on an honest, competent and responsible debtor who has been denied employment opportunities which can help elevate his financial status.
[136] The Nigerian BA had similar provisions which restricted a bankrupt. See s 126(1)(a)—(e) of the BA as discussed ch 3 par 3.1. These provisions are seen as one of the major reasons the bankruptcy system is under-utilised, because it led to stigma. However, a major reform has taken place with the proposed BIA as it eliminates these provisions.
[137] See ch 3 par 3.1.
[138] *Ibid*.
[139] See ch 2 par 2.5.1.
[140] *Ibid*.
[141] See ch 2 para 2.5.1, 2.5.2 and 2.5.4 for discussions on the World Bank *Report* on stigma and discrimination of debtors.
[142] See Bertelsmann *et al Mars* 547.
[143] See s 119 of the IA.
[144] See Boraine and Delport *Insolvency* 570.

the creditors' claims will be paid partially or in full, subject to certain circumstances and conditions, as a full and final settlement".

Furthermore, the Law Reform Commission has proposed provision be made for a pre-liquidation composition for debtors who do not qualify for the sequestration procedure in the event that they cannot satisfy the advantage for creditors' requirement.[145] However, this provision is yet to be implemented.[146]

The common law composition requires that the debtor enters into some form of agreement with his creditors on dividends to be paid on creditors' claims.[147] The parties can enter into a common law composition agreement before or after the granting of the provisional sequestration order.[148]

A common law composition is based on the principles of the law of contract and as such binds only the creditors who agreed to it.[149] A common law composition has the advantage of not affecting the status of a debtor or his contractual capacity. This means that the debtor's assets remain vested in him.[150]

The implication of the common law composition is that the original contracts entered into by the debtor and his creditors are terminated and that a new one is established.[151] The termination of the former contract may afford relief to a debtor.[152] For instance, debts may be written off in whole, in part, or the terms of the repayment plan can be made more favourable.[153] The new contract may take the form of a contract of release,[154] compromise[155] or novation.[156]

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[145] See cl 118(10) 2015 Insolvency Bill.
[146] The pre-liquidation composition procedure will be discussed later in the thesis under the South African reform initiatives in par 4.6.2.
[147] See Bertelsmann *et al Mars* 547.
[148] Sharrock *et al Hockly's insolvency law* 188.
[149] See *De Wit v Boathavens CC* 1989 (1) SA 606 (C) 611.
[150] Smith 1968 *THRHR* 29–30.
[151] See Otto and Prozesky-Kuschke *Breach of contract and termination of contractual relationship* 148.
[152] *Ibid*.
[153] *Ibid*.
[154] Release can be described as
> a bilateral act based on consensus between the two contracting parties where the creditor makes an offer to release the debtor and where the debtor may accept such an offer or not.

See Otto and Prozesky-Kuschke *Breach of contract and termination of contractual relationship* 148.
[155] A compromise or settlement
> refers to an agreement between parties to settle a dispute. Where a dispute is settled in such a manner the initial contract

The new contract entered into can represent different forms of the common law composition, which have no statutory recognition. The conclusion of such contracts will provide a way out only to debtors whose creditors are cooperative.[157]

Section 119 of the IA provides for a statutory composition procedure.[158] This procedure entails that an insolvent debtor make an offer through his trustee for composition to the creditors of the insolvent estate. The offer may occur at any time after the first meeting of creditors.[159] The composition may be in the form of an agreement that claims will be paid in part or in full as full and final settlement.[160] It is pertinent to note that the rights and duties of all parties are determined by the composition agreement and all relevant provisions in the IA.[161]

Because the statutory composition is available only after a provisional sequestration order has been granted it is not an independent procedure and therefore cannot assist those who are excluded from the sequestration procedure such as NINA debtors.[162] Where the composition fails the formal process for liquidation automatically will continue.[163] In the context of a composition an insolvent may immediately apply for his rehabilitation (with three weeks' notice) if he has paid 50 cents in the Rand in respect of proven claims or has provided security.[164]

In evaluating possible compositions from a debt relief perspective, the common law composition does not require a debtor to have some form of assets to prove an advantage to creditors. Furthermore, it is a non-judicial procedure and as such

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is terminated and replaced with a new settlement contract, which from there on will regulate the rights and duties of the parties.
See Otto and Prozesky-Kuschke *Breach of contract and termination of contractual relationship* 148–149.

[156] Novation refers to the situation where parties to a valid contract conclude a second contract with the aim of terminating and replacing the initial contract with the second one. The implication is that an old debt is cancelled through the creation of a new debt in its place.
See Otto and Prozesky-Kuschke *Breach of contract and termination of contractual relationship* 149.

[157] See Roestoff *'n Kritiese evaluasie* 420 as referred to by Coetzee *A comparative reappraisal of debt relief measures* 291.

[158] The statutory composition is a debt relief procedure which stems from the IA but it is discussed alongside the common law composition which does not come under the IA.

[159] S 119(1) of the IA.

[160] *Ibid*.

[161] *Ilic v Parginos* 1985 (1) SA 795 (A).

[162] See Coetzee *A comparative reappraisal of debt relief measures* 168.

[163] The statutory composition procedure under the IA is similar to the proposal procedure under the repealed Nigerian BA. See ch 3 par 3.4.

[164] See s 124(1) of the IA.

eliminates the challenge of the high cost of proceedings. Also it overcomes the challenge of the delay experienced in relation to judicial proceedings. Therefore, it is accessible to a wide range of debtors, irrespective of their financial status, including NINA debtors. However, successful common law compositions are rare because in order to be effective it has to obtain consent from all creditors.[165] This requirement appears impracticable where debtors are seriously over-indebted, such as is the case with NINA debtors. In this respect and according to Coetzee, "the chances of all credit providers reaching a common agreement to such effect are slim".[166] Even though a common law composition could provide for a discharge of debts, subject to agreement by the parties, and as such adheres to international guiding principles in relation to access and discharge, it is most likely it will not work for NINA debtors.

The statutory procedure, on the other hand, can be accessed only under sequestration as earlier stated. The implication is that the statutory composition faces the same shortcomings as the sequestration procedure such as the challenge of high costs in initiating sequestration proceedings and the challenge in proving an advantage to creditors. In essence, the statutory composition under the IA cannot be accessed by a good number of debtors (including NINA debtors) because they cannot afford the costs of initiating sequestration proceedings and also do not have any income or assets to negotiate terms with creditors. Consequently, they cannot obtain a discharge. The statutory composition only aligns with the international guiding principles of access and discharge if there are other procedures that cater for other groups of debtors which it excludes.[167]

4.5 Alternative debt relief measures

4.5.1 Introduction

The sequestration procedure is severe on lower and no-income debtors considering its access requirements and nature.[168] However, there are a number of statutory

[165] Coetzee *A comparative reappraisal of debt relief measures* 302 and 303.
[166] *Idem* 303.
[167] *Ibid*.
[168] Van Heerden and Boraine 2009 *PELJ* 86.

alternatives to the sequestration procedure which can be explored by an indebted individual.

The alternative statutory procedures are the administration order procedure under the MCA[169] and the debt review procedure in terms of the National Credit Act (NCA).[170]

4.5.2 Administration order procedure

The administration order procedure was introduced in South Africa under the influence of the English law[171] and represents a repayment plan procedure which can be explored by debtors who do not qualify for sequestration.[172] The administration order procedure has been described as a simple and inexpensive alternative procedure available to debtors who find themselves in financial difficulties.[173] It affords such debtors the opportunity to obtain "a statutory rescheduling of debt sanctioned by a court order".[174]

Theophilopoulos describes the procedure as follows:[175]

> In terms of the order, the debtor has an obligation to make regular payments to the administrator. The administrator, after deducting necessary expenses and a specified remuneration determined by tariff, would in turn make a regular distribution in weekly or monthly instalments or otherwise out of such received payments to all creditors.

The administration order procedure is most appropriate for persons who have a regular source of income.[176] The aim of this procedure is to prevent debtors in financial difficulty experiencing the financial embarrassment of being sequestrated because they are afforded an opportunity to pay off their debts in a conveniently restructured way.[177]

The Supreme Court of Appeal in the case of *Bafana Finance Mabopane v Makwakwa*[178] summarised the purpose of the administration order procedure as being to help protect debtors who have small estates (often the illiterate or the poor) and secondly to ensure

[169] See s 74 of the MCA.
[170] See s 86 of the NCA.
[171] Boraine 2003 *De Jure* 219.
[172] Paterson *Eckard's Principles of civil procedure in the Magistrates' Courts* 318.
[173] See Greig 2000 *SALJ* 626.
[174] See Boraine 2003 *De Jure* 217–218.
[175] Theophilopoulos *et al Fundamental principles of civil procedure* 376.
[176] Paterson *Eckard's Principles of civil procedure in the Magistrates' Courts* 318.
[177] See *Cape Town Municipality v Dunne* 1964 (1) SA 741 (C) 744. See also *African Bank Limited v Jacobs* 2006 (3) SA 364(C) 365.
[178] 2006 (4) SA 581 (SCA)

that creditors are able to recover as much as possible from their debtors.[179] An administration order may be granted by a court in the district where the debtor lives, works or carries on business[180] and the order is granted only in the following circumstances:[181]

a) Where a judgment debtor does not have the financial capacity in a lump sum to satisfy the judgment debt obtained against him by a judgment creditor;
b) Where a debtor does not have sufficient assets or funds to meet any of his financial obligations or satisfy any judgment debt; or
c) Where the judgment debtor is before the court for an investigation into his financial affairs under section 65 and during the investigation he applies for an administration order.

Administration orders are available to persons whose debts do not exceed the amount determined by the minister of justice. The amount is published through a notice in the official gazette from time to time.[182] The current amount stated is R50 000.[183] Every debt that has been listed in the statement of affairs presented before the court is regarded as being proved unless amended by the court.[184] The debts anticipated here are debts that are "due and payable" and do not include *in futuro* debts (debts that are only due to be paid in the future).[185]

To commence the procedure the debtor files an application at the Magistrate's court. The application should be accompanied by a statement of his affairs, which should detail information required by the law and which should be in the prescribed form.[186]

The magistrate presides over the case and the parties before the court are the debtors, creditors and their legal representatives. The debtor can be questioned by the creditors, their legal representatives or the court on any of the following issues:[187]

[179] See *Bafana Finance Mbopane v Makwakwa* 2006 (4) SA 581 SCA 587–588.
[180] See s 74(1) of the MCA.
[181] S 74(1)(a) of the MCA.
[182] See s 74(1)(b) of the MCA.
[183] S 74(1)(b) of the MCA, GN R217 in GG 37477 of 27 March 2014. In essence, any debtor that is indebted to an amount exceeding this amount cannot obtain relief through this procedure.
[184] See s 74B(1)(a) and (b) of the MCA.
[185] See the case of *Cape Town Municipality v Dunne* 745–746.
[186] S 74(1) and 74A(1) and (2) of the MCA. See also forms 44 and 45.

a) Assets and liabilities;
b) current and future income of the debtor and his spouse;
c) current standard of living; and
d) other matters that the court may deem relevant.

A wide discretion is given to the court to take any decision that it deems fit with regards to the application.[188] However, this discretion must be exercised judicially.[189]

When the court is satisfied with the debtor's application, the court grants an administration order in the prescribed form and an administrator is appointed to see to the implementation of the administration order.[190] The order made will reveal a weekly or monthly payment plan/arrangement of money which should be paid by the debtor to the administrator.[191] This amount to be paid takes into cognisance the living expenses of the debtor, his dependants and existing maintenance orders.[192]

An administrator is appointed to draw up a list of creditors and the amounts owed to each of them as on the day the order was granted[193] and the administrator undertakes the task to collect payments in terms of the order and disperse them respectively among the creditors.[194] Once all costs of administration and all creditors listed have been paid in full the administrator will lodge a certificate with the clerk of the court and the administration order terminates.[195]

Criticisms have been levied against the administration order procedure; that it is difficult to implement[196] and often is abused by administrators.[197] Furthermore, the process is

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[187] See s 74B(1)(e) of the MCA.
[188] Paterson *Eckard's Principles of civil procedure in the Magistrates' Courts* 326.
[189] *Fortuin v Various Creditors* 2004 (2) SA 570 (C) 573.
[190] S 74E of the MCA.
[191] S 74I of the MCA.
[192] *Ibid*.
[193] See s 74G(1) of the MCA.
[194] See s 74J(1) of the MCA.
[195] S 74U of the MCA.
[196] The administration order procedure has been criticised for being difficult to implement because there is a lack of the uniform application of the process. The reason for the lack of a uniform application of the process is because the Magistrate Courts are seen to be operating varying application process rules. See Boraine 2003 *De Jure* 218.
[197] See Boraine 2003 *De Jure* 217, 230–234 with respect to the position of administrators in particular. See also Boraine and Roestoff 2014 *THRHR* 353. The challenge of suspected abuse by administrators has been identified as one of the problems in respect of administration orders. A number of things have contributed to the abuse such as allowing under-regulated entities to provide services as an administrator. See *African Bank Ltd v Weiner* 2005 (4) SA 363 (SCA) 366. The courts also have been blamed for not being meticulous enough in carrying out sufficient background checks in the appointment of administrators. For example, practitioners or attorneys who have already been struck of the roll are being appointed. Furthermore, administrators

restrictive in its scope of application[198] and does not provide for the discharge of the debts of debtors who have successfully gone through the procedure.[199]

In conclusion, the administration order procedure is inaccessible to a wide range of debtors for a number of reasons. First, the administration order procedure is a repayment plan procedure and as such is not suitable for NINA debtors who do not have any form of income that can form the basis of a repayment plan. Also, the administration order procedure restricts the access of debtors who owe more than R50 000.[200] Consequently, considering international guiding principles, [201] the administration order procedure satisfies the principle of access, (which states that every debtor must have access to debt relief irrespective of their financial state) only if there are other debt relief procedures available to other classes of debtors who have been excluded by the administration order procedure in South Africa.[202]

Furthermore, as the administration order procedure does not provide for a discharge of debts it also does not satisfy the international principle of discharge, which requires discharge to be available to every debtor.[203]

4.5.3 The debt review procedure

Section 86 of the NCA provides a debt review procedure, loosely referred to as debt counselling.[204] The debt review procedure is a debt restructuring procedure[205] that pertains only to credit agreements regulated by the NCA.[206] It involves a re-organising of the financial obligations of a distressed debtor.[207]

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were said to have been charging fees higher than the required tariff which deepened the debtor's financial situation. See *African Bank Ltd v Weiner* 366.

[198] The administration order procedure has a debt limit of R50 000 as such it has been criticised because it excludes many insolvent debtors. See Coetzee *A comparative reappraisal of debt relief measures* 237.

[199] See Boraine 2003 *De Jure* 218.

[200] See par 4.4.2.

[201] See ch 2 par 2.6.

[202] *Ibid*.

[203] See ch 2 par 2.6.

[204] Coetzee *A comparative reappraisal of debt relief measures* 189.

[205] See Van Heerden and Boraine 2009 *PELJ* 23.

[206] See s 86 of the NCA.

[207] See Van Heerden and Boraine 2009 *PELJ* 23. Besides the fact that access to this procedure is limited to debts that arose from credit agreements in terms of the NCA, it involves a re-scheduling of debts, just as the administration orders and as such, is not suitable for a NINA debtor.

The Supreme Court of Appeal in the case of *Collett v FirstRand Bank Limited*[208] expressed the view that "[t]he purpose of debt review is not to relieve the consumer of his obligations, but to achieve either a voluntary debt re-arrangement or a debt re-arrangement by the Magistrate's Court".

The NCA regulates only certain types of civil obligations collectively termed credit agreements.[209] Generally speaking, the NCA applies to credit agreements between parties that are unrelated and which have legal consequences in South Africa.[210]

An agreement constitutes a credit agreement if it qualifies as a credit facility,[211] credit transaction[212] or a credit guarantee for credit facilities or credit transactions.[213] When an agreement does not resort under the definition of a credit facility, transaction or guarantee, an agreement still constitutes a credit agreement if it is characterised by a payment deferral and the levying of a charge fee or interest.[214] The characteristics of credit agreements are a deferral of payment and fees, charges or interest imposed in respect of the deferred payment.[215]

Once it is established that an agreement constitutes a credit agreement under the NCA the next requirement to consider is whether the agreement was between parties dealing at arm's length.[216] This is necessary as the NCA applies only to agreements where parties are dealing at arm's length.

The NCA does not define "dealing at arm's length". However, a number of examples illustrate situations where parties are considered not to be dealing at arm's length.[217] Examples of such agreements are credit agreements between natural persons in

[208] 2011 (4) SA 508 (SCA) 514.
[209] See s 1 of the NCA.
[210] S 4 of the NCA.
[211] An agreement is regarded as a credit facility if a credit provider supplies goods, services or money to a consumer from time to time and the credit provider defers the consumer's obligation to pay any part of the goods, services and money periodically. See s 8(3)(a)(i) of the NCA.
[212] An agreement would constitute a credit transaction if the agreement is a pawn transaction, discount transaction, incidental credit agreement, instalment agreement, mortgage agreement, secured loan, or a lease of movable property. See s 8(4) of the NCA. See also s 1 for the definitions of these agreements.
[213] An agreement is regarded as a credit guarantee if a person undertakes or promises to satisfy upon demand any obligation of another consumer in terms of a credit facility or a credit transaction to which the NCA applies. See s 8(5) of the NCA. This is commonly referred to as a suretyship.
[214] See s 8(4)(f) of the NCA.
[215] See Otto and Otto *National Credit Act explained* 8.
[216] See s 4(1) of the NCA.
[217] See s 4(2)(b)(i)–(iv) of the NCA for examples of arrangements where the parties would be considered not to have dealt at arm's length.

familial relationships who are co-dependent on one another or when one is dependent on the other[218] or situations where parties are not independent of one another and as a result do not strive to obtain the utmost possible advantage out of the transaction.[219] The last general requirement to consider is whether the credit agreement was concluded within South Africa or has an effect within the Republic of South Africa.[220]

The NCA further specifically excludes some credit agreements from the auspices of the Act, such as debt arising from a continuous service, credit extended for the purpose of an insurance policy or maintaining premiums on insurance policies, credit collected for purpose of a lease on immovable property, a transaction between a *stokvel* and its members and debts resulting from a dishonoured cheque or similar instrument.[221] Furthermore, some agreements to which the NCA provisions generally apply are excluded specifically for purposes of the debt review procedure. For example, section 86(2) of the NCA provides that "[an] application in terms of this section may not be made in respect of, and does not apply to, a particular credit agreement if, at the time of that application, the credit provider under that credit agreement has proceeded to take the steps contemplated in section 130 to enforce that agreement".[222]

Additionally, juristic persons acting in the capacity of a consumer are excluded from the provisions of chapter 4 part 4D of the NCA which relates to over-indebtedness and reckless credit.[223] Also, in situations of incidental credit agreements,[224] student loans,[225] pawn transactions,[226] emergency loans,[227] public interest credit agreement,[228] or a temporary increase in the credit limit under a credit facility the application of the NCA is limited.[229]

[218] See s (4)(2)(b)(iii) of the NCA.
[219] See s 4(2)(b)(iv)(aa) of the NCA.
[220] See s 4(1) of the NCA.
[221] See s 4(1)(a–d), 4(2)(a–b), s 4(5), s 4(6)(b), s 8(2)(a), s 8(2)(b), s 8(2)(c) of the NCA for specific credit agreements excluded from the ambit of the NCA.
[222] See s 86(2) of the NCA.
[223] See s 78(1) of the NCA
[224] See s 78(2)(e) of the NCA.
[225] See s 78(2)(a) of the NCA.
[226] See s 78(2)(d) of the NCA.
[227] See s 78(2)(b) of the NCA.
[228] See s 78(2)(c) of the NCA.
[229] See s 78(2)(f) of the NCA.

Under the NCA a debtor is considered to be over-indebted when he cannot meet his financial obligations as they fall due.[230] To commence the debt review procedure a debtor would make an application to a debt counsellor to be placed under debt review.[231]

On receipt of the debt review application the debt counsellor may request that the debtor pay an application fee, not more than the prescribed amount, before accepting an application for debt review.[232] Also, the debt counsellor must provide the debtor with a proof of receipt of the application[233] and inform all the creditors listed in the application and all credit bureaus of the application for debt review within five business days after receiving the application.[234]

The debt counsellor then determines in the prescribed manner and within the prescribed time frame whether or not the debtor is over-indebted.[235] In a situation where the debtor is found not to be over-indebted the debt counsellor must provide the debtor with a rejection letter.[236] However, the debtor has an opportunity of applying directly to the Magistrate's Court by seeking the leave of the court in the prescribed form when his application for debt review has been turned down by the debt counsellor.[237] The application should be made within 20 business days after the debt counsellor must have issued the letter of rejection.[238]

I In situations where the debt counsellor discovers that a debtor is not over-indebted but rather is experiencing difficulty in fulfilling his financial obligations timeously, the debt counsellor recommends that the debtor and the respective credit providers consider a voluntary proposal for debt re-arrangement.[239] Peradventure the debtor and his respective credit providers come to an agreement and adopt a proposal it must be

[230] S 79 of the NCA.
[231] See s 86(1) of the NCA.
[232] See s 86(3)(a) of the NCA.
[233] See s 86(4)(a) of the NCA.
[234] See s 86(4)(b) of the NCA.
[235] See s 86(6)(a) of the NCA. The debt counsellor would refer to s 79 of the NCA and also consider reg 24(7)(a–)(c) of the National Credit Regulations 2006 (hereafter referred to as the Regulations) while determining whether or not the debtor is over-indebted.
[236] See reg 25 of the Regulations.
[237] See s 86(9) of the NCA.
[238] See reg 26 of the Regulations.
[239] See s 86(7)(b) of the NCA.

recorded by the debt counsellor in the form of an order.[240] If the order is consented to by the debtor and his credit providers it will be filed with the court or the Tribunal[241] as a consent order according to section 138.[242] In the event that a debtor and his credit providers fail to come to an agreement, the debt counsellor must refer the matter to the Magistrate's Court with a recommendation.[243]

In situations where a debtor is found to be over-indebted, in practice the debt counsellor must approach the credit providers with a proposal for a voluntary repayment plan as a first option before approaching the court for debt rescheduling.[244] If the voluntary repayment plan option fails between the debtor and his credit providers, the debt counsellor can make a proposal to the Magistrate's Court stating that any of the following orders be made:

a. That one or more of the consumer's credit agreements be declared reckless or/and[245]
b. That one or more of the consumer's commitments to his credit providers be re-arranged by[246]

(aa) extending the period of the agreement and reducing the amount of each payment due accordingly;
(bb) postponing during a specified period the dates on which payments are due under the agreement;
(cc) extending the period of the agreement and postponing during a specified period the dates on which payments are due under the agreement; or
(dd) recalculating the consumer's obligations because of contraventions of Part A or B of Chapter 5, or Part A of Chapter 6.

The Magistrate's Court can decide to implement any of the orders proposed by the debt counsellor or decide not to accept any.[247] It is pertinent to note that the court would expect the debt counsellor to ensure that proposals made on behalf of debtors are "economically justifiable".[248] The court frowns on the use of computer-generated debt repayment proposals which may end up being economically unjustifiable. The court

[240] See s 86(8)(a) of the NCA.
[241] "Tribunal" means the National Consumer Tribunal established by s 26 of the NCA. See s 1 of the NCA.
[242] *Ibid*.
[243] See s 86(8)(b) of the NCA.
[244] Scholtz *Guide to the Naitonal Credit Act* par 11.3.3.2. See s 12 of the NCA and reg 10A(9) of the Regulations.
[245] S 86(7)(c)(i) of the NCA. See also reg 24 of the Regulation.
[246] S 86 (7)(c)(ii)(aa)–(dd) of the NCA.
[247] S 87(1)(a–b) of the NCA.
[248] See *Firstrand Bank Ltd t/a First National Bank v Seyffert and others* 2010 (6) SA 429 (GSJ) 433. See also Scholtz *Guide to the Naitonal Credit Act* par 11.3.3.2.

would expect the debt counsellor to advise parties to pursue other remedies in situations where re-payment schedules are not justifiable.[249]

After an application for debt review has been filed at the court or Tribunal a credit provider may not terminate an application for debt review except in situations where a debtor is found to have defaulted under the credit agreement.[250] After an order for debt review has been granted by the court the payment distribution agent (PDA) is vested with the power to aid payments of the re-arranged instalments to credit providers.[251] The PDA is required to distribute the re-arrangement instalments among the credit providers within five days of receipt.[252]

A debtor whose debts have been re-arranged in terms of part D of chapter 4 must be issued with a clearance certificate by the debt counsellor within seven days after the debtor has satisfied all obligations under every credit agreement that was subject to the debt re-arrangement order.[253] The debtor has to demonstrate the financial ability to satisfy future obligations in terms of the re-arrangement order or agreement under a mortgage agreement which secures a credit agreement for the purchase or improvement of immovable property or any other long term agreement prescribed.[254]

A debt counsellor within seven days of issuing the debtor a clearance certificate must file a certified copy of the certificate with the national register established in terms of section 69 of this Act and all registered credit bureaus.[255] Also, the credit provider within seven days after settlement must submit settlement information to all registered credit bureaus in situations where the agreement was the subject of an adverse classification of consumer behaviour or classification of enforcement action against a consumer or a listing recorded in the payment profile of the consumer or a judgment

[249] See *BMW Financial Services (SA) (Pty) Ltd v Mudaly* 2011 (2) All SA 207 (KZD) 223.
[250] See s 86(10)(b) of the NCA.
[251] See reg 10A(9) of the Regulation for the duties and obligations of a PDA.
[252] *Ibid*.
[253] See s 71(1A) of the NCA.
[254] See s 71(1A)(a) and (b) of the NCA. See also Scholtz *Guide to the Naitonal Credit Act* par 11.3.3.2.
[255] See s 71(4)(a) of the NCA.

debt.[256] Thereafter, the credit bureaus expunge any form of negative listings made against the debtor.[257]

If a debt counsellor decides not to issue or fails to issue a clearance certificate, the debtor may apply to the Tribunal to review the decision of the debt counsellor.[258] If the Tribunal is satisfied with the debtor's appeal, the Tribunal may order the debt counsellor to issue the clearance certificate.[259]

One of the purposes of the NCA is to discourage reckless credit granting by credit providers[260] and the NCA therefore encompasses situations where a credit agreement may be considered as reckless credit.[261] A credit provider has a duty to ensure that he does not enter into a reckless credit agreement with a debtor.[262] Section 80 of the NCA provides for situations where a credit agreement is considered to be reckless credit.[263]

A credit agreement constitutes reckless credit according to the provisions of section 80(1) of the NCA if the credit provider[264]

a) fails to carry out a proper financial background check on the debtor notwithstanding what the outcome would have been at that time;[265] or
b) having carried out a proper assessment of the debtor, still went ahead to grant the credit despite the fact that the assessment revealed that the debtor would be over-indebted by entering into the agreement;[266] or
c) having carried out a proper assessment of the debtor, still went ahead to grant the credit despite the fact that the information available indicated that the consumer did not generally appreciate or understand the risks, costs or obligations that are tied to the proposed consumer agreement.[267]

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[256] See s 71A(1) of the NCA.
[257] See s 71(6) and 71A (2) of the NCA.
[258] See s 71(3) of the NCA.
[259] *Ibid*.
[260] See s 3(c)(ii) of the NCA.
[261] "Reckless credit" means the credit granted to a consumer under a credit agreement concluded in circumstances described in section 80, see s 1 of the NCA. See also s 80(1) of the NCA for instances where a credit agreement is considered reckless.
[262] See Otto and Otto *National Credit Act explained* 90.
[263] S 1 and s 80(1) of the NCA.
[264] See s 80(1) of the NCA and Otto and Otto *National Credit Act explained* 90.
[265] S 80(1)(a) of the NCA.
[266] S 80(1)(b)(ii) of the NCA.
[267] S 80(1)(b)(i) of the NCA.

When a debtor raises the defence of reckless credit, the debtor is expected to prove the necessary facts to substantiate the claim.[268] It is important for the court to establish if the debtor was over-indebted at the time of the proceedings, because the fact that a credit agreement was recklessly granted does not automatically guarantee over-indebtedness on the part of the debtor.[269]

When a court declares a credit agreement reckless in terms of section 80(1)(a) or 80(1)(b)(i) of the NCA, it may make an order to[270]

a) set aside all or part of the debtor's rights under the agreement if it is just and reasonable; or
b) suspend the force and effect of the credit agreement in accordance with subsection 3(b)(i) of the NCA.

The effect of the court setting a reckless credit agreement aside (in whole or in part) is that the debtor will not be expected to perform his obligations with regard to the part of the agreement set aside.[271] In the case of *SA Taxi Securitisation (Pty) Ltd v Mbatha* the court established that in situations where the consumer makes a valid claim that it was the recklessness of the credit provider that led him into entering the credit agreement, the court may consider it "'just and reasonable" to "set aside the agreement".[272] Consequently, the agreement is rendered null and void as if it never existed.[273] The debtor in this case would have no need to fulfil his obligations under the credit agreement and is released from further indebtedness or a deficiency claim under the agreement.[274]

As stated in the case of *SA Taxi Securitisation (Pty) Ltd v Mbatha,* the effect of the court suspending the force and effect of the credit agreement is that the debtor would not be expected to pay interest, fees and charges,[275] which means all "elements of the

[268] See *SA Taxi Securitisation (Pty) Ltd v Mbatha* 2011 (1) SA 310 (GSJ) 321.
[269] S 83(3)(a) of the NCA.
[270] S 83(2)(a) and (b) of the NCA.
[271] See s 84(1) of the NCA.
[272] *SA Taxi Securitisation (Pty) Ltd v Mbatha* 319.
[273] *Ibid*.
[274] *Ibid*.
[275] See the case of *SA Taxi Securitisation (Pty) Ltd v Mbatha* 332.

agreement would have to be suspended".[276] At the end of the suspension the rights and duties of both parties (debtors and credit providers) automatically are re-instated except in situations where the court states otherwise.[277] The effect of the court suspending the force and effect of the credit agreement will not result in the discharge of debt as is the case with setting aside credit agreements.[278]

The court also can declare that a credit agreement is reckless in terms of section 80(1)(b)(ii). In such instances, the court

(a) must further consider whether the consumer is over-indebted at the time of those court proceedings; and

(b) if the court concludes that the consumer is over-indebted, the court may make an order to suspend the effect of the credit agreement until a later date determined by the court and also make an order to restructure the consumer's obligations in terms of section 87.[279]

With respect to this provision on reckless credit the financial state of the debtor is considered at two stages, namely the stage when the credit agreement was entered into and the stage when it was determined that reckless credit was granted. The order made by the court in this latter circumstance will not lead to the discharge of a debtor, but only to the restructuring of the consumer's obligations as is the case with debt review in general.

In summary, debt review under the NCA can best be described as a repayment plan procedure and therefore is not suitable for the NINA group of debtors who do not have income with which to negotiate or who cannot propose a viable proposal. Furthermore, it is a procedure restricted to debts incurred by credit agreements regulated by the NCA and only where debt enforcement has not commenced.[280] Generally speaking, a NINA debtor thus is unable to access debt relief through the debt review procedure.[281] However, a NINA debtor may benefit from the end result of a debt review procedure in a

[276] *SA Taxi Securitisation (Pty) Ltd v Mbatha* 319.
[277] S 84(2)(a)(ii) of the NCA.
[278] See Coetzee *A comparative reappraisal of debt relief measures* 280.
[279] See s 8393) of the NCA.
[280] See par 4.5.3.
[281] Coetzee *A comparative reappraisal of debt relief measures* 215 and 235.

situation where a credit agreement has been found to be the subject of reckless credit and the court decides to set aside all or part of the debtors rights under the agreement. In such a situation the debtor is not expected to fulfil his obligations under the credit agreement as explained above.[282]

The debt review procedure does not provide for the discharge of debts at the end of the debt review process. In the example of the court setting aside a reckless credit agreement there is a possibility a NINA debtor is able to access discharge through the debt review procedure. Generally speaking, discharge is not available to debtors under the debt review procedure and it does not satisfy the international guiding principles of discharge.[283]

4.6 Constitutional considerations

Coetzee notes that Evans was the first to raise the issue of the unconstitutionality of insolvency law in relation to South African debtors[284] in the context of the IA. In this respect Evans made the following submission:[285]

> Although the [Insolvency] Act does not provide for different classes of debtors who are to be treated differently in accordance with differing or changing circumstances, it does in fact differentiate between those 'rich debtors' who are able to prove advantage to creditors, and the 'poor debtors' who cannot. This raises the question whether, under present legislation, the door has been opened for these 'poor debtors' to question the constitutionality of their position.

Coetzee builds on Evans by applying the logic of the argument to the broader South African natural person insolvency law, which includes secondary debt relief measures.[286] The argument in relation to whether or not the disenfranchising of poor debtors such as NINA debtors is unconstitutional is juxtaposed to the provisions of the South African Constitution[287] and the Promotion of Equality and Prevention of Unfair Discrimination Act[288] which guarantee the equality of all persons.

[282] See par 4.5.3.
[283] See s 83(3) of the NCA.
[284] See Coetzee *A comparative reappraisal of debt relief measures* 11.
[285] Evans 2002 *Int Insol Rev* 34.
[286] See par 4.5 for secondary debt relief measures.
[287] The Constitution of the Republic of South Africa, 1996 (hereafter referred to as the Constitution).
[288] See the Promotion of Equality and Prevention of Unfair Discrimination Act 52 of 2002 (hereafter referred to as the Equality

Section 9 of the Constitution, which forms part of Chapter 2 the Bill of Rights, states that:[289]

1) Everyone is equal before the law and has the right to equal protection and benefit of the law.
2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality legislative and other measures designed to protect or advance persons or categories of persons, disadvantaged by unfair discrimination may be taken.
3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.
4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.
5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.

'Equality' in terms of the Promotion of Equality and Prevention of Unfair Discrimination Act is the "full and equal enjoyment of rights and freedoms as contemplated in the Constitution and includes de jure and de facto equality and also equality in terms of outcomes".[290]

With reference to equality there are two broad classifications.[291] The first is formal equality which is based on the fact that the law should be applied equally to all persons irrespective of race, class, socio-economic status, etcetera. The second classification is substantive equality which requires an examination of the actual social and economic conditions of groups and individuals to decide whether or not the Constitution's commitment towards equality is realised.[292] Substantive equality signifies a proactive approach to the Constitution. It seeks to impose positive duties on the state and all persons to ensure equality is advanced at all levels.[293]

Act).
[289] See s 9 of the Constitution.
[290] See s 1 of the Equality Act.
[291] Currie and De Waal *Bill of Rights* 213.
[292] *Ibid*.
[293] Albertyn and Goldblatt *Introduction to the Promotion of Equality and Prevention of Unfair Discrimination Act: Act 4 of 2000* 125–126.

It has been argued that there are two key deterministic tests when considering if the right to equality of certain persons has been violated under the law.[294] The first test is the determination of similarities in people's situations, whereas the second test determines what constitutes equal treatment to those who are dissimilarly situated.[295]

Coetzee considers the two key deterministic tests in the field of natural person insolvency law.[296] Having applied the first test, she argues that there are similarities between the situations of all insolvent persons because "all insolvent natural persons universally face the exact same difficulties, namely, the inability to service debt and the consequential socio-economic adversities attached thereto".[297]

On the other hand, dissimilar issues in respect of individual debt-related predicaments are the level of contribution that these individuals can make towards servicing part of their debt.[298] Consequently, Coetzee, having considered the second key deterministic test, submits that the main issue to be determined is whether debtors who are facing similar financial difficulties but who do not have the same repayment capacity should be treated in the same manner and, if that is the case, what then constitutes equality in the insolvency law context.[299]

To answer these questions and more specifically whether the exclusion of NINA debtors from the entire system constitutes unfair discrimination, she employed the three stage enquiry as set out by the Constitutional Court in the *Harksen v Lane*[300] case. The first question she considers is whether or not there is differentiation between people or categories of people under the system. Relying on the *Harksen v Lane* case in respect of the restricted access of debtors (most especially NINA debtors) to the three debt relief measures provided in South Africa,[301] it appears that the South African natural

[294] *Idem* 210.
[295] *Ibid*.
[296] See Coetzee *A comparative reappraisal of debt relief measures* 14.
[297] *Ibid*.
[298] *Ibid*.
[299] *Ibid*.
[300] 1998 (1) SA 300 (CC) 302–303. The *Harksen v Lane* decision was reached under the Interim Constitution of the Republic of South Africa 200 of 1993 (hereafter referred to as the Interim Constitution). The provisions of the Interim Constitution run parallel to provisions in the 1996 Constitution.
[301] See par 4.3, 4.4 and 4.5.

person insolvency system differentiates between categories of debtors.[302] For example, distinctions are drawn between debtors who have something to offer their creditors (whether assets or income) and those who do not have something to offer.[303] Coetzee states that it is unclear if the differentiation of NINA debtors from other debtors should be classified as differentiation based on social origin, which is a listed ground. If discrimination is based on a listed ground, it automatically amounts to unfair discrimination.[304] Because it is not established that a listed ground is applicable, the tests as set out in *Harksen v Lane* are used rather to determine whether the differentiation of NINA debtors under the insolvency system as a whole amounts to unfair discrimination.[305]

Having observed that there is differentiation, it is important subsequently to establish whether the differentiation is based on a legitimate government purpose.[306] If it is not based on such a purpose, it constitutes discrimination. However, *Harksen v Lane* states that even in situations where differentiation bears a rational connection to a legitimate government purpose, nevertheless it might amount to discrimination.[307]

Coetzee states that the primary purpose of the IA is to regulate the sequestration procedure by ensuring that there is an orderly and fair distribution of the assets of the insolvent estate among creditors.[308] Therefore, it seems logical to conclude that only debtors who can prove an advantage for creditors are allowed access to the procedure[309] and, as such, its object is legitimate.[310] As regards the debt review procedure Coetzee states that the legislative purpose of the NCA, which is to ensure that all debts under credit agreements are satisfied, most likely is responsible for the

[302] See Coetzee *A comparative reappraisal of debt relief measures* 17, where she applies the first enquiry as set out in *Harksen v Lane* 302.
[303] See par 4.3 for discussions on debtors who may be admitted into each debt relief procedures and those who are perpetually exempt from all procedures (NINA debtors).
[304] The argument that the exclusion of NINA debtors amounts to indirect unfair discrimination based on race also Was advanced based on the fact that more black South Africans fall under the NINA group of debtors than white South Africans. However, conclusions cannot be made that there is differentiation based on race, because the South African insolvency law is neutral as regards race. See Coetzee *A comparative reappraisal of debt relief measures* 17.
[305] See s 9 of the Constitution.
[306] *Harksen v Lane* 303.
[307] *Ibid*.
[308] Coetzee *A comparative reappraisal of debt relief measures* 156.
[309] See Coetzee and Roestoff 2013 *Intl Insolv Rev* 208.
[310] Coetzee *A comparative reappraisal of debt relief measures* 156 and 228.

exclusion of a large number of debtors.[311] This legislative purpose can be viewed as sincere and laudable and a legitimate purpose even though it is not practically achievable in all cases.[312] Also, she considers the administration order procedure and opines that it is unclear why only debtors with disposable income qualify for the administration order.[313] Therefore, it is unclear if differentiation under the administration order procedure has a legitimate purpose.[314]

In considering the insolvency system as a whole (thus all three statutory measures), the rationality of allowing only debtors with income or assets to access one of the statutory debt relief procedures has been questioned.[315] In essence, it is unclear why it would be reasonable to grant access only to debtors who have sufficient means to "buy access" when all debtors face the same financial predicament, called insolvency.[316] Even though legitimate government purposes are linked to the differentiation that the sequestration and debt review procedures result in, the indirect marginalisation of NINA debtors that the broader system produces may still constitute discrimination in terms of section 9(1) of the Constitution.[317] This position can be substantiated by *Harksen v Lane*, where it is stated that even if differentiation bears "a rational connection, it might nevertheless amount to discrimination".[318] To make such a determination one needs to establish whether the human dignity of persons has been impaired.[319] In this respect Coetzee suggests that the apparent socio-economic difficulties faced by the NINA debtors and consequent exclusion from all statutory debt relief measures impair NINA debtors' human dignity as opposed to those who have income and assets and thus are allowed to access statutory debt relief measures.[320] The exclusion adds to such debtors' already degrading financial circumstances by keeping them in a perpetual state of poverty and thereby entrenching "the dichotomy between the 'haves' and the 'have

[311] *Idem* 228.
[312] *Ibid 229*.
[313] *Ibid*.
[314] *Ibid*.
[315] *Ibid*.
[316] *Ibid*.
[317] *Ibid*.
[318] *Harksen v Lane* 303.
[319] *Ibid*.
[320] See Coetzee *A comparative reappraisal of debt relief measures* 230.

nots'".[321] From the foregoing it is safe to say that the systemic exclusion of NINA debtors from all statutory debt relief measures amounts to discrimination.[322]

The next question to be considered is whether or not the discrimination against NINA debtors results in unfair discrimination according to the judgement in *Harksen v Lane*.[323] Unfair discrimination has been defined in the case of *Prinsloo v Van der Linde*[324] as "treating persons differently in a way which impairs their fundamental dignity as human beings, who are inherently equal in dignity".[325]

In considering whether the discrimination is unfair, the impact of the discrimination on the debtor is taken into account considering a plethora of factors, such as the nature of the provision and the purpose of the provision.[326] Coetzee submits that the impact of the discrimination on NINA debtors is obvious considering the fact that they do not have the option of ridding themselves of excessive debt as opposed to their "more well-to-do fellow citizens".[327] As earlier stated the exclusion of NINA debtors impairs their human dignity and adds to their already degrading financial circumstances by keeping them in a perpetual state of poverty.[328] Having taken the impact of the unfair discrimination into consideration, the nature and purpose of the provision are examined.[329] According to Coetzee the purpose of the system is not deliberately to impair the NINA debtor's dignity and the motives behind excluding this group of debtors have not been determined.[330] In this respect the haphazard fashion in which the system as a whole developed, with no actual direction or holistic goal, results in their marginalisation. The consequence of the nature of the system is such that it discriminates against excluded debtors.[331] The discrimination against these debtors negatively impairs their rights and

[321] See Coetzee and Roestoff 2013 *Intl Insolv Rev* 210.
[322] See Coetzee 2016 *Intl Insolv Rev* 42.
[323] *Harksen v Lane* 303.
[324] 1997 (3) SA 1012 (CC).
[325] *Prinsloo v Van der Linde* 1032–1034.
[326] *Harksen v Lane* 321.
[327] See Coetzee and Roestoff 2013 *Intl Insolv Rev* 230.
[328] Coetzee *A comparative reappraisal of debt relief measures* 230
[329] *Ibid*.
[330] *Ibid*.
[331] *Ibid.*

interests as they "will potentially be slaves to their dire financial situation indefinitely, which clearly impairs their fundamental dignity".[332]

The final step to consider once unfair discrimination is established is whether the unfair discrimination of NINA debtors can be justified under the limitations clause according to section 36(1).[333] The insolvency system looked at as a whole demonstrates that the unfounded and unfair differentiation created by the system cannot be justified in terms of the limitations clause set out in section 36.[334]

In conclusion, Coetzee opines that the existing statutory debt relief measures all together result in systemic and unfair discrimination.[335] She explains that if existing debt relief procedures already have specific debtors they cater for, the system might as well provide sufficient specialised procedures that would handle all types of debtors depending on their peculiarity.[336] Therefore, although the broader South African insolvency system unfairly discriminates against NINA debtors by excluding them from all remedial measures, it can be rectified by including sufficient measures to cater for all.[337]

4.7 Reform initiatives

4.7.1 General

A number of shortcomings have been identified in respect of the South African natural person insolvency system, which includes the problem of having to prove "advantage to creditors", inadequate debt relief measures for all classes of debtors, the high cost of sequestration proceedings[338] and the lack of unified legislation.[339] It is apparent that the available debt relief measures in South Africa have not kept up with the needs of society.

[332] *Ibid*.
[333] See *Harksen v Lane* 303.
[334] See See Coetzee *A comparative reappraisal of debt relief measures* 231.
[335] See Coetzee *A comparative reappraisal of debt relief measures* 229.
[336] *Ibid*.
[337] *Idem* 233 and 235.
[338] See Roestoff and Coetzee 2012 *SA Merc LJ* 55 and 75. See also Coetzee and Roestoff 2013 *Intl Insolv Rev* 221—224.
[339] See also Rochelle 1996 *TSAR* 315.

For purposes of this thesis it is important to note that some of these shortcomings have contributed to the exclusion of debtors from the economy, most especially NINA debtors and thus are a spur to Coetzee and Roestoff's view that "[by] removing these obstacles from the system and providing debtors with a fresh start, such debtors will have a better chance of becoming active in the economy and the formal sector – thereby encouraging and possibly stimulating economic growth".[340]

It is encouraging to note that the legislature has taken cognisance of some of the shortcomings and reform initiatives are proposed.[341] These measures are the pre-liquidation composition and the debt intervention procedure.

4.7.2 Reform initiatives pertaining to NINA debtors

4.7.2.1 Pre-liquidation composition

In 2000 the South African Law Reform Commission made a first attempt to provide for debtors who do not have income or assets by proposing the pre-liquidation composition procedure.[342] In this respect the South African Law Reform Commission in its 2000 Insolvency Bill proposed that the pre-liquidation measure should constitute an alternative to insolvency proceedings and should be inserted into the Magistrate's Courts Act through section 74X.[343] This measure would provide for a process whereby debtors who are unable to prove an advantage to creditors can make voluntary compositions.[344] In the latest version of the Insolvency Bill it is proposed that the pre-liquidation composition rather be inserted into the Insolvency Act[345] and not the Magistrate's Courts Act as proposed in 2000.

The proposed pre-liquidation composition procedure commences when a debtor lodges a signed copy of a composition together with a sworn statement with an

[340] Coetzee and Roestoff 2013 *Intl Insolv Rev* 226 and 227.
[341] Boraine and Roestoff 2014 *THRHR* 529. See also Coetzee 2016 *Insol Int Rev* 37.
[342] See the South African Law Reform Commission *Report on the review of the law of insolvency 2000* (hereafter referred to as 2000 Law *Report*). See also South African Insolvency Bill 2000. The South African Insolvency Bill 2000 also contains an explanatory memorandum (Project 63) (hereafter referred to as 2000 Explanatory memorandum). See also Coetzee 2018 *THRHR* 2 and 3.
[343] See 2000 Explanatory memorandum 266.
[344] *Idem* 201.
[345] See Cl 118 of the 2015 draft Insolvency Bill (hereafter referred to as the 2015 Insolvency Bill). See also the South African Law Reform Commission *Report on the review of the law of insolvency* 2014: *Draft Insolvency Bill and explanatory memorandum* (hereafter referred to, as 2014 Explanatory memorandum). The 2015 version of the Insolvency Billis referred to being a more recent version.

administrator.[346] The administrator (who is expected to supervise negotiation of the composition) chooses a date when the creditors consider the composition and questions the debtor.[347]

On the day of the hearing the administrator is present to preside over the hearing where claims are proven.[348] The debtor may be interrogated by the administrator, creditors or any other interested party as regards his assets, income and liabilities or any other relevant issue(s) as the administrator deems fit.[349]

If the composition is accepted by the required majority of creditors, the administrator must certify it and send the certificate to the master after which the composition becomes binding on all.[350] On the other hand, in situations where the composition is not accepted by the required majority of creditors and where it appears that the debtor cannot pay more than he has offered in the composition, the position is that:[351]

a) the administrator must declare that the proceedings have ended and that the debtor is in the same position he was prior to the commencement of the proceedings. Furthermore, the administrator should lodge a copy of his declaration with the master and known creditors by way of a standard notice. and
b) the master may grant a discharge of the debtor's debts (except secured or preferred debts) upon the application of the debtor if:
    i. the debtor satisfies the master that all creditors and the administrator have been given a standard notice of the application for discharge together with a copy of the debtor's application not less than 28 days before the application is made to the master; and
    ii. the master is satisfied having considered the debtor's application and comments of the creditors and the administrator;
        a. that the proposed composition is the best offer that the debtor can make to his creditors;

[346] Cl 118(1) of the 2015 Insolvency Bill.
[347] Cl 118(6) of the 2015 Insolvency Bill.
[348] Cl 118 of the 2015 Insolvency Bill.
[349] Cl 118(10)(e) of the 2015 Insolvency Bill.
[350] Cl 118(17) of the 2015 Insolvency Bill.
[351] Cl 118(22) of the 2015 Insolvency Bill.

b. that the debtor's inability to pay his debts in full is not as a result of his involvement with crime or inappropriate behaviors; and
c. that the debtor does not qualify for an administration order in terms of section 74 of the Magistrate's Court Act 32 of 1944.

Coetzee observes that the proposed pre-liquidation composition procedure aligns to international guiding principles which favour less court involvement and more emphasis on administrators to supervise the pre-liquidation composition.[352] Most importantly it appears that the proposed pre-liquidation procedure has been conceived with the NINA group of debtors in mind.[353] This conclusion is drawn from the wording of the 2014 *Explanatory memorandum*, which states that the procedure is intended to provide an opportunity for a fresh start and a discharge to those who do not qualify for liquidation proceedings.[354]

The major challenge with the proposed pre-liquidation composition procedure in relation to NINA estates is the initial negotiation phase where the composition is considered by the creditors.[355] It appears unreasonable to force NINA debtors through an initial negotiation phase considering they do not own anything of value to offer, which means they do not have negotiating power.[356] Therefore, the negotiations are doomed from the outset. Added to this probability is that the costs of the first phase of the procedure, such as the cost of engaging an administrator and that of an insolvency practitioner, are wasteful.[357] A NINA debtor cannot afford any of these costs and no provision has been made to assist NINA debtors to finance this provision.[358]

The proposed pre-liquidation composition procedure was the first attempt by the South African government to address the predicament of the marginalised group of debtors.[359] The proposed pre-liquidation composition has an advantage of being cost effective.[360]

[352] See Coetzee *A comparative reappraisal of debt relief measures* 253.
[353] See Coetzee *A comparative reappraisal of debt relief measures* 254.
[354] See the 2014 Explanatory memorandum 201 and 208.
[355] See Coetzee *A comparative reappraisal of debt relief measures* 254.
[356] *Ibid.*
[357] *Ibid*.
[358] *Ibid*.
[359] See Coetzee 2018 *THRHR* 2 and 3.
[360] See Cl 118(10) 2015 Insolvency Bill.

Furthermore, it would cater to debtors who cannot show an advantage to creditors and who consequently have been excluded from the liquidation procedure.[361] Another positive attribute of the proposed pre-liquidation composition is that it would be available outside sequestration.[362] However, it would cater only to debtors whose debt does not exceed R200 000.[363] Steyn submits that the pre-liquidation composition procedure would provide an avenue for debtors to save their homes from the clutches of secured creditors, which differs from sequestration where houses often are liquidated.[364] Unfortunately, this attempt fails to solve the challenges facing NINA debtors in South Africa.[365]

4.7.2.2 Debt intervention measure

The failure of the first attempt by the government to address the predicament of the marginalised group of debtors (NINA debtors) led to a second attempt, namely the debt intervention measure.[366] In September 2018 the Portfolio Committee on Trade and Industry[367] published the Draft National Credit Amendment Bill, 2018[368] and the bill was accompanied by a Memorandum on the objects of the National Credit Amendment Bill, 2018.[369] The primary objective of the Bill is:

> [to] amend the National Credit Act, 2005, so as to provide for debt intervention; to include new definitions; to include the evaluation and referral of debt intervention applications as a function of the National Credit Regulator and to provide for the creation of capacity within the National Credit Regulator to execute this function; to include the consideration of a referral as a function of the Tribunal; to provide for the recordal of information related to debt intervention;...[370]

The preamble to the Bill admits there is an insoluble difficulty that certain groups of debtors in South Africa face in managing or improving their financial position. Also, that the legislature has taken note of the lack of "suitable alternative debt interventions" for over-indebted individuals. Therefore, in order to achieve the purpose set out by the NCA

[361] See 2014 Explanatory memorandum 201 and 208
[362] See 2014 Explanatory memorandum 201 and 208.
[363] Cl 118(1) 2015 Insolvency Bill.
[364] Steyn *Statutory regulation of forced sale of the home in South Africa* 354.
[365] See Coetzee 2018 *THRHR* 2 and 3 and Coetzee *A comparative reappraisal of debt relief measures* 254.
[366] See Coetzee 2018 *THRHR* 2 and 3.
[367] Hereafter referred to as "the Portfolio Committee".
[368] Hereafter referred to as the "Bill".
[369] Hereafter referred to as "Memorandum".
[370] See the introductory paragraph of the Bill.

all indebted natural persons "must be afforded protection through fair, transparent, sustainable and responsible processes".[371]

Clause 1 of the Bill provides that section 1 of the National Credit Act, 2005 be amended to include the definition of the debt intervention measure and a debt intervention applicant after the definition of ''credit co-operative''. Debt intervention "means a measure as contemplated in section 86A or section 171(2A), as the case may be, which aims to assist identified consumers for whom existing debt interventions are not accessible in practice".

A debt intervention applicant is:

> a natural person, or natural persons who own a joint estate, who on the date of submission of the application for debt intervention contemplated in section 86A—
> (a) is a consumer under unsecured credit agreements, unsecured short term credit transactions or unsecured credit facilities only;
> (b) receives no income, or if he or she, or the joint estate as the case may be, receives an income or has a right to receive income, regardless of the source, frequency or regularity of that income, that gross income did on an average for the six months preceding the date of the application for debt intervention not exceed R7 500, or such an amount as may be prescribed by section 171(2B)(a), per month;
> (c) is over-indebted, whether due to a change in personal circumstances such as retrenchment, death of a breadwinner, or other circumstances; and
> (d) is not sequestrated or subject to an administration order.

From the definition of a debt intervention applicant it appears that the first requirement, (a), excludes a number of NINA debtors from the ambit of the procedure considering the fact that not all debt qualifies as credit-agreement debts.[372] However, it is clear that the second and third requirements, (b) and (c), suggest that the reliefs are available to NINA and LILA debtors.[373]

To commence a debt intervention procedure an applicant would file an application with the National Credit Regulator (NCR) in terms of the proposed section 86A.[374] The NCR

[371] *Ibid*.
[372] Coetzee 2018 *THRHR* 7 and 8. Although Coetzee's analysis stems from the Amendment Bill published in September 2017, her interpretations and analysis remain valid in light of similar provisions in the final amendment Bill.
[373] *Ibid*.
[374] See proposed s 86A(1).

(while considering such an application) must provide the applicant with counselling and training to help improve the applicant's financial literacy and financial capability.[375] The NCR, having provided the applicant with counselling and training on financial literacy and capability, must evaluate the application and where a conclusion is reached that:

a) a debt intervention applicant does not qualify for debt intervention, the NCR must reject the application;[376] or
b) an applicant is found not to qualify for debt intervention, but is experiencing or likely to experience challenges in fulfilling his financial obligations under credit agreements in a timely manner, the NCR must recommend that the applicant and his respective credit providers consider a voluntary debt rearrangement plan;[377] or
c) a credit agreement constituting an application for debt intervention is found to be a case of reckless lending, unlawful credit agreement or a credit agreement resulting from prohibited conduct, the NCR must refer the credit agreement to the Tribunal for appropriate declaration;[378] or
d) the applicant qualifies for debt intervention and his obligations can be re-arranged within a period of five years, or such period as may be prescribed, the NCR must make a recommendation to the Tribunal in the prescribed manner for an order contemplated in section 87(1A);[379] or
e) a debt intervention applicant qualifies for debt intervention, but his income and assets are not sufficient for his obligations to be re-arranged within a period of five years, or such period as may be prescribed, the NCR must make a recommendation to the Tribunal in the prescribed manner and form for an order contemplated in section 87A.[380]

Subsections (d) and (e) above would apply to a debt intervention applicant who has no income (such as NINA debtors) or whose gross income does not exceed an average of R7 500 for the period of six months preceding the date of the application for debt

[375] See proposed s 86A(5).
[376] See proposed s 86A(6)(a).
[377] See proposed s 86A(6)(b).
[378] See proposed s 86A(6)(c).
[379] See proposed s 86A(6)(d).
[380] See proposed s 86A(6)(e).

intervention and who has a total of not more than R50 000 in unsecured debt outstanding.[381]

A referral made to the Tribunal according to subsection (e) may be considered by a member of the Tribunal in the prescribed manner and form. Reference would be made to the documents included in the referral from the NCR and any representations contemplated in section 86A(9).[382]

The Tribunal may make an order that the applicant does not qualify for the debt intervention measure and reject the application or suspend all of the qualifying credit agreements (in part or in full) for a period of 12 months and this period may be extended for one further period of 12 months, taking into account the factors referred to in sub section (3).[383] When considering the suspension of a credit agreement or further extention of the period of suspension, the Tribunal must take into account relevant factors such as whether the applicant is disabled, a minor heading a household, an elderly person or a woman heading a household or whether the applicant had ever applied for debt review.[384] Furthermore, the Tribunal would consider the circumstances of the applicant if there was any act or omission on his part when entering into each qualifying credit agreement.[385] Also, the Tribunal will consider if there was an act or omission on the part of each credit provider when determining whether or not the credit agreement should be suspended or whether the period of suspension should be further extended.[386]

The NCR must review the financial state of the applicant eight months after an order for suspension is granted to determine whether the applicant at that time has sufficient income or assets for his obligations to be re-arranged according to section 86A(6)(d). Where the applicant has sufficient income or assets, the NCR must make a recommendation to the Tribunal in the prescribed manner and form for an order

[381] See proposed s 86A(12)(a)(i) and (ii).
[382] See proposed s 87A(1).
[383] See proposed s 87A(2) (a) and (b).
[384] See proposed s 87A(3)(a).
[385] See proposed s 87A(3)(b).
[386] See proposed s 87A(3)(c).

contemplated in section 87(1A).[387] Where the applicant does not have sufficient income or assets to allow for the obligations to be re-arranged, the NCR would refer the matter to the Tribunal to consider an extension of the period of suspension as contemplated in subsection (2)(b).[388]

When the Tribunal makes an order for the extension of the period of suspension the NCR must again conduct a review of the financial state of the applicant eight months into the extended period.[389] If the applicant has sufficient income or assets to allow for his financial obligations to be re-arranged, the NCR would make a recommendation to the Tribunal in the prescribed manner and form for an order contemplated in section 87(1A).[390] However, if the applicant still does not have income or assets to be re-arranged, the NCR would refer the matter to the Tribunal to consider extinguishing[391] the whole or part of the total cost of credit under every credit agreement (including the principal debt) contemplated in section 101(1).[392] It is pertinent to note that when the NCR makes a referral of this nature (such as referrals anticipated under proposed section 86A(6)(e), 87A(5)(b)(ii) and 87A(5)(c)(ii)) the NCR must inform all affected credit providers listed in the debt intervention application and also invite such credit providers to make representations to the Tribunal on or before the specified date.[393]

The Tribunal, having considered the referral made under section 87A(5)(c)(ii), can declare the total cost of credit as contemplated in section 101(1) extinguished.[394] The extinguishment may be a "percentage of the cost of credit as contemplated in section 101(1) under each qualifying agreement and must apply equally to all the qualifying credit agreements".[395] The Tribunal must limit the applicant's right to apply for credit as

[387] See proposed s 87A(5)(b)(i).
[388] See proposed s 87A(5)(b)(ii). The costs of credit are the principal debt, initiation fees, service fee, interest, cost of credit insurance and so on. See s 101(1) of the NCA.
[389] See proposed s 87A(5)(c).
[390] See proposed s 87A(5)(c)(i).
[391] The proposed s 1 provides for the definition of "Extinguishment" as
(a) the cessation of all rights and obligations inherent to, or resulting from, a credit agreement; and
(b) the cessation of any rights or obligations that may arise in law, whether statutory or otherwise, because of the cessation contemplated in paragraph *(a),* prospectively from the date on which the act of extinguishment becomes effective.
[392] See proposed s 87A(5)(c)(ii).
[393] See proposed s 86A(9)(a) and (b).
[394] See proposed s 87A(6).
[395] See proposed s 87A(7)(a) and (b).

contemplated in section 60 for a minimum period of 6 months after granting an order to extinguish debts according to section 87A(6)[396] and a maximum of 12 months.[397]

The proposed section 88B provides for the rehabilitation of an applicant debtor. This provision states that an applicant who is subject to an order made according to proposed section 87A(6) may apply to the NCR for a rehabilitation order to be granted by the NCT.[398] This application for rehabilitation can be made at any time after the order(s) have been granted.

The applicant must submit proof that he has paid the cost of credit contemplated in section 101 either by making full payment of the obligations[399] or by entering into a settlement agreement with the relevant credit providers that the cost of credit has been fulfilled to the credit provider's satisfaction.[400] The application for rehabilitation should be accompanied by supporting documents, such as a proof that the applicant has improved his financial circumstances to such an extent that he can participate in the credit market. Also, the application for rehabilitation should be accompanied by a proof that he has successfully completed the financial literacy or financial capability programme contemplated in section 87A(2)(b) and such additional information as the minister may prescribe.[401]

Upon receipt of the application for rehabilitation the NCR must notify all credit providers and every registered credit bureau in the prescribed form and refer the application to the Tribunal if it meets the necessary requirements.[402] Where the NCR rejects an application for rehabilitation the debt intervention applicant may apply directly to the Tribunal, with the leave of the Tribunal, in the prescribed form.[403]

It appears that rehabilitation under the proposed section 88B would cater for situations only where a composition was reached with the credit provider to the effect that the cost

[396] See proposed s 87A(8).
[397] See proposed s 87A(9).
[398] Proposed s 88B(1).
[399] Proposed s 88B(2)(a).
[400] Proposed s 88B(2)(b).
[401] See proposed s 88B(3)(a)–(b).
[402] See proposed s 88B(4)(a)–(b).
[403] See proposed s 88B(5).

of credit has been fulfilled to the satisfaction of the credit provider or where payments have been made in full to all credit providers.[404] Such a person will merely proceed through the process until debt is extinguished after 24 months. In essence, proposed section 88B will not offer rehabilitation to NINA debtors. However, it appears that a NINA debtor will be able to apply to be rehabilitated after the six months period in which his right to apply for credit (which was limited by the Tribunal) elapses.[405]

The Tribunal having considered an application for rehabilitation may grant an order for rehabilitation if satisfied that the applicant has complied with the necessary requirements.[406] The Tribunal must notify all credit providers of the date on which the appliction for rehabilitation would be considered.[407] An order for rehabilitation would extinguish any limitation on the rights of the debt intervention applicant contemplated in section 60 from the date of the order.[408]

The proposed section 87A(6) offers a discharge of debts under NINA circumstances and is significant because it satisfies one of the principal objectives of an insolvency system for natural persons, which is economic rehabilitation.

It is apparent that the debt intervention procedure is an improvement on the pre-liquidation composition[409] because the peremptory negotiated settlement is not present under the debt intervention procedure[410] and favours the NINA debtor who has no notable income and assets to go through the peremptory negotiated stage.[411] Considering that the negotiations are destined to fail from the outset, there is no reason to incur such wasteful costs, which a NINA debtor cannot afford in the first place.[412]

[404] See proposed 88B(2).
[405] See proposed 87A(8).
[406] See proposed s 88B(7).
[407] See proposed s 88B(6).
[408] See proposed s 88B(8).
[409] See Coetzee 2018 *THRHR* 17.
[410] *Ibid*.
[411] *Ibid*.
[412] *Ibid*.

A further major positive step taken in terms of this proposed procedure is the introduction of the NCR and NCT as the supervisors and decision-making bodies.[413] This proposal aligns to international principles[414] which favour non-judicial proceedings.

In considering the proposed debt intervention procedure, the most prominent remarkable attribute to be noted is the liberal access requirements which favour NINA debtors and the ultimate relief that the procedure offers.[415] The proposed debt intervention procedure appears to be a more direct approach towards tackling the challenge of marginalisation of NINA debtors. However, as Evans cautions, the benefits of law reforms only become evident when they are implemented.[416]

4.8 Conclusion

This chapter explores a critical examination and discussion of the South African natural person insolvency system from a debt relief perspective with the focus on NINA debtors. Comparisons were drawn between the South African and Nigerian debt relief systems in the context of NINA debtors. The South African debt relief procedures were measured individually against the most important international guiding principles of access to debt relief and discharge of debts.[417]

An evaluation of the entire South African statutory debt relief system against the four international guiding principles (the principle of access to debt relief, discharge of debts, preference for non-judicial procedures and preference for informal procedures) laid down in chapter 2[418] and in the narrow context of NINA debtors, brings to light the following conclusions.

As regards the first international guiding principle of access by all debtors to debt relief measures[419] it is clear that the sequestration procedure, which is the main debt relief procedure, is inaccessible to a wide range of debtors in South Africa, especially NINA

[413] *Ibid*.
[414] See ch 2 par 2.6.
[415] See Coetzee 2018 *THRHR* 17.
[416] Evans 2003 *The Quarterly Law Review for People in Business* 176.
[417] See par 4.3, 4.4 and 4.5.
[418] See ch 2 par 2.6.
[419] *Ibid*. The principle of access advocates that all honest but unfortunate debtors must have access to a debt relief procedure irrespective of their financial status.

debtors. The lack of access by debtors to the sequestration procedure is due to a number of reasons, most notably the requirement of establishing an advantage to creditors,[420] the high cost of initiating the sequestration procedure[421] and the restrictions imposed on an un-rehabilitated insolvent debtor in South Africa which indirectly discourages debtors from going through the sequestration procedure.[422]

In terms of South African composition procedures NINA debtors' cannot access the statutory composition procedure because they do not have assets or income with which to negotiate.[423] Although the common law composition procedure theoretically is accessible to all debtors, including the NINA debtor, chances of success are slim where debtors are seriously over-indebted as is the case in respect of NINA debtors.[424]

The alternative statutory debt relief procedures, namely the administration order procedure and the debt review procedure can be classified as debt rescheduling procedures which require that an applicant debtor has some form of income to negotiate with creditors.[425] Because the alternative debt relief procedures primarily are for debtors who have some form of income, they cannot be accessed by NINA debtors.[426] Therefore, the entire South African insolvency system excludes NINA debtors from all remedial measures because such debtors do not have access to any measure and consequently, the South African insolvency system unfairly discriminates against NINA debtors.[427]

In respect of the second international guiding principle of discharge (which states that the end result of every insolvency system should be a discharge and the discharge must be available to every debtor, irrespective of their financial state)[428] the sequestration procedure and the common law composition procedure currently are the only debt relief procedures that can provide for a discharge of debts in South African

[420] See para 4.3.1.1 and 4.3.1.2.
[421] See par 4.3.1.1.
[422] Par 4.3.2.
[423] See par 4.4.
[424] *Ibid*.
[425] See par 4.5.
[426] *Ibid*.
[427] See par 4.6.
[428] See ch 2 par 2.6.

insolvency law.[429] Therefore, discharge of debts under the South African debt relief system is restricted because it is available only to debtors who can successfully proceed through the sequestration procedure. Although a common law composition can provide for a discharge of debts, subject to agreement by the parties, most likely it will not work for NINA debtors because "the chances of all credit providers reaching a common agreement to such effect are slim".[430]

The third international guiding principle prefers informal debt relief procedures because they are faster, more cost effective compared to formal procedures and also because they help curb the challenge of stigmatisation often encountered in developing countries.[431] International guiding principles add that in order for informal negotiated settlements to be effective there is a need to introduce "some institutional support and incentives" because very few cases are resolved through voluntary settlements.[432] Therefore, examining the South African debt relief system in light of the international principle favouring informal procedures, it appears that South Africa does not provide for an informal debt relief procedure because the sequestration procedure and all alternative debt relief procedures are formal procedures.[433]

Lastly, as regards the fourth international guiding principle on a preference for non-judicial procedures it is opined that a good insolvency system should have a variety of procedures. The variety of procedures would include judicial and extra-judicial procedures in order to cater for different classes of debtors.[434] However, extra-judicial procedures are preferred because they are faster and more cost effective than court proceedings.[435] Therefore, in evaluating the South African debt relief system against the international guiding principle favouring non judicial proceedings, South Africa mostly offers judicial procedures. The sequestration procedure under the IA is a judicial procedure,[436] as is the case with the debt review procedure and the administration order

[429] See par 4.3.1.1.
[430] See par 4.4.
[431] *Ibid*.
[432] *Ibid*.
[433] See para 4.3, 4.4 and 4.5.
[434] See ch 2 par 2.6.
[435] *Ibid*.
[436] See par 4.3.

procedure. However, the common law composition can be classified as a non-judicial procedure.[437]

An evaluation of the entire South African debt relief system against the four international guiding principles laid down in chapter 2[438] reveals that the South Africa debt relief system does not align to the international guiding principles of access, discharge and preference for informal procedures. However, the South Africa debt relief system aligns to international guiding principles in the preference for non-judicial procedures.

In considering the South African consumer debt relief laws in light of NINA debtors, it is apparent that the NINA group of debtors are marginalised as they do not have access to any of the statutory insolvency procedures.[439] Consequently, they cannot be discharged of their debts.[440] The only procedure that appears to be accessible to NINA debtors in South Africa is the common law composition. As stated earlier, the chances of reaching such composition are slim.[441] The exclusion of NINA debtors from debt relief procedures in South Africa has been found to be unconstitutional as it impairs the equality right.[442] This situation can be remedied only by providing a debt relief procedure that specifically can cater to the needs of NINA debtors.

Although South Africa currently does not have a debt relief procedure for NINA debtors, it is pertinent to note that there has been an attempt to ensure that NINA debtors are not excluded from the system.[443] These attempts led to the proposed law reforms, which brought about the proposed pre-liquidation composition procedure and the proposed debt intervention procedure.[444]

The proposed pre-liquidation composition procedure was conceived to cater for the plight of NINA debtors. This procedure fulfils the international guiding principle of access because as it does not have a financial access requirement and also it is cost effective

[437] See para 4.4 and 4.5.
[438] See ch 2 par 2.6.
[439] See para 4.3, 4.4 and 4.5 for analysis of each debt relief procedure with the principles of access and discharge.
[440] *Ibid*.
[441] See par 4.4.
[442] See par 4.6.
[443] See par 4.7.1.
[444] See par 4.7.2.

because it can be initiated in a lower court.[445] Also the proposed pre-liquidation composition procedure provides for a discharge of debts and requires less court involvement. However the major challenge identified with the pre-liquidation composition is the costs associated with the initial negotiation phase, which makes it impossible for NINA debtors to access.[446] Also, they do not have assets or income with which to negotiate.

Of utmost importance to this research is the most recent law reform initiative which will introduce the debt intervention procedure.[447] The provision of the debt intervention procedure is specifically to cater for NINA debtors. As mentioned earlier, the wording of the bill suggests that a NINA debtor would be able to access the debt intervention procedure and consequently obtain discharge from debts.[448] Also, the debt intervention procedure would be administered by the NCR and the NCT, which indicates that it is a non-judicial procedure.[449] In essence, the debt intervention procedure is a non-judicial procedure which grants access and discharge to NINA debtors.

Although it is clear that the proposed debt intervention procedure would provide relief only for debts incurred under credit agreements, the fact remains that it will offer some form of relief to NINA debtors.

In conclusion, Nigeria stands to learn from the way in which the South African natural person insolvency law has developed over the years. First and foremost are the lessons which can be drawn from the shortcomings encountered in providing for insufficient debt relief procedures and the constant struggle of NINA debtors to get a discharge of debts. A situation determined to be unconstitutional.[450] Also, Nigeria can learn from the recent efforts to ensure that all debtors are catered for in South Africa, most especially NINA debtors. Finally, and most importantly, there is the lesson that can be learnt from the proposed debt intervention procedure which offers a direct approach towards tackling the challenge of marginalisation of NINA debtors in South Africa. Notably, the proposed

[445] *Ibid*.
[446] *Ibid*.
[447] *Ibid*.
[448] *Ibid*.
[449] *Ibid*.
[450] See par 4.6.

debt intervention procedure is a formal procedure and there are compelling reasons to believe that formal procedures might be more effective in the case of NINA debtors because creditors would not agree willingly to a zero plan negotiation unless there is an incentive to do so.[451]

[451] See ch 2 par 2.5.3.

CHAPTER 5
AN EUROPEAN APPROACH: DEBT RELIEF MEASURES IN FRANCE AND SWEDEN

Summary

5.1 Introduction

A major challenge developed countries face is dealing with an ever-growing number of overburdened debtors.[1] Several developed jurisdictions note increasing numbers of poor debtors who cannot afford to file for regular court liquidation proceedings (such as bankruptcy) due to the related out-of-pocket costs.[2] Therefore, either they have reformed their insolvency laws for natural persons or are considering reforms to make provision for adequate debt relief measures that assist debtors in this category.[3]

The purpose in this chapter is to review the debt relief measures available to natural persons under the French and Swedish natural person insolvency laws with a specific focus on procedures for No Income No Assets (NINA) debtors. The choice of these jurisdictions is motivated by the fact that Sweden[4] and France[5] are prominent examples of developed countries with functional and highly effective debt relief measures.[6] French insolvency law is one of the oldest[7] and France is known for its unique insolvency legislation, which is a hybrid of the traditional European earned discharge approach (for certain groups of debtors) and the American straight dis-

[1] Ziegel *Comparative consumer insolvency regimes: A Canadian perspective* 3.
[2] Ben-Ishai and Schwartz 2007 *Osg Hall LJ* 472.
[3] See Kilborn 2010 http://bit.ly/2N3wdUo 1 (accessed 21/01/2019).
[4] See Swedish Bankruptcy Act of 1987 as regards the Swedish system (hereafter referred to as SWA). See also the Debt Relief Act of 1994.
[5] See Code de la Consommation (Consumer Code) Order No 2016-301 of 2016 (hereafter referred to as the Consumer Code).
[6] Kilborn 2012 *Loy Consumer L Rev* 20—21 and 25—28.
[7] Kilborn 2010 http://bit.ly/2N3wdUo 28 (accessed 21/08/2018).

charge approach in the treatment of situations of over-indebtedness.[8] Sweden significantly in 2007 reformed its insolvency proceedings in order to tackle delays. Sweden is reported to have achieved "its stated goals of making the debt adjustment process simpler, more efficient, and thus more effective".[9] Sweden became the first European state to eliminate the generally required negotiation stage (preceding bankruptcy proceedings), which caused delay and was criticised as "a fruitless waste of labour".[10]

A detailed study of debt relief provisions for NINA debtors in these jurisdictions is important in order to evaluate the contemporary European approach to such measures, so as to establish if Nigeria could learn any lessons.

5.2 France

5.2.1 Background to insolvency of natural persons in France

The provision of insolvency procedures for natural persons specifically is a new development in France. Prior to 1990 the personal insolvency laws that existed applied only to "*commercants*" and traders.[11] An exception was the Alsace and Moselle region where the "*faillite civile*" procedure long provided for summary debt discharge for both corporate entities and insolvent natural persons residing in the area.[12]

In December 1989 France became the second continental European nation to pass legislation that caters for the increasing number of financially overburdened natural persons, and is known as the *Loi Neiertz*.[13] This law was adopted on 31 December 1989 and came into operation in 1990.[14] The *Loi Neiertz* provides a debt relief measure through which a debtor's obligation can be rescheduled.[15]

The *Loi Neiertz* added a series of sections to the French Consumer Code, but failed to provide for a discharge of debts. However, on 29 July 1998 the French Law No.

[8] Roestoff and Coetzee 2017 *CILSA* 269. See also Kilborn 2005 *Mich J Int'l L* 635.
[9] Kilborn 2012 *Loy Consumer L Rev* 2.
[10] *Idem* 21.
[11] Kilborn 2005 *Mich J Int'l L* 620 and 628. See also, Huls *Overindebtedness of consumer in the EC member states: Facts and search for solutions* 100.
[12] Kilborn 2005 *Mich J Int'l L* 620 and 656.
[13] Denmark was the first to adopt natural person insolvency legislation in 1984. See Niemi-Kiesiläinen *Consumer bankruptcy in global perspective* 42.
[14] Law No. 89-1010 of Dec. 31, 1989.
[15] *Ibid*.

98-657[16] was passed which for the first time provided for a broad discharge of debts.[17]

The French Consumer Code has been amended a couple of times and it includes provisions for the treatment of consumer over-indebtedness which is contained in Book VII, Title I–IV of the Consumer Code. Although several amendments have been added to the French Consumer Code on different occasions, it was not repealed.

5.2.2 Debt relief measures for insolvent natural persons in France

5.2.2.1 General

French insolvency law makes provision for the "treatment of situations of indebtedness"[18] in the Consumer Code.[19] The French law on "treatment of situations of indebtedness" operates a three tier relief system which comprises a payment plan,[20] a moratorium and partial discharge[21] and a personal recovery procedure (for NINA debtors).[22]

To commence the "treatment of situations of indebtedness" in France a debtor applies to the secretariat of *commissions de surendettement des particuliers* (commission on individual over-indebtedness).[23] This commission is an administrative body that oversees the treatment of situations of over-indebtedness in France. It does not form part of the judiciary.[24]

The application for the treatment of over-indebtedness should specify the name and address of the debtor and contain a detailed statement of his income, assets, liabilities and the name and addresses of his creditors.[25] The debtor should also mention in his application if there are any enforcement proceedings in progress against his property or if he has authorised any transfer of remuneration to his creditors.[26]

[16] Effective 1 February 1999. See also Kilborn 2005 *Mich J Int'l L* 650.
[17] See also Kilborn 2005 *Mich J Int'l L* 651.
[18] See Desurvire *Histoire De La Banqueroute Et Faillite Contemporaine* 167 and 295.
[19] See arts. L.711–1 ─ L.733–18 of the Consumer Code.
[20] See arts. L.732–1 of the Consumer Code.
[21] See arts. L.733–1 — L.733–9 of the Consumer Code.
[22] See arts. L.741–1 — L.742–25 of the Consumer Code.
[23] See arts. L.712–1 (hereafter referred to as the commission).
[24] Kilborn 2005 *Mich J Int'l L* 637.
[25] See arts. L.721–2 of the Consumer Code.
[26] See arts. L.722–2 — L.722–4 of the Consumer Code. That is when a debtor enters into a prior agreement that his remunera tion should be paid to a creditor or creditors to satisfy his debts.

Upon receipt of the application the commission first decides whether the access requirements of "good faith" and over-indebtedness have been met.[27] The requirement of "good faith" is a major condition for accessing debt relief in France[28] and the commission and courts initially struggled with the interpretation of "good faith".[29] In the end, the French insolvency system took a liberal approach to interpreting "good faith" by adhering to Huls's recommendations,[30] which suggest that the rigid construction of the "good faith" requirement should be avoided as resulting in the exclusion of deserving debtors.[31] Consequently, "good faith" is supposed, whereas bad faith must be proven so as to exclude only those who have acted fraudulently.[32]

Furthermore, the commission must decide on the admissibility and orientation of the application.[33] The orientation of the application is decided by the commission through a reasoned decision which indicates whether the debtor would benefit from either a repayment plan or a personal recovery procedure.[34] Thereafter, the commission notifies the debtor and the creditors of the decision[35] and informs them that the decision may be appealed.[36]

The French legislation does not provide for an automatic stay of enforcement actions. Therefore, when a debtor files an application before the commission, he also may request through the commission a suspension of debt-enforcement procedures in the District Court.[37] Where the request has been made successfully by the commission on behalf of the debtor, all enforcement proceedings in respect of the debtor's assets, (which have been mentioned in his application) are suspended until the commission decides on the appropriate debt-relief measure(s) to implement. However, the duration of the moratorium will not exceed two years.[38]

[27] See arts. L.711–1 and L.712–1 of the Consumer Code.
[28] Kilborn 2016 *Norton Journal of Bankruptcy Law and Practise* 590.
[29] Kilborn 2010 http://bit.ly/2N3wdUo 31 (accessed 21/08/2018).
[30] *Ibid*.
[31] Huls *Report* 1, 4 and 5.
[32] *Ibid.*
[33] See arts. L.721–2, L.721–4. and L.722–1 of the Consumer Code.
[34] See arts. L.721–1 and L.724–2 of the Consumer Code.
[35] *Ibid*.
[36] *Ibid.* The appeal can be made through a declaration delivered or sent by registered letter to the secretariat of the commission and the declaration indicates the name, forenames and address of the appellant, the decision appealed against and the reasons for the appeal.
[37] See arts. L.721–4 of the Consumer Code.
[38] See arts. L.722–2 and arts. L.722–3 of the Consumer Code.

5.2.2.2 Payment plan

The payment plan procedure was the only option available to debtors under the 1989 *Loi Neiertz*, but currently it is the first level of relief under the French insolvency law.[39] To qualify for this first level of debt relief the commission must have established that the debtor has a repayment capacity,[40] which requires it should consider the debtor's monthly resources and also assess all his current household expenses.[41] Thereafter, the commission formulates and proposes a conventional recovery plan.[42] The commission serves a notice of proposal for a conventional recovery plan on creditors by registered letter and the creditors have to acknowledge receipt.[43] A plan may not last more than seven years[44] and may include so-called ordinary measures.[45] The latter includes limited concessions and modifications to the debtor's debt, such as debt rescheduling and interest-rate reductions.[46] Theoretically, the approval only of the principal creditor is required for the approval of a plan,[47] but in practice a commission will not accept a plan if any of the creditors refuses to sign it.[48]

In instances where the commission fails to obtain the consent of all creditors to secure an out-of-court payment plan arrangement, it has the option of making recommendations to court for a court-imposed plan.[49] The commission can recommend a court-imposed plan only at a debtor's request.[50]

The availability of an alternative court-imposed plan has encouraged creditors to accept the "carrot" of a flexible out-of-court negotiated plan rather than suffering the "stick" of a court imposed plan.[51] With regard to the payment plan procedure the role of the court is limited to only two functions: the resolution of a small variety of proce-

[39] See Spooner 2013 *European Review of Private Law* 752.
[40] See arts. L.731–1 of the Consumer Code.
[41] See arts. L.731–2 and L.731–3 of the Consumer Code.
[42] See art. L.712–15. The French payment plan procedure is similar to the Nigerian proposal procedure because they are both repayment plan procedures available to indebted individuals who have some form of income with which to negotiate. There fore, they cannot be accessed by debtors who do not have income to negotiate with such as NINA debtors. A major differ ence between the two is that the Commission formulates and proposes a plan under the French system, wheras a debtor proposes and files a payment plan under the Nigerian proposal procedure; See ch 3 par 3.4 as regards the Nigerian position.
[43] See art. L.721–2 of the Consumer Code.
[44] See art. L.732–1 of the Consumer Code. The total length of the payment plan, including the period for which it may have been subjected to revision and renewal, may not exceed seven years, except in situations where a loan has been taken out for the purchase of the debtor's principal residence which may be rescheduled over a longer period of time. See arts. L.732–3 and L.733–3 of the Consumer Code.
[45] See Spooner 2013 *European Review of Private Law* 753
[46] See Spooner 2013 *European Review of Private Law* 753. See also art. L.732–2 of the Consumer Code.
[47] See art. L.732–1 of the Consumer Code; See also, Khayat *Le Surendettement Des Ménages* 101.
[48] Khayat *Le Surendettement Des Ménages* 101.
[49] See art. L.733–1 of the Consumer Code.
[50] See art. L.733–1 and L.733–2 of the Consumer Code.
[51] *Ibid*.

dural disputes that may arise in the course of the commission's work[52] and confer-ment of legal force on recommendations made by the commission.[53]

The payment plan procedure does not provide any discharge of principal debt.[54] However, the suspension of interest is an option, which constitutes a partial dis-charge of future contractual indebtedness.[55] The French payment plan procedure requires that a debtor has some form of income as well as not providing any dis-charge of principal debt.[56] Therefore, access to this procedure is restricted and NINA debtors in particular are excluded.

5.2.2.3 Global payment moratorium and partial discharge of debt

The *Banque de France* eventually realised that the first level of debt relief, namely the payment plan procedure, was beginning to fail as a result of debtors having in-sufficient resources with which to negotiate.[57] This failure necessitated the commis-sion and the courts to come up with reforms in 1999, which brought about a payment plan procedure that imposes a multi-year deferral of all payments (global payment moratorium).[58]

The French legislature provided the commission with the additional power to offer "extraordinary" measures to debtors in situations where negotiations fail.[59] The extra ordinary measures may include debt rescheduling or postponement of payment(s), a reduction of interest rates, the application of payments primarily to capital, and a two year moratorium on debt enforcement. The commission offers any of these measures depending on the debtor's financial state, and the court imposes the measure(s) recommended by the commission.[60]

Were the debtor to have insufficient resources to render these measures suitable, the commission must make a recommendation to the court to impose a global defer-

[52] See arts L.733–10 ─ L.733–12 and L.752–2 of the Consumer Code for disputes concerning the initiation of the case (determining the debtor's state of "over-indebtedness" or "good faith") and disputes relating to the debtor's financial condition.
[53] See Khayat *Le Surendettement Des Ménages* 36–37. See also Hyest & Loridant, § I.A2(b). The French payment plan procedure is mostly an administrative procedure with less court involvement than is the case with the proposal procedure in Nigeria; See ch 3 par 3.3.
[54] Kilborn 2005 *Mich J Int'l L* 635—636. A major difference between the French payment plan procedure and the proposal procedure in Nigeria is the fact that the Nigerian proposal procedure would provide for the discharge of debts. See ch 3 par 3.3.3.4.
[55] Kilborn 2005 *Mich J Int'l L* 635—636.
[56] See par 5.2.2.1.
[57] Vatin 1996 *Bulletin de la Banque de France* 108.
[58] See Hyest & Loridant § I.A.
[59] See par 5.2.2.2. http://bit.ly/2N3wdUo 34 (accessed 21/08/2018).
[60] See art. L.733–1 of the Consumer Code.

ral of all the debtor's debts for up to two years.[61] On the expiration of the imposed years of deferral the debtor is expected to return with a "repeat filing" for relief.[62] Thereafter, the commission re-examines the debtor's financial situation to determine if there has been an improvement in his financial state.[63] If the debtor's situation has improved, the commission must[64] recommend a payment plan which may include any of the measures available in terms of the payment plan above.[65] If the debtor's financial situation did not improve at the expiration of that period, the commission must recommend a partial pro-rata discharge of most of his obligations (except support obligations, such as alimony or child support) to the court.[66] A discharge, for instance can be granted where there is an unfulfilled obligation remaining on a home mortgage loan following the forced sale of the home,[67] for example where a foreclosure sale of a home is carried out and it produced net proceeds of only $80,000 whereas the debtor owed $100,000, technically the debtor remains liable for the "deficiency" of $20,000. The court under these circumstances may discharge the $20,000 in part or in full.[68] The commission has the prerogative to determine on a case by case basis what proportion of the debtor's obligations will be discharged.[69]

Even though the global payment moratorium and partial discharge of debt procedure primarily were designed for debtors who are severely financially overburdened and demoralised, the debtor is still expected to repay at least some portion of his debt as stated above. Thus the global payment moratorium and partial discharge of debt procedure are not workable for NINA debtors.

5.2.2.4. Personal recovery procedure

In 2001 the *Banque de France* carried out a survey which revealed that the commission did not implement effective relief for the most over-indebted consumers.[70] The survey discovered that more than a quarter of debtors who filed for debt relief had no

[61] *Ibid*.
[62] Hyest & Loridant, §§ II.C.2 and III.B.5.
[63] *Ibid*.
[64] *Ibid*.
[65] See par 5.2.2.1 above.
[66] See arts L.733−7 of the Consumer Code. The French insolvency system for natural persons has gradually evolved into a liberal system with regard to discharge. The system has taken cognisance of the needs of the debtors to ensure an effective debt relief system.
[67] See arts L.733−1 and L.733−7 of the Consumer Code.
[68] See arts L.7331 and L.733-7. See also Kilborn 2005 *Mich J Int'l L* 648 of the Consumer Code.
[69] See art. L.731–1 to731–3 of the Consumer Code.
[70] See Assemblée Nationale, Avis 2003 Doc. No. 1003 *http://bit.ly/2L7WRK9* 13–14 (accessed 21/08/2018). See also, Assemblée Nationale, Avis 2003 Doc. No. 1002 http://bit.ly/2LcpANY 10 (accessed 21/08/2018). See Sénat Avis, 2003 Doc.No. 404 http://bit.ly/2MqeV7J 12 (accessed 21/08/2018).

capacity to pay back any of their debts, even after the expiration of the deferral period under the global payment moratorium and the application of the partial discharge of debt procedure.[71] Consequently, only a small fraction of debtors eventually received successful relief.[72] In essence, a considerable number of debtors were not only insolvent, but their insolvency clearly was not transitory because they likely would be unable to pay any significant part of their debts (even after a two-year global payment deferral).[73] Employing a moratorium in these instances obviously was not effective and merely constituted a formality, which created a heavier administrative burden on the commission.[74] The legislators took their cue from the survey and decided that there was a need to reform the laws to cater for the most over-indebted debtors.[75]

The French have deviated from a traditional European stance in that more and more "irredeemably compromised" debtors are not required to make any future income payments.[76]In 2004, the legislature took a more aggressive approach to debt relief measures. It was directed at debtors whose financial situations were "irremediably compromised" and a new procedure, called the "personal recovery" (*rétablissement personnel*) procedure, was established as a means of granting debt relief to such debtors.[77] The personal recovery procedure is similar to the U.S. "Chapter 7" procedure,[78] which offers a full and immediate discharge of debt, without the necessity of proceeding through a rehabilitation plan.[79]

The personal recovery procedure initially involved taking an inventory of the debtor's assets and liquidation of the assets.[80] It was observed that only a few debtors had assets which could be liquidated and so the legislature introduced a personal recov-

[71] See also Kilborn 2010 http://bit.ly/2N3wdUo 34 (accessed 21/08/2018).
[72] *Ibid*.
[73] See § 2.2.2.2 Comité consultatif du Conseil national du crédit et du titre, Rapport (2002–2003) http://bit.ly/2OPZLFE (accessed 21/08/2018).
[74] Assemblée Nationale, Avis 2003 Doc. No. 1003 http://bit.ly/2LcpANY 36 (accessed 21/08/2018).
[75] See also Kilborn 2010 http://bit.ly/2N3wdUo 34 (accessed 21/08/2018).
[76] See also Kilborn 2010 http://bit.ly/2N3wdUo 32 (accessed 21/08/2018). The European approach of insisting on income payment orders or payment plans has been criticized in both the Insol *Report* and the IFF *Report* as encouraging fruitless squandering of substantial administrative resources. See ch 2 para 2.3 and 2.4.
[77] *Ibid*.
[78] See ch 2 par 2.2.2.
[79] Kilborn 2005 *Mich J* Int'l *L* 648–651 and 655–660.
[80] See art. L.742–1 of the Consumer Code. Kilborn 2010 http://bit.ly/2N3wdUo 35 (accessed 21/08/2018).

ery procedure without the necessity of liquidating assets effective from 1 November 2010.[81]

The factors that the commission considers before recommending the personal recovery procedure without liquidation are the irredeemable financial state of the debtor (meaning that the debtor has no valuable assets of any sort that can be liquidated for the benefit of creditors) and the "good faith" requirement.[82] Therefore, the commission bears the gate-keeping responsibility of deciding whether a debtor's financial situation is "irremediably compromised"[83] and if so recommends to the court for the opening of a "personal recovery" procedure.[84] Where the commission makes a recommendation for the opening of the "personal recovery" procedure with liquidation of assets, the court considers whether the financial state of the debtor is "irremediably compromised" and whether the debtor acted in "good faith".[85] Thereafter, the court enters an order opening a "personal recovery" proceeding.[86] On the other hand, if the commission recommends a personal recovery procedure without liquidation of assets, the court merely confirms the recommendation which is the ground for granting a personal recovery procedure.[87]

After 2010 the personal recovery procedure has been less burdensome for the courts as they do not have to decide on the preliminary issues before entering an order for personal recovery[88] as the commission does much of the work. The commission directly recommends the matter to the courts, which eventually leads to an immediate and complete discharge of debt by the courts.[89] After the reforms in 2010 the number of cases that successfully were routed through the personal recovery procedure in the first six months after its implementation superseded the number recorded in 2009.[90]

[81] See art. L.741–1 – L.741–10 of the Consumer Code.
[82] See art. L.724–3 of the Consumer Code.
[83] See par 5.2.2 above. The personal recovery procedure is an non-judicial procedure, because it is largely administered by an institutional structure other than the courts, as encouraged by international instruments. See par 2.6.
[84] See art. L.741–1 to L.741–4 and art. L.742–2 of the Consumer Code.
[85] See art. L.724–1
[86] See art. L.742–20 – L.742–21 of the Consumer Code.
[87] See art. L.741–2. of the Consumer Code.
[88] Speedy and cost effective procedures are encouraged by international guiding instruments and this is achieved through non-judicial procedures in order to curb the challenges experienced with long and costly judicial procedures. See ch 2 par 2.6.
[89] See art. L.741–1 – L.741–4 of the Consumer Code. This is the essence of every insolvency system, namely ensuring that there is provision for discharge of debts for all honest but unfortunate debtors in the long run. See ch 2 par 2.6.
[90] Banque de France, Statistiques mensuelles du surendettement http://bit.ly/2MD5SzG (accessed 21/08/2018).

The personal recovery procedure is reserved for the most financially overburdened and economically sidelined debtors.[91] The debtor can access the personal recovery procedure as many times as required as long as good faith is shown.[92]

Although the French Consumer Code seeks to grant access to as many debtors as possible, simultaneously it guards against moral hazard. Therefore, debtors found guilty of wrongful conduct such as fraud, asset concealment or the aggravation of insolvency by new borrowings are unable to gain access to this debt relief procedure.[93]

The third level of the French model for natural person insolvency is clearly committed to ensuring that an American-style "full discharge" is reserved for only the most crucial cases of marginalised debtors through the personal recovery procedure.[94] The personal recovery procedure is accessible to two kinds of debtors, namely those who have some form of assets that can be liquidated for the benefit of creditors and those who do not have assets such as NINA debtors (who are excluded from the first and second level of debt relief under the French insolvency law).[95] The personal recovery procedure is not designed for debtors who only have income and wish to go through the payment plan procedure. This group (who do have a source of income) has access only to the first and second level of debt relief under the French insolvency law. Nevertheless, the personal recovery procedure provides for the discharge of debts in appropriate circumstances which aligns to international guiding principles.[96]

5.2.2.5 Analysis

The French natural person insolvency law gradually underwent an impressive evolution and now offers broader and more effective debt relief measures to all types of

[91] See art. L.741–1 of the Consumer Code. See Assemblée Nationale, Avis, Doc. No. 1002 (2003) 5.
[92] At the beginning of the implementation of the personal recovery procedures, propositions were made that it should be a once in a life time procedure. However, the senate rejected this proposition and stated that some people might genuinely be in need of a fresh start more than once during their lifetime. See Sénat, Avis 2002-2003 Doc. No. 404 http://bit.ly/2MqeV7J 23 and 74 (accessed 21/08/2018). See also Assemblée Nationale, Avis 2003 Doc. No. 1003 *http://bit.ly/2L7WRK9* 88 (accessed 21/08/2018); Assemblée Nationale, Avis 2003 Doc. No. 1002 http://bit.ly/2MqeV7J 28 (accessed 21/08/2018). International guiding principles on access as espoused in ch 2 supports this. See ch 2 par 2.6.
[93] See Kilborn 2005 *Mich J* Int'l *L* 636. See also Kilborn 2010 http://bit.ly/2N3wdUo 31 (accessed 21/08/2018) where it was stated that the only countries that explicitly require "good faith" for entry into the system are France and the Netherlands.
[94] *Ibid*.
[95] See par 5.2.2.2.
[96] See ch 2 par 2.6.

debtors.[97] France's long acquired experience has driven it to be more progressive in the direction of the IFF *Report* by excluding a larger group of debtors from payments and plans thereby saving on a "resource-intensive and unproductive administrative burden". Efforts have been made to ensure that debtors are channelled through more appropriate procedures depending on their circumstances.[98] The series of reforms which took place under the French natural person insolvency law clearly illustrates a development towards directing a good number of debtors away from the payment plan procedures and towards more suitable procedures, namely the personal recovery procedure.[99] This development is to ensure that debtors have access to debt relief procedures that best suit their financial status and to avoid the waste of resources on fruitless administrative functions.[100] This approach of cutting down on waste and preserving resources sets an example especially for developing countries such as Nigeria, where resources are scarce.[101]

For example, it appears that the introduction of the personal recovery procedure in France has helped to curb waste by channelling debtors who do not have income with which to negotiate to a procedure that best meets their needs. It also signifies a change in the legislature's approach in that, in certain instances, it migrated from the traditional earned-discharge approach to the straight discharge as is the practice under the United States Chapter 7 procedure.[102] The primary purpose of introducing the personal recovery procedure, namely to cater for NINA debtors' specific needs, aligns to the World Bank *Report*'s recommendations for a good insolvency system and serves as an example for developing countries, such as Nigeria.[103]

The 2010 reforms also resolved the challenge of delayed proceedings due to overburdened courts by eliminating the need to channel payment plans through the courts where "ordinary measures" are recommended and also by making provision for situations where the commission can recommend a personal recovery procedure, without having to burden the court with the process of asset liquidation.[104]

[97] Kilborn 2005 *Mich J* Int'l *L* 619.
[98] See also Kilborn 2010 http://bit.ly/2N3wdUo 34 (accessed 21/08/2018).
[99] *Ibid*.
[100] *Ibid*. Coetzee *A comparative reappraisal of debt relief measures* 55.
[101] Coetzee *A comparative reappraisal of debt relief measures* 55.
[102] Roestoff and Coetzee 2017 *CILSA* 269.
[103] See ch 2 par 2.5.4.
[104] Coetzee *A comparative reappraisal of debt relief measures* 57.

Generally speaking, the role of the court in regard to the personal recovery without liquidation procedure has been reduced to the barest minimum to a point where the courts basically "rubber stamp"[105] such applications, except in opposed cases.[106] In essence, administrative methods have been deployed across the entire French insolvency system to ensure that applications are speedily resolved.

5.3 SWEDEN

5.3.1 Background to insolvency of natural persons in Sweden

Sweden, as were other European nations, was affected by credit deregulation in the 1980s.[107] Deregulation caused the rate of household debt to grow drastically as the rate of personal savings dwindled.[108]

In 1986 *Riksdagen* (the Swedish parliament) considered the formulation of laws to regulate consumer debt for the first time.[109] This process brought about the *Konkurslagen* (Swedish Bankruptcy Act of 1987), which provides for the bankruptcy procedure and which still is in force. As in other continental European states it was observed that the Swedish Bankruptcy Act did not benefit both creditors and debtors,[110] since the majority of consumer debtors do not have non-exempt assets which are required to pay some of the creditors' claims.[111] Also, the Bankruptcy Act does not provide for the discharge of debts.[112]

In the late 1980s until early 1990 it was recorded that there was a growing debt burden on natural persons.[113] This situation drew the attention of policymakers[114] and led to the commissioning of an official investigation into the possibility of alternative debt relief measures to bankruptcy.[115] In October 1990 the investigative commission

[105] *Ibid.*
[106] Kilborn 2012 *Loy Consumer L Rev* 27–28.
[107] Kilborn 2006 *Am Bankr LJ* 437.
[108] Ett steg mot ett enklare och snabbare skuldsaneringsförfarande, sou 2004:81 55 http://bit.ly/2N33uil (hereafter referred to as SOU 2004) (Accessed 21/08/2018).
[109] Kilborn 2010 http://bit.ly/2N3wdUo 14 (accessed 21/08/2018).
[110] *Ibid*.
[111] *Ibid*. See also ch 1 s 1 SWB, which states that the bankruptcy procedure provides the opportunity for creditors to jointly and compulsorily take the total assets of a debtor for the purpose of receiving payment of their claims.
[112] Kilborn 2010 http://bit.ly/2N3wdUo 14 (accessed 21/08/2018).
[113] Freeman *et al The National bureau of economic research* 8.
[114] Ramsay *Personal insolvency in the 21st Century* 138.
[115] *Ibid*.

submitted its report, which proposed a new legal scheme of debt adjustment for individuals which was similar to the one adopted by Denmark in 1984.[116]

In February 1994 the Swedish government presented a draft law known as *Skuldsaneringslag* (the Debt Adjustment Act).[117] In the process of the formulation of the Debt Adjustment Act the American straight discharge method was rejected outright because it does not consider the debtor's future ability to pay.[118] The objective of the law rather was to aid "economic rehabilitation" in radically altered circumstances or unpredicted events where individuals were unable to repay and consequently was not aimed at alleviating social problems. Consequently, the new law allowed access only under strict conditions, for instance permanent insolvency and "reasonableness" on the part of the debtor. The latter requirement allows the court to look into the conduct of the debtor and the nature and age of the debts.[119] Although it was recommended that the courts supervise the law, it was intended to be a "quick, simple and inexpensive" procedure.[120]

After a brief debate on the draft law the Swedish parliament adopted the government proposal for *Skuldsaneringslag* 1994,[121] otherwise known as the (Debt Adjustment Act of 1994), which came into effect on 1 July 1994.[122] This legislation adopted a three stage procedure.[123] The first stage required that the debtor took an initial step of negotiating with the creditors for settlement, which was done with the help of the municipal counselling services.[124] The second stage was activated when negotiations failed and required that the debtor submit an application for relief to the *Kronofogdemyndigheten* (state enforcement agency, also known as KFM).[125] The KFM was required to draw up a payment plan in line with statutory guidelines and present it to the creditors for a vote. The third stage involved the court's intervention on debt

[116] *Ibid*.
[117] *Idem* 133.
[118] *Idem* 139.
[119] *Ibid*.
[120] Lennander 1991 *Stockholm Institute for Scandinavian Law* 141.
[121] 1994: 334.
[122] Kilborn 2006 *Am Bankr LJ* 438.
[123] Ramsay *Personal insolvency in the 21st Century* 139. See also Kilborn 2010 http://bit.ly/2N3wdUo 22 (accessed 21/08/2018).
[124] The Debt Adjustment Act of 1994 provided for municipal counselling services that assisted debtors in negotiating settlements with creditors, see Ramsay *Personal insolvency in the 21st Century* 139.
[125] This is a Swedish government administrative body where all applications for debt restructuring in Sweden are lodged. The KFM is the Swedish debt enforcement agency whose primary responsibility is to act as official debt collector for the public, private individuals, companies and it is also known as Royal Debt Collector's Office. The KFM operates as an independent public authority, but it is accountable to the central government. See Huls 2012 *J Consum Policy* 504.

adjustment plans[126] and was applicable in instances where the creditors rejected the payment plan that was drawn up by the KFM in the second stage, as often was the case.[127]

A number of challenges arose with the implementation of the Debt Adjustment Act, such as long processing times, few voluntary settlements and a lack of clarity in the roles of the enforcement service and municipality which assist debtors in negotiating settlements.[128] These challenges led to further reforms of the Debt Adjustment Act of 1994,[129] which consequently led to *Skuldsaneringslag* 2006[130] otherwise known as the (Debt Adjustment Act of 2006).

A major reform included in the Debt Adjustment Act of 2006 is the elimination of the initial negotiation stage, because it was regarded as a waste of time for the municipal counsellors who assisted in negotiations.[131] Sweden was the first state to abolish the required first step of attempting negotiated settlements with creditors.[132] Legislators were convinced of the need to eliminate this requirement due to many years of long delays.[133] Many creditor representatives supported the move as they regarded the negotiation phase as "nearly meaningless".[134]

Another major reform was the elimination of the "hyper-technical requirement of court imprimatur on debt adjustment plans".[135] Thus step three of the process was removed because the courts complained that it amounted to a waste of their time and resources. More often than not the creditors' objections to proposed debt adjustment plans were baseless and amounted to a sheer waste of time where the proposal simply should have been accepted.[136] This innovative step abolished the need to involve the courts in the process of the alternative debt adjustment procedure.[137] The abolition of this "superfluous court review process" rendered the system

[126] See Kilborn 2012 *Loy Consumer L Rev* 21.
[127] *Ibid*.
[128] See Kilborn 2012 *Loy Consumer L Rev* 21. See also Ramsay *Personal insolvency in the 21st Century* 139.
[129] *Ibid*.
[130] 2006: 548 http://bit.ly/2Gzm6Gr (accessed 09/02/2019).
[131] *Ibid*.
[132] *Ibid*.
[133] Ramsay *Personal insolvency in the 21st Century* 139.
[134] Kilborn 2010 http://bit.ly/2N3wdUo 22 (accessed 21/08/2018).
[135] Kilborn 2012 *Loy Consumer L Rev* 21 and 27.
[136] Kilborn 2010 http://bit.ly/2N3wdUo 22 (accessed 21/08/2018).
[137] *Ibid*.

more efficient.[138] It was submitted the abolition of the court review process helps in disposing of about 20,000 cases each year.[139]

The latest amendment to the Swedish natural person insolvency system is the repeal of the Debt Adjustment Act of 2006 and its replacement with the *Skuldsaneringslag* 2016,[140] otherwise known as the Debt Adjustment Act of 2016 (DAA). The purpose of the DAA is to make the conditions for obtaining debt relief easier by relaxing access requirements, facilitating discharge for "heavily indebted people who have little chance of ever getting rid of their debts" and introducing an electronic medium of application.[141] Furthermore, the DAA seeks to introduce a new debt restructuring law to help highly-indebted entrepreneurs by affording them a second chance and improving the conditions for running companies in Sweden.[142]

5.3.2 Debt relief measures for insolvent natural persons in Sweden

5.3.2.1 Background

The Swedish insolvency system is regulated by two pieces of insolvency legislation, namely the Swedish Bankruptcy Act (SWB) and the DAA. The SWB provides a debtor with two channels of debt relief: the bankruptcy procedure[143] and the proposal procedure.[144] The DAA provides for a single channel for debt relief which is reserved for severely overburdened debtors. This channel of debt relief is known as the debt restructuring procedure.[145] An insolvent natural person in Sweden has three options for debt relief, namely the bankruptcy proceedings, the composition procedure and the debt restructuring procedure.

5.3.2.2 Bankruptcy procedure

An insolvent natural person debtor in Sweden has the opportunity to go through the bankruptcy proceeding to obtain relief from indebtedness.[146] In this respect,

[138] Kilborn 2012 *Loy Consumer L Rev* 21.
[139] *Ibid*.
[140] 2016: 675. This latest version of the Swedish Debt Adjustment Act shall be referred to in the course of this chapter http://bit.ly/2tebzZm (accessed 09/02/2019).
[141] Report of the committee on civil liberties 2015/16; Report on debt restructuring – improved opportunities for over- indebted to restart (hereafter referred to as the report of the committee on civil liberties 2015/2016) http://bit.ly/2GCyWDX (accessed 12/02/2019)
[142] *Ibid*.
[143] Ch 1 s 1 of the SWB.
[144] Ch 12 of the SWB.
[145] S 5 of the DAA.
[146] This is a liquidation procedure that requires that the debtor has some form of assets to be liquidated for the benefit of the creditor's of the insolvent estate.

"[i]nsolvency means that the debtor cannot pay his debts when due and that this incapacity is not merely temporary".[147]

The Swedish bankruptcy procedure provides the opportunity for creditors jointly and forcibly to take the total assets of a debtor for the purpose of receiving payment on their claims.[148] A bankruptcy proceeding can be initiated either by a debtor or a creditor through a debtor's or creditor's petition.[149]

A petition for bankruptcy is made in writing, addressed to the district court and personally signed by the petitioner or the representative of the petitioner.[150] A debtor's petition includes a signed schedule detailing the assets, debts, account of the estate and also information concerning the creditor(s), such as their names and postal address.[151] A debtor also needs to present proof of balance sheet insolvency, which reveals that his debts are greater than his assets.[152] The debtor's proof of balance sheet insolvency is admissible in the district court as a valid act of insolvency.[153]

Thereafter, a date is fixed for the hearing and determination of the debtor's bankruptcy application. The date fixed must be within two weeks after the petition is delivered to the court or within a month at most in exceptional circumstances.[154] Where the debtor fails to attend the hearing, the court makes a decision on the petition in his absence.[155]

A creditor's petition should provide information about his claim(s) and enclose original or copies of documents to which he wishes to refer.[156] The petition and enclosed documents must be submitted to the court in duplicate.[157] When the claims of the creditor are confirmed by the court or an enforcement authority under the SWB, the

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[147] Ch 1 s 2 of the SWB.
[148] Ch 1 s 1 of the SWB. Looking at the wording of ch 1 s 1 of the SWB, which states that bankruptcy
> provides the opportunity for creditors to jointly and compulsorily take the total assets of a debtor for the purpose of receiving payment of their claims

it appears that the Swedish bankruptcy procedure primarily is designed compulsorily to provide some sort of advantage for creditors through the assets of the insolvent. This is the case with the ddebtors' bankruptcy application (receiving order) under the proposed BIA. See ch 3 par 3.3.3.3 and ch 4 par 4.3.1.
[149] Ch 2 ss 1 and 2 of the SWB. This is similar to the bankruptcy procedure in Nigeria which also provides for a debtor's bankruptcy application through the assignment procedure and the creditor's application through the receiving orders procedure. See ch 3 par 3.3.3.2 and 3.3.3.3.
[150] See ch 2 s 1 of the SWB.
[151] Ch 2 s 3 of the SWB.
[152] Ch 2 s 7 of the SWB.
[153] *Ibid*.
[154] Ch 2 s 14 of the SWB.
[155] *Ibid*.
[156] Ch 2 s 4 of the SWB.
[157] *Ibid*.

accepted claim forms a basis to request that the debtor be declared bankrupt.[158] The court sets a date for the hearing of the creditor's bankruptcy petition.[159] After the date is set, the concerned parties should be issued a summons to the hearing. The summons issued to the debtor states that there will be an opportunity for the debtor to answer to the bankruptcy petition at the hearing. However, it is not compulsory for the debtor to attend the hearing provided he consents in writing to the petition.[160]

After a bankruptcy order is granted by the court, irrespective of whether the proceedings were initiated by a debtor or creditor, a permanent administrator[161] is appointed by the court to take over the debtor's assets and businesses.[162] The bankruptcy order contains a date for a meeting where the debtor is expected to take the estate inventory oath[163] and entails a presentation of an estate inventory of his assets to which contents he must swear in the presence of a commissioner of oaths.[164] The assets realised from the insolvent estate will be sold by the administrator and the creditors paid from the proceeds of the estate.[165]

A Swedish indebted natural person also has an opportunity to make proposals to his creditors for a composition scheme in full or partial fulfilment of his debt.[166] It can be done only in the course of the bankruptcy proceedings after the creditors have proved their claims under the SWB.[167]

Where the parties agree to a proposal for composition it will be sent to the court for approval. On the other hand, if there was no proposal for composition or no agreement was reached on the proposal, the bankruptcy proceedings continue and are deemed completed after the district court confirms the administrator's distribution account.[168]

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[158] See s 6 of the SWB.
[159] Ch 2 s 16 of the SWB.
[160] *Ibid*.
[161] An administrator is the person appointed by the court to "take all those measures promoting an advantageous and expeditious winding-up of the estate". See ch 7 s 1 and 8 of the SWB.
[162] Ch 2 s 24(2) and ch 7 s (2) of the SWB.
[163] Ch 2 s 24(1) of the SWB.
[164] *Ibid*.
[165] See ch 8 (1) and (2) of the SWB.
[166] Ch 12 of the SWB.
[167] *Ibid*. This is similar to the Nigerian composition and scheme of arrangement under the BA. See ch 3 par 3.4. However, it will change under the proposed BIA because the proposal procedure under the proposed BIA is an independent alternative debt relief procedure to bankruptcy and no longer is a proposal under bankruptcy proceedings.
[168] Ch 11 s 18 of the SWB.

The SWB fails to provide for a discharge of a debtor who has gone through the bankruptcy procedure.[169] Also, the Swedish bankruptcy procedure is an assets liquidation procedure, which provides an avenue for all creditors collectively and compulsorily to take the total assets of the debtor in exchange for their claims.[170] From the foregoing, it appears that the Swedish bankruptcy procedure cannot provide debt relief to a NINA debtor because the primary purpose of the bankruptcy procedure according to chapter 1 section 1 of the SWB is to create an avenue for creditors to take the debtor's assets in exchange for their claims.[171] Furthermore, the proposal procedure, which is available in the course of bankruptcy proceedings, can be accessed only by debtors who have some form of assets to access the bankruptcy procedure and income to fulfil the financial obligations set out in the proposal.[172] Therefore, NINA debtors are excluded from the bankruptcy and proposal procedure.

5.3.3 Debt relief measures for heavily burdened and NINA debtors in Sweden

5.3.3.1 Debt restructuring procedure

The Swedish insolvency laws for natural persons provide for a once in a life time debt restructuring procedure[173] as an alternative to bankruptcy. This procedure was first introduced in the Debt Adjustment Act of 1994 and currently is regulated by the DAA of 2016.

The court grants an application for debt restructuring only where the requirements of sections six to ten of the DAA are fulfilled.[174] The requirements are as follows:

a) The debtor shall have his main interests in Sweden;[175]
b) The debtor should be unable to pay his debts and his inability to pay debts is assumed to continue for the foreseeable future (this is referred to as qualified insolvency);[176]
c) There shall be no prohibitions on the debtor's business in situations where the debtor is a trader;[177]

[169] Ginsburg *et al Civil procedure Sweden* 341.
[170] See ch 1 s 1 of the SWB.
[171] See par 5.3.2.1.
[172] *Ibid*.
[173] See s 10 of the DAA.
[174] See s 5 of the DAA.
[175] S 6 of the DAA.
[176] S 7 of the DAA. See discussions on "qualified insolvency" thereafter.
[177] See s 8 of the DAA.

d) The debtor's financial circumstances, efforts made to fulfil his financial obligations, participations and comportment since the commencement of the debt adjustment case are such that the court considers it reasonable to grant the application for debt restructuring (otherwise known as the requirement of "reasonableness");[178]
e) The debtor should never have been subject to debt restructuring. This requirement may be waived under special circumstances where the court deems it fit to grant a debt restructuring for a second time.[179]

With regard to the requirement of "qualified insolvency", which is defined as the inability of the debtor to pay his debts for the foreseeable future,[180] the law fails to define the length of time that would be regarded as the "foreseeable future". However, the KFM laid down guidelines in 2008 stating that it is reasonable to say that it must be unlikely that the debtor will regain solvency within the period of five to ten years.[181]

In relation to the requirement of "reasonableness"[182] the debt should be old enough to establish that the debtor had struggled under it for a long time.[183] The debtor must show good faith in that his over-indebtedness was caused by circumstances beyond his control and thus is not as a result of his recklessness.[184] Further, the debt collector's office, which has the discretion to grant the application,[185] must be convinced that the debtor has made reasonable efforts to offset the debt.[186]

[178] See s 9 of the DAA. See further discussions on the requirement of "reasonableness" below.
[179] See s 10 of the DAA.
[180] The phrase "unable to pay his or her debts as they come due" which is the test for insolvency is taken from the existing business focused bankruptcy law. See PROP 1993/94 § 4.3.2; SOU 2004 60. Although some courts have interpreted this to mean a minimum debt level of 200,000 crowns, (which is about $25,000). However, the legislators intentionally avoided fixing a minimum debt level for access to the debt restructuring procedure. See PROP 1993/94 § 4.3.2. See also Lennander 991 *Scandinavian studies in law* 145, McGregor *et al* 2001 *Int'l J Cons Stud* 214 and SOU 2004 61. The Supreme Court was called upon twice in the early years (after the new system started) to reverse lower court denials of petitions of individu als whose debts fell below the minimum debt level of 200,000 crowns and were seen to be "insufficiently indebted". See the case of NJA 1997:46 s. 229 (HD case no. Ö402096) available online at http://bit.ly/2PeeXfJ (accessed 28/08/2018). In this case, the Supreme Court reversed the decision of the lower court whose application was denied because the total debts were about 95,000 crowns (that is about $11,875) and did not meet the minimum debt level of 200,000 crowns. See also, NJA 1996:87 s. 548 (HD case no. Ö5483-95) where the court also reversed the decision of the lower court which was de nied because the petitioner's debts were about 175,000 crowns, (that is about $21,875). The Supreme Court over turned these decisions stating that the debtor's income and consequent ability or inability to pay debts within the foreseeable future was all that mattered and not the size of the debt.
[181] See Ramsay *Personal insolvency in the 21st Century* 144.
[182] Ramsay *Personal insolvency in the 21st Century* 138 and 144. See also Kilborn 2006 *Am Bankr LJ* 453–454.
[183] *Ibid*.
[184] Ramsay *Personal insolvency in the 21st Century* 144 and 145.
[185] See ch 5 s 27 of the SBA.
[186] Ramsay *Personal insolvency in the 21st Century* 144 and 145.

The "reasonableness" requirement was developed subsequent to the abandonment of steps one and three of the debt adjustment procedure.[187] Some commentators are of the opinion that the age of the debt[188] is appropriate to granting debt relief under the debt adjustment procedure, because the "debtor must spend significant time in a sort of debt purgatory before being allowed to pass through the pearly gates of debt forgiveness".[189] This period shows that the debtor has struggled with debt for quite some time with no hope of getting out of it. In essence, the debtor has no option but to apply for the formal debt adjustment procedure as a last resort. [190]

The purpose of these requirements, that is, "qualified insolvency" and "reasonableness", is to prevent debtors who are "temporarily insolvent from using the process and also to address concerns about moral hazard both before and after a debtor experiences financial difficulty".[191]

An application for debt restructuring should be in writing and signed by the debtor.[192] Where the application is submitted electronically, it should be electronically signed.[193] The application should contain information regarding the debtor's assets, income, expenses, liabilities, details of his creditors and debts owed to each creditor. Furthermore, the application should state the genesis of the liabilities and efforts made to fulfil the financial obligations.[194]

After sufficient investigation has been carried out by the KFM on the debt restructuring application, the KFM, together with the debtor, draws up a proposal for debt restructuring.[195] The proposal contains information as to outstanding debt, how the debts are to be paid and the duration of the payment plan.[196] Thereafter, the proposal for debt restructuring is sent to all known creditors whose claims are covered by the proposal, together with an injunction informing them of their rights to express their views on the proposal within a specified period.[197] After the expiration of the pe-

[187] See par 5.3.1 for discussions on the evolution of the DAA.
[188] PROP 1993/94 § 4.3.3.
[189] Kilborn 2006 *Am Bankr LJ* 445.
[190] Ramsay *Personal insolvency in the 21st Century* 145.
[191] Ramsay *Personal insolvency in the 21st Century* 143 and 144.
[192] See s 11 of the DAA.
[193] *Ibid*.
[194] S 12 of the DAA.
[195] S 25 of the DAA.
[196] S 29 of the DAA.
[197] See s 26 of the DAA.

riod extended to the creditors to respond the KFM decides either to grant or reject the application for debt restructuring.[198]

An application for debt restructuring shall be rejected if the debtor is subject to another debt settlement procedure, the application is deficient, the conditions for debt restructuring are not met, the debtor does not appear in person at a meeting, or does not participate in the proceedings.[199] On the other hand, if the conditions for debt restructuring have been fulfilled, the debt restructuring order is granted.[200]

The amount to be paid by the debtor according to the debt restructuring payment takes into account the debtor's assets and income (after deducting what is reserved for the debtor and his family's livelihood).[201] Debtors are required to pay creditors only the amount ordered in terms of the proposal and at intervals specified under the plan. To save costs intermediaries are not involved.[202]

Where the debtor has no income or does not have income above the minimum amount needed to survive, the debtor is not required to make any payments to the creditors.[203] Many debtors fall into this category and such debtors must wait for five years before obtaining a discharge from their debts (even if they are on a zero-repayment plan).[204] Therefore, Swedish NINA debtors can access the debt restructuring procedure as a means of obtaining a discharge, however, this privilege is a once in a life time opportunity as the debt restructuring procedure can be accessed only once.[205]

The DAA provides for the release of a debtor from the liability of all debts covered by the debt restructuring procedure.[206] Another important feature is that the total cost of the procedure, including the related costs pertaining to the activities of the KFM, is covered by the Swedish government. This renders the debt restructuring procedure absolutely free and, consequently, is accessible to a NINA debtor.[207]

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[198] See s 27 of the DAA.
[199] See ss 13, 14 and 16 of the DAA.
[200] See s 27 of the DAA.
[201] See s 33 of the DAA.
[202] See s 38 of the DAA.
[203] Ramsay *Personal insolvency in the 21st Century* 140.
[204] *Ibid*.
[205] See s 10 of the DAA.
[206] See s 47 of the DAA.
[207] *Ibid*.

The Swedish debt restructuring procedure can be described as a specialised measure available to debtors in grave financial circumstances.[208] It is regulated by an administrative government body and financed by the Swedish government, which enhances access to the measure and eliminates the challenge of high cost which often constitutes a barrier to debt relief.[209] However, a debtor is allowed to access it for a second time only under extraordinary situations such as illness, early retirement or prolonged unemployment.[210] Although the Swedish debt relief procedure mostly adheres to international guiding principles relating to access to debt relief because all debtors irrespective of their financial state have access to the system, it can be improved. Any improvement entails making it accessible to debtors as many times as possible, as long as good faith is shown.[211]

As regards the discharge of debt, it is available only under the debt restructuring procedure.[212] Although the Swedish debt relief procedure provides for a discharge of debts, the discharge would be accessible only to debtors who qualify for the debt relief procedure. In essence, Sweden does not fully comply with international guidelines which state that every debtor should have access to a discharge of debts,[213] because the procedure does not provide for a discharge of debts.

5.3.4 Analysis

The Swedish insolvency law underwent several stages of reform, as is the case with the French law.[214] These reforms clearly show increased compliance with recent international prescriptions which encourage a system that caters for all classes of debtors, irrespective of their financial status.[215]

The crux of the 2007 Swedish reforms was to simplify the debt restructuring process.[216] The act of simplifying the debt restructuring process seems to have acceler-

[208] See par 5.3.3.1.
[209] Ramsay *Personal insolvency in the 21st Century* 150.
[210] *Ibid*. This brings about a striking difference between the Swedish debt restructuring procedure and the French personal recovery procedure which can be granted as many times as possible as long as good faith is shown. Although a second discharge may be granted to an indebted individual in Sweden for debt restructuring, this would only be granted for "extreme reasons" and the selection process would be detailed and thorough; see par 5.2.3.
[211] See ch 2 par 2.6.
[212] See par 5.3.3.1.
[213] *Ibid*.
[214] See para 5.2.1. and 5.3.1 above for discussions on the evolution of the French and Swedish bankruptcy laws.
[215] See ch2 par 2.6 for a summary of international prescriptions for a good insolvency system.
[216] See par 5.3.1.

ated performance in a remarkable way.[217] The overall benefit of simplifying the system is that time and resources are saved, which sets an example especially for countries where resources are limited.[218]

Another benefit of the 2007 reforms is that the KFM reserves the authority to enforce debt adjustment plans on creditors who dissented to the debt adjustment plans. Hence, from 2007 the courts have no major role in the debt restructuring process, except for hearing appeals by interested parties.[219] This development is in line with international principles and guidelines that favour non-judicial proceedings because they save time and costs.[220]

Most importantly as far as this thesis is concerned the 2007 reform provides for NINA debtors in Sweden through the debt restructuring procedure, which is available to seriously over-indebted natural persons.[221] The fact that the Swedish government pays all expenses is especially beneficial in NINA circumstances, because out of pocket costs often hamper NINA debtors from accessing relief measures, which technically are available to them.

Sweden does not offer a swift procedure for NINA debtors in the way the French personal recovery procedure does.[222] However, the fact that Sweden provides for the eventual discharge of NINA debtors shows that the system is in touch with modern needs and realities which demand that NINA debtors should not be discriminated against.[223] The purpose behind this recognition is to ensure that no debtor is shut out of the insolvency system and consequently from the formal economy..[224]

As discussed above, in order for a NINA debtor to obtain relief via the debt restructuring procedure in Sweden the debtor must adhere to certain access requirements. Upon satisfaction of all such requirements he has to wait five years before obtaining a total discharge of his debts.[225] Consequently, it appears that the Swedish system still operates the traditional European earned-discharge approach compared to the

[217] Kilborn 2006 *Am Bankr LJ* 435. See also Kilborn 2012 *Loy Consumer L Rev* 20.
[218] See Coetzee *A comparative reappraisal of debt relief measures* 55.
[219] Kilborn 2006 *Am Bankr LJ* 453-454. See also Maghembe *A proposed discharge dispensation* 289.
[220] See ch 2 par 2.6.
[221] SOU 2004 60.
[222] Ramsay *Personal insolvency in the 21st Century* 141.
[223] See ch 2 par 2.5.4 for discussions on the World Bank *Report* in respect to NINA debtors.
[224] *Ibid*.
[225] See par 5.3.3.1.

French personal recovery procedure that requires only "good faith" on the part of the debtor and which offers a straight discharge to NINA debtors (without their having to wait for years).[226]

The Swedish "politics of compromise" places greater weight on the perceived importance of a "good payment culture" than the economic and social benefits of a fresh start for debtors.[227] The fact that the personal recovery procedure is available to debtors only once in a life time signifies that the Swedish insolvency law is still caught up in the traditional system which believes that a discharge should not be given freely and should be earned.

5.4 Conclusion

In this chapter an evaluation of the French and Swedish natural person insolvency laws was carried out with a focus on NINA debtors. Also, such laws were compared to those proposed in Nigeria.

An evaluation of the French and Swedish natural person insolvency laws reveals that a number of them share similarities with what is proposed in Nigeria but there are also differences. Furthermore, the French and Swedish procedures were measured against the vital international guiding principles of access to debt relief and discharge of debts as expressed in chapter 2.

A notable development in the insolvency laws of both Sweden and France is the step that both jurisdictions took recently to reduce the role of courts in the insolvency process to the barest minimum.[228] To achieve this goal the laws provide for cost effective, non-judicial procedures.[229] The courts have a role to play only in instances where creditors are dissatisfied with a non-judicial resolution.[230]

Evaluating the entire French and Swedish insolvency laws against the first international guiding principle on access of all debtors to debt relief, it is apparent that the French debt relief system is unique in its liberality towards consumer debtors. The French system can be described as flexible in that it accommodates the varying fi-

[226] See par 5.2.4.
[227] Ramsay *Personal Insolvency in the 21st Century* 133.
[228] See para 5.2.2, 5.2.3 and 5.3.3.
[229] This supports the principled preference for non-judicial proceedings rather than judicial as enumerated in ch 2 par 2.6.
[230] See para 5.2.2, 5.2.3 and 5.3.3. This is similar to the new independent proposal procedure under the proposed Nigerian BIA. See ch 3 par 3.4.

nancial situations of debtors. There are debt relief measures for debtors who may have sufficient income to proceed through payment plans.[231] At the same time the system caters for a situation in which a debtor who may have opted for a payment plan encounters financial problems rendering him unable to honour his financial obligations in terms of the payment plan. Such debt will be suspended for a period and then reactivated when it is apparent that the debtor's financial situation has improved.[232] Most importantly, French insolvency law provides for NINA debtors through the specialised personal recovery procedure.[233] This procedure is designed specifically to cater for this group of debtors who often are neglected elsewhere.[234]

Further, in relation to the international guiding principle of access the personal recovery procedure has been simplified to such an extent that a debtor can access it without having to go through a liquidation phase.[235] The only entry requirement of the three-stage procedure in France is "good faith".[236] Therefore, there are no artificial entry requirements hindering access in any way,[237] a reason the French system is regarded as liberal.[238] Because the French insolvency law attempts to accommodate as many debtors as possible, without discriminating against any based on financial incapability, it conforms to the international principle of access as expressed in chapter 2.[239]

In light of the first international guiding principle on access to debt relief for all debtors in Sweden there are three debt relief procedures by which debtors can access the system. The procedures are the bankruptcy procedure, compositions[240] and the debt restructuring procedure.[241] The bankruptcy procedure is an assets liquidation procedure which provides the opportunity for creditors jointly and compulsorily to take the total assets of a debtor for the purpose of receiving payment on their claims.[242] In the course of bankruptcy proceedings a debtor also can access the

[231] See par 5.2.2.1.
[232] See par 5.2.2.2.
[233] See par 5.2.3.1.
[234] See ch 2 para 2.5.4 and 2.6.
[235] *Ibid*.
[236] See para 5.2.2.1, 5.2.2.2 and 5.2.3.1.
[237] *Ibid*.
[238] See para 5.2.2.1, 5.2.2.2 and 5.3.2.1.
[239] See ch 2 par 2.6.
[240] See par 5.3.2.1.
[241] See par 5.3.3.1.
[242] See par 5.3.2.2.

composition procedure.[243] In this instance a composition refers to a payment plan arrangement which requires the debtor to have some form of income to fulfil the financial obligations agreed on by the parties.[244] It means that access to bankruptcy and the composition procedure basically are restricted to debtors who have some form of assets or income.

On the other hand, the debt restructuring procedure caters for two other groups of debtors, namely those who have serious financial difficulties but who can still afford a payment plan and those who do not have any form of assets or income (NINA debtors).[245] The total cost associated with the debt restructuring procedure, including the related costs pertaining to the activities of the KFM (which could have served as a hindrance to the access of NINA debtors), is fully covered by the Swedish government. This feature renders the debt restructuring procedure more accessible to debtors, most especially NINA debtors.[246] However, the procedure has a number of access requirements which likens it to an earned discharge, which is popular also among other European countries.[247]

It appears that Swedish insolvency laws allow sufficient access to debt relief for every debtor as a wide range of debtors are catered for, most especially through the reformed debt restructuring procedure. However, the major impediment to access in Sweden appears to be the fact that the debt restructuring procedure is accessible to NINA debtors only once in a life time and a second opportunity would be granted only in rare instances.[248] Furthermore, debt relief is not immediate as is the case in France.

Second, international guidelines opine that the availability of a discharge is a vital feature of all effective natural person insolvency legislation. Therefore, every financially distressed debtor should be able to obtain a discharge of debts under the system.[249] In France the payment plan procedure does not provide for a discharge of a debtor after completion of the payment plan, the global payment moratorium proce-

[243] See par 5.3.3.1.
[244] *Ibid*.
[245] *Ibid*.
[246] See par 5.3.3.1.
[247] See ch 2 par 2.4.1 for a discussion of the European concept of "earned discharge".
[248] *Ibid*.
[249] See ch 2 par 2.6.

dure provides only a partial pro-rata discharge of most of the debtor's obligations,[250] whereas the personal recovery procedure offers an immediate and complete discharge of debts to NINA debtors.[251] Therefore, a discharge in accordance with the debtor's specific financial circumstances is available to debtors under the French system.

As regards the Swedish system a discharge is not available to debtors who enter the bankruptcy procedure[252] On the other hand, the debt restructuring procedure provides for a once in a life time opportunity for a discharge of debts.[253] It appears that access to discharge is still restrictive in Sweden and as such, the system does not comply fully with the international guiding principle, which favours the availability of discharge for all debtors.

Thirdly, international guiding principles favour formal procedures in that they are deemed to be more effective.[254] However, the informal procedures are regarded as more time efficient, cost effective and also help curb the challenge of stigmatisation.[255] It has been observed that in order to ensure the effective use of informal procedures there is a need for some form of "institutional support and incentives" because past experience shows that few cases get resolved through voluntary settlements.[256]

In the French insolvency system the three debt relief procedures provided (which are the payment plan procedure, moratorium and partial discharge and the personal recovery procedure) are all formal procedures.[257] Although international guiding principles are positive with regard to informal procedures for a number of reasons, the use of formal procedures is not condemned.[258] It is important to note that the French insolvency law has undergone several reforms of these procedures to the extent that the challenges usually identified with formal procedures (which are the high cost of

[250] See par 5.2.2.2.
[251] See par 5.2.3.1.
[252] See ch 2 par 2.6.
[253] See par 5.3.3.1.
[254] *Ibid*.
[255] *Ibid*.
[256] *Ibid*.
[257] See par 5.2.2.
[258] See ch 2 par 2.6.

proceedings and delay) have been tackled as a result of the use of administrative mechanisms in order to ensure quicker and more cost effective proceedings.[259]

As is the case in France, the bankruptcy and debt restructuring procedures currently available in Sweden can be regarded as formal procedures. These procedures are formalised in the SWB and the DAA and are administered by the KFM and the courts,[260] which further strengthens the institutional structure.[261] The Swedish system in that it provides for formal procedures is in alignment with international guidelines.[262]

Lastly, international guidelines favour non-judicial or out-of-court proceedings above judicial proceedings because they are faster and more cost effective than judicial proceedings. The core attribute of the most recent reforms in France and Sweden is the reduction of court involvement in insolvency processes.[263]

The debt relief procedures offered by France largely are administered by the commission on individual over indebtedness (administered principally under the auspices of the *Banque de France*) in alignment with international guidelines which favour non-judicial procedures.[264] Also, the 2010 reforms, which extended powers to the commission to endorse a personal recovery procedure,[265] further entrenched the French preference for non-judicial procedures. In support, the statistics show that the percentage of cases administered through the personal recovery procedure in the first six months of 2010 increased by 16% over the total recorded in 2009.[266]

In Sweden the liquidation procedure is administered by the courts,[267] while the debt restructuring procedure is administered by the KFM,[268] which renders it non-judicial in nature. In light of this possibility the Swedish system aligns with international guidelines which advocate the provision of non-judicial procedures.[269]

[259] See par 5.2.2.
[260] See par 5.3.2.1.
[261] See par 5.3.3.1.
[262] See par 5.3.1.
[263] See ch 2 par 2.6.
[264] See par 5.2.1 and ch 2 par 2.6.
[265] See par 5.2.1.
[266] *Ibid*.
[267] See par 5.3.2.1.
[268] See par 5.3.3.1.
[269] See ch 2 par 2.6.

The discussion of the French and Swedish debt relief systems in this chapter provides insight into the practicality of a debt relief system that aligns with the international guiding principles set out in chapter 2. Also, the evaluation of these two debt relief systems showcases two European approaches to debt relief from which Nigeria can learn. These approaches are the longstanding and conservative approach (the earned discharge) and the new liberal approach (the straight discharge) offering debt relief for NINA debtors. Also, and most importantly, lessons can be drawn from the different styles of debt relief provided to NINA debtors in France and Sweden, which are the free access personal recovery procedure under the French system and the restrictive, once in a life time, debt restructuring procedure available in Sweden.

CHAPTER 6
AN ANGLO-AMERICAN APPROACH: DEBT RELIEF MEASURES IN IRELAND AND CANADA

Summary

6.1 Introduction

Historically, in the context of Anglo-American insolvency law, several varieties of natural person insolvency law developed from what can be described as a general insolvency legislation.[1] In essence, indebted natural persons in these systems obtained relief in terms of provisions which focused on insolvent individuals, albeit in the context of the broader insolvency law and not as separate legislation.[2] The procedures in the former usually are simpler court proceedings as opposed to the more complex procedures applied in the case of businesses.[3]

The purpose in this chapter is to review the debt relief measures available to insolvent natural persons in Ireland and Canada, which reflect aspects of an Anglo-American system with a specific focus on NINA debtors. A further purpose is to perform a comparative study of the debt relief measures available in these jurisdictions with that which is proposed in Nigeria to identify lessons to be learnt. Further, the comparative debt relief systems are measured as a whole against the international guiding principles extracted in chapter 2.

[1] See the World Bank *Report* 51.
[2] *Ibid*.
[3] *Ibid*.

The choice of Ireland and Canada is motivated by the need to consider an Anglo American approach to debt relief for insolvent natural persons, particularly the insight this offers in relation to NINA provisions. The Irish bankruptcy law is considered because of its recent reforms,[4] which introduced largely administrative procedures and most importantly, because of the NINA provision that was introduced as a third procedure by the new Act.[5] Canada is chosen because of its sound qualified "fresh start" policy[6] and its unique provisions for two different classes of NINA debtors.[7]

6.2 Ireland

6.2.1 *Background to insolvency of natural persons*

The first legislation to provide for the insolvency of natural persons in the Republic of Ireland was the Irish Bankruptcy Act of 1988.[8] This legislation provides two debt relief procedures, namely bankruptcy and an alternative procedure known as schemes of arrangement.[9] The Irish Bankruptcy Act was characterised by a number of factors which deterred its use by debtors,[10] among others, that the bankruptcy procedure was expensive to file because it involved several hearings in the Irish High Court which attracts high legal fees.[11] Also, the Irish Bankruptcy Act required the debtor to pay a deposit of €650 and to hold assets worth €1900 to commence a bankruptcy proceeding. These requirements restricted the number of debtors accessing bankruptcy.[12] Further, the Irish Bankruptcy Act did not provide for an automatic discharge,[13]but for a discharge by court order only twelve years after bankruptcy and after all non-exempt assets have been turned over.[14] Lastly, the alternative statutory scheme of arrangement procedure was extremely costly, complicated and burdensome and as such was hardly used as an alternative debt relief procedure.[15]

[4] See the Personal Insolvency Act No 44 of 2012 (hereafter referred to as the PIA).
[5] Ss 26, 34, 46 of the PIA.
[6] Ziegel 1999 *Osg Hall LJ* 205.
[7] Ben-Ishai and Schwartz 2007 *Osg Hall LJ* 473.
[8] See the Irish Bankruptcy Act of 1988 Act No 27 of 1988 (hereafter referred to as the Irish Bankruptcy Act). Although the Irish Bankruptcy Act's date of promulgation is quite dated it has been amended to adjust to modern needs.
[9] See ss 87–109 of the Irish Bankruptcy Act.
[10] Kilborn 2014 *PILR* 330.
[11] *Ibid*.
[12] *Idem* 337.
[13] *Ibid*.
[14] *Ibid*.
[15] Irish Law Reform Commission, *Consultation paper on personal debt management and debt enforcement* (LRC CP 56, 2009).

As a result of these challenges proposals were made for reform of the Irish Bankruptcy Act.[16] Law reforms were initiated to address the criticisms levied against the Irish Bankruptcy Act of 1988,[17] which brought about the enactment of the PIA. The primary objective of the PIA is to amend the Irish Bankruptcy Act and establish or determine the functions of the Insolvency Service of Ireland.[18] In essence, the Irish natural person insolvency system is regulated by two pieces of legislation, which are the PIA and the Irish Bankruptcy Act of 1988.

The PIA addressed the excessive twelve years waiting period for a discharge by providing an automatic and nondiscretionary discharge three years after the adjudication order in respect of the bankruptcy was granted.[19] It also repealed the required deposit of €650 and assets worth €1900 required of the debtor.[20] The PIA introduced three new procedures, namely the debt settlement arrangement procedure, personal insolvency arrangement procedure and the debt relief notice procedure, which largely are administrative in nature.[21]

The PIA in turn was amended by the Personal Insolvency (Amendment) Act of 2015.[22] The 2015 Amendment Act grants greater supervisory power to the Insolvency Service with regard to regulating insolvency practitioners, further clarifies the roles of creditors, courts and Insolvency Services under the PIA in relation to debt resolution proposals and increases the amount of debt covered by a debt relief notice procedure from €20,000 to €35,000.[23] The 2015 Amendment Act strengthened the powers of the Insolvency Service of Ireland in regard to raising awareness so that the public can be more informed about personal insolvency and bankruptcy matters. It also affords a debtor the right to seek a review by the courts where a creditor has refused a proposal for a personal insolvency arrangement to deal with unsustainable debts.[24]

[16] *Ibid*.
[17] Spooner 2018 *The Mod. L. Rev* 798.
[18] See the introductory paragraph of the PIA. S 2 of the PIA defines the Insolvency Service as "the Insolvency Service of Ireland established by section 8". S 8 states that the Insolvency Service is a body corporate with perpetual succession and s 9 reports the functions of the Insolvency Service as primarily to monitor the operations of the PIA.
[19] See also Spooner 2018 *The Mod. L. Rev* 801.
[20] See s 157 of the PIA.
[21] Ss 25, 55 and 89 of the PIA. See also Spooner 2013 *ERPL* 760.
[22] No. 32 of 2015 (hereafter referred to as the 2015 Amendment Act).
[23] See the Irish Department of Justice and Equality official website http://bit.ly/2IEccV4 (accessed 17/04/2019).
[24] *Ibid*.

6.2.2 Debt relief measures for insolvent natural persons

6.2.2.1 Bankruptcy proceedings

The Irish Bankruptcy Act primarily regulates the bankruptcy procedure as a means of securing relief from indebtedness.[25] The bankruptcy procedure can be initiated by way of a petition filed by a creditor (creditor's bankruptcy proceedings) or a debtor (debtor's bankruptcy proceedings).[26] This procedure too is the case under the proposed Nigerian BIA.[27]

To commence a creditor's bankruptcy procedure the law requires that creditors approach the court to obtain a bankruptcy summons that must be served on the debtor.[28] The bankruptcy summons includes a notice requiring that the debtor pays his debts within 14 days after the notice is served on the debtor and this notice sets out the particulars of the debts due.[29]

To obtain a bankruptcy summons the creditor must prove that he has a due claim of more than €20,000 against the debtor; the debt is a liquidated sum, he has given at least 14 days notice in the prescribed form to the debtor of his intention to apply for a bankruptcy summons and the debt remained unpaid.[30] A bankruptcy summons can be granted as well where there are two or more creditors who apply jointly and who are not partners and their debts amount to more than €20,000.[31]

The debtor reserves the right to apply to the court for dismissal of the summons in the prescribed manner[32] and the court dismisses the summons if satisfied that an issue would arise for trial.[33]

A creditor may present a creditor's bankruptcy petition for adjudication against a debtor only where the[34]

[25] S 4 of the Irish Bankruptcy Act. This is the assets liquidation procedure and requires that the assets of the debtor be liquidated for the purpose of his creditors.
[26] See ss 11 and 15 of the Irish Bankruptcy Act and ss 144 and 145 of the PIA for the amended provisions.
[27] See ch 3 para 3.3.3.2 and 3.3.3.3.
[28] See s 8 of the Irish Bankruptcy Act and s 144 of the PIA.
[29] See s 8(3) of the Irish Bankruptcy Act.
[30] See s 8(1) of the Irish Bankruptcy Act.
[31] See s 8(2) of the Irish Bankruptcy Act.
[32] See s 8(5) of the Irish Bankruptcy Act.
[33] See s 8(6) of the Irish Bankruptcy Act.
[34] See s 11 of the Irish Bankruptcy Act and s 145 of the PIA.

a) debt owed by the debtor to the petitioning creditor (or in situations where there are two or more creditors whose aggregate amount of debt being owed) amounts to more than €20,000;
b) debt owed to the petitioning creditor is a liquidated sum;
c) acts of bankruptcy[35] on which the petition was initiated had occurred within a period of three months prior to the filing of the petition;
d) the debtor is resident in the state or had carried on business or resided in the state within a year prior to the presentation of the petition.[36]

The court grants a creditor's application for bankruptcy only if satisfied that the creditor has complied with the stated requirements[37] and that the bankruptcy procedure is the most suitable route for debt enforcement available to the parties in the circumstance.[38] In order for the court to determine whether the bankruptcy procedure is the most suitable route, it would consider factors such as the nature

[35] (1) An individual (in this Act called a "debtor") commits an act of bankruptcy in each of the following cases—
(a) if in the State or elsewhere he makes a conveyance or assignment of all or substantially all of his property to a trustee or trustees for the benefit of his creditors generally;
(b) if in the State or elsewhere he makes a fraudulent conveyance, gift, delivery or transfer of his property or any part thereof;
(c) if in the State or elsewhere he makes any conveyance or transfer of his property or any part thereof, or creates any charge thereon, which would under this or any other Act be void as a fraudulent preference if he were adjudicated bankrupt;
(ca) the individual has been subject as a debtor to a Debt Settlement Arrangement which has been terminated under section 83 of the Personal Insolvency Act 2012; PT. I S. 3 [No. 27.] Bankruptcy Act 1988 [1988.];
(cb) the individual has been subject as a debtor to a Debt Settlement Arrangement which under section 84 of the Personal Insolvency Act 2012 is deemed to have failed;
(cc) the individual has been subject as a debtor to a Personal Insolvency Arrangement which has been terminated under section 122 of the Personal Insolvency Act 2012;
(cd) the individual has been subject as a debtor to a Personal Insolvency Arrangement which under section 123 of the Personal Insolvency Act 2012 is deemed to have failed];
(d) if with intent to defeat or delay his creditors he leaves the State or being out of the State remains out of the State or departs from his dwelling-house or otherwise absents himself or evades his creditors;
(e) if he files in the Court a declaration of insolvency;
(f) if execution against him has been levied by the seizure of his goods under an order of any court or if a return of no goods has been made by the sheriff or county registrar whether by endorsement on the order or otherwise;
(g) if the creditor presenting a petition has served upon the debtor in the prescribed manner a bankruptcy summons, and he does not within fourteen days after service of the summons pay the sum referred to in the summons or secure or compound for it to the satisfaction of the creditor.
(2) A debtor also commits an act of bankruptcy if he fails to comply with a debtor's summons served pursuant to section 21(6) of the Bankruptcy (Ireland) Amendment Act, 1872, within the appropriate time there under, and section 8(6) of this Act shall apply to such debtor's summons.
See s 7(1) and (2) of the Irish Bankruptcy Act and s 143 of the PIA.

[36] This is similar to the requirement for proposed Nigerian receiving orders, which refers to the creditor's bankruptcy application in Nigeria. The Nigerian BIA provides that to present a petition for receiving orders, the creditor must show that the debt being owed by the debtor to the petitioning creditor amounts to not less than one million naira and the debtor has committed an act of bankruptcy within the period of six months prior to the filing of the petition for a receiving order. See ch 3 par 3.3.3.2.

[37] See s 11(1) of the PIA and s 15 of the Irish Bankruptcy Act.

[38] S 147 of the PIA.

and value of the assets available in the insolvent estate and the extent of the debtor's liabilities.[39]

A debtor in Ireland may present a petition for personal bankruptcy (a debtor's bankruptcy application),[40] which is akin to the proposed assignment procedure in Nigeria.[41] This petition must be accompanied by an affidavit stating that the debtor made reasonable efforts to reach an appropriate settlement agreement with his creditor(s).[42] A settlement may be offered by way of a proposal to creditors in the form of a debt settlement arrangement (DSA) according to section 57 of the PIA or a personal insolvency arrangement procedure (PIAP) according to section 91 of the PIA.[43]

A debtor must file a bankruptcy petition, an affidavit in support of the petition and his financial statements indicating that his debts exceed his assets by an amount greater than €20,000 to commence the debtor's bankruptcy procedure.[44] Thereafter, the court considers the value of the debtor's assets and liabilities (his financial statement) to determine whether he qualifies for bankruptcy.[45] This process assists the court in determining whether the bankruptcy procedure is the most suitable option in the circumstances before issuing a bankruptcy order.[46]

After a debtor has been adjudged bankrupt (either through a creditor's or debtor's bankruptcy petition) the bankrupt debtor must deliver the following to the official assignee: books and records relating to the estate in his possession, a statement of affairs in the prescribed form, properties and other forms of assistance needed for the administration of his estate.[47] The debtor has an option of applying to the court for a stay of the realisation of his estate (after he has been adjudged bankrupt) to allow him or any one acting on his behalf to make an offer of composition to his creditors in terms of section 39.[48] Where the court grants such a stay the bankrupt calls for a meeting of his creditors before the court to make an offer of composition to

[39] *Ibid*.
[40] See s 145(b) of the PIA.
[41] See ch 3 par 3.3.3.3.
[42] See s 145(b)(4) of the PIA.
[43] *Ibid*. See also s 15 of the Irish Bankruptcy Act.
[44] See s 145(b)(5) of the PIA.
[45] See s 147(14)(1) of the PIA.
[46] See s 14 of the Irish Bankruptcy Act and s 147 of the PIA.
[47] See ss 19 and 20 of the Irish Bankruptcy Act.
[48] See s 38 of the Irish Bankruptcy Act.

them.[49] The notice of the meeting specifying the precise offer of composition must be sent by post to each creditor at least ten days before the meeting.[50]

A composition is deemed accepted and binding on all creditors of the bankrupt if three fifths in number and value of the creditors voting at the meeting, excluding creditors whose debt is less than €500,[51] accept the offer (in person or by an agent authorised in writing) and the offer is approved by the court.[52]

The composition is payable in cash within one month after the court's approval (except where the court allows otherwise) or by way of instalments agreeable to creditors or a combination of cash and instalments.[53] The court has a discretion to refuse any instalment payment that would last more than two years.[54] Upon the application of a debtor or his representative the court discharges the adjudication order when the official assignee submits a report that the required payments have been lodged and there is an absence of fraud.[55]

Where the debtor fails to make an offer for composition or where an offer for composition fails, all properties belonging to the bankrupt at the date of adjudication vest in the official assignee that sees to it that the estate of the bankrupt is liquidated for the benefit of the bankrupt's creditors.[56] Also, the court, on application of an official assignee or trustee, may make an order requiring that the bankrupt makes payments from his income or other assets (bankruptcy payment order) to the official assignee for the benefit of his creditors.[57] This application may not be made after the bankrupt has been discharged from bankruptcy.[58]

The Irish bankruptcy procedure provides for a discharge of debts proven in bankruptcy.[59] A debtor who has been adjudged bankrupt may have his debts

[49] See s 39(1) of the Bankruptcy Act.
[50] See s 39(2) of the Irish Bankruptcy Act. The Irish composition procedure is similar to the proposed composition under the BIA. However, a major difference is the fact that the composition procedure under the BIA is an independent alternative debt relief procedure which can be accessed without necessarily having to proceed through bankruptcy first. See ch 3 par 3.4.
[51] S 39(4) of the Irish Bankruptcy Act.
[52] S 39(3) of the Irish Bankruptcy Act.
[53] S 40(1) of the Irish Bankruptcy Act.
[54] S 40(3) of the Irish Bankruptcy Act.
[55] S 41 of the Irish Bankruptcy Act.
[56] Ss 43 and 44 of the Irish Bankruptcy Act.
[57] S 85D(1) and (2) of the Irish Bankruptcy Act and s 157 of the PIA.
[58] S 85D(2) of the Irish Bankruptcy Act and s 157 of the PIA.
[59] See s 85(1)–(8) of the Irish Bankruptcy Act and s 157 of the PIA.

discharged either through an automatic discharge from bankruptcy or a discharge via an order of court,[60] as similarly is provided under the proposed BIA.[61]

An automatic discharge will be granted to a bankrupt three years after the adjudication order for bankruptcy was made unless the bankruptcy was annulled.[62] Where the order for adjudication has been made more than three years before the coming into operation of section 157 of the PIA, the bankrupt is discharged six months after the coming into operation of section 157 of the PIA, except where the bankrupt's debts already have been discharged.[63] The debtor has the right to apply to an official assignee for a certificate of discharge from bankruptcy.[64]

A debtor may also receive a discharge from bankruptcy via an order of court. Such an order is granted when the court is satisfied that the costs of bankruptcy have been paid by the insolvent estate.[65] Furthermore, a discharge via an order of court may be granted where the debtor has obtained the consent of all of his creditors (whose debts have been proved and admitted in the bankruptcy) in writing.[66] In essence, discharge via an order of court is granted subject to the fulfilment of certain financial obligations and with the consent of creditors, as is the case with discharge under the proposed BIA.[67] A person whose bankruptcy has been discharged by virtue of this section may apply to the official assignee for a certificate of discharge of debts.[68]

From the foregoing it appears that access to the Irish bankruptcy procedure is restricted to debtors whose debts amount to more than €20,000 and who have assets or income that can be realised for the benefit of the creditors of the insolvent estate. The composition procedure can be accessed only in the course of the bankruptcy proceedings. Thus, a debtor who does not qualify for the bankruptcy procedure is excluded from the composition procedure. It appears that the Irish bankruptcy and composition procedure is inaccessible to the NINA group of debtors.

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[60] *Ibid.*
[61] See ch 3 par 3.3.3.4.
[62] *Ibid*. The Irish automatic discharge provision is similar to the Nigerian automatic discharge under the proposed BIA, except that automatic discharge under the proposed BIA is available to a first time bankrupt eight months after bankruptcy while it is implemented after three years in Ireland. See ch 3 par 3.3.3.4.
[63] *Ibid*.
[64] *Ibid*.
[65] See s 157 of the PIA. This excludes a NINA debtor who has no income or no assets and cannot afford to pay such costs and expenses to obtain a discharge of debts.
[66] *Ibid*.
[67] See ch 3 par 3.3.3.4.
[68] *Ibid*.

6.2.2.2 Debt Settlement Arrangement (DSA) procedure

An Irish debtor has the option of proceeding through the DSA procedure as an alternative to bankruptcy. A debtor may apply for relief in terms of the DSA through a statutorily qualified personal insolvency practitioner[69] if he satisfies the eligibility requirements of[70]

a) being domiciled in the state, or residing in the state or had a place of business in the state within a period of one year prior to the date on which an application was filed for a protective certificate;[71]
b) being insolvent;
c) having completed a prescribed financial statement (of his assets, liabilities, income and expenditure) and has also made a statutory declaration to confirm the accuracy of the statement;
d) not being an un-discharged bankrupt, or a discharged bankrupt who is still subjected to a payment plan order or a specified debtor under a DRN or PIA procedure;
e) never being the subject of a protective certificate issued under DSA less than 12 months prior to the date of application for such protective certificate under DSA;
f) not having his debt discharged under the DRN procedure three years prior to date of application;
g) not had his debt discharged under the PIA procedure five years prior to the date of application or has not been discharged from bankruptcy less than five years prior to the date in which he applied for a protective certificate under the DSA procedure.

Once a debtor has informed a statutorily qualified insolvency practitioner of his intention to make a proposal for a DSA, the insolvency practitioner notifies the Insolvency Service of the debtor's intention to propose a DSA. The insolvency practitioner also will apply for a protective certificate on behalf of the debtor.[72] A protective certificate deters creditors from initiating legal proceedings against the

[69] S 2 of the PIA states that a "personal insolvency practitioner" means a person authorised under Part 5 to act as a Personal Insolvency Practitioner.
[70] See s 57 of the PIA.
[71] S 2 of the PIA states that a protective certificate means a certificate issued by the appropriate court pursuant to chapter 3 or chapter 4 – that is a certificate issued in terms of debt settlement arrangement procedure or personal insolvency arrangement procedure. S 62(1)(a)–(g) of the PIA sets out the effect of a protective certificate.

[72] See s 59 (1) of the PIA.

debtor or prosecuting legal proceedings already initiated. It also forbids creditors from taking any step to secure or recover payments from the debtor or enforcing a judgment or order of a court or tribunal against the debtor. Also, a protective certificate deters creditors from recovering goods from the debtor.[73]

The Insolvency Service will consider the application for a protective certificate and where satisfied that the application meets the necessary requirements of the law[74] (such as proof that the debtor is eligible under section 57 of the PIA to make a proposal for DSA; that the personal insolvency practitioner is qualified to act in that capacity; that the necessary documents that are required to accompany an application for a protective certificate have been filed accordingly; and that the application is not frivolous or attempts to frustrate the efforts of creditors to recover their debts)[75] will issue a certificate stating that the application for a protective certificate meets the necessary requirements.[76] Thereafter, the Insolvency Service furnishes the appropriate court with the certificate indicating that the application for a protective certificate is in order together with a copy of the application for a protective certificate and other supporting documents.[77] The Insolvency Service must notify the insolvency practitioner of this development.[78] Where the Insolvency Service is not satisfied that the application for a protective certificate meets the necessary requirements, it must notify the insolvency practitioner of such an outcome.[79] In such instances the Insolvency Service may request the insolvency practitioner to submit a revised application within 21 days from the date of the notification or confirm that the application has been withdrawn.[80]

Upon receiving an application for a protective certificate from the Insolvency Service, the court considers the application and if satisfied that the eligibility requirements have been met, the court issues the protective certificate.[81] A protective certificate serves as a moratorium on debt enforcement in that creditors will not be able to initiate any legal proceedings against the debtor with regard to the debts in question.

[73] S 62(1)(a)–(g) of the PIA.
[74] See s 60 of the PIA.
[75] See s 60(3)(a) and (b) of the PIA.
[76] See s 61(1)(a)(i) of the PIA.
[77] See s 61(1)(a)(ii) of the PIA.
[78] See s 61(1)(a)(iii) of the PIA.
[79] See s 61(1)(b) of the PIA.
[80] *Ibid*.
[81] See s 61(2)(a) of the PIA.

Furthermore, the creditors will not be able to execute or enforce any judgment or order of court granted against the debtor.[82]

After the protective certificate has been issued the debtor through a statutorily qualified personal insolvency practitioner may make a proposal for a repayment arrangement with his unsecured creditors in terms of the DSA.[83] The repayment terms will be decided by the parties subject to certain mandatory guidelines laid down by the law.[84] The purpose of the guidelines is to ensure that a payment plan affords the debtor a reasonable standard of living.[85] A payment plan can last for a maximum period of six years and once the period has run out the debtor's remaining obligations are discharged.[86] During the period before discharge the debtor is expected to comply with the terms of the payment plan and act in good faith.[87]

A proposal for DSA becomes accepted if 65 per cent in value of creditors agree to the proposal and it comes into effect on court approval.[88] Priority creditors and secured creditors are protected. However, protection is afforded also to the debtor's home.[89]

A DSA is deemed to have failed when a debtor is in arrears with his payment for a period of six months.[90] Where a debtor has complied with all requirements and obligations under the DSA, the debtor is discharged from all debts specified in the DSA.[91] A debtor is not entitled to make a proposal under DSA if he incurred 25 per cent or more of his qualifying debts during the preceding six months prior to his application for a protective certificate under the DSA procedure.[92] Furthermore, an excludable debt will be included in a proposal for a DSA only if the creditors concerned have been notified and all have consented.[93]

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[82] See s 62(1) of the PIA.
[83] See s 64 of the PIA. See also ss 54–88 of the PIA. This procedure excludes NINA debtors who do not have assets or income to be channelled towards a payment plan agreement.
[84] See ss 73(6) and 78–79 of the PIA. It appears as if the DSA procedure under the PIA can be likened to the proposed proposal procedure in Nigeria because both are repayment plan procedures, which would require that the debtor has some form of income to negotiate a plan with creditors. Also, both procedures provide for a form of moratorium whereby creditors may not institute an action or claim against the property of the debtor in the course of the payment plan proceedings. See ch 3 par 3.4.
[85] See Spooner 2013 *ERPL* 260. See also Spooner 2018 *Mod. L. Rev* 799.
[86] See s 26(8)(d) of the PIA.
[87] See ss 81, 83, 87 and 126–130 of the PIA.
[88] See ss 73(6) and 78–79 of the PIA.
[89] See Spooner 2013 *ERPL* 260.
[90] See ss 61 and 84 PIA.
[91] S 86(2) of the PIA.
[92] See s 57(3) of the PIA.
[93] See s 58(1) of the PIA.

It appears that the DSA procedure is accessible only to debtors who have income to negotiate a plan with the creditors. Thus, discharge under the DSA procedure will be accessible only to debtors who can access it. In essence, a NINA debtor in Ireland cannot access the DSA procedure.

6.2.2.3 The Personal Insolvency Arrangement procedure (PIAP)

An Irish debtor is entitled to make a proposal for a PIAP,[94] subject to the requirements of the law.[95] An eligible debtor is one that[96]

a) has an aggregate secured debt of less than €3,000,000;
b) is domiciled in the state or has ordinarily resided in the state or had a place of business in the state within a period of one year prior to the date on which an application for a protective certificate was filed;
c) has at least one secured creditor who holds security over an interest in the property of the debtor (whether interest in real property or personal property) which is situated in the state;
d) is insolvent;
e) has completed a prescribed financial statement of his assets, liabilities, income and expenditure and has also made a statutory declaration confirming the authenticity of this statement;
f) has completed a statement under section 54 (in terms of which a statement completed by the insolvency practitioner confirming that the information contained in the debtor's prescribed financial statement is accurate and also confirming that the debtor is eligible to make a proposal having considered the debtor's financial statement);
g) has declared in writing that he has co-operated with his creditors who are secured creditors in respect to his principal private residence in accordance with any process relating to mortgage arrears for a period of at least 6 months;
h) is not an undischarged bankrupt or a discharged bankrupt who is subject to a bankruptcy payment order or a specified debtor in relation to a DRN or DSA procedure which is in effect;
i) has not been subjected to an arrangement under the control of the court;[97]

[94] See s 91(1) of the PIA.
[95] See ss 89–135 of the PIA.
[96] See s 91(1)(a)–(i) of the PIA.
[97] See part IV of the Irish Bankruptcy Act.

j) has not been issued with a protective certificate under PIAP within twelve months prior to the date of the application for a protective certificate;
k) has not had his debts discharged under the DRN procedure less than three years prior to the date of application for a protective certificate or has not obtained a discharge of debts pursuant to a DSA procedure within a period of five years prior to the date of application for the protective certificate or has not obtained a discharge of debts under bankruptcy within a period of five years prior to the date of the application for a protective certificate.

A debtor who satisfies these eligibility requirements may make a proposal for a PIAP through a statutorily qualified personal insolvency practitioner.[98] The proposal can be made in respect of payment, satisfaction or restructuring of his debts.[99] After a debtor informs a personal insolvency practitioner of his intention to make a proposal for the PIAP, the insolvency practitioner must notify the Insolvency Service of the debtor's intention to propose a PIAP and apply for a protective certificate on behalf of the debtor.[100]

The application must be filed as prescribed by the Insolvency Service and must be accompanied by documents as required by the law.[101] Where the Insolvency Service is satisfied that an application for PIAP adheres to the requirements of the law, it will issue a certificate to that effect.[102] Thereafter, the Insolvency Service must furnish the appropriate court with the issued certificate and a copy of the application and other supporting documents.[103] The Insolvency Service must then notify the insolvency practitioner of this development.[104]

Where the Insolvency Service is not satisfied that the requirements for filing the PIAP have been met, it will notify the insolvency practitioner of the outcome and request him to submit a revised application or to confirm that the application has been withdrawn within 21 days from the date the insolvency practitioner was notified.[105]

[98] See s 89(2) of the PIA.
[99] See s 93(1) of the PIA.
[100] See s 59(1) of the PIA.
[101] See s 93(2) of the PIA for the additional documents that must accompany the application.
[102] See s 95(1)(a)(i) of the PIA.
[103] See s 95(1)(a)(ii) of the PIA.
[104] See s 95(1)(a)(iii) of the PIA.
[105] See s 95(1)(b) of the PIA.

When the court receives the application for a protective certificate, it must consider the application and if satisfied that the eligibility requirements have been met as is the case under DSA procedure, a protective certificate must be issued.[106] A maximum duration of a PIAP is 72 months but this period may be extended for a further period of 12 months under certain circumstances as stated by the PIAP.[107]

After the court has issued a protective certificate the debtor through a statutorily qualified personal insolvency practitioner may make a proposal for a PIAP to his creditors.[108] A proposal for PIAP becomes accepted if 65 per cent in value of creditors agree to the proposal (including the approval of over 50 per cent of unsecured creditors and over 50 per cent of secured creditors) and comes into effect on court approval.[109] Thereafter, the debtor is discharged from all debts[110] having performed all obligations as specified in the PIAP.[111]

The PIAP allows the debtor to renegotiate with both secured and unsecured creditors. However, secured creditors are given extra protection by allowing principal write-downs to be clawed back where the secured property is sold (any time within a 20 year period) at a higher value.[112] Furthermore, secured debts are discharged only to the extent specified in the arrangement.[113]

The PIAP and DSA procedures are similar because both are payment plan procedures.[114] However, the access conditions for the PIAP are more stringent as compared to those of the DSA procedure.[115] For example, a debtor must show at least six months' cooperation with his creditors in respect of rescheduled mortgage loans.[116] Also, the required 65 per cent creditor approval for proposals must include the approval of over 50 per cent of unsecured creditors and over 50 percent of secured creditors.[117] Furthermore, the PIAP can be accessed only by debtors who have an aggregate secured debt of less than €3,000,000 and can be accessed only

[106] See s 95(2)(a) of the PIA.
[107] See s 99(2)(b) of the PIA.
[108] See s 98(1)(a) of the PIA.
[109] See ss 91 and 111 of the PIA.
[110] Except the secured debts, unless otherwise stated in terms of the PIA. See s 99(2)(c) of the PIA.
[111] See s 99(2)(c) of the PIA. Discharge under this procedure follows only once the debtor has fulfilled his obligations under the payment plan. In essence, it means that a NINA debtor cannot obtain a discharge under this procedure, because he does not have income or assets to fulfil his responsibilities.
[112] See s 103 of the PIA.
[113] Ss 99 and 125 of the PIA.
[114] See also Spooner 2018 *Mod. L. Rev* 800.
[115] See Spooner 2013 *ERPL* 260.
[116] See also Spooner 2018 *Mod. L. Rev* 800.
[117] See ss 91 and 111 of the PIA.

once in a life time.[118] The PIAP is inaccessible to NINA debtors as is the case with DSA, because they are repayment plan procedures and so NINA debtors cannot access them.

6.2.3 Debt relief measures for NINA debtors

6.2.3.1 Debt Relief Notice (DRN)

The third debt relief option introduced by the PIA is a "no income, no assets" procedure, which offers qualifying debtors a debt discharge after a three-year waiting period without surrendering income and/or assets.[119] This debt relief procedure is known as the Debt Relief Notice (DRN).[120] To commence the DRN procedure the debtor must submit a written statement, which includes information concerning his creditors, assets, debts and liabilities[121] to an approved intermediary.[122] Thereafter, the approved intermediary must apply to the Insolvency Services for a DRN on behalf of the debtor and according to the provisions of the law.[123] A DRN must not be issued in respect of an excludable debt,[124] except where the creditors concerned have consented according to section 28 of the PIA.[125]

A debtor is eligible for a DRN once he has complied with the procedures for submitting an application for DRN as stated earlier[126] and on the application date has[127]

a) qualifying debts which amount to €35,000[128] or less;
b) a net disposable income of €60[129] or less a month;[130]
c) assets worth €400[131] or less;[132]

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[118] See s 90 of the PIA. The fact that the PIAP can be explored only once in a life time limits access.
[119] See also Spooner 2018 *The Mod. L. Rev* 800.
[120] *Ibid*.
[121] The statement would be submitted in terms of s 27(1) of the PIA.
[122] An "approved intermediary" is defined by s 29 of the PIA as a person authorised by the Insolvency Service under s 47 to perform the functions of an approved intermediary.
[123] See s 29 of the PIA.
[124] See s 2 of the PIA which provides that
"excluded debt", in relation to a debtor, means any:
(a) liability of the debtor arising out of a domestic support order;
(b) liability of the debtor arising out of damages awarded by a court (or another competent authority) in respect of personal injuries or wrongful death arising from the tort of the debtor;
(c) debt or liability of the debtor arising from a loan (or forbearance of a loan) obtained through fraud, misappropriation, embezzlement or fraudulent breach of trust;
(d) debt or liability of the debtor arising by virtue of a court order made under the Proceeds of Crime Acts 1996 and 2005 or by virtue of a fine ordered to be paid by a court in respect of a criminal offence.
[125] See s 28 of the PIA.
[126] See ss 27(1) and 29 of the PIA.
[127] See s 26(1) and (2) of the PIA. See also ss 23, 26(5) and (6) of the PIA for more details on how the debtor's assets, income and liabilities are calculated.
[128] See s 26(2)(a) of the PIA.
[129] The net disposable income of €60 is calculated in accordance with s 26(5) of the PIA.
[130] See s 26(2)(b) of the PIA.

d) carried on business, been residing or resided in the state within a period of one year prior to the date on which the application for DRN was made;[133]
e) no likelihood of being solvent (while maintaining a realistic standard of living) within the three year period from the date of commencement of the DRN application;[134]
f) not entered into any transaction that negatively contributed to his financial state for a period of two years prior to the date the application for a DRN was made;[135]
g) not given any preference to any person, which had the effect of reducing the amount available to the creditors, except debt paid to preferential creditors.[136]

Having complied with the provisions and requirements of the law regarding an application for DRN, a debtor still is not eligible if he[137]

a) incurred 25 per cent or more of his qualifying debts during the six-month period prior to the date on which an application for DRN was made;
b) had previously been a specified debtor;[138]
c) had previously applied for a protective certificate under chapters 3 and 4 of the PIA within a period of 12 months prior to the application date;
d) is a party to a DSA or PIA on the date of the application for a DRN;
e) successfully completed a DSA or a PIA within a period of five years prior to the application for DRN;
f) subject to the provisions of the law in section 26(9) has made an application for bankruptcy and the petition for bankruptcy has not been adjudicated as at the date of application for DRN;
g) has been charged to court by the creditor for bankruptcy subject to the provisions of the law in section 26(10) and the hearing of the case has not been conducted;
h) has been adjudicated bankrupt before the date on which an application for DRN was filed and the adjudication has not been discharged or annulled; or

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[131] The assets worth €400 is calculated in accordance with s 26(6) of the PIA.
[132] See s 26(2)(c) of the PIA.
[133] See s 26(4)(d) of the PIA.
[134] See s 26(4)(e) of the PIA.
[135] See s 26(2)(f) of the PIA.
[136] S 26(4)(g) of the PIA.
[137] See ss 26(4) and 26 (8)(a)–(j) of the PIA. These eligibility requirements are cumbersome and may exclude a good number of Irish NINA debtors.
[138] See s 25 of the PIA for the definition of a specified debtor, which provides that a
"Specified debtor" means a person who is the subject of a Debt Relief Notice and, in relation to a particular Debt Relief Notice, means the person who is the subject of that Notice in accordance with section 32 (a).

i) has been discharged from bankruptcy within the period of five years prior to the date an application for DRN was made.

After all necessary requirements are met the Insolvency Service issues a certificate showing that the application is satisfactory.[139] The Insolvency Service lodges the certificate together with the application for DRN and other supporting documents at the appropriate court.[140] Thereafter, the approved intermediary either is notified by the Insolvency Service that the application was successfully lodged at the court or is required to submit additional documents.[141]

If the court is satisfied that the requirements have been fulfilled and the necessary documents filed are satisfactory, it will issue a DRN in respect of the debts specified.[142] Thereafter, the court informs the Insolvency Service that the DRN has been issued and the Insolvency Service in turn sends notices to the creditors and to the debtor.[143] Where the court is not satisfied that the necessary requirements have been fulfilled it will refuse to issue the DRN.[144]

As stated above, debtors cannot apply for a DRN directly as the entire process is carried out through approved intermediaries. The Insolvency Service of Ireland has a list of all the approved intermediaries on the Insolvency website.[145] A debtor interested in filing for the DRN will need to give full and correct details of his financial situation, meaning details as to his debts, assets, liabilities and income.[146] The approved intermediary then advises the debtor as to whether he is qualified for the DRN procedure based on the information at his disposal and also to the effect of obtaining a DRN.[147]

The effect of obtaining a DRN is that it creates a 'moratorium' period of three years (which may be extended).[148] During this period, creditors cannot take any action to recover or enforce their debts against the debtor. Furthermore, during the period when the DRN procedure is in force a debtor is not required to make any direct

[139] See s 31(1)(a)(i) of the PIA.
[140] See s 31(1)(a)(ii) of the PIA.
[141] See ss 31(1)(a)(iii) and (b) of the PIA.
[142] See s 31(2)(a) of the PIA.
[143] See s 33(1) and (2) of the PIA.
[144] See s 31(2)(b) of the PIA.
[145] See Insolvency Service of Ireland *Guide to a debt relief notice* (2018) 7 (hereafter known as *Insolvency service guide*).
[146] *Ibid*.
[147] *Insolvency service guide* 7 and 13.
[148] *Ibid*.

payments to the creditors in respect of debts that are included in the process.[149] A debtor is not required to make any direct payments provided the debtor complies with all the requirements and provided the debtor's circumstance does not change. Also, the listed debts specified in the DRN will be written off in full.[150]

The DRN procedure is largely administrative[151] because debtors are expected to apply directly to the newly established Insolvency Service of Ireland through an approved intermediary.[152]

The purpose of the DRN procedure is to assist financially-impaired debtors recover from their financial difficulties and the role of an approved intermediary is to help in making the DRN process as straightforward as possible.[153] The DRN procedure is absolutely free for debtors as approved intermediaries cannot charge a fee in connection with the functions executed under the DRN procedure.[154] The Insolvency Service has the responsibility to pay approved intermediaries under the DRN procedure.[155] The Insolvency Service of Ireland waives its fees as well.[156]

A debtor who successfully goes through the DRN procedure obtains a discharge of debts three years after the DRN is granted. [157] During the three year waiting period the debtor is expected to exercise good faith and failure to do so may result in the postponement or denial of a debtor's discharge.[158] The Insolvency Service issues a debt relief certificate to the debtor confirming his discharge from the debts listed in the DRN.[159] Consequently, the debtor becomes solvent.[160] The three year waiting period has been condemned as being unduly long for a NINA procedure since there is no income or assets to be liquidated.[161] However, the waiting period is not solely a

[149] *Ibid*.
[150] *Ibid*.
[151] See Spooner 2013 *ERPL* 761. This agrees with modern international trends as discussed in ch 2 par 2.6.
[152] Spooner *Personal insolvency law in the modern consumer credit society* 95.
[153] *Insolvency service guide* 7.
[154] See s 47(2) of the PIA.
[155] See s 47(7) of the PIA.
[156] *Insolvency service guide* 7.
[157] See ss 34(1) and 46(1) of the PIA.
[158] See s 34 of the PIA.
[159] *Insolvency service guide* 12.
[160] *Ibid*.
[161] Spooner 2013 *ERPL* 761.

period for waiting to obtain a discharge but rather serves an educational purpose for debtors.[162]

As regards the situation where a debtor's financial circumstances change within the three year period a debtor must inform the Insolvency Service of the changes.[163] If a debtor applies for credit over €650 during the three year supervision period, the debtor must tell the creditor that he is subject to a DRN.[164] The DRN grants access to debt relief and a consequent discharge of debt to qualifying NINA debtors who cannot access bankruptcy, compositions, DSA and PIAP procedures in Ireland.

6.2.3 Analysis

As is the case in France and Sweden[165] Ireland has recorded a number of developments in relation to its natural person insolvency laws. The crucial developments in the Irish insolvency system were brought about as a result of the inadequacies of the Irish Bankruptcy Act and which led to the enactment of the PIA.[166]

The PIA amended some provisions of the Irish Bankruptcy Act and introduced three non-judicial procedures including the DRN, the latter focuses on the NINA debtor.[167] Ireland is prominent in that it has specific provisions for NINA debtors, a development that was influenced by the World Bank *Report*.[168] The DRN procedure largely is administrative in nature, absolutely free to a NINA debtor and offers an eventual discharge of debts.[169] These factors make it accessible to NINA debtors and thus it complies with the World Bank recommendations in respect of NINA debtors.[170]

Another remarkable development is the step taken by the Irish insolvency system in reducing the twelve years waiting period for discharge under bankruptcy to a period

[162] See World Bank *Report* 121 and 122.
[163] *Insolvency service guide* 8 and 11.
[164] *Ibid*.
[165] See ch 5 para 5.2.2.5 and 5.3.4.
[166] See par 6.2.1.
[167] See par 6.2.2.
[168] Kilborn 2014 *PILR* 307.
[169] See par 6.2.3.1.
[170] See ch 2 par 2.5.4.

of three years.[171] This development makes it easier for debtors to obtain discharge from their debts.

6.3 Canada

6.3.1 Background to natural person debt relief

Canada operates a federal system of government and its private law rules are based largely on common law concepts.[172] The very first insolvency legislation in Canada was the Insolvency Act of 1869.[173] The Insolvency Act of 1869 provided for involuntary proceedings (initiated by creditors) and voluntary proceedings (initiated by debtors) both of which resulted in a discharge of debts.[174] However, the Insolvency Act of 1869 applied only to traders, meaning that only indebted individuals who engaged in buying and selling were eligible for discharge under the 1869 Insolvency Act.[175] Farmers (who represented a large percentage of the population of the rural areas in the 1870s)[176] and professionals could not file for insolvency under the Act.[177]

The Insolvency Act of 1869 was repealed and replaced by the Insolvency Act of 1875.[178] The 1875 Act abolished voluntary proceedings and made discharge more inaccessible by requiring that a debtor's assets meet a threshold of $0.33 in the dollar for the debt. This amount later was increased in parliament to a threshold of $0.50 in the dollar in the course of the operations of the 1875 Act.[179]

The 1875 Insolvency Act was criticised extensively and led to a fierce debate among members of parliament.[180] The crux of the debate was the issue of discharge because the 1875 Insolvency Act made the requirements for debt forgiveness very stringent. Popular opinion held that debtors had the moral obligation to repay all of their debts.[181] One of the arguments canvassed by a member of parliament in a House of Commons debate was that when a man honestly gives up his estate for the

[171] See par 6.2.1 and 6.2.2.1.
[172] See Telfer 2010 *UTLJ* 607 and 613. See also Ziegel 1999 *Osg Hall LJ* 210.
[173] The Insolvent Act of 1869 (Can.) 32-33 Vict c. 16.
[174] See Telfer 2010 *UTLJ* 607.
[175] *Idem* 605 and 607.
[176] *Idem* 610.
[177] *Idem* 607.
[178] See the Insolvent Act of 1875 (Can.), 38 Vict. c. 16.
[179] See Telfer 2010 *UTLJ* 608.
[180] *Ibid*. See also Ziegel 1999 *Osg Hall LJ* 212.
[181] Ben-Ishai, Schwartz and Telfer 2011 *Canadian Business Law Journal* 237. See also Telfer 2010 *UTLJ* 608.

benefit of his creditors, he is entitled to relief.[182] It further was opined that the moral obligations imposed on debtors to pay their debts may have contributed to the number of debtors who absconded to avoid bankruptcy.[183]

Parliament repealed the Insolvency Act of 1875 in 1880,[184] leaving Canada without any bankruptcy law until 1919.[185] In 1919[186] Canada adopted the first comprehensive bankruptcy legislation which governed both individual and corporate insolvencies.[187] This legislation was influenced heavily by the British Bankruptcy Act of 1883[188] and is referred to as the Canada Bankruptcy Act of 1919.[189] The Bankruptcy Act of 1919 (hereafter referred to as the CBIA)[190] re-enacted voluntary proceedings which the 1875 Act abolished[191]and also adopted a privately-oriented structure for the administration of insolvent estates.[192] The CBIA provided the courts with a very broad discretion in determining the terms of a debtor's discharge[193] and for the first time enshrined a general discharge policy for non-trader debtors as well as trader debtors.[194]

The CBIA has been amended or revised on several occasions after its enactment, but has not been repealed.[195] The most significant amendments took place in 1992 and 1997.[196] The significance of the 1992 reforms is that they greatly simplified the personal bankruptcy procedure and introduced a separate procedure that allowed bankrupt individuals to make proposals as an alternative to bankruptcy.[197] The 1997 amendments add a very significant chapter in the treatment of consumer bankruptcies and section 68 of the CBIA was re-written so that debtors can pay over their surplus income (based on standards issued by the Superintendent of Bankruptcy)[198] between the time of bankruptcy and the time of their discharge.[199]

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[182] See Telfer 2010 *UTLJ* 608.
[183] *Idem* 609.
[184] 1880 (Can.), 43 Vict. c. 1.
[185] Ben-Ishai, Schwartz and Telfer 2011 *Canadian Business Law* Journal 237.
[186] Bankruptcy Act, SC 1919, c 36.
[187] Ziegel 1999 *Osg Hall LJ* 212.
[188] *Ibid*.
[189] Bankruptcy Act, SC 1919, c 36.
[190] Currently cited as Bankruptcy and Insolvency Act R.S.C. 1985, c. B-3.
[191] Ziegel 1999 *Osg Hall LJ* 215.
[192] *Idem* 212.
[193] See Ben-Ishai, Schwartz and Telfer 2011 *Canadian Business Law* Journal 249. See also Ziegel 1999 *Osg Hall LJ* 228
[194] Ziegel 1999 *Osg Hall LJ* 229.
[195] *Idem* 212 and 213.
[196] *Idem* 212.
[197] *Idem* 213.
[198] A "Superintendent" "means the Superintendent of Bankruptcy appointed under subsection 5(1)". A superintendent is appointed to supervise the administration of all estates and matters to which the CBIA applies. See s 2 for the definition of a superintendent and s 5(2) for the duties of a superintendent.

Also, new provisions dealing with the debtor's application for a discharge were added to the CBIA.[200] The CBIA governs the majority of matters relating to corporate insolvency in Canada and it is supplemented by the Companies' Creditors Arrangement Act[201] and the Winding Up and Restructuring Act.[202]

The purpose of the CBIA, as is suggested by case law, is to facilitate the impartial distribution of the debtor's assets among his proven creditors.[203] The further purpose of the CBIA is to provide for the rehabilitation of a debtor.[204]

6.3.2 Debt relief measures for insolvent natural persons

6.3.2.1 Background

The CBIA provides for a number of relief measures that can be explored by financially distressed natural persons in Canada.[205] The debt relief measures are the bankruptcy procedure, the consolidation order regulated by part X of the CBIA, the consumer proposal under division II of the CBIA and the commercial proposal in terms of division I of the CBIA. Bankruptcy is the main debt relief procedure available while the consolidation order, consumer proposal and commercial proposal are formal alternative procedures to bankruptcy in Canada.[206]

6.3.2.2 Bankruptcy proceedings

An application for bankruptcy can be made by a creditor or by a debtor. The latter takes place by means of an assignment.[207] An application for bankruptcy can be made only by or in respect of an insolvent person[208] who is defined as[209]

> a person who is not bankrupt and who resides, carries on business or has property in Canada, whose liabilities to creditors provable as claims under this Act amount to one thousand dollars,[210] and
>
> a) who is for any reason unable to meet his obligations as they generally become due,

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[199] Ziegel 1999 *Osg Hall LJ* 213.
[200] *Ibid*.
[201] Companies' Creditors Arrangement Act 1985.
[202] See Winding up and Restructuring Act 1985. See Bennett *Bennett on bankruptcy* 32.
[203] *Industrial Acceptance Corp. v. Lalonde* , 1952 2 SCR 109.
[204] *Vachon v. Canada Employment & Immigration Commission* 1985 2 SCR 417.
[205] Ziegel *Comparative consumer insolvency regimes: A Canadian perspective* 45.
[206] *Ibid*.
[207] See ss 42(1) and 43(1) of the CBIA. See also Bennett *Bennett on bankruptcy* 114. This is similar to the proposed Nigerian receiving orders and the assignment procedure. See ch 3 par 3.3.
[208] See s 2 of the CBIA.
[209] *Ibid*.
[210] This is similar to what obtains under the proposed Nigerian BIA. The BIA defines an insolvent person as someone whose liabilities to his creditors amount to not less than one million naira. See ch 3 par 3.3 above. This requirement generally would limit access in Nigeria. On the other hand, it appears that in Canada, this provision does not constitute much of a problem (meaning restriction), because there are different options for debt relief which can be explored by debtor's in Canada.

b) who has ceased paying his current obligations in the ordinary course of business as they generally become due, or
c) the aggregate of whose property is not, at a fair valuation, sufficient, or, if disposed of at a fairly conducted sale under legal process, would not be sufficient to enable payment of all his obligations, due and accruing due; (*personne insolvable*)

A number of requirements must be met before a creditor's bankruptcy application is successful,[211] they are that the debt(s) being owed by the debtor to the applicant creditor or creditors must amount to one thousand dollars[212] and that the debtor must have committed an act of bankruptcy within six months prior to the filing of the application.[213]

Judicial precedence shows that the creditor also is required to prove that the application will not constitute an abuse and that it is imperative that bankruptcy is granted due to "special circumstances" (such as acts of bankruptcy).[214] In the case of *Re Holmes* the court set out examples of "special circumstances"[215] as follows:

a) Where the creditor has made several demands to the debtor to repay his debts and all demands made have been to no avail.
b) Where the debtor has confirmed his inability to pay the creditors of the estate.
c) Where the applicant creditor is a "significant creditor" and circumstances of fraud have occurred and it is necessary in this circumstance to initiate a bankruptcy procedure to secure the interest of the creditor.

The court upon receipt of the creditor's bankruptcy application conducts a hearing into the application.[216] At the hearing the court requires proof of the facts alleged in the application and also proof that the application has been served.[217] If the court is satisfied with the proof provided and service of the application, the court grants the bankruptcy application.[218] Thereafter, the court appoints a trustee who sees to the administration of the insolvent estate.[219] The trustee makes inquiries as to the names and details of all the creditors and then gives notice of the first creditors' meeting to

[211] See s 43(1)(a) and (b) of the CBIA.
[212] This is similar to the requirements for filing a proposed receiving order in Nigeria. See ch 3 par 3.5.1 above.
[213] *Ibid*.
[214] *Re Holmes* 1975 20 C.B.R. (NS) 111 (Ont. SC).
[215] 1975 20 C.B.R. (NS) 111 (Ont. SC). These three circumstances were also affirmed in the Canadian Court of Appeal case of *Valente v Fancy Estate* 2004 70 OR 47 CBR 317 (Ont. CA).
[216] See s 43(6) of the CBIA.
[217] *Ibid*.
[218] *Ibid*.
[219] See s 43(9) of the CBIA.

the creditors of the insolvent estate and the Superintendent of Bankruptcy.[220] The first creditors meeting shall be held within twenty one days following the appointment of a trustee.[221] The purpose of the meeting is to consider the financial affairs of the bankrupt, to confirm the appointment of the trustee or substitute the trustee if need be, to appoint inspectors who would oversee the administration of the estate[222] and to give directions to the trustee in relation to the administration of the estate.[223] Thereafter, the insolvent estate shall be liquidated and distributed amongst creditors who have provable claims.[224] The provisions of the CBIA with regards to creditors' bankruptcy proceedings do not apply to individuals whose principal occupation is fishing or farming or any individuals who work and earn wages, salary, commission or compensation for an amount not exceeding two thousand five hundred dollars.[225]

Also, an indebted natural person or partnership may file for an assignment of his estate (that is a debtor's bankruptcy procedure) for the benefit of the creditors of the insolvent estate.[226] An assignment is filed with a sworn affidavit detailing the property of the insolvent estate and the creditors' claims[227] at the office of the official receiver[228] for the district where the insolvent resides or carries on business.[229]

When the application is received and accepted by the official receiver the debtor becomes bankrupt and a trustee is appointed.[230] The trustee sees to the administration of the insolvent estate as discussed earlier.[231]

The CBIA provides for a compressed procedure for insolvent natural persons with smaller estates who have filed for the assignment procedure.[232] The compressed procedure is known as summary administration[233] and applies only where the bankrupt is not a corporation and has an estate whose realisable assets do not

[220] See s 102(1) of the CBIA.
[221] *Ibid.*
[222] Se s 116–120 of the CBIA.
[223] See s 102(5) of the CBIA.
[224] See s 128–135 of the CBIA.
[225] See s 48 of the CBIA.
[226] See s 49(1) of the CBIA. This can be referred to as voluntary or debtors' bankruptcy and it is similar to the proposed assignment and summary administration procedure in Nigeria. See ch 3 par 3.3.3.3.
[227] See s 49(2) of the CBIA.
[228] According to s 2 of the CBIA, an "official receiver means an officer appointed under subsection 12(2)". S 12(2) states:
> The Governor in Council shall appoint one or more official receivers in each bankruptcy division who shall be deemed to be officers of the court and shall have and perform the duties and responsibilities specified by this Act and the General Rules.

[229] See s 49(3) of the CBIA.
[230] S 49(4) of the CBIA.
[231] See s 102(1) of the CBIA.
[232] See ss 102, 116–120 and 128–135 of the CBIA.
[233] This is similar to the position in the proposed Nigerian BIA with regards to employing summary administration for the purpose of small estates. See ch 3 par 3.5.2 above.

exceed five thousand dollars (after the claims of secured creditors have been deducted) or such amount prescribed from time to time.[234] The filling fees are 75 Canadian dollars for a first time bankrupt.[235]

The summary administration procedure is a faster procedure with fewer requirements.[236] For example, under summary administration the trustee would not be required to post security for his appointment or publish a bankruptcy notice in any local newspaper.[237] Also, notices sent to creditors under the summary administration procedure may be sent by ordinary mail as opposed to notices sent under the regular assignment procedure.[238]

Where a debtor files for bankruptcy and there are no assets found in the insolvent estate, such as in NINA situations, the debtor will obtain a discharge of debts without providing assets for liquidation.[239] There are no technical access requirements, which hinder a NINA debtor from accessing the Canadian bankruptcy procedure, however as in every other liquidation procedure access is curtailed due to bankruptcy costs such as trustee's fees.

6.3.2.3 Discharge

The CBIA makes provision for two types of discharge, namely an automatic discharge for the first time bankrupt and a discharge via court application.[240] An automatic discharge is available to first-time bankrupt individuals nine months after bankruptcy, as is provided by the proposed BIA in Nigeria.[241] The automatic discharge routinely takes effect provided that the bankrupt is not required to make surplus income payments.[242] Where a bankrupt is expected to make surplus income payments he is entitled to an automatic discharge only twenty-one months after bankruptcy.[243]

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[234] See s 49(6) and (7) of the CBIA.
[235] Rule 138(1)(a) Bankruptcy and Insolvency General Rules 2011.
[236] See s 155 of the CBIA.
[237] *Ibid*.
[238] *Ibid*. The Canadian provision for summary administration is similar to summary administration under the proposed Nigeria BIA, because they both operate in the form of a compressed debtors' bankruptcy procedure for debtors with smaller estates. See ch 3 par 3.3.3.3.
[239] See s 173(1)(a) of the CBIA.
[240] See s 168.1(1) and s 169 of the CBIA.
[241] See s 168.1(1) of the CBIA. This is similar to the Nigerian BIA's discharge provisions; see ch 3 par 3.3.3.4.
[242] See s 168.1(1) of the CBIA. See also Bennett *Bennett on Bankruptcy* 158.
[243] See s 172.1(1)(a)(i) of the CBIA.

Where the debtor is not a first time bankrupt the CBIA provides for an automatic discharge[244] twenty-four months after bankruptcy provided he is not required to make surplus income payments.[245] Where such payments are expected, the bankrupt is eligible for an automatic discharge thirty-six months after the date of bankruptcy.[246]

A creditor, trustee and the Superintendent of Bankruptcy may oppose an automatic discharge for a first-time bankrupt before the nine months period after which the automatic discharge is effective.[247] Where an automatic discharge has been opposed, the trustee must apply to court for a date to hear the opposing application.[248]

In relation to bankrupt individuals who are not entitled to an automatic discharge (that is debtors who are not first time or second time bankrupts) and consequently must access discharge via a court order,[249] it is interesting to note that the bankruptcy or assignment order in itself operates as an application for a discharge, as is the case with a discharge via a court order under the proposed Nigerian BIA.[250] The trustee of the insolvent estate must apply to court for a date for the hearing of the discharge application within three months to one year after the order for bankruptcy or assignment is made.[251] The court proceedings during the hearing of an application for discharge take the form of summary proceedings.[252] The court will grant an absolute discharge only to a bankrupt who has enough assets to settle at least 50 percent of his unsecured debts, except where the court is satisfied that the insolvent's inability to pay is due to circumstances beyond his control, in which case the 50 percent provision will not apply.[253]

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[244] See s 168.1(1)(b) of the CBIA.
[245] See s 172.1(1)(b)(i) of the CBIA.
[246] See s 172.1(1)(a)(ii) of the CBIA.
[247] See s 168.2(1) of the CBIA.
[248] S 168.2(2) of the CBIA.
[249] See s 169 of the CBIA.
[250] See s 169(1) of the CBIA.
[251] *Ibid*. The CBIA and the proposed Nigerian BIA have similar provisions with regards to discharge via court order. The proposed Nigerian BIA also provides that the discharge via court is deemed to have been made when a receiving order has been made against a debtor's estate or when a debtor has made an assignment of his estate. See ch 3 par 3.3.3.4. However, the major difference between the provisions of the CBIA and the proposed BIA is that the Nigerian BIA goes further to provide for an exception where a bankrupt individual serves a notice in writing to the court and the trustee in which he waives his right to this provision.
[252] See Bennett *Bennett on bankruptcy* 408.
[253] See s 173(1)(a) of the CBIA. This also is similar to what is provided under the Nigerian BIA. The BIA states that the court would refuse an application for discharge where the assets of the bankrupt are not of a value equal to thirty-three and one-third cents on the dollar on the amount of the bankrupt's unsecured liabilities. An exception to this is when the bankrupt satisfies the Court that the fact that the assets are not up to the required value is due to circumstances for which

The Canadian discharge provision does not cover fines, penalties or restitution orders imposed by a court in respect of an offence, alimony or alimentary pension.[254] Further, it does not extend to damages awarded by the court in civil proceedings in respect of bodily harm intentionally inflicted, sexual assault or wrongful death, etcetera.[255] A discharge does not release a person who at the time of the bankruptcy was a partner.[256]

It is apparent that a debtor who has assets that can be liquidated and distributed among creditors can access the bankruptcy procedure considering that basically it is a liquidation procedure. However, a debtor who does not own assets (such as a NINA debtor) also can access the Canadian bankruptcy procedure, because the CBIA does not impose access requirements deterring them from accessing it.[257] Consequently, the discharge in terms of the Canadian bankruptcy procedure is available to debtors whose assets have been liquidated and to those who have no form of assets such as NINA debtors.

6.3.2.4 Consolidation order

The consolidation order procedure is available to insolvent natural persons in selected provinces in Canada.[258] A consolidation order can be issued by the clerk of a provincial court with the effect that all the insolvent's debts are combined into a

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the bankrupt cannot justly be held responsible. See ch 3 par 3.3.3.4.
However, the major difference with this provision and that of the CBIA lies in the wording. The BIA states that except if the bankrupt satisfies the Court that the fact that the assets are "not up to the required value" is due to circumstances in which the bankrupt cannot be held liable. This suggests that the exception here would only cover situations where there is a shortfall and not a case where nothing is paid such as in the case of NINA debtors. On the other hand, the wording of the CBIA provides that when "the insolvent's inability to pay is due to circumstance beyond his control...". This suggests that there is a safety net for debtors in situations where they are unable to pay anything (such as NINA debtors) and not when there is a shortfall. Therefore, the discharge under the CBIA is the same as the American straight discharge under the chapter 7 procedure. See ch 2 par 2.2.2 in relation to the American position.

[254] See s 178(1) of the CBIA.

[255] See s 178(1) of the CBIA for other exempted debts.

[256] S 179 of the CBIA.

[257] The bankruptcy procedure under the CBIA is very similar to the bankruptcy procedure under the proposed BIA as highlighted above. However, there are no access requirements for bankruptcy under the CBIA. It can be accessed by debtors who have assets to be liquidated and those who do not have assets to be liquidated. This is similar to the American chapter 7 procedure. See ch 2 par 2.2.2.). On the other hand, the debtor's bankruptcy procedure in Nigeria (assignment procedure) requires that a debtor makes an assignment for the collective benefit of the creditors. See ch 3 par 3.3.3.3. This suggests that the procedure should be employed for the benefit of creditors. The bankruptcy discharge provision under the CBIA suggests that debtors who have assets to be liquidated and those who do not have any assets that can be liquidated, such as NINA debtors, can obtain a discharge. On the other hand, discharge of a bankrupt under the Nigerian BIA would accommodate only a bankrupt who has some form of assets.

[258] Part x and s 219 of the CBIA. See also Bennett *Bennett on bankruptcy* 497. This procedure is not accessible to all debtor's in Canada but is limited to the provinces where it applies.

single debt.[259] A consolidation order does not cover debts owed to the state or debts that arose from a charge or agreements for the sale of land.[260]

The consolidation order procedure originally was applicable to insolvent persons whose debts did not exceed 1,000 Canadian dollars.[261] From 1998 this provision was extended to accommodate[262] any amount of non-excluded debts.[263] An insolvent making an application for a consolidation order to the clerk of the court in the province where it is applicable[264] must ensure the application is accompanied by an affidavit stating the names and addresses of the creditors, the name and address of the debtor, the relationship between the debtor and each of his creditors, the amount owed to each of the creditors and, if there are secured creditors, details of the securities they hold and the debtor's income, assets and dependents.[265]

After the court clerk receives the application for the consolidation order he determines the amount that the debtor is expected to pay and the period in which it should be paid in instalments (after he has interviewed the debtor and considered all the information provided).[266] Thereafter, the court clerk files the application for a consolidation order and the affidavit submitted, gives the file a number and enters all the details of the file in a register.[267] Furthermore, the clerk must give notice to all creditors informing them of the application for a consolidation order, their right to object and the time and venue where the application for a consolidation order will be heard by the clerk if there are no objections.[268] The clerk enters in the register the date the notice was sent out.[269]

Creditors who desire to object may do so within a period of thirty days after the dispatch of the notice of an application for a consolidation order. Such creditors may object to the amount entered in the register as the amount owed them, the amounts

[259] See s 224(b) of the CBIA. See also s 27 Orderly Payment of Debts Regulations (C.R.C.c 369) 1998.
[260] See s 218(2) of the CBIA.
[261] See Bennett *Bennett on bankruptcy* 495.
[262] The provision was extended by s 28(a) of the Orderly Payment of Debts Regulations (C.R.C.c 369) 1998.
[263] See Bennett *Bennett on bankruptcy* 495.
[264] S 219(1) of the CBIA.
[265] S 219(2) of the CBIA.
[266] S 220(1) of the CBIA.
[267] S 220(1) and (2) of the CBIA.
[268] S 220(3) of the CBIA.
[269] S 221(1) of the CBIA.

stated by the clerk as the amounts to be paid by the debtor or the time frame in which the payments will be made.[270]

The court clerk conducts a hearing on the objections raised and makes a decision whether or not to amend the application to accommodate the objections.[271] Having made the necessary amendments on the objection(s) raised, the court clerk will make a consolidation order.[272]

Where there are no objections a consolidation order is made by the court clerk[273] and he sees to it that all creditors are paid accordingly.[274] In cases of secured creditors the security will be disposed of and the proceeds will be paid to the creditor and where the proceeds do not cover full payment of debts owed the creditor is entitled to the balance of his claim.[275] Where the proceeds are in excess to the secured debt the excess is paid to the court and applied in payment of other judgment debts.[276]

The court clerk reports to the Superintendent on all that pertains to the administration of the consolidation order.[277] A consolidation order that does not provide for the full payment of all debts within a period of three years shall not be issued by the court clerk except where the creditors agree to the order in writing or the order is approved by the court.[278]

A consolidation order application may be referred to court only where the debtor or any registered creditor disputes the claim of a creditor, the consolidation order does not provide for the full payment of debts or where there is a need to review (so as to vary the terms) or reconfirm the consolidation order.[279]

It appears that the consolidation order procedure is a form of scheduled repayment arrangement which seeks to assist the debtor in spreading out his financial obligations.[280] The consolidation order procedure guarantees the full payment of

[270] S 221(1) of the CBIA.
[271] See s 220 (1)(c) of the CBIA.
[272] See ss 221, 223 (1) and (2), 225(1), 225(2) and 225(2)(b) of the CBIA.
[273] S 224 of the CBIA.
[274] S 235 of the CBIA.
[275] S 232(4) of the CBIA.
[276] S 232(4) of the CBIA.
[277] S 239(1) of the CBIA.
[278] See s 226(1) and 226(2) of the CBIA.
[279] See ss 226(2), 227(1) and 231(2) of the CBIA.
[280] See Bennett *Consumer bankruptcy: A practical guide for Canadians* 1 and 11.

debts and does not include writing off of debts (except in situations where the creditor consents to a non-full payment plan or where the court approves, as stated above). Therefore, the consolidation order procedure can be accessed only by debtors who have some form of income or assets with which to negotiate and so it is not accessible to NINA debtors.

6.3.2.5 Consumer proposal

The consumer proposal constitutes an alternative debt relief procedure.[281] It affords debtors the opportunity to make a proposal for a compromise to their creditors.[282] Prior to 1992 the CBIA did not differentiate between a commercial proposal and proposals for natural persons because they all used the same proposal procedure.[283] Thereafter, the CBIA introduced the division II proposal (consumer proposal), which specifically caters for natural persons.[284] The procedure is available only to an insolvent person whose debts are less than CAD$250,000, excluding the debtor's mortgage on his residence.[285]

Consumer proposals usually are administered by administrators who could be a licensed trustee or any person appointed or selected by the Superintendent to administer it.[286] To initiate a division II consumer proposal an insolvent must engage the service of an administrator[287] in preparing the proposal and the insolvent is expected to submit a statement containing all his financial dealings to the administrator.[288] The administrator must facilitate a compulsory counselling session with the insolvent in order to educate him on the benefits of cultivating a good financial way of life.[289] Thereafter, the administrator prepares a consumer proposal together with a statement of affairs of the insolvent, which is filed at the official receiver's office.[290]

The administrator then sends the proposal together with a report on the insolvent's financial affairs to the creditors.[291] The creditors are expected to indicate whether

[281] See division II of the CBIA.
[282] See Bennett *Bennett on bankruptcy* 163.
[283] *Ibid*.
[284] *Ibid*.
[285] See s 66.11(b) of the CBIA.
[286] S 66.11 of the CBIA.
[287] S 66.13(1)(a) of the CBIA.
[288] See s 66.13(1) and (2) of the CBIA.
[289] See s 66.13(1)(b) of the CBIA. See also par 6.3.2.2.
[290] See s 66.13(1)(b) of the CBIA and s 66(14)(1)(a)(i) of the CBIA.
[291] See s 66.15 of the CBIA.

they accept or reject the proposal within 45 days or prior to the meeting of creditors.[292] Creditors who have chosen to accept or reject the proposal shall be considered to have been present and voted at the meeting.[293]

Where the creditors fail to object or accept the proposal, at the expiration of the 45 days period there will not be a creditors meeting and the consumer proposal is deemed accepted by creditors.[294] Also, where objections have been raised and a creditors' meeting is called and at the meeting there is no quorum the consumer proposal shall be deemed accepted by creditors.[295] Where objections have been raised and a creditors' meeting has been called and a quorum is formed, the creditors may by ordinary resolution (voting as one class) vote to accept or reject the proposal (as filed or subject to the amendments made at the meeting).[296]

Once the proposal has been accepted by the creditors the proposal is deemed accepted by the court.[297] The effect of an accepted proposal is that it becomes binding on all creditors.[298]

A consumer proposal must not exceed a period of five years and this must be specifically stated in the proposal.[299] All the money payable in terms of the consumer proposal must be paid to the administrator together with all fees and expenses incurred[300] after which the administrator distributes the money to the creditors in accordance with the provisions of the proposal.[301] After a consumer proposal is fully performed the administrator issues a certificate in the prescribed form to the consumer debtor and the official receiver.[302]

Regarding the discharge under a consumer proposal procedure, the CBIA provides that an accepted consumer proposal will not release a consumer debtor from debts or liabilities exempted from a discharge under bankruptcy,[303] as discussed earlier.[304] In other words, the consumer proposal procedure results in a discharge of debts if

[292] See s 66.17(1) of the CBIA.
[293] See s 66.17(2) of the CBIA.
[294] See s 66.18(1) of the CBIA.
[295] See s 66.18(2) of the CBIA.
[296] See s 66.19(1) of the CBIA.
[297] See s 66.22 of the CBIA.
[298] This procedure is similar to proposed proposals under the Nigerian BIA. See par 3.6.1 above for further discussions on the Nigerian proposal procedure.
[299] S 66.12(5) of the CBIA.
[300] S 66.12(6)(b) of the CBIA.
[301] S 66.26(1) of the CBIA.
[302] S 66.38(1) of the CBIA.
[303] S 66.28(2.1) of the CBIA.
[304] See par 6.3.2.3.

the creditors agree to a discharge.[305] Further, the acceptance of a consumer proposal will not release those who ordinarily would not be released in terms of the Act, for instance[306] sureties or partners.[307]

The consumer proposal is a payment plan procedure and can be accessed by debtors who have some form of income that can be used to negotiate a plan with creditors. Also discharge of debts is available to debtors if it has been agreed on in terms of the proposal.

6.3.2.6 Commercial proposal

An indebted natural person in Canada has the option of applying for the commercial proposal procedure as a debt relief measure.[308] This procedure is available to corporate bodies and to natural persons; often it is used by natural persons whose debts exceed CAD$250,000.[309] This procedure takes the form of a payment plan.[310]

In the case of an insolvent person an application for a commercial proposal is commenced by filing a "notice of intention to file a proposal" with the official receiver in the insolvent person's locality.[311] The notice of intention must state the intention to make a proposal, the name and address of the licensed trustee who has consented to act under the proposal and the names and claims of the creditors involved.[312] Thereafter, the insolvent person files an application for a commercial proposal with the licensed trustee who has consented to act.[313]

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[305] S 66.28(2.1) of the CBIA. This is also the case with the proposed proposal procedure under the BIA. See ch 3 par 3.4.
[306] See s 66.28(3) of the CBIA.
[307] S 179 of the CBIA. The consumer proposal under the CBIA and the proposal procedure under the proposed Nigerian BIA are both payment plan procedures that can be accessed by debtors who have some form of income to fulfil their financial obligations. As such, they are not appropriate for NINA debtors. Furthermore, the proposal discharge provisions under the CBIA and Proposed BIA are identical as the wordings appear to have been couched the same way stating that the mere acceptance of a consumer proposal by a creditor would not release certain persons who ordinarily would not be released under the Act by the discharge of the consumer debtor. See s 66.28(3) of the CBIA and s 44(5) of the proposed Nigerian BIA. See ch 3 par 3.4 for further discussions on discharge under the proposal procedure. Another similarity between the two jurisdictions is that the proposal procedure under the CBIA is largely administrative in nature as is the case with proposed proposals under the Nigerian BIA. The role of the court simply is to verify the validity of the proposal after it was accepted by the required number of creditors. See s 66.22 of the CBIA and s 44(4)(a) and (b) of the Nigerian BIA.
[308] Division I of the CBIA.
[309] This financial requirement would exclude a good number of debtors who are indebted to a much lesser amount.
[310] See Bennett *Bennett on bankruptcy* 158.
[311] See s 50.4(1) of the CBIA.
[312] *Ibid*.
[313] See s 50(2) of the CBIA.

A bankrupt applicant first must obtain the consent of inspectors[314] before proceeding to file a commercial proposal.[315] Thereafter, the bankrupt will file an application for a commercial proposal with the trustee of the estate.[316]

A commercial proposal sets out the terms of the proposal, the particulars of securities (if any) and the proposal will be signed by the debtor and sureties if there are sureties.[317] It is available to persons subject to bankruptcy. After an application for a commercial proposal is filed with a trustee the trustee must file a copy of the proposal with the official receiver.[318]

The trustee shall call a creditors' meeting, which will take place within 21 days after the proposal has been filed with the official receiver.[319] A notice of the meeting is sent out stating the date, time and venue of meeting and the notice will be accompanied by a statement of the debtor's assets and liabilities, list of creditors and their claims, copy of the proposal, proof of claim, proof of secured claim in the case of secured creditors, proxy and a voting letter if prescribed.[320]

Creditors who have proved a claim (whether secured or unsecured) may respond to the proposal by dissenting or assenting to it prior to the day of the creditors' meeting.[321] Any response received by the trustee will be considered as if the creditor was present and voted at the creditors' meeting.[322]

All unsecured creditors who have proven claims and secured creditors in respect of whose secured claims the proposal was made are entitled to vote according to the class of their respective claims.[323] A proposal is deemed to be accepted by creditors if all classes of unsecured creditors present in person or by proxy vote for the acceptance of the proposal by a majority in number and two thirds in value,[324] and

[314] As stated above, inspectors usually oversee the administration of insolvent estates and also provide direction to trustees on how to administer the estate. See par 6.3.2.2.
[315] S 50(3) of the CBIA.
[316] See s 50(2) of the CBIA.
[317] See s 50(2) of the CBIA.
[318] See ss 50(2.1) and 62(1) of the CBIA.
[319] S 51(1) of the CBIA.
[320] *Ibid*.
[321] See s 53 of the CBIA.
[322] *Ibid*.
[323] S 64(2)(a) and (b) of the CBIA.
[324] S 54(2)(d) of the CBIA.

also if two thirds in value of secured creditors who have secured claims in respect of which the proposal was made voted.[325]

Where the proposal is not approved by creditors the debtor will be considered to have made an assignment and the trustee without delay files a report of the deemed assignment with the official receiver.[326] Thereafter, the official receiver will issue a certificate of assignment.[327]

After the creditors have voted in favour of the proposal the trustee within five days after acceptance, must apply to the court for an appointment to hear the application for the court's approval of the proposal.[328] After a date has been secured, a notice of the hearing of the application will be sent in the prescribed manner to the debtor, all creditors who have proven claims (secured or unsecured) and the official receiver, not later than fifteen days before the date of the hearing.[329] The court considers the report of the trustee, conduct of the debtor, objections of opposing creditors and additional statements from the trustee and applicant debtor to determine whether or not to approve the proposal.[330]

Where the court considers the terms of the proposal to be unreasonable or that it likely will not benefit the general body of creditors the court shall refuse to approve the proposal.[331] A proposal accepted by creditors and approved by the court is binding on all creditors in respect of all unsecured claims and secured claims in respect of which the proposal was made.[332]

In respect to the discharge under the commercial proposal proceedings the law provides that an accepted commercial proposal will not release the insolvent person from any particular debt or liability referred to in subsection 178(1) (as listed earlier under bankruptcy) unless the proposal clearly provides for the compromise of that debt or liability and the creditor in respect to that debt or liability voted for the acceptance of the proposal.[333] The mere acceptance of a proposal by a creditor

[325] Ss 64(2) and 62(2) of the CBIA.
[326] S 57(a) and (b) of the CBIA.
[327] S 57(b.1) of the CBIA.
[328] S 58 of the CBIA.
[329] *Ibid*.
[330] S 59(1) of the CBIA.
[331] S 59(2) of the CBIA.
[332] S 62(2) of the CBIA.
[333] See s 62(2.1) of the CBIA.

does not release any debtor who ordinarily would not be released under the Act by the discharge of the debt.[334] An insolvent person who successfully made a proposal is entitled to a discharge if agreed to by the court and the creditors.[335]

The Canadian commercial proposal constitutes a payment plan procedure and thus is akin to the consumer proposal. Therefore, it cannot be accessed by debtors who do not have any form of assets or income to fulfil their financial obligations or part thereof. The major difference between the commercial proposal and the consumer proposal is the financial requirements. The consumer proposal is available to insolvent natural persons whose debts do not exceed CAD$250,000 whereas the commercial proposal procedure is accessible to those with debts exceeding CAD$250,000.

6.3.3 Debt relief measures for NINA debtors

In the Canadian context a NINA debtor is defined as a debtor that has no exempt assets[336] to liquidate and at the same time has no income above the OSB's (Office of the Superintendent of Bankruptcy) surplus income standards[337] to offset his debts.[338] Surplus income standards usually are determined by the Superintendent of Bankruptcy by the directives established in respect of provinces or one or more bankruptcy districts or parts of bankruptcy districts.[339] Surplus income is defined as the portion of a bankrupt's total income which exceeds that which is necessary for him to maintain a reasonable standard of living, having regard to the applicable standards determined by the Superintendent of Bankruptcy.[340]

NINA debtors are able to obtain a discharge via the regular bankruptcy procedure if they can afford the regular trustee's fee, which usually is spread over a period of twelve months.[341] A NINA debtor in this category is one who does not have assets and income above the median, but who can afford the trustee's fees and will therefore proceed through bankruptcy.[342]

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[334] See s 62(3) of the CBIA.
[335] Ss 168.1, 173, 174 and 178 of the CBIA.
[336] See s 67(1) of the CBIA for the definition of non-exempt assets.
[337] See s 68(1) and (2) of the CBIA for the definition of surplus income.
[338] Ben-Ishai and Schwartz 2007 *Osg Hall LJ* 475. See also Ziegel 1999 *Osg Hall LJ* 213.
[339] See s 68(1) of the CBIA.
[340] See s 68(2) of the CBIA.
[341] See s 156.1 BIA.
[342] It is important to note that some NINA debtors may have income or a few assets. However, the income is below the OSB's surplus Income Standards and at the same the assets fall under exempt assets and as such cannot be liquidated.

It has been observed that there is another group of NINA debtors who are in a more grave situation because they cannot afford the trustee's fees and thus cannot proceed through bankruptcy.[343] This second class of NINA debtors, namely those who cannot afford to seek bankruptcy in Canada, have three options:[344]

a) First, they may try to find trustees who are willing to file for bankruptcy on their behalf at a lower-than-normal price.
b) Secondly, they may seek assistance from the Bankruptcy Assistance Programme (BAP) operated by the OSB, which seeks to assist debtors who do not have sufficient funds to cover the costs of bankruptcy such as trustee's fees, which may deter them from accessing debt relief;[345] or
c) Thirdly, they may decide not to respond to collection by simply informing the collection agencies of their inability to pay.

This group of NINA debtors has been defined in the context of consumer bankruptcy as being poor before insolvency, remaining poor during insolvency and are likely to remain poor for the foreseeable future.[346] They have been defined further as the group of people who rely on social support, live in houses subsidised by the government, have "no income, no friends, no family" and live alone. In some instances these individuals live with mental disability.[347] As a result of these factors they are said to be judgment proof and, in principle, simply can decide not to respond to collection by informing the collection agencies of their inability to pay. Consequently, they face no risk that a court would allow their creditors to take any action against them.[348]

Nonetheless, the seemingly simple refusal to respond to debt collection is characterised by its own problems, because judgment proof debtors are not protected by legislation. Therefore they stand the chance of being harassed by their creditors.[349] Creditors are known to be aggressive, which often causes debtors to reach breaking point because they cannot deal with harassment on a daily basis.

[343] Ben-Ishai and Schwartz 2007 *Osgoode Hall Law Journal* 474 and 480.
[344] *Idem* 481.
[345] See Bankruptcy Assistance Programme Directive No. 20 issued August 14 2009 (hereafter referred to as BAP Directives). The purpose of this directive is to set out the framework of the BAP, which allows a debtor who does not have sufficient funds to cover the cost of the administration of a bankruptcy to have access to the bankruptcy system. This directive sets out the process and conditions for eligibility.
[346] Ben-Ishai and Schwartz 2007 *Osgoode Hall Law Journal* 477.
[347] *Idem* 4.
[348] *Idem* 9.
[349] *Idem* 6.

Such incessant harassment, coupled with the emotional need to be free from debt, propels these NINA debtors to seek bankruptcy protection at the trustee's office[350] through the Bankruptcy Assistance Programme (BAP). The purpose of the BAP can be inferred from the purpose of its directives which provide that it "is to set out the framework of a programme that would permit a debtor who has insufficient funds to cover the cost of an administration of a bankruptcy to have access to the bankruptcy system".[351]

In essence, the BAP seeks to assist the group of NINA debtors who cannot afford the trustee's fees to enable them to proceed through bankruptcy by assigning trustees under BAP to them at a reduced cost.[352] A NINA debtor would be able to apply to the OSB for BAP after he has consulted with at least two trustees and is unable to obtain the services of either due to financial reasons.[353] Also, a NINA debtor is entitled to apply for this service if he considers bankruptcy the only potential solution. After the debtor applies to the OSB a registration form is filled out detailing the debtor's names, address, contact details and the details of the trustees previously contacted.[354] The registration form then is assigned to a designated trustee under the BAP who will administer the assignment.[355]

The designated trustee must be available and also must ensure that the same level of attention and priority is given to the BAP files as to the non BAP files.[356] Also, the application must not be delayed by a trustee due to a lack of payment of the reduced trustee's fees, and trustees are entitled to their out-of-pocket expenses in full.[357] The reduced trustee's fees vary (depending on to what the trustee and the NINA debtor voluntarily agree and the amount the NINA debtor can afford) because there is no set fee charged by trustees for BAP cases.[358] In essence, out-of-pocket costs, such as filing fees and costs of counselling sessions usually are paid up front and in full by the debtor, whereas the NINA debtor is required to pay only a reduced trustee's fees

[350] *Ibid*.
[351] See cl 3 of the BAP Directives.
[352] See cl 11 of the BAP Directives. See also Bennett *Consumer bankruptcy: A practical guide for Canadians* 14.
[353] See cl 5 of the BAP directives.
[354] *Ibid*.
[355] See cl 6 of the BAP directives.
[356] See cl 10 of the BAP directives.
[357] See cl 11 of the BAP directives.
[358] Ben-Ishai and Schwartz 2007 *Osg Hall LJ* 477.

(voluntarily agreed to by the NINA debtor and the BAP trustee) in instalments over the nine months period of the bankruptcy.[359]

In summary, there are two groups of NINA debtors in Canada, those who can afford to pay the associated out-of-pocket costs such as the trustee's fees and those who cannot afford to pay the trustee's fees to secure relief through bankruptcy. However, the latter group stands the chance of obtaining relief from their indebtedness through the BAP, which is operated by the OSB.

6.3.4 Mandatory counselling

The CBIA introduced mandatory counselling in 1992 for all bankrupts or indebted individuals who have filed a proposal. The purpose of the mandatory counselling is to provide debtors who are financially stressed with financial education.[360] This counselling is compulsory for all debtors and any debtor that does not abide by the counselling process is disqualified from an automatic discharge.[361] The debtor is expected to attend two counselling sessions (of one hour each) in the nine months preceding the time at which he will be eligible for an automatic discharge.[362] The proposed Nigerian BIA has a similar provision on counselling for bankrupt or insolvent individuals.[363]

The first counselling session is directed at educating the debtor on money management and efficient spending habits.[364] This session takes place between ten and sixty days after the debtor enters bankruptcy or after a debtor has applied for the consumer proposal procedure.[365] The second counselling session, which is known as identification of roadblocks to solvency and rehabilitation,[366] takes place not earlier than one month after the first counselling session and not later than two hundred and ten days (210) after the debtor enters for bankruptcy or after a debtor has applied for the consumer proposal procedure.[367] The purpose of the second counselling session is to help the debtor identify reasons for his indebtedness other

[359] *Idem* 478.
[360] See s 157(1) and (2) of the CBIA. See also Ziegel *Comparative consumer Insolvency regimes: A Canadian perspective* 50 and Berry and McGregor 1999 *Osg Hall LJ* 370.
[361] S 157(1)(3) of the CBIA.
[362] See ss 157 and 168 of the CBIA.
[363] See s 148(1) and s 160(1)(g) of the proposed BIA. See also ch 3 par 3.5.2 for an explanation of debt counselling in the proposed Nigerian BIA.
[364] Ziegel *Comparative consumer insolvency regimes: A Canadian perspective* 50.
[365] Directive 1R2, Office of the Superintendence of Bankruptcy 1998.
[366] Ziegel *Comparative consumer insolvency regimes: A Canadian perspective* 50.
[367] *Ibid*.

than financial ones. These counselling sessions are headed by a counsellor or trustee.

Some critics are of the opinion that the mandatory counselling requirement often is ineffective.[368] This opinion was substantiated in a study carried out by Schwartz, which measured the creditworthiness of bankrupts who proceeded through counselling against those who did not proceed through counselling over a period of ten years.[369] The study revealed that the effect of bankruptcy counselling on the bankrupt is insignificant.[370]

6.3.5 Analysis

The Canadian natural person insolvency system is similar to that of the United States of America in that it operates a straight discharge system which affords every debtor (including NINA debtors) a "fresh start"[371] as proposed by international guidelines and principles.[372]

Of importance to this thesis is the issue of NINA debtors. In this regard, in Canada the bankruptcy procedure provides an avenue through which a NINA debtor may obtain a discharge of debts.[373] The Canadian bankruptcy procedure caters for NINA debtors who are able to afford the costs of bankruptcy and NINA debtors who cannot afford the costs of bankruptcy.[374] Also, a NINA debtor in Canada has the option not to respond to debt collection (is judgment proof) as stated above.[375] However, judgment proof debtors are not protected by any legislation in Canada, as is the case in Nigeria. Consequently, they stand the chance of being harassed by their creditors from time to time, which definitely is not a solution or debt relief.

6.4 Conclusion

Ireland and Canada are prominent examples of countries with functional and highly effective provisions for NINA debtors; these circumstances render a discussion of their laws crucial to the aims of this research work.[376] In this chapter a discussion of

[368] See Ramsay 2002 *Fordham JCFL* 541. See also Ziegel 1996 *CBLJ* 108.
[369] See Schwartz 2003 *Am Bankr LJ* 227.
[370] *Ibid*.
[371] See ch 2 par 2.2.3. See also par 6.3.1.
[372] See ch 2 para 2.3, 2.4 and 2.5.
[373] See par 6.3.2.2.
[374] See par 6.3.3.
[375] *Ibid*.
[376] See para 6.2.2 and 6.3.3.

the Irish and Canadian natural person insolvency systems was carried out with a focus on NINA debtors, and a comparative study was carried out between these jurisdictions and the proposed Nigerian system. The overall goal of these considerations was to measure the Irish and Canadian systems against international guiding principles in order to determine whether Nigeria can learn from their experience. In light of the four international guiding principles (the principles of discharge, access, formal versus informal and judicial versus extra judicial procedures) the Irish and Canadian systems are evaluated.

Evaluating the entire Irish and Canadian insolvency laws against the first international principle on access of all debtors to debt relief, it is apparent that the Irish and Canadian systems overall provide access for different classes of debtors according to their financial capability.[377] The Irish bankruptcy procedure is a liquidation procedure which caters for debtors who have assets that can be liquidated, whereas the composition procedure allows debtors in the process of bankruptcy to negotiate with creditors if they so desire.[378] Also, Ireland has provision for settlement agreement procedures, such as the DSA and the PIAP.[379] These procedures can be explored by debtors who have income of some sort with which to negotiate.[380] Moreover, the DRN procedure specifically caters for the need of NINA debtors.[381]

On the other hand, the Canadian bankruptcy procedure is a liquidation procedure that is accessible by debtors who have assets that can be liquidated and by debtors who do not have any assets to be liquidated (such as NINA debtors).[382] The consolidation order procedure, the consumer proposal and the commercial proposal are all forms of payment plan procedures which can be explored by debtors who have some form of income with which to negotiate with creditors.[383] In essence, the Canadian system provides access to debt relief for all classes of debtors.

[377] See para 6.2.2 and 6.3.2.
[378] See par 6.2.2.1.
[379] See para 6.2.2.2 and 6.2.2.3.
[380] *Ibid*.
[381] See par 6.2.3.
[382] See para 6.3.2.2. and 6.3.3.
[383] See para 6.3.2.4 and 6.3.2.5.

Evaluating the Irish and Canadian insolvency laws against the second international guiding principle on discharge for all debtors,[384] the various debt relief procedures in Ireland specifically provide a discharge. For example, the Irish bankruptcy procedure provides for an automatic discharge of debts three years after a bankruptcy order is made and a discharge via court order where a debtor has obtained the consent of all his creditors in writing.[385] The DSA and PIA procedures provide for a discharge when all duties and obligations imposed on the debtor have been fulfilled.[386] Also, a NINA debtor who enters a DRN procedure is entitled to a discharge three years after the DRN has been issued.[387] These factors imply that the Irish debt relief system conforms to the international principle on discharge because discharge is available to all classes of debtors, including NINA debtors.

The Canadian bankruptcy procedure provides for an automatic discharge nine months after bankruptcy and for a discharge via court order.[388] These discharge provisions can be accessed by debtors who have assets that can be liquidated and by those who do not have assets such as NINA debtors.[389] The consumer proposal and commercial proposal procedures also offer an immediate discharge to debtors who successfully fulfil their payment plan obligations.[390] However, the consumer proposal and commercial proposal procedures do not cater for NINA debtors. The fact that the Canadian system provides for the discharge of different classes of debtors, including NINA debtors, demonstrates that Canadian natural person insolvency laws conform to the international principle which states that discharge should be available for all classes of debtors.[391]

In terms of the third international guiding principle it appears that informal procedures are preferred to formal procedures because they are deemed to be more time efficient, cost effective and also help curb the challenge of stigmatisation. In order to ensure the effective use of informal procedures there is a need for some form of

[384] See ch 2 par 2.6.
[385] See par 6.2.1.1.
[386] See para 6.2.1.2 and 6.2.1.3.
[387] See par 6.2.2.1.
[388] See par 6.3.2.3.
[389] See par 6.3.2.3.
[390] See para 6.3.2.4, 6.3.2.5 and 6.3.2.6.
[391] See ch 2 par 2.6.

"institutional support and incentives".[392] The use of formal procedures is not condemned, because they are more effective compared to informal procedures.[393]

Evaluating the Irish and Canadian insolvency laws against the third international guiding principle, the four debt relief procedures (bankruptcy and composition procedure, DSN, PIAP and the DRN) available in Ireland all are formal procedures.[394] As stated, the use of formal procedures is not condemned but informal procedures are preferred for a number of reasons.

On the basis of the reasons for preferring informal procedures it appears that the DSA, DRN and PIAP procedures being largely administrative in nature[395] and principally regulated by the Insolvency Services may result in their being time efficient and cost effective. Also, the fact that approved intermediaries appointed under the DRN procedures do not charge the debtors any fee in connection with the functions discharged makes the procedure cost effective.[396]

The debt relief measures provided in Canada also are formal procedures because they rely on institutional structures such as the courts or the office of the Superintendent of Bankruptcy. Further, the procedures are implemented by the trustees and official receivers and legislated in CBIA and BAP Directives.[397]

Lastly, the fourth international guiding principle prefers the use of extra-judicial or out-of-court proceedings over judicial procedures because they are faster and more cost effective than judicial proceedings. From the bankruptcy procedure in Ireland clearly it is a judicial proceeding as it is channeled through the courts.[398] However, the DSA, PIA and DRN procedures are extra-judicial procedures, because basically they are filed by an insolvency practitioner through the Insolvency Service.[399] The role of the court is minimal in these procedures because the major part of the proceedings is channelled through administration. Consequently, Ireland complies with international guiding principles in this regard.

[392] *Ibid*.
[393] *Ibid*.
[394] See ch 2 par 2.6.
[395] See par 6.2.3.
[396] See par 6.2.3.1.
[397] See para 6.3.2.2, 6.3.2.3, 6.3.2.4, 6.3.2.5 and 6.3.2.6.
[398] See par 6.2.1.1.
[399] See para 6.2.1.2, 6.2.1.3 and 6.2.2.1.

Canada provides a bankruptcy procedure which basically is a judicial procedure, as is the case in Ireland.[400] The commercial proposal, consumer proposal, and consolidation order procedure largely are administrative by nature and are referred to as extra-judicial procedures.[401] However, they do not cater for NINA debtors.

Having evaluated the two systems against the international guiding principles, it is important to add that it appears from the discussion of the Canadian system that the proposed Nigerian BIA developed from the current Canadian natural person insolvency law (CBIA) taking into consideration the level of similarity between them. However, the proposed Nigerian BIA deliberately appears to have left out NINA debtors by adding and rephrasing some clauses to exclude NINA debtors. For example, the proposed BIA states that assignments and proposals can be refused if it is established that they will not result in an advantage to the body of creditors.[402] This provision implies that NINA debtors cannot access these procedures. This situation is not the case in terms of the CBIA because there is no such restriction. Also, the CBIA provides for exceptions under which debtors who do not have assets or income to meet the required threshold for a discharge can obtain a discharge of debts. The proposed BIA amends that clause to accommodate only debtors that have a shortfall and not NINA cases.[403]

The Canadian system recognises two classes of NINA debtors, as discussed earlier, and Nigerian NINA debtors most likely will fall into the second class of NINA debtors recognised in Canada (meaning NINA debtors who cannot afford the costs of bankruptcy such as trustee's fees). The Canadian system has a greater number of the first class of NINA debtors; the Canadian economy is much stronger than the Nigerian economy. Adopting the Canadian bankruptcy procedure as a means to cater for NINA debtors in Nigeria may not provide adequate relief for "Nigerian NINA debtors". The Canadian experience shows that in different countries the system likely will deal with different kinds of NINA debtors and this must be taken into consideration when proposing a NINA procedure that best suits the circumstances.

[400] See par 6.3.2.2.
[401] See para 6.3.2.4, 6.3.2.5 and 6.3.2.6.
[402] See ch 3 para 3.3.3.3 and 3.4.
[403] See ch 3 par 3.3.3.4 for discussions on discharge under the proposed BIA. See par 6.3.2.3 for discharge under the CBIA and the differences between discharge under the proposed BIA and CBIA.

The Irish system via the PIA introduced administrative procedures primarily overseen by the Insolvency Service of Ireland and not by the courts. The DRN procedure for NINA debtors is one of these procedures and is available to NINA debtors at no cost. Nigeria can learn from this development because it seems that a judicial NINA procedure most likely is not affordable to NINA debtors in Nigeria and they will suffer the same challenge of delay that currently is experienced with court proceedings in Nigeria.

In conclusion, the study of Ireland and Canada in this chapter presents examples of natural person insolvency systems that are aligned to the four vital international guidelines analysed in chapter two. The evaluation of these debt relief systems showcases two examples of what may be considered as Anglo American approaches to debt relief from whose experience Nigeria can learn. Most importantly, lessons can be drawn from the different styles of debt relief provided NINA debtors in Ireland and Canada, such as the Irish DRN procedure which offers an eventual discharge of a NINA debtor three years after the DRN is granted and the regular bankruptcy procedure in Canada which offers a straight discharge to a NINA debtor.

CHAPTER SEVEN

CONCLUSION

SUMMARY

7.1 General Introduction

The core research objective of this thesis is to evaluate the proposed Bankruptcy and Insolvency Act (BIA) for insolvent natural persons in Nigeria, with a focus on debtors who do not have assets or income (popularly referred to as NINA debtors).[1] The current Nigerian natural person insolvency system is ineffective under the operations of the Bankruptcy Act (BA)[2] and contributes to the manner in which insolvency law is regarded; Nigerians regard bankrupt individuals as outcasts that should be ostracised.[3] The BA fails to provide adequate debt relief measures, the available procedures cater only for debtors who have assets that can be liquidated or who have some form of income to qualify for a payment plan. Clearly, NINA debtors are left without debt relief.[4] The majority of Nigerians, including legal practitioners, are ignorant of the content of BA. The BA never gained traction; insolvency law is not part of the curriculum for law students and because the procedures available under the BA are expensive to file.[5]

[1] See ch 1 par 1.2.
[2] See ch 1 par 1.1.
[3] See ch 1 par 1.1.
[4] See ch 3 par 3.2.
[5] *Ibid*.

To achieve the core research objective set out in chapter one, the Nigerian natural person insolvency system has been evaluated in light of the proposed BIA with a focus on NINA debtors.[6] To address the core research objective a brief discussion identifies the challenges posed by the current system under the BA.[7] These challenges initiated a movement for reform culminating in the proposed BIA.[8] The proposed Nigerian natural person insolvency system as envisaged in the BIA is evaluated and compared with contemporary international developments, principles and guidelines from a debt relief perspective[9] In order to gain insight into modern trends in natural person insolvency systems, with specific emphasis on NINA debtors. Another objective in investigating international best practice is to determine whether the proposed BIA complies with practices that could result in an effective and functional natural person insolvency system.[10]

As well as an evaluation of the international principles and guidelines stemming from the Insol *Report*, IFF *Report* and the World Bank *Report* in chapter two, a comparative study was carried out between the proposed Nigerian insolvency laws and those of South Africa, France, Sweden, Ireland and Canada.[11] The purpose of the comparative study is to draw inferences as to how the plight of NINA debtors is handled by these various systems. The ultimate aim of this research is to propose suggestions for future law reform, which this chapter sets out to do in detail.[12]

From the preliminary outline of the challenges identified with the BA in chapter one and three, it is clear that the BA does not provide for adequate debt relief measures, among others, because NINA debtors are excluded from the Nigerian natural person insolvency system.[13] An evaluation of the proposed BIA in chapter three shows that two main debt relief procedures will be provided under the BIA. These procedures are the bankruptcy procedure, which primarily is a liquidation procedure for debtors who have assets, and the proposal procedure, which caters for debtors who have

[6] See ch 2 par 2.5.4 where the World Bank *Report* was discussed with regards to the importance of providing for NINA debtors.
[7] See ch 3 par 3.2.
[8] *Ibid*.
[9] See ch 2 in general.
[10] See ch 1 par 1.2.
[11] See chs 4, 5 and 6.
[12] See ch 1 par 1.2.
[13] See chs 1 and 3.

income with which to negotiate,[14] clearly, NINA debtors will still be excluded from debt relief under the BIA.[15]

The exclusion of NINA debtors generally does not satisfy contemporary socio-economic needs, as evaluated in chapter two. According to the World Bank *Report*, which was extensively discussed in chapter four, every debtor should have access to debt relief, irrespective of his financial situation.[16]

Considering the socio-economic conditions that Nigeria faces with high poverty rates, unemployment and indebtedness,[17] it is apparent that Nigeria shelters a good number of NINA debtors. These socio-economic challenges initiated an empowerment drive by the government for the unemployed, indicating concern in relation to the part of the population that overlaps those regarded as NINA debtors. The Nigerian government has organised several efforts to create empowerment or skills acquisition programmes for those who are unemployed and extends loans to the successful candidates to assist them in starting their own businesses.[18] If entrepreneurship is to be encouraged, there needs to be a good bankruptcy system which provides a soft landing for entrepreneurs (who have been granted loans) in case of failure.[19]

From the foregoing, it is clear that there was (and still is) a need for law reforms. However, renaming and rebranding old procedures in the name of law reform are solutions to ending the ineffectiveness of the existing system. Rather, a decisive overhaul of the system is necessary featuring new and specialised procedures, such as a NINA procedure. A deliberate policy-focused overhaul should eradicate the discrimination against NINA debtors and combat the issue of stigma, which is a societal barrier to the effective implementation of the Nigerian natural person insolvency system.[20]

[14] See ch 3 par 3.3.3.
[15] See ch 3 par 3.5.
[16] See ch 2 par 2.6.
[17] See ch 3 par 3.1.
[18] See ch 1 par 1.1.
[19] *Ibid*.
[20] See ch 3 par 3.2.

7.2 Objectives of and recommendations for law reform

7.2.1 *Background*

In considering the current state of the natural person insolvency system in Nigeria, it is obvious from the discussions in chapters one and chapter three that the system as a whole is deficient, [21] the evidence for which is the absence of even a single report of a successfully completed bankruptcy case in Nigeria despite the fact that the law has been in existence for decades.[22]

It is common knowledge that Nigeria has a high level of unemployment and poverty, and therefore a large number of NINA debtors.[23] This group of debtors does not qualify for discharge under the BA's receiving orders and assignment procedures because they are asset liquidation measures which require that a debtor has some form of assets to distribute among creditors.[24] Furthermore, NINA debtors do not qualify for the proposal procedure because the proposal procedure constitutes a payment plan procedure which requires that a debtor has some form of income with which to negotiate.[25] The fact that the BA and proposed BIA do not cater for NINA debtors means that the system unjustifiably and unreasonably discriminates against NINA debtors.[26] Corroboration for this statement is found in the World Bank *Report,* which regards the exclusion of NINA debtors from debt relief as discrimination because it is a form of unequal treatment.[27] Also, it is argued that the exclusion of NINA debtors in South Africa is unconstitutional because it infringes on the constitutional right of equality.[28]

What constitutes equal treatment of debtors as opined by international instruments is ensuring that all honest but unfortunate debtors have access to a debt relief procedure which consequently leads to the discharge of debt.[29] From the discussion above, it is apparent that the main factors to consider in ensuring an insolvency system that caters for modern-day socio economic needs are access for every insolvent debtor to a suitable debt relief measure and a debtor's subsequent

[21] See ch 3 par 3.2.
[22] See ch 1 par 1.2 and ch 3.
[23] See ch 3 para 3.1 and 3.5.
[24] See ch 3 par 3.3.3.4.
[25] *Ibid*.
[26] See ch 3 par 3.5.
[27] See ch 2 par 2.5.4.
[28] See ch 4 par 4.6.
[29] See ch 2 par 2.6.

economic rehabilitation. These factors are important in that they not only assist individuals but also boost the economy.[30]

An evaluation of international reports in chapter two establishes universal guidelines for a good natural person insolvency system. The most important of these guidelines are

a) access to all honest but unfortunate debtors to debt relief measures;
b) a discharge for every honest debtor;
c) preference for extra-judicial procedures; and
d) preference for informal procedures.

7.2.2 *Access to debt relief for all honest but unfortunate debtors*

International guiding principles are clear that all honest but unfortunate debtors should have access to debt relief procedures.[31] In ensuring there is access prominent international reports propose that insolvency laws should not be punitive or restrictive in nature.[32] International reports warn that because access of all debtors is an important element of every natural person insolvency system the financial capability of a debtor should not determine access in any way.[33] Access can be achieved by providing for adequate debt relief measures to cater for all debtors.[34]

The World Bank *Report* opines that the solution to a challenged insolvency process, in terms of access is to ensure there is provision for a liquidation procedure (which caters for an exemption of certain assets), a payment plan procedure (which provides for debtors who have some form of disposable income to negotiate with) and a NINA procedure.[35]

As regards NINA debtors the World Bank *Report* unequivocally supports the call to cater for NINA debtors' specific needs. The World Bank *Report* points out that it is common practice for natural person insolvency systems to ignore the plight of NINA debtors, but that it is important to integrate them because their exclusion results in discrimination.[36] Furthermore, exclusion of this group of debtors does not benefit the

[30] See ch 2 par 2.2.1 and ch 4 par 4.7.1.
[31] *Ibid*.
[32] *Ibid*.
[33] *Ibid*.
[34] *Ibid*.
[35] See ch 2 par 2.5.4.
[36] *Ibid*.

economy in any way. In contrast, reintegration of this group of debtors encourages and possibly stimulates economic growth.[37]

In terms of the jurisdictions compared and evaluated in chapters four, five and six, in light of the guiding principle on access espoused in chapter two, it is pertinent to note that France, Sweden, Ireland and Canada provide access for every class of debtor, including NINA debtors.[38] Currently, South Africa does not provide access to a debt relief measure for NINA debtors. However, it recognises the need to rehabilitate NINA debtors and there are imminent planned reforms making provision for their economic rehabilitation by means of a proposed debt intervention procedure.[39]

In relation to access in terms of the proposed BIA a debtor must be insolvent to access the system.[40] The definition of an insolvent person according to the proposed BIA is someone whose liabilities to creditors (provable as claims) amount to not less than one million naira.[41] This requirement constitutes a monetary restriction on access to the BIA's remedial measures. It will exclude a large number of insolvent debtors as one million naira is a substantial amount of money.[42]

From the evaluation of the debt relief procedures under the proposed BIA in chapter three, it transpires that only two classes of debtors are catered for, those who have assets that may be liquidated and distributed among creditors under the bankruptcy procedure and those who have some form of income to negotiate with creditors under the proposal procedure. In essence, and as is currently the case with the BA, the proposed BIA does not cater for NINA debtors despite that by all accounts they form a large part of debtors in Nigeria.[43]

In light of the monetary restriction placed on access to the BIA in the definition of an insolvent person, I recommend that the financial requirement which states that only debtors whose "liabilities to creditors provable as claims amounts to not less than one million naira" can access the BIA be reduced to an amount not less than 2 000 Nigerian naira. This reduced amount accommodates more debtors and is similar to

[37] *Ibid*.
[38] See ch 5 and ch 6.
[39] See ch 4 para 4.7 and 4.8.
[40] See ch 3 par 3.5.
[41] *Ibid*.
[42] *Ibid*.
[43] *Ibid*.

the amount currently in place under the BA.[44] The reason I make the suggestion is that a large number of NINA debtors grapple with survival debts, including debts incurred to finance food, clothing and shelter, which is closer to the amount of to my proposal than to the BIA's proposed one million naira.[45] Also, I recommend that specific provisions be made for NINA debtors under the BIA because they cannot access relief via the bankruptcy and the proposal procedures available under the BIA. The NINA provision should enable NINA debtors to access the system at little or no cost to avoid a situation which includes them formally yet practically excludes from relief and as a result continue to be disqualified from the formal economy.

7.2.3 *Availability of a discharge for every debtor*

A discharge is at the heart of every natural person insolvency system;[46] the essence of providing for debt relief procedures is to ensure an end discharge of debts irrespective of the debtor's financial status.[47] The purpose of the discharge is to make sure that the debtor is set free from indebtedness and consequently reinstated in his pre-insolvency state to guarantee a fresh start.[48] In this respect it is important to remember the World Bank *Report*'s cautionary statement that debtors should obtain relief from as much debt as possible, as the more debts excluded from the discharge the less effective the insolvency regime.[49]

Considering the comparative jurisdictions evaluated in chapters four, five and six, discharge provisions can be classified into the straight discharge approach (which is typical of an Anglo-American style of discharge) and the earned discharge approach (which is a typical European conservative means of obtaining a discharge). Examples of jurisdictions that operate a straight discharge approach are the United States of America, Canada, France and South Africa,[50] whereas Sweden operates the earned discharge approach.[51] Irespective of the approach adopted to provide a discharge, international guiding principles prescribe that a discharge must be available to every class of debtor without exceptions[52]

[44] See ch 3 pa 3.3.3.2.
[45] See ch 2 par 2.3.1.
[46] See ch 2 par 2.6.
[47] *Ibid*.
[48] See ch 2 par 2.5.4.
[49] *Ibid*.
[50] See ch 2 par 2.2, ch 5 par 5.2 and ch 6 par 6.3.
[51] See ch 4 and ch 5 par 5.3.
[52] See ch 2 para 2.5.4 and 2.6.

France, Sweden, Ireland and Canada provide a discharge of all debts, including that of NINA debtors.[53] Currently, South Africa does not provide a discharge of debts for NINA debtors.[54] Fortunately, the proposed debt intervention procedure when operative will cater for the needs of NINA debtors in South Africa.[55]

The proposed BIA provides for an automatic discharge of debts nine months after bankruptcy. Also, it provides for a discharge via application to a court at any time after a bankruptcy order is made,[56] indicating that the proposed BIA provides a speedy discharge of debts for those who can gain access to the bankruptcy procedure. A discharge under the proposed BIA can be explored only by debtors whose assets (meaning realisable assets that amount to thirty-three and one-third cents on the dollar on unsecured liabilities)[57] have been liquidated under the receiving order or assignment procedure.[58] In situations where the debtor does not have realisable assets equal to the required amount (where there is a shortfall) the debtor will still be granted a discharge. . However, in situations where the debtor has no realisable assets (that is a NINA debtor) the proposed BIA will not grant a discharge of debts.[59] As well as the exclusion of debtors who do not meet the financial requirement relating to access above, another exclusion seems to be related to the fact that the proposed BIA will not grant a discharge of debts where there are no assets to be liquidated, clearly withholding a discharge from these debtors, including NINA debtors, who are fortunate enough to gain access to the relevant procedures.[60]

The proposal procedure under the BIA also provides for the discharge of debts,[61] is available to debtors whose debts do not stem from fraud, bail applications or spousal or child support.[62] However, a NINA debtor will not be able to access this discharge, because access to the proposal procedure is restricted to debtors whose terms of proposal are considered by the court to be reasonable and calculated to benefit the

[53] See chs 5 and ch 6.
[54] See ch 4.
[55] See ch 4 par 4.7.2.2.
[56] See ch 3 par 3.3.3.4.
[57] See ch 3 par 3.3.3.4.
[58] See ch 3 para 3.3.3.4 and 3.4.
[59] *Ibid*.
[60] *Ibid*.
[61] See ch 3 par 3.4.
[62] *Ibid*.

general body of creditors.[63] This provision definitely contravenes international guidelines and principles.

In light of the foregoing I recommend that discharge should be extended to NINA debtors under the proposed BIA in order to avoid discriminating against them and also to help boost economic growth in Nigeria.[64]

7.2.4 A preference for informal procedures

Informal procedures generally are preferred to formal procedures because they save time and costs and curb stigmatisation, elements which can undermine a well thought-out insolvency system.[65] The World Bank *Report* provides that the challenge of stigmatisation may be difficult to eradicate at once but that it can be dealt with gradually.[66] It suggests that the use of informal procedures creates a level of privacy for debtors, which reduces the effect of stigmatisation and shame.[67] Informal procedures have an added advantage of not imposing the general bankruptcy restrictions which often discourage debtors from going through the bankruptcy procedure. As regards the latter, Nigeria has done away with these restrictions under the proposed BIA.[68]

Informal procedures basically are a form of voluntary negotiated settlement between parties, which eliminates the procedural delays encountered in dealing with formal institutions and, as was stated, the regular bankruptcy restrictions. Also, it minimises costs that usually are incurred in filing formal applications and in paying professionals for their services.[69]

Notwithstanding the benefits identified with informal procedures, mostly they are ineffective because they are not institutionally regulated. The lack of institutionalisation of informal procedures makes it nearly impossible for parties to enforce settlement agreements.[70] The World Bank *Report*, the most recent of the international reports discussed in chapter two, prefers the use of formal procedures, because they are more effective.[71] The IFF *Report* and the World Bank *Report*

[63] *Ibid*.
[64] See ch 3 par 3.5.
[65] See ch 2 par 2.6.
[66] See chs 1 par 1.1 and ch 2 para 2.5.1 and 2.5.3.
[67] *Ibid*.
[68] See ch 3 par 3.5.
[69] See ch 2 par 2.6.
[70] See ch 2 par 2.2.4.2.
[71] See ch 2 par 2.5.3.

propose that for informal negotiated settlements to be effective, "some institutional support and incentives" must be present. Such institutional support and incentives include the involvement of experienced skilled advisors or negotiators and the right to enforce the decisions reached.[72] The purpose of introducing institutional support and incentives is to ensure that parties comply with the agreement reached, particularly in a situation involving NINA debtors because in this situation it is difficult to see creditors agree to a zero plan, without any incentives to do so.[73]

In examining the comparative jurisdictions discussed in chapters four, five and six, it is notable that they use only formal procedures. This fact further justifies the World Bank's stance that formal procedures are more effective. Also, in the course of evaluating the debt relief procedures available in the various comparative jurisdictions, it is observed that these jurisdictions have made attempts to modify most of the formal procedures by generally channelling the procedures through administrative bodies rather than through the courts. These reforms have resulted in the speedy resolution of matters and cost effectiveness of many such formal procedures, which characteristics are the attractive features of informal procedures.[74]

The proposed BIA prefers formal procedures over informal procedures, in fact, all the procedures available are formal. Although the World Bank *Report* states that informal procedures can help to cure the challenge of stigmatisation, which is a problem facing the Nigerian natural person insolvency system, I do not think proposing an informal procedure for NINA debtors will be effective,[75] as creditors likely will not negotiate with a NINA debtor except if there is an incentive to do so. Therefore, I recommend the use of a formal procedure for NINA debtors. The benefits of formal procedures outweigh the disadvantages and the challenge of stigmatisation should be addressed through other means than providing for an informal procedure with a high risk of ineffectiveness. In this regard, I propose aggressive and consistent education of the Nigerian people on bankruptcy and the importance of seeking relief for the benefit of the individual, his family, creditors and the society. This process can be carried out via the internet and television and/or

[72] See ch 2 para 2.4.1.5 and 2.6.
[73] See ch 2 para 2.4.1.5.
[74] See ch 5 par 5.4 and ch 6 par 6.4.
[75] *Ibid*.

radio adverts. Furthermore, bankruptcy should be included in the school curriculum for law students. Finally, legal practitioners should be sensitised to these issues by seminars or at the yearly Nigerian Bar Association conferences.

7.2.5 Preference for extra-judicial procedures

International guiding principles favour the use of extra-judicial procedures, because they are cheaper to access and faster to conclude than judicial procedures.[76] This is not to say that judicial involvement should be eliminated absolutely. However, as far as possible, the involvement of the courts should be avoided.[77]

With regard to the comparative jurisdictions discussed in chapters four, five and six, it is observed that both judicial and extra-judicial procedures are used. This combination results in a variety of debt relief options. At the same time, it reduces the burden on the courts in that some matters are resolved via extra-judicial procedures.

The proposed BIA provides for both judicial and extra-judicial procedures through the bankruptcy procedure (judicial procedure) and the proposal procedure (extra-judicial procedure).[78] This proposed amendment constitutes an improvement on the BA because the BA provided for bankruptcy and the proposal procedure, both of which were judicial procedures in nature.

As stated above, the purpose of providing for an extra-judicial procedure is to ensure that there is quick and affordable access to debt relief for debtors who cannot afford to go through judicial procedures.[79] From the foregoing, it is apparent that the overall goal of providing for an extra-judicial procedure, namely access to debt relief, has not been fulfilled by the proposed BIA. This is because NINA debtors who cannot afford to proceed through bankruptcy under the proposed BIA are still excluded from the system. As recommended earlier there is a need to provide for a formal NINA procedure and I further recommend that the NINA procedure should be extra-judicial in nature. In essence, the NINA procedure should be channelled through

[76] See ch 2 par 2.6.
[77] *Ibid*.
[78] See ch 3 par 3.4.
[79] *Ibid*.

administrative avenues rather than the courts to avoid the challenges of costs and delays experienced with court procedures.[80]

7.2.6 Summary

In conclusion, looking at the four key international guiding principles discussed above, in light of the challenges identified with the current BA, it is safe to state that such international principles address most of the challenges identified in the current Nigerian system. In addition to the recommendations made above, I further recommend that the challenge of "ignorance of the Nigerian people and the legal practitioners" be addressed by carrying out a series of educational programmes and campaigns. This can be done via television, radio and social media platforms to sensitise the populace on personal bankruptcy laws. Furthermore, insolvency law should be included in the curriculum for law students at university so that more lawyers are aware of the bankruptcy law and legal remedies available in terms thereof.

7.3 Specific NINA procedures in considered jurisdictions

7.3.1 General introduction

A major point to consider in tackling the objection raised by the Nigerian president in respect of domestication of the proposed BIA[81] is providing debt relief for NINA debtors in Nigeria, which is the core of this thesis. Because of the rate of unemployment and poverty in Nigeria, government is steering an aggressive sensitisation of the people on the need to be self-empowered via entrepreneurship. I believe that the reform of natural person insolvency law ties in with such initiatives. Therefore, the proposed BIA should provide for all classes of debtors to assist all who are brave enough to embrace entrepreneurship, but whose business consequently fails. This assistance is necessary to encourage risk taking, without which entrepreneurship and growth are impossible.

Having considered a number of NINA procedures in the comparative chapters, it is to be noted that no particular NINA procedure evaluated will fit the Nigerian system precisely as things stand. Nigeria has unique features and challenges which determine the kind of NINA procedure that will best suit a Nigerian NINA debtor. This

[80] See ch 3 par 3.2.
[81] *Ibid*.

consideration echoes the president's call for domestication of the proposed BIA because it is clear that Nigeria is dealing with a much more serious case of unemployment and poverty in comparison with jurisdictions such as the United States of America, France, Canada, Sweden, Ireland and even South Africa. However, lessons can be drawn from the NINA procedures discussed in the comparative chapters and such lessons will assist in developing a NINA procedure that will best suit the Nigerian context.

The various approaches to NINA procedures considered in chapters two, four, five and six, can be divided into two major categories, namely an Anglo-American approach (represented by the American, Irish and Canadian systems)[82] and the European approach (the French and Swedish systems).[83]

The main difference between these two approaches is that the Anglo-American approach traditionally is more liberal towards debt discharge and offers a straight discharge (meaning it offers an automatic and immediate discharge of debts), whereas the European approach generally focuses on a discharge that is earned. However, in the course of discussing these jurisdictions, it became clear that there are deviations from the norm in that some European jurisdictions have diverged from a traditional European conservative approach of an earned discharge. For example, the French system has migrated from the European conservative approach towards the more liberal Anglo-American straight or immediate discharge approach.[84]

In what follows, the key features of the various NINA procedures discussed in the comparative chapters will be highlighted. The ultimate purpose is to gain a comprehensive understanding of how NINA procedures function to draw lessons for devising a NINA procedure for Nigeria.

7.3.2 The United States chapter seven procedure

The United States of America pioneered what is referred to as the "fresh start policy", which provides for a liberal straight discharge regime.[85] This explains the reason the Anglo-American approach to consumer debt relief is categorised as the "straight discharge" approach as opposed to the European "earned discharge approach".

[82] See ch 2 par 2.2 and ch 6.
[83] See ch 5.
[84] See ch 5 par 5.2.
[85] See par 7.2.1.

The Chapter 7 bankruptcy procedure provides an avenue whereby debtors, including NINA debtors, can access an end discharge of debts.[86] This procedure is a judicial liquidation procedure, which is the process most widely used in the United States of America.[87] The chapter seven bankruptcy procedure provides an eventual discharge to (also) NINA debtors who do not earn above the required disposable income median or have non-exempted assets that can be liquidated.

The "means test" was introduced by the Bankruptcy Abuse Prevention and Consumer Protection Act 2005 (BAPCPA) when some argued that chapter seven bankruptcy filings were misused by those who can afford to proceed through the repayment procedure instead.[88] The "means test" is not intended to restrict genuine debtors such as NINA debtors who deserve chapter seven bankruptcy relief from obtaining it but rather to channel those who have the means to make worthwhile payments to the chapter thirteen repayment plan procedure.

The key feature of the chapter seven procedure is that it offers an immediate discharge of debts to an "honest but unfortunate debtor", meaning a debtor who becomes insolvent due to no fault of his own.[89] This definition may also imply "good faith". Other features of the chapter seven procedure are that it is a judicial liquidation procedure, which entails that the trustee liquidates the debtor's non-exempt properties (if any) and distribute the proceeds among creditors, while at the same time offering an immediate and unfettered discharge where there are no non-exempt assets to be liquidated. It is the latter attribute that creates a safety net for NINA debtors although it is not a specialised procedure that caters only for that group.[90] Most importantly, the chapter seven procedure is accessible free of charge to NINA debtors who cannot afford the costs of bankruptcy.[91] However, no debtor, including a NINA debtor, will be able to access a discharge where he has previously obtained a discharge via chapter seven bankruptcy within the period of eight years prior to the date of filing of the petition.[92] In essence it means that a NINA debtor, who has no assets or is left with only exempt assets, can obtain a discharge under the chapter seven liquidation procedure without having to proceed through the

[86] See ch 2 par 2.2.2.
[87] *Ibid*.
[88] See ch 2 par 2.2.4.3.
[89] See ch 2 par 2.2.2.
[90] *Ibid*.
[91] *Ibid*.
[92] *Ibid*.

liquidation phase as long as he has not obtained a discharge within the period of 8 years prior to the date of filing of the petition.[93]

7.3.3 The South African proposed debt intervention procedure

The South African debt intervention procedure, when it becomes operative, will provide an avenue by which NINA debtors whose debts are the subject of credit agreements under the National Credit Act (NCA) may obtain a discharge of debts.[94] The proposed procedure will apply to debtors who have no income or debtors whose gross income does not exceed an average of R7 500 for the period of six months preceding the date of the application for debt intervention and who has a total of not more than R50 000 in unsecured debt outstanding.

The procedure, which will form part of the NCA, will be supervised by the National Credit Regulator (NCR) and National Credit Tribunal (NCT), which will render it extra-judicial and largely administrative in nature. Unfortunately, it will not be accessible to every NINA debtor in South Africa because the process applies only to debts that arose under defined unsecured credit agreements where a credit provider has not proceeded to enforce the agreements.[95]

In relation to the procedure the consumer applies to the NCR who will consider the application and if it finds that the consumer qualifies for the procedure, will propose that the NCT suspends the debt for a 12 month period. Before expiry of the suspension period the NCR will again evaluate the consumer's circumstances and again propose to the NCT to make a suspension order for a further 12 months, but only if the consumer is still destitute. Finally, and before expiry of the second suspension period the NCR must evaluate the consumer's circumstances to determine whether his fortunes have improved. If the debtor's circumstance has not improved, the NCR may propose to the NCT to discharge the consumer's debt. Therefore, a South African NINA debtor's debt, once the debt intervention procedure is introduced, will be discharged after a minimum of 24 months after the consumer has applied for the debt intervention procedure.[96]

[93] *Ibid*.
[94] See ch 4 par 4.7.2.2.
[95] *Ibid*.
[96] *Ibid*.

7.3.4 The French personal recovery procedure

The French system provides for a three tier debt relief system which offers debtors whose financial situations are "irremediably compromised" debt relief via the personal recovery procedure. Such debtors typically are NINA debtors.[97] The personal recovery procedure offers a full and immediate discharge of debts to NINA debtors, as is the case with the United States' Chapter 7 procedure. The personal recovery procedure, akin to the United States' Chapter 7 procedure, is a liquidation procedure in nature. However, the major difference is that the French personal recovery procedure is an extra judicial procedure because it is largely channelled through the Commissions on Individual Over-indebtedness,[98] whereas the United States' Chapter 7 procedure is a judicial procedure.[99]

The key feature of the French personal recovery procedure is that it offers a "straight discharge'', which ensures a nearly unfettered access of NINA debtors to discharge of their debts. Access to the procedure merely requires that the debtor shows good faith.[100] From the foregoing, it is interesting to note that the French system adopts elements of an Anglo-American approach to debt relief.[101]

This liquidation procedure entails the trustee liquidating the debtor's non-exempt properties where possible, while NINA debtors are recommended for a discharge without proceeding through liquidation.[102] A NINA debtor is not restricted from accessing the procedure in any way and can obtain a discharge at any time as long as the requirement of "good faith" is met.[103]

7.3.5 Swedish debt restructuring procedure

The Swedish insolvency laws provide debt relief to the NINA group of debtors through an extra-judicial procedure called the debt restructuring procedure.[104] This debt relief procedure is regulated by an administrative government body known as the *Kronofogdemyndigheten* (KFM) and is financed by the Swedish government.[105] It offers debt relief to NINA debtors who do not have assets that can be liquidated or

[97] See ch 5 par 5.2.2.4.
[98] *Ibid*.
[99] See ch 2 par 2.2.2.
[100] *Ibid*.
[101] See ch 5 par 5.2.2.4.
[102] *Ibid*.
[103] *Ibid*.
[104] See ch 5 par 5.3.3.1.
[105] *Ibid*.

income to fulfil financial obligations. However, this procedure reflects the European approach to debt relief, which focuses more on earned discharge as opposed to the Anglo-American straight discharge approach.

The key features of the Swedish debt restructuring procedure are that it is an extra-judicial procedure which is largely administered by the KFM, that it is accessible to a NINA debtor once in a life time, although a second opportunity is granted in rare cases and that it is fully funded by the Swedish government and, as such, free to NINA debtors.[106] The Swedish debt restructuring procedure has a number of access requirements, such as the necessity to fulfil the "qualified insolvency" test and the requirement of "reasonableness", the latter places a form of responsibility on the debtor.[107]

Because the Swedish debt restructuring procedure is actually a payment plan procedure which generally caters for debtors who have some form of income with which to negotiate it is not a specialised NINA procedure – although it also provides for such debtors. The procedure offers an earned type of discharge to debtors in that those with sufficient income must have fulfilled their payment obligations and NINA debtors must wait for a period of five years before the discharge is awarded. This situation is unlike the case in the United States' Chapter 7 procedure and the French personal recovery procedure, both of which offer an immediate discharge of debts.[108] The five year waiting period also is much longer than the 24 month period after which South African NINA debtors will receive a discharge once the debt intervention procedure is in force.[109]

7.3.6 Irish Debt Relief Notice (DRN) procedure

The Irish Personal Insolvency Act provides for a specialised debt relief procedure, which caters exclusively for NINA debtors.[110] This procedure is known as the debt relief notice (DRN), primarily regulated by the Insolvency Services of Ireland and can be accessed only by a NINA debtor with the assistance of an approved intermediary.[111] The measure is available to NINA debtors who have a small amount of qualifying debts and a net income not exceeding €60 and assets the value of

[106] *Ibid*.
[107] *Ibid*.
[108] *Ibid*.
[109] See ch 4 par 4.7.2.2.
[110] See ch 6 par 6.2.3.1.
[111] *Ibid*.

which value does not exceed a total of €400.[112] The Irish natural person insolvency system is in some respects a reflection of the Anglo-American debt relief system because it offers a discharge of debts to a NINA debtor without any requirement other than the requirement of "good faith" (thus, an automatic discharge). However, unlike the Anglo-American debt relief system it does not offer an immediate discharge of debts.

A key feature of the Irish DRN procedure is that it is a specialised procedure that specifically caters for NINA debtors in Ireland.[113] Also, the DRN procedure is not a liquidation procedure and constitutes an extra-judicial procedure that is administered by the Insolvency Services of Ireland.

Unfortunately, the Irish DRN procedure has a long list of eligibility requirements before it can be accessed by a NINA debtor. However, it can be accessed by a NINA debtor as many times as necessary, as is the case with the United States of America chapter seven procedure, the French payment plan procedure and the proposed South African debt intervention procedure. Also, it offers an automatic, but not immediate discharge of debts as the Swedish debt restructuring procedure does. Discharge is available three years after the DRN is granted (as long as the debtor shows "good faith"). The procedure is absolutely free to debtors because the Insolvency Service of Ireland waives its fees for DRN procedures and has the responsibility to pay approved intermediaries who represents NINA debtors.[114]

7.3.7 The Canadian bankruptcy procedure

The Canadian bankruptcy procedure provides an avenue through which NINA debtors may obtain a discharge of their debts.[115] This bankruptcy procedure operates in a similar fashion to the United States of America chapter seven procedure because both are judicial liquidation procedures which seek to liquidate the assets of a debtor (if any) after which a discharge is awarded. In NINA cases (a situation where a debtor does not have exempt assets to liquidate or income above the prescribed amount) the court will proceed to discharge the debtor's debt without the necessity to proceed through liquidation.

[112] *Ibid*.
[113] *Ibid*.
[114] *Ibid*.
[115] See ch 6 par 6.3.2.2.

The Canadian system recognises two types of NINA debtors. These are NINA debtors who can afford to pay the trustees' costs incurred in filing for bankruptcy and NINA debtors who find themselves in more grievous financial situations and thus cannot afford the regular trustees' costs.[116] The latter group of NINA debtors will have to seek assistance from the Bankruptcy Assistance Programme (BAP).[117] This latter group of NINA debtors represents the largest part of the group of NINA debtors likely we will find in Nigeria.[118] However, the slight difference between the United States' Chapter 7 procedure and the Canadian bankruptcy procedure is that the courts eventually waive the costs of bankruptcy for a NINA debtor in a grave financial situation under the United States' Chapter 7 procedure. In Canada the BAP only assists such debtors to get trustees willing to file on their behalf for a sum affordable and agreeable to the debtor.[119] In this respect the Canadian system highlights the fact that there are different classes of NINA debtors and that countries likely will deal with different kinds of NINA debtors, such as those who can still afford to pay the costs of bankruptcy and those who are too poor to afford it. This factor must be taken into consideration when proposing a NINA procedure that will best suit the system.[120]

The key features of the Canadian bankruptcy procedure for NINA debtors are that it is a liquidation procedure and not a specialised NINA procedure akin to the United States' Chapter 7 procedure and the French personal recovery procedure.[121] Furthermore, it is a judicial procedure as is the case with the United States' Chapter 7 procedure. There are no stringent access and eligibility requirements except to prove that the debtor does not have exempt assets or income.[122] Also, it is accessible as many times as possible as is the case with the United States of America's chapter seven procedure, the South African proposed debt intervention procedure, the French personal recovery procedure and the Irish debt relief notice procedure.

Additionally, the Canadian bankruptcy procedure offers[123] an automatic an immediate discharge of debts, as does the French personal recovery procedure and

[116] See ch 6 para 6.3.2.2 and 6.3.3.
[117] See ch 6 par 6.3.3.
[118] See par 7.3.1.1.
[119] See ch 6 par 6.3.3.
[120] See ch 6 par 6.4.
[121] *Ibid*.
[122] *Ibid*.
[123] *Ibid*.

the United States' Chapter 7 procedure. In essence, the Canadian bankruptcy procedure is an example of the Anglo-American straight discharge approach. However, it is not absolutely free for either of the two classes of NINA debtors recognised in Canada, unlike other comparative jurisdictions where NINA debtors are not required to pay anything (such as in France under the personal recovery procedure, the United States' Chapter 7 procedure, the Swedish debt restructuring procedure, the Irish debt relief notice procedure and presumably also the South African proposed debt intervention procedure).

7.4 The proposed Nigerian NINA procedure

7.4.1 General

The discussions carried out on the various jurisdictions in chapters two, four, five and six brought to light different approaches to cater for NINA debtors, from which Nigeria can learn. However, as stated, cognisance must be taken of the unique Nigerian condition (which can be attributed to history, features and challenges of the system) before a proposition can be made for a model for law reform.[124] Transplanting laws without giving due consideration to the uniqueness of each system may result in an eventual ineffectiveness of the law.[125]

The various NINA provisions evaluated above describe different models of how NINA provisions can be formulated to suit the needs of varying jurisdictions. The discussions also make it clear that a NINA provision is important for every natural person insolvency system, irrespective of the manner in which it is formulated. Therefore, in light of international principles and guidelines investigated, all the various NINA provisions considered and with cognisance of Nigeria's unique socio-economic position, I recommend that Nigeria adopts a NINA provision with the following features:

7.4.2 Extra-judicial procedure

As will be the case with the proposed South African debt intervention procedure and as is the case with the operative NINA procedures in France, Sweden and Ireland, I propose an extra-judicial NINA procedure for Nigeria; it will eliminate the costs

[124] See ch 3 par 3.2.
[125] See ch 1 par 1.1.

incurred in court-related proceedings and also eliminate the challenge of long delays currently experienced in the Nigerian courts.

In light of the objection raised by the Nigerian president in respect of the domestication of the proposed BIA, among the issues to consider is that a large number of Nigerians live in poverty and that the rate of unemployment in Nigeria is high compared to most other countries discussed in this thesis. Consequently, the possibility of NINA debtors who will be able to afford the costs of bankruptcy or trustees fees, as is the case in Canada and the United States, is slight. In essence, an extra-judicial procedure is recommended because it will be cheaper and faster. Therefore, the challenge of expensive court proceedings and judicial laxity facing the BA must be tackled when providing a NINA procedure in the proposed BIA. I further recommend that the extra-judicial procedure should be a separate specialised procedure, as is the case in Ireland, considering the fact that already there are two proposed procedures which will take care of the needs of debtors who have assets and those who have income with which to negotiate.

As is observed in the World Bank *Report* the NINA group of debtors are more predominant in developing countries, however the creation of new extra-judicial institutions might be unrealistic in jurisdictions with scarce monetary resources. Consequently, the use of existing administrative structures may help alleviate the challenge and associated costs of setting up non-judicial institutions.[126] I second the recommendation of the World Bank *Report* and consequently suggest that the existing government structures, such as local government offices across the country, be used for this purpose.[127]

7.4.3 Minimal or No financial requirements for participation

There should be no minimum qualifying debt requirement for access by NINA debtors to the recommended NINA procedure in Nigeria, as is the case in the United States of America, Canada, France, Sweden Ireland and, when the debt intervention procedure is introduced, South Africa.[128] However, if there must be any prescribed amount of qualifying debt, this amount should be set at a minimum which would accommodate and not exempt a large group of NINA debtors. For example, an

[126] See ch 2 par 2.3.3.
[127] See ch 3 par 3.3.1.
[128] See para 7.3.2, 7.3.3, 7.3.4, 7.3.5, 7.3.6 and 7.3.7.

amount of 2 000 Nigerian naira as proposed earlier may be prescribed as opposed to the proposed minimum of one million naira qualifying debts prescribed for access to debt relief under the BIA.[129] Furthermore, the NINA procedure should be devoid of other stringent or onerous access requirements which may hinder access and the consequent discharge of debts.

7.4.4 Formal procedure

Thirdly, I recommend that the NINA procedure should be a formal procedure, as is provided in the United States of America, France, Sweden, Ireland and Canada and as will be provided by South Africa's proposed debt intervention measure. This is because formal procedures have been proven to be more effective. Although informal procedures are said to help combat the challenge of stigmatisation, with which Nigeria is currently plagued, such procedures lack institutional structure and consequently it is difficult to enforce compliance. Formal backup is especially needed in NINA circumstances where otherwise would not be an incentive for creditors to comply. Formal procedures ensure that the whole exercise is not rendered futile.

7.4.5 Possibility of repeat applications

Fourthly, I recommend that the NINA procedure should be accessible to NINA debtors as many times as necessary as long as "good faith" is shown. An attempt to limit access to 'once in a life time' may result in an eventual increase of NINA debtors in the system. For instance, this happens when a NINA debtor goes bankrupt for a second time and is then locked into the procedure. Such result will remove any incentive for the debtor to participate actively in the formal economy if not totally removing the opportunity to participate.

Thus, access of NINA debtors to the recommended NINA procedure should not be restricted by cost or by the number of times that a consumer can access the procedure. However, I do recommend that the eventual discharge and rehabilitation of a debtor should be determined by the requirement of "good faith". The "good faith" requirement should be linked to the eventual discharge and rehabilitation of a NINA debtor and thus should not be set as an initial access screening requirement for all

[129] See par 7.2.2.

NINA debtors. This step will help minimise wasteful expenditure in situations where good faith is not an issue.[130]

7.4.6 Waiting period before a discharge may be awarded

I propose that the discharge of debts be granted once a period of between two and three years has lapsed after initiating the procedure, as is the case with the DRN procedure in Ireland, the debt restructuring procedure in Sweden and the proposed debt intervention procedure in South Africa.[131] Before debt is discharged the debtor's situation should be re-evaluated to determine if it has improved or not and if not a discharge of debts should be awarded. During this waiting period the debtors and their families should undergo financial education.

7.5 Concluding remarks

The current Nigerian Bankruptcy Act (BA) is ineffective and plagued with a number of challenges. The ineffectiveness of the BA led to various calls for reform, which led to the drafting of the proposed BIA.

The proposed BIA is an improvement on the BA. However, on examining key challenges identified with the system, such as stigma, ignorance and an absence of adequate debt relief procedures (which bring about discrimination against NINA debtors) it appears that an attempt to introduce the new law may not necessarily change the *status quo*. This possibility is because the challenges of the current system have not yet been addressed by the proposed BIA. Therefore, educating people to create some form of awareness on the benefits of a bankruptcy law and re-orientating their thinking so as not to stigmatise debtors in general is vital.

More importantly, discrimination against NINA debtors should be tackled in Nigeria. This problem can be addressed only by ensuring that the BIA provides for a NINA procedure. The NINA measure should be practicable for debtors who cannot afford to proceed through bankruptcy. It should address the issue of domestication of the BIA, raised by the Nigerian president, because the current draft of the proposed BIA is in denial of the fact that Nigeria harbours poor debtors. The NINA procedure also

[130] See ch 3 para 5.2.2.5 and 5.3.3.4 for discussions on the example set by the French system for developing countries like Nigeria to cut down on waste of resources on unnecessary procedures which often results in futility.
[131] See para 7.3.3, 7.5 and 7.3.6.

will boost the economy and further boost entrepreneurship, which is an important focus of Nigerian development.[132]

A provision for NINA debtors cannot be ignored as the current state of the country reveals that there is a great deal of unemployment and poverty. It is disturbing that the proposed BIA does not cater for this group of debtors despite the fact that more developed jurisdictions, with buoyant economies, deliberately provide for NINA debtors. A NINA procedure will encourage the NINA debtors to seek relief and eventually help them to re-integrate into the formal economy rather than being lost to the informal economy. This eventuality ties in with the various international reports and the jurisdictions evaluated that maintain that a provision for NINA debtors is imperative because it drives economic growth in the long run.

[132] See par 7.2.1.

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10.0 List of acronyms and abbreviations

BA	Bankruptcy Act
BAPCPA	Bankruptcy Abuse Prevention and Consumer Protection Act
BIA	Bankruptcy and Insolvency Act
CAMA	Companies and Allied Matters Act
CIA	Central Intelligence Agency
DAA	Debt Adjustment Act
DRN	Debt Relief Notice
DSA	Debt Settlement Arrangement
IA	Insolvency Act
IFAD	International Fund for Agricultural Development
INSOL	Insolvency International
OPEC	Organisation of Petroleum Exporting Countries
SARS	South Africa Revenue Service
LFN	Laws of federation of Nigeria
MCA	Magistrates' Courts Act
NCA	National Credit Act
NCR	National Credit Regulator

NINA	No income No assets
PDA	Payment Distribution Agents
PIA	Personal Insolvency Act
PIAP	The Personal Insolvency Arrangement procedure