

Insolvency Proceedings for Natural Persons: Why is Latin America innovating?

Abstract:

The benefits of commercial insolvency proceedings have been acknowledged globally. However, commercial insolvency proceedings are driven only by economic concerns. When the insolvent is a human being other concerns must be considered, such as: satisfaction of basic needs of the debtors and their families, relief from stress and health problems caused by over indebtedness, incentives to remain productive and to maintain or help debtors re-entry the economic market. Many international organizations had developed recommendations and principles for effective business insolvency regimes, but insolvency for non-business natural persons was left behind. However, the 2008 recession alerted of the dangers of excessive household debt. Accordingly, international organizations recommended revisions to insolvency laws dealing with natural persons. In Latin America only a few countries have implemented a special insolvency system for individuals. This paper will compare and analyze key features of the insolvency proceedings for natural persons implemented by Colombia and Chile. The analysis will be made by examining the statistics each country has provided, and by discussing the weight that: (a) access requirements, (b) renegotiation terms, (c) repayment terms and requirements for approval of repayment plans, and (d) costs have played in the results. The renegotiation proceedings implemented by Colombia and Chile have a special feature that has played a key role in achieving restructuring agreements with creditors: failure to reach an agreement during the negotiation stage leads to bankruptcy, and bankruptcy grants a discharge. However, statistics show that there are around 35% more filings in Chile than in Colombia, and that around 30% more repayment plans have been approved in Chile than in Colombia. Findings show that access requirements and costs have played an important role in these results, and the fees and costs also make a difference in the number of filings and in the number of approved repayment plans. Renegotiation and repayment terms, as well as, requirements for approval of repayment plans do not seem to have a relevance influence in the results.

Key Words: Insolvency, natural persons, Latin America, Colombia, Chile.

Introduction

The benefits of commercial insolvency proceedings have been acknowledged globally. Insolvency proceedings: (a) save time and expenses, (b) stop unnecessary pursuit of uncollectible debt, (c) concentrate risk on creditors, (d) maximize the value of the debtors' assets, (e) provide a more equitable distribution to creditors, and (f) encourage more responsible lending practices. However, commercial insolvency proceedings are driven only by economic concerns. When the insolvent is a human being other concerns must be considered, such as: satisfaction of basic needs of the debtors and their families, relief from

stress and health problems caused by over indebtedness, incentives to remain productive and to maintain or help debtors re-entry the economic market.¹

Studies have stressed the relationship between discharge and entrepreneurship, productivity and innovation.² Notwithstanding the foregoing, it was not until recent decades that civil law countries started implementing special insolvency regimes for natural persons. Many international organizations had developed recommendations and principles for effective business insolvency regimes,³ but insolvency for non-business natural persons was left behind. However, the 2008 recession alerted of the dangers of excessive household debt.⁴ Accordingly, international organizations recommended revisions to insolvency laws dealing with natural persons, and to introduce mechanisms that would allow individuals to overcome household debt.⁵ Accordingly, nowadays most European countries have adopted an insolvency regime for natural persons, and have introduced some form of discharge.

Generally, alternatives are a composition with creditors or a straight discharge. The latter system has been associated with the United States of America. Typically, European countries have rejected a straight discharge. They have accepted to provide debtors with a discharge, but conditioned to fulfillment of a repayment plan. The repayment plan is aimed to encourage payment responsibility in debtors, and not to provide full payment to creditors. Length of the repayment plan usually goes from 1 to 6 years. In contrast, the U.S. Bankruptcy Code provides debtors –subject to certain restrictions- with both possibilities: a straight discharge or a repayment plan. However, debtors must choose one of those systems, they cannot submit to both. If they choose Chapter 7 liquidation, they must surrender to creditors their assets to obtain a discharge. If they choose a repayment plan under Chapter 13, they will only obtain a discharge after completion of the repayment plan. Hence, either debtors deliver to creditors their existing assets, or they agree on a repayment plan to be fulfilled with future income.

Few studies have focused on Latin American countries. During the last 20 to 30 years, Latin American countries have enacted new insolvency laws for business debtors, mainly large corporations with large amounts of debt, to provide companies with a reorganization

¹ The World Bank, “*Report on the Treatment of the Insolvency of Natural Persons*”. Available at <https://openknowledge.worldbank.org/bitstream/handle/10986/17606/ACS68180WPOP120Box0382094B00PUBLIC0.pdf?sequence=1&isAllowed=y>, para. 50 and 51.

² Armour, John and Cumming, Douglas. *Bankruptcy Law and Entrepreneurship*. European Corporate Governance Institute. 10(2) Am. L. & Econ. Rev 303 (2008).

³ The UNCITRAL Legislative Guide on Insolvency Law (2004), available at: http://www.uncitral.org/uncitral/en/uncitral_texts/insolvency/2004Guide.html; the World Bank Principles for Effective Insolvency and Creditor/Debtor Regimes, available at: <http://www.worldbank.org/en/topic/financialsector/brief/the-world-bank-principles-for-effective-insolvency-and-creditor-rights>; and the Creditor Rights and Insolvency Standard, best known as the ICR Standard, available at: http://siteresources.worldbank.org/INTGILD/Resources/ICRStandard_Jan2011_withC1617.pdf.

⁴ Ramsay, Iain, *Personal Insolvency in the 21st. Century (A Comparative Analysis of the US and Europe)*, Hart Publishing, 2017, at 3-4; IMF, World Economic Outlook April 2012 (*Growth Resuming, Dangers Remain*) at Chapter 3, available at <http://www.imf.org/external/pubs/ft/weo/2012/01/pdf/text.pdf>; The World Bank, *supra* note 1; Kilborn, Jason, *The Personal Side of Harmonizing European Insolvency Law*, Norton Journal of Bankruptcy Law and Practice, No. 5, at 581.

⁵ IMF, *Id.*, and Ramsay, *Id.*

opportunity. The “rescue” culture reflected in these new laws has penetrated the business and commercial sector, but has paid little attention to the situation of natural persons, especially non-business debtors. However, recently a few Latin American countries have followed the trend to adjust insolvency laws for natural persons. Colombia and Chile have introduced special insolvency proceedings for natural persons with a unique feature that has become a powerful incentive for creditors to reach an agreement. Chile has reported that the parties agree on a repayment plan in more than 90% of the filings.

For the first time, this article provides an overview of the main features prevailing in the insolvency systems for natural persons in Colombia and Chile, and analyzes the key innovative feature that have caused such a high percentage of approved repayment plans. For such purposes, this paper is divided in two sections. The first section provides an overview of the benefits of insolvency proceedings, and focuses on the challenging areas and on the current trends of insolvency proceedings of natural persons. The second section evaluates the systems of Colombia and Chile and their results. It starts by discussing a classic feature of the Latin American legal tradition: the distinction of individuals on the basis of the performance of commercial activities to determine the applicable law. Secondly, this paper explains the key innovative feature introduced by these insolvency systems. This is followed by the examination of the statistics each country has provided, and by a discussion on the weight that the following key issues have played in the number of filings and of approved repayment plans: (a) access requirements, (b) renegotiation terms, (c) repayment terms and requirements for approval of repayment plans, and (d) costs. The analysis is concluded by discussing the results such items have in the discharge and rehabilitation of debtors.

I. Benefits and Features of Insolvency Systems for Natural Persons.

For a long time, scholars have discussed the benefits achieved by commercial insolvency proceedings.⁶ These proceedings: (a) save time and expenses, (b) stop unnecessary pursuit of uncollectible debt, (c) concentrate risk on creditors, (d) maximize the value of the debtors’ assets, (e) provide a more equitable distribution to creditors, and (f) encourage more responsible lending practices.

Insolvency proceedings are collective proceedings. Hence, instead of undertaking individual research and legal action to seek repayment, all creditors participate in a collective proceeding specially designed to deal with the debtors’ financial situation and procure repayment to creditors.⁷ A collective proceeding saves time and expenses not only to creditors, but also to debtors. Debtors do not have to follow separate proceedings, which would not only be time-consuming, but additionally decrease the resources and assets available to creditors.

Accordingly, a collective proceeding maximizes the debtors’ assets because all costs are concentrated in one proceeding, which is designed to prevent waste and preserve the debtors’ course of business. As well, insolvency proceedings stop unnecessary pursuit of

⁶ Jackson, Thomas H., *The Logic and Limits of Bankruptcy Law*, Harvard University Press, 1986; Finch, Vanessa, *Corporate Insolvency Law*, Cambridge University Press, 2nd Ed.

⁷ The World Bank, *supra* note 1, at para. 60.

uncollectible debt because they force creditors to accept reality. Creditors fear insolvency proceedings because they believe the proceedings will destroy value. However, as the World Bank Report explains,⁸ it is not the proceeding that destroys value, but insolvency itself. Hence, an insolvency proceeding compels creditors to acknowledge the debtors' financial situation and to focus on reorganization instead of wasting resources insisting on legal actions.

Insolvency proceedings also concentrate risk on creditors and encourage more responsible lending practices because by forcing creditors to acknowledge there is no value they must register losses, and creditors have to implement better systems to select debtors and to follow up on debtors' financial status. As well, many scholars have insisted in the fact that creditors are better risk bearers⁹ because most of them are sophisticated entities with: more economic resources than a regular debtor, multiple monitoring systems, and many alternatives to compensate losses. For example, by rising interest rates on other products or customers that are making regular payments.

In addition, insolvency proceedings provide a more equitable distribution of the debtors' assets because all creditors are compelled to appear: to request acknowledgement of their claims, to vote the reorganization plan and to participate in the decisions involving the debtors' assets. As well, insolvency proceedings usually provide for a stay of enforcement actions to stop the segregation of the debtors' assets, and to make sure that creditors of the same class are treated equally.

Hence, the benefits of commercial insolvency proceedings have been acknowledged globally. Within the last three (3) decades many countries have amended their legal provisions to facilitate the debt restructuring of commercial companies following recommendations by international organizations,¹⁰ and resulting in systems with features similar to Chapter 11 of the U.S. Bankruptcy Code. Only in Latin America: Mexico, Peru, Chile, Colombia, Brazil and Ecuador have replaced commercial insolvency legislation to pursue more efficient mechanisms to avoid bankruptcy and reorganize of companies. The "rescue" culture reflected in these new laws has penetrated the business and commercial sector, but has paid little attention to the situation of natural persons, especially non-business debtors.

The benefits of commercial insolvency proceedings are also applicable to the insolvency of natural persons. However, many countries that have adjusted commercial insolvency proceedings have failed to do the same with proceedings applicable to natural persons. In contrast to corporations, which may be liquidated; natural persons have many basic needs that require satisfaction,¹¹ such as: a household, food, clothes, health, education. If the insolvency proceeding does not provide for a balance between creditors' interests and debtors' needs, the system will lead debtors to hide. By doing so, debtors avoid the pressure

⁸ Id. at para. 37 and 38.

⁹ Finch, Vanessa, *The Measures of Insolvency Law*, 17 O.J.L.S. at 227 (1997); Jackson, Thomas H., see *supra* note 6, at 228-230.

¹⁰ The UNCITRAL Legislative Guide on Insolvency Law and the ICR Standard. See *supra* note 3.

¹¹ The World Bank, *supra* note 1, at para. 50 and 51.

exercised by creditors, as well as, to surrender their assets to creditors. However, if debtors hide they also cease to be part of the formal economy, and they conceal any future value they may produce. Such are consequences that do not benefit creditors, but neither debtors nor society.

The 2008 recession alerted several international organizations and authorities from several countries of the relationship between increases in household debt and severe recessions. The International Monetary Fund, the World Bank and the European Commission acknowledged that gross household debt could constrain economic activity. Therefore, they recommended revisions to insolvency laws dealing with natural persons, and to introduce mechanisms that would allow individuals to overcome household debt.¹² As well, the World Bank issued a Report on the Treatment of the Insolvency of Natural Persons.¹³ In the Preface of the World Bank Report, the Task Force meeting stated: “[O]ne of the lessons from the recent financial crisis was the recognition of the problem of consumer insolvency as a systemic risk and the consequent need for the modernization of domestic laws and institutions to enable jurisdictions to deal effectively and efficiently with the risks of individual over-indebtedness.... the expansion of access to finance, the extension of modern modes of financial intermediation, and the mobility and globalization of financial flows may have changed the character and scale of the risk of consumer insolvency in similar ways in many different economies.”¹⁴

The World Bank Report states that an insolvency proceeding for natural persons provides benefits not only to debtors, but also to creditors and society. This Report states that a discharge: provides debtors relief from stress, prevents health problems, and helps debtors maintain or re-entry in the formal economy. Although the World Bank Report does not recommend a specific system, it enhances the benefits of a repayment plan. This Report emphasizes that in many insolvency proceedings for natural persons it is likely that debtors will have no assets or very little assets for repayment at the time of the filing. However, creditors may find value in the future earnings the debtor will have. For such purposes, debtors must have an incentive to be productive in the future. Debtors will refuse to work only for the benefit of their creditors. In contrast, if debtors know they may retain an important part of their future earnings, they will have an incentive to be productive and create value. Repayment plans must not exceed a maximum of 5 years. To bound debtors to assign a part of their income to their creditors for a longer period may difficult completion of the plan. Accordingly, the goal is not that creditors obtain full payment, but to inculcate payment responsibility on debtors and to avoid moral hazard. The repayment plan must consider that debtors must keep all income necessary to satisfy their families’ minimum domestic needs. Therefore, only surplus income may be assigned to the plan for distribution to creditors.

This Report also suggests that a neutral and professional trustee or counselor may be another crucial issue required for the proceeding to be successful. Such feature will secure credibility by the parties, and objectivity in the negotiations and in the evaluation of the

¹² The World Bank, *supra* note 4, at 3-4; IMF, World Economic Outlook April 2012, *supra* note 4, at 89-90; Kilborn, Jason, see *supra* note 4.

¹³ The World Bank, *supra* note 1.

¹⁴ *Id.*, at para. 6.

debtor's financial condition and possible outcomes. It is advisable that the trustee or counselor has experience in negotiating with creditors and sufficient knowledge of finance and insolvency. The World Bank Report also provides that creditors usually play a very small role in insolvency proceedings of natural persons because individual debtors usually have no assets or very little assets. Creditors may be heard and offer evidence, but they normally do not vote. Certainly, creditors have a conflict of interest in evaluating the debtor's position. Creditors may have lack of interest in the proceeding if there is not sufficient value, and they may have partial or incomplete information.

As well, there is an increased tendency to limit the role of courts. Court-driven proceedings are: more formal, lengthier and more expensive. The parties usually must hire a lawyer in addition to the court fees that some countries charge. Moreover, judges are experts in applying and interpreting the law, but not necessarily in negotiating with creditors. As well, judges may lack knowledge in finance, accounting, and many other subjects required for a successful restructuring agreement. Although insolvency involves legal issues, it is an economic problem that may only be solved through negotiations dealing with the following issues: value of the debtors' existing assets, the income the debtors may have in the future, the amount of the debtors' existing obligations, the liens encumbering the debtors' assets, and the parties' expectations. Issues on which most judges are not exactly experts. Finally, if it is not unusual to find that insolvent individuals do not have assets or that they have assets with little value, it is unreasonable to have an expensive, complex and lengthy proceeding that debtors will not be able to pay.

Conclusively, insolvency proceedings help natural persons rehabilitate by: releasing debtors from over-indebtedness, allowing them to keep a reasonable amount of resources to cover their ordinary living expenses, and providing them with incentives to reentry the economic market.

Generally, alternatives are a composition with creditors or a straight discharge. A straight discharge releases debtors from repayment obligations existing at the time of the filing, as long as debtors surrender to creditors all of their non-exempt assets. There is no repayment plan or debt restructuring agreement, and debtors keep exempt assets and all assets acquired after the filing. The straight discharge is a remedy obtained through bankruptcy filing. The straight discharge is generally associated with the U.S. bankruptcy system. The straight discharge is regulated in Chapter 7 of the U.S. Bankruptcy Code. Chapter 7 regulates a liquidation proceeding, under which, debtors surrender their non-exempt assets to the case trustee, who sells the assets and distributes the sale proceeds to creditors. As aforesaid, there is no payment plan. Debtors keep exempt assets and all assets acquired after the filing. Upon receiving a discharge, creditors of discharged debts may not start legal actions against debtors or their assets.¹⁵

Alternatively, Chapter 13 of the U.S. Bankruptcy Code provides debtors with the possibility to keep their assets by entering a repayment plan with their creditors. Chapter 13 regulates a proceeding, under which individuals with regular income may propose a

¹⁵ See Chapter 7 of the U.S. Bankruptcy Code. For a summary see: <http://www.uscourts.gov/services-forms/bankruptcy/bankruptcy-basics/chapter-7-bankruptcy-basics>

repayment plan with fixed regular payments to their creditors. Basically, the repayment plan should include all disposable income of the debtor less reasonable living expenses. The goal is that creditors should receive at least as much as they would receive in a liquidation proceeding. The case trustee examines the repayment plan, and after hearing the creditors may recommend approval of the plan to the bankruptcy court. To be approved, the plan must pay priority claims in full. Debtors make monthly or biweekly deposits to the trustee, who is in charge of distributing such proceeds to creditors. The filing stops most collection actions from creditors, including foreclosure proceedings, to the extent the debtor cures delinquent mortgage payments and continues to pay installments on time during the proceeding. The debtor may not incur new debt without the trustee's consent. Secured creditors are entitled to get repaid with at least the value of their collateral. However, if debtors want to keep the collateral, as a rule they must pay the debt in full. Chapter 13 allows the restructuring of certain secured debts, other than a mortgage on the primary home. Debtors obtain a discharge order by the court after the trustee certifies completion of their obligations under the repayment plan, except for certain debts that may not be discharged, such as: the home mortgage, alimony, certain taxes and student loans. Repayment plans may be from 3 to 5 years.¹⁶

Hence, the U.S. Bankruptcy Code provides debtors –subject to certain restrictions– with both possibilities: a straight discharge or a repayment plan. However, debtors must choose one of those systems, they cannot submit to both. If they choose Chapter 7 liquidation, they must surrender to creditors their assets to obtain a discharge. If they choose a repayment plan under Chapter 13, they will only obtain a discharge after completion of the repayment plan. Then, either debtors deliver to creditors their existing assets, or they agree on a repayment plan to be fulfilled with future income.

Although studies have stressed the relationship between discharge and entrepreneurship, productivity and innovation;¹⁷ generally, civil law countries had been reluctant to introduce an insolvency system for natural persons. It was not until 1984 that Denmark introduced the first insolvency system for natural persons in Europe.¹⁸ Progressively other countries started implementing their own systems: Ireland in 1988, France in 1989, Finland in 1992, Germany in 1994, Netherlands in 1998. However, the possibility of discharge was very limited in those newly implemented systems. Generally, European countries do not agree with a straight discharge. Most European systems condition discharge to completion of a repayment plan. They expect debtors to contribute part of their future income to earn a discharge. The repayment plan is aimed to encourage payment responsibility in debtors, and not necessarily to provide full payment to creditors. Length of the repayment plan usually goes from 1 to 6 years. The few European countries that currently allow a discharge in no-asset cases –without a repayment plan– were originally in disagreement with that possibility, but experience caused several reforms that resulted in the

¹⁶ See Chapter 13 of the U.S. Bankruptcy Code. For a summary see: <http://www.uscourts.gov/services-forms/bankruptcy/bankruptcy-basics/chapter-13-bankruptcy-basics>

¹⁷ Armour, John, *supra* note 2.

¹⁸ Kilborn, Jason, *Twenty-Five years of consumer bankruptcy in Europe: Internalizing Negative Externalities and Humanizing Justice and Denmark*, 18 Int. Insolv. Rev. 155 (2009).

allowance of a straight discharge in exceptional cases.¹⁹ Nowadays, most European countries have regulated an insolvency proceeding for natural persons.²⁰

In Latin America only a few countries have implemented a special insolvency system for individuals. There is no uniformity. The region is divided in countries that have implemented a special system or have a form of discharge for natural persons, and countries that have no special system at all. The latter usually only provide in their Civil Codes a liquidation proceeding, under which individuals must surrender to creditors all their assets. No real possibility to renegotiate indebtedness or a discharge is provided. Argentina is a country that has provided a form of discharge since many decades ago, but does not regulate a special proceeding for natural persons. The current proceeding is court-driven and is regulated within the same insolvency law applicable to corporations. No special statistics or reports are made on the filings made by individuals, which has caused a lack of information on the number of filings that are made and their results.

Another group of countries, such as Brazil, Mexico and Peru do not regulate a special insolvency system for individuals nor provide for a discharge. In these countries individuals may only deal with their insolvency by surrendering their assets to creditors. As no discharge is available, even if they do surrender their assets they would continue indebted. Naturally, individuals are not inclined to file for such a proceeding. This causes a very low number of filings, and of course, no information or statistics are available on the number of filings and their results.

Finally, a couple of countries have followed the recent trend that started in Europe to regulate a special system of insolvency for natural persons. Among these countries are Colombia and Chile. The Colombian insolvency law for natural persons started to be in effect on 2013, and the Chilean law on 2015. Both are very recent laws, and have introduced a similar system. A system that is providing good results, which may overcome some of the stigma and reluctance that has prevailed in the region with respect to insolvency, and currently very especially when dealing with consumers. As will be explained in the next section, these systems have relevant similar features, but also key differences that are influencing the results. This article intends to analyze the relevant aspects of these systems to determine what is causing the different results.

II. Insolvency Systems for Natural Persons in Colombia and Chile.

This section will compare and analyze key features of the insolvency proceedings for natural persons implemented by Colombia and Chile, and evaluate the statistics that have been reported by these countries. The main key feature to be discussed is the combination these systems have made of composition and bankruptcy, and the results that this feature has caused in the number of filings and the percentage of repayment plans that have been approved. The analysis will be made by examining the statistics each country has provided,

¹⁹ Ramsay, *supra* note 4.

²⁰ Austria, Belgium, Cyprus, Czech Republic, Denmark, England and Wales, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Netherlands, Norway, Poland, Romania, Russia, Scotland, Slovakia, Slovenia, Spain, and Sweden. See Ramsay, *supra* note 4, at. 3-4.

and by discussing the weight that the following key issues have played in the results: (a) access requirements, (b) renegotiation terms, (c) repayment terms and requirements for approval of repayment plans, and (d) costs. In addition, this section will start by discussing a classic feature of Latin American legal tradition: Should law applicable to individuals be determined on whether the individual performs or not business activities?

II.1. Business vs. Non-business Insolvency Proceedings for Natural Persons

Colombia enacted Law 1564 of 2012²¹ on July 12, 2012. Within the Third Section of Third Book lies Title IV; entitled “Insolvency of the Non-Business Natural Person.”²² The proceeding is regulated in 45 articles, and it is only applicable to individuals that do not ordinarily perform commercial activities. This law has only been in effect for 5 years; as it started to be applied on 2013 after enactment of Ruling 2677 on December 2012.²³ Commercial insolvency proceedings are regulated in Law 1116 of 2006.

In Chile, the proceeding is regulated by Law 20720, published on January 9, 2014, and in effect as from October 10, 2014.²⁴ Law 20720 regulates both: insolvency proceedings for corporations and for individuals, and as in Colombia, the law distinguishes between individuals that perform business activities and individuals that do not.²⁵

The distinction made on the basis of the performance of commercial activities has been relevant in insolvency matters since many centuries ago. Insolvency law was originally enacted for traders.²⁶ It is true that the aims to be achieved by an insolvency system made for companies differ from the aims intended for an insolvency system addressed to consumers. The first aims for productivity, while the latter aims for consumption.²⁷ A system for traders is intended to promote entrepreneurship: a second chance for innovation and risk. The result should only be loss of the business if the business fails. Hence, this system should only be applicable to corporations and companies with limited liability. Bankruptcy of a business with limited liability results in the loss of the business, but it will not reach the assets of the business’ owners. In contrast, bankruptcy of a natural person reaches all assets of the individual, including those that are necessary for daily living expenses.²⁸ Natural persons do

²¹ The Congress of Colombia originally regulated the insolvency proceeding for non-business natural persons in Law 1380 of 2010 enacted on January 25, 2010. However, this law was in effect for a very short period because on September 19, 2011 the Constitutional Court resolved that the proceeding for the approval of such law had violated the Constitution. Such judgment, contained in file C-685 (2011), rendered the law without effect.

²² *Insolvencia de la Persona Natural No Comerciante*.

²³ Decreto 2677 of December 21, 2012.

²⁴ The law is called “Nueva Ley de Insolvencia y Reemprendimiento”, and is *available at*: <http://www.superir.gob.cl/ley-n-20-720/>

²⁵ Individuals may only apply if they have not performed commercial activities within 24 months before the filing, according to Article 261, subsection e) of Law 20720.

²⁶ According to Vanessa Finch, *Corporate Insolvency Law, Perspectives and Principles* 10 (Cambridge University Press 2009), Elizabeth I enacted legislation that allowed traders to become bankrupt, and at the rise of modern insolvency law, a clear distinction between traders and non-traders was made.

²⁷ Méjan Carrer, Luis Manuel C., *Un Régimen de Insolvencia de los Consumidores en México*, Praxis Legal No. 2, Abril 2016, Bosch México.

²⁸ In some countries there are very few exempt assets, and with little value.

not have limited liability.

Accordingly, the strong distinction many civil law countries continue to make between trader and non-trader individuals causes more difficulties than benefits nowadays. As aforesaid, the criteria should not depend on the trading activity, but on the existence of limited liability. Because an individual, whether performing or not trading activities, has many needs and ordinary living expenses that must be considered in bankruptcy: food, clothes, health, a household, education, among others.

The distinction between trader and non-trader individuals has already caused certain difficulties in Colombia to have access to the system, and a few in Chile.²⁹ According to a publication by an arbitration center in Colombia,³⁰ the first problem many individuals face is to prove that they must submit to the non-business insolvency law instead that to the commercial insolvency law. However, individuals may receive income from different sources: commercial and professional sources. To which proceeding should individuals in such situation submit? To the commercial one or to the non-business? That has created an opportunity for creditors to challenge the proceeding filed by the individual as inapplicable, causing the filing to be dismissed. There has been no uniform criteria and judges have disagreed on the extent of the authority they have to deal with that issue. The fact is that such indetermination may delay or even hinder debtors' opportunities to renegotiate their debt.³¹

Such distinction has also caused problems in Chile according to the information provided by the Government of Chile.³² However, there have been less cases in Chile because the regime for non-business natural persons only applies to employees, housewives, students, and pensioners, among others.³³ Individuals that perform commercial and/or professional activities, or that are self-employed, must submit to the commercial insolvency law.³⁴ The foregoing makes more expensive and lengthier insolvency proceedings for individuals that perform either commercial or professional activities, or that are self-employed, because commercial proceedings are court-driven and a private trustee must be appointed.³⁵ In contrast, the composition proceeding for non-business individuals is handled with no cost by public officers of the Office of Insolvency and Reorganization, a public administrative body supervised by the Ministry of Economy, hereafter called the "Insolvency Authority".³⁶

The foregoing may create a disincentive for individuals that perform professional activities, or that are self-employed, to file for a renegotiation with their creditors. Statistics

²⁹ Official Communication 2830 issued by the Office of Insolvency and Reorganization of Chile on March 14, 2018.

³⁰ See Nieto, Luis Álvaro, *Insolvencia (negociación de deudas) de persona natural no comerciante. ¿Mito o realidad?* (2016), at <http://www.centroarbitrajeconciliacion.com/content/download/16773/227083/file/Insolvencia>.

³¹ Id.

³² See *supra* note 29.

³³ See <http://www.superir.gob.cl/preguntas-frecuentes/preguntas-frecuentes-renegociacion/>

³⁴ The commercial debtor is defined in terms of income tax payments. First category tax payers, and persons whose earnings come from the exercise of a profession, either legal or natural persons, are deemed commercial debtors.

³⁵ Veedores. Article 2, definition number 40) of Law 20720.

³⁶ Superintendencia de Insolvencia y Reemprendimiento.

published by the Insolvency Authority in Chile show a much lower number of filings for business insolvency proceedings. Filings for business reorganization proceedings equal to only 4% of non-business renegotiation filings, and such figure includes filings made by commercial companies. Figures can be easily verified by comparing the statistics of business vs. non-business insolvency proceedings:

Year	Negotiation Proceeding Non-Business	Reorganization Proceeding Business	Liquidation Proceeding Non-Business	Liquidation Proceeding Business
2016	944	53	1,175	701
2017	1,177	38	2,085	1009
Total	2,121	91	3,260	1,710

These facts raise a couple of questions: Is the Chilean system achieving the aim intended by excluding from the inexpensive and easier insolvency proceeding individuals that perform professional activities, are self-employed or are entrepreneurs? Is a commercial insolvency proceeding the best choice for individuals that are not protected by limited liability? If insolvency proceedings provide several benefits to debtors, creditors and society in general, and commercial insolvency proceedings are more expensive and more complex because they are designed to deal with big companies; then, forcing individuals to submit to a commercial insolvency proceeding may disincentive filings, and accordingly, fail to provide debtors an opportunity to rehabilitate. As aforesaid, to reach the aims intended by an insolvency system for natural persons the proceeding must be affordable, straightforward, and limit court participation as much as possible.

II.2. Key feature

Whereas, Colombia regulates only one insolvency proceeding for non-business individuals, Chile regulates two separate insolvency proceedings for non-business individuals: a straight bankruptcy and a renegotiation proceeding.³⁷ Both, the latter and the insolvency proceeding implemented by Colombia have a special feature that has played a key role in achieving restructuring agreements with creditors: failure to reach an agreement during the negotiation stage leads to bankruptcy, and bankruptcy grants a discharge.

Such special feature is quite unique, because regulations that have been implemented in other countries do not impose a straight discharge upon failure to agree on a repayment plan. Such element is a strong incentive for creditors to reach an agreement, because if they fail to do so, their debtor will receive a straight discharge. A straight discharge releases debtors from repayment obligations existing at the time of the filing as long as debtors deliver

³⁷ Chapter V, Title 1 (Renegotiation Proceeding) and Title 2 (Bankruptcy Proceeding) of Law 20720.

to creditors all of their non-exempt assets. There is no repayment plan or debt restructuring agreement, and debtors keep exempt assets and all assets acquired after the filing. Therefore, the threat of the straight discharge places a strong pressure on creditors to reach any agreement that would allow them to recover a little more than what they would receive with distribution of existing assets; as entering into an agreement would allow creditors to reach debtors' future assets and income.

Straight discharge places more pressure on creditors when (i) debtors have no assets, (ii) debtors have few assets with little value, or (iii) applicable law provides for a generous exemption. For example, if applicable law exempts debtors' homestead. As in such cases debtors, either have nothing to lose or keep their more important assets. In these scenarios creditors will be more interested than debtors to reach an agreement, and may be willing to give up more. The interest in reaching an agreement is shifted to debtors when they have valuable assets or they are not able to keep their homestead.

An important feature of these insolvency systems is that debtors' consent for approval of the repayment plan is always required. Accordingly, the value of debtors' assets is in contradiction with the weight of debtors' decision. To the extent debtors have less assets or less valuable assets, then debtors will be less interested in reaching an agreement with creditors and more inclined to go for bankruptcy and a straight discharge. The fact is that debtors' decision may define if the proceeding finishes with a repayment plan or with a straight discharge.

In addition, in the Chilean system debtors may choose to file directly for bankruptcy, instead of filing for a debt restructuring plan. In that case, debtors do not have to go through the renegotiation step with creditors. Bankruptcy also provides a straight discharge; however, the bankruptcy proceeding is court-driven. Therefore, it is not filed before the Insolvency Authority, but before a court. Debtors must also pay a liquidator. Only when the debtor has no assets or the value of the debtor's assets is insufficient, the law imposes a cap on the liquidator's fees. They may not exceed 30 UF.³⁸ To obtain the straight discharge in bankruptcy debtors must also surrender their non-exempt assets for distribution to their creditors, and according to the Law, even 3 month-wages may be attached for the benefit of creditors.³⁹ Upon termination of the proceeding, they are discharged from all obligations existing at the opening of the proceeding that were not paid.⁴⁰

II. 3. Statistics

This section will compare the statistics provided by Colombia and Chile; and then analyze the elements that have a major influence in the results. Unfortunately, Colombia has not published results or any statistics. The Ministry of Justice provides information upon request. The table below shows the number of filings that the Ministry of Justice has

³⁸ On March 24, 2018 one UF equals to \$26,633.18 Chilean pesos, and US\$1.00 equals to \$607.76 Chilean pesos. Then, 30 UF equal \$798,995.4 Chilean Pesos and US\$1,314.65 Dollars. See <http://indicadoresdeldia.cl/valor-uf-hoy.html>.

³⁹ Article 276 of Law 20720.

⁴⁰ Id.

reported:⁴¹

Year	Number of Proceedings
2013	99
2014	276
2015	353
2016-02/11/17	1,354

It is worth emphasizing that the last figure covers almost 2 years, as it includes the number of filings that have taken place since January 2016 to November 2, 2017. Numbers displayed show a rapid growth in the number of filings; although there have been less filings than in Chile. In contrast, Chile has published statistics since 2016. The following table shows the number of filings made in Chile during 2016 and 2017:

YEAR	Renegotiation Proceeding Non-business	Bankruptcy Non-business	Total Filings Non-business	Reorganization Proceeding Business	Commercial Liquidation Proceeding	Total Filings Business
2016	994	1,175	2,169	53	701	754
2017	1,177	2,085	3,262	38	1,009	1,047
TOTAL	2,171	3,260	5,431	91	1,710	1,801

<http://www.superir.gob.cl/informacion-y-estadisticas/informacion-y-estadisticas-ley-n-20-720/>

A simple comparison among the figures shows that there were 1,354 filings in Colombia vs. 5,431 in Chile during approximately the same period. Even if we cut the filings in Chile on October 2017, considering that the figure obtained from Colombia covers up to November 2, 2017 –a 2-day difference-, filings in Chile reach⁴² 4,891. According to these figures, Colombia received 28% of the filings received in Chile. However, it is fair to acknowledge that more than half of the filings made in Chile each year belong to the liquidation proceeding. A proceeding that does not involve a repayment plan or negotiations with creditors, but that provides a straight discharge upon surrendering of existing assets to creditors. A proceeding that is well suited for debtors with no assets or very few assets, but that was not regulated in Colombia. In Colombia debtors must necessarily file for the negotiation proceeding, and only upon failure to reach an agreement or fulfill the agreement they will be declared bankrupt. Debtors will be discharged from their existing obligations

⁴¹ Information provided in official communication OF116-0005155-DMA-2100 dated February 29, 2016, and emails received from Jose Guillermo Cobos, Head of the Office of Alternative Dispute Resolution of the Ministry of Justice of Colombia on May 10 and November 2, 2017.

⁴² From January to October 2017 there were 1,072 filings for the renegotiation proceeding, and 1,650 filings for the liquidation proceeding. See <http://www.superir.gob.cl/wp-content/document/estadisticas/ley20720/BOL-EST-201710.pdf>

upon surrendering their existing assets to creditors.

This first comparison shows clearly that more debtors choose the straight bankruptcy proceeding. Straight bankruptcy becomes an incentive for many debtors to get a fresh start⁴³ that they will not have in the absence of a discharge. If the applicable law necessarily requires negotiation with creditors and approval of a repayment plan, many debtors will choose not to file. Reasons may vary: no assets or no income, no job, lack of interest from creditors, high percentage of creditors or of total indebtedness required for approval, reluctance from creditors to accept insolvency and approve a discharge, or to avoid having to devote several months to a negotiation with creditors that may be costly and useless.

However, even if only renegotiation proceedings are compared, it is still possible to conclude that much more filings take place in Chile. According to the preceding information, there were 1,072 filings for the renegotiation proceeding in Chile from January to October 2017, which added to 994 in 2016 totaled 2,066. In contrast, there were only 1,354 filings during the same period in Colombia, which equal 65% of the filings made in Chile. There is another finding worth mentioning: while only 60% of the filings result in a repayment plan in Colombia,⁴⁴ the parties reach an agreement in over 90% of the cases in Chile. According to the statistics of 2017 published by the Insolvency Authority of Chile, the parties approved a repayment plan in 92.1% of the filings. As well, statistics relating to year 2016 show that the parties approved a repayment plan in 91.5% of the filings. Therefore, statistics show that there are around 35% less filings in Colombia than in Chile.⁴⁵ As well, there are around 30% less repayment plans in Colombia than in Chile. This means that the Chilean system is more used, and it is apparently providing more relief to debtors as it is reaching in a larger number of cases the purpose intended.

The number of filings reveals that a system is being used. The best example is the U.S. insolvency system. Statistics⁴⁶ show that during 2010 there were 1’593,081 bankruptcy filings in the U.S. Courts, of which at least 1’536,799 were non-business filings. This equals 96.46% of the bankruptcy filings. The following table shows that even though the number of total filings has decreased year by year, the percentage of non-business filings has maintained the same proportion:

Year	Total Bankruptcy Filings	Bankruptcies (Non-business Chapter 7 & 13)	% of Bankruptcies (Non-business Chapter 7 & 13)
2010	1’593,081	1’536,799	96.46
2011	1’410,653	1’362,847	96.61

⁴³ Jackson, see supra note 6, at 225-252.

⁴⁴ Jose Guillermo Cobos, Head of the Office of Alternative Dispute Resolution of the Ministry of Justice of Colombia, reported in an email dated November 2, 2017, that 400 out of the total number of cases filed from January 2016 to November 2, 2017 (1,354) had no result [sin resultado], which means that they were still in progress. If such 400 cases are subtracted from the total cases (1,354), the result is 954. Then, the number of cases in which the parties reached an agreement (573) equals 60% of 954.

⁴⁵ Comparing only the figures belonging to the negotiation and renegotiation agreement.

⁴⁶ United States Courts, *Caseload Statistics Data Tables (Bankruptcy)* (2017), at <http://www.uscourts.gov/statistics-reports/caseload-statistics-data-tables>.

2012	1'221,091	1'181,016	96.71
2013	1'071,932	1'038,720	96.90
2014	936,795	909,812	97.11
2015	844,495	819,760	97.07
2016	794,960	770,846	96.96
2017	789,020	764,771	96.92

<http://www.uscourts.gov/statistics-reports/caseload-statistics-data-tables>

The large number of filings reveals that U.S. debtors use the system. A logical explanation for such usage is that the system provides debtors relief. Otherwise, why would debtors give away part of their time and pay to use a system that will not provide any relief? Hence, a large number of filings or a regular increase in the number of filings show that the system is providing the relief it was intended to give.

The number of repayment plans that are approved also allows to assess the efficiency of the systems, as the insolvency systems that are being compared focus on a renegotiation scheme. Bankruptcy and discharge are a last resort. Indeed, the Colombian system regulates only one proceeding for non-business natural persons, which requires debtors to enter into negotiations with creditors. Only if negotiations fail, debtors have access to bankruptcy. Accordingly, the system aims for a renegotiation agreement among debtors and creditors. Therefore, to make sure the system works properly it is necessary to examine if the goal is being fulfilled, and to what extent it is being fulfilled. Such system has to be compared with the Chilean renegotiation proceeding, for a fair comparison. The Chilean renegotiation proceeding also aims for a renegotiation agreement among debtors and creditors, and has similar features to those of the non-business Colombian insolvency system.

The remaining part of this section will analyze the weight that the following elements have played in the results displayed by the non-business insolvency systems of Colombia and Chile: (a) access requirements, (b) terms, and (c) costs.

III.3(a) Access requirements

In both systems only debtors may file for the renegotiation proceeding. However, in Colombia debtors may only file when they have 2 or more obligations overdue for at least 90 (ninety) days to 2 or more creditors, or if they are a defendant in at least 2 summary trials for the enforcement of debt.⁴⁷ The debt involved must be of at least 50% (fifty percent) of the debtors' total indebtedness.⁴⁸ Alike, to access the Chilean renegotiation proceeding debtors must have 2 or more obligations for a total amount in excess of 80 UF⁴⁹ overdue for over 90 calendar days. On the understanding that such obligations must arise from different sources –not necessarily different debtors–, and debtors must not have been notified of the

⁴⁷ Juicios ejecutivos.

⁴⁸ Article 538 of Law 1564 of 2012.

⁴⁹ Unidad de Fomento (UF) is an index, a unit of account that is adjusted to inflation in Chile. On March 23, 2018, one UF was equal to \$26,633.18 Chilean pesos, and US\$1.00 was equal to \$607.76 Chilean pesos. Then, as of March 23, 2018 80 UF were equivalent to \$2'130,654.40 Pesos and to US\$3,505.74 Dollars. Cfr. See <http://indicadoresdeldia.cl/valor-uf-hoy.html>.

commencement of a bankruptcy proceeding or a summary trial for the enforcement of debt (other than labor).⁵⁰ Debtors may only submit to this proceeding if they provide an affidavit specifying that they have not performed business activities within the 24 months before the filing.

Although the filing requirements are quite similar, it is possible to identify an important difference: Chilean filing requirements set forth a minimum debt amount, but do not require that the overdue obligations meet a percentage of the total indebtedness. Accordingly, in Chile individuals may only file for the renegotiation proceeding if their debt exceeds an amount of approximately U.S.\$3,500 Dollars. However, in the event their debt is below that amount, individuals may still have a choice: they may file for the liquidation proceeding. In contrast, the Colombian proceeding does not set forth a minimum amount to access the proceeding; all individuals may file regardless of the amount of their debt, but in any event their overdue obligations must equal at least 50% of their total indebtedness.

The fact that in Colombia individuals may only file if value of their overdue obligations is at least equal to 50% of their total indebtedness has a similar effect as establishing a minimum debt amount. All debtors that fail to comply with their obligations have to wait until their overdue obligations reach half of their total indebtedness. Henceforth, debtors may have to endure their creditors' pressure for a long time. By the time this requirement is met, it may be more difficult for debtors to renegotiate their indebtedness. Their income and assets may have decreased, but their indebtedness increased. In contrast, in Chile individuals with indebtedness below the minimum amount established for the renegotiation agreement may always file for the liquidation proceeding. Debtors that file for the latter do not have to meet any test. Accordingly, in Chile any debtor may always have access to some form of relief, what does not happen in Colombia. This may be a reason for the higher number of filings in Chile, and the popularity of the liquidation proceeding.

The fact that Chile only allows access to the renegotiation proceeding when indebtedness is above U.S.\$3,500.00, and that all individuals with indebtedness below that amount must file the liquidation proceeding reinforces the idea that liquidation or straight bankruptcy is addressed to individuals with no assets or non-valuable assets. Large amounts of debt are regularly not granted to individuals with no assets or no income.

II. 3(b) Renegotiation Terms

Moreover, Colombia's proceeding sets forth a time limit for renegotiation and approval of the repayment plan. The law states that the renegotiation term should not exceed 60 days, which may be extended to 90.⁵¹ However, the Ministry of Justice has not reported the average length of renegotiation proceedings that have taken place in Colombia. In contrast, the renegotiation proceeding in Chile does not have a time limit. The Chilean law provides for 3 different types of hearings among debtors and creditors: (1) the first hearing is for approval of claims conforming the total indebtedness, (2) the second hearing is for approval of the repayment plan, and (3) the third hearing is for approval of a liquidation plan

⁵⁰ Article 260 of Law 20720.

⁵¹ Articles 544 and 551 of Law 1564 of 2012.

if no repayment plan was approved. However, the absence of a renegotiation term does not seem to affect the length of proceedings, as the Insolvency Authority has reported that average length of renegotiation proceedings is of 70 days.⁵²

Setting forth a time limit assures the parties an expedite process and saves expenses. However, the time limit may impact negatively the renegotiations; as timing is preferred to a possible successful agreement. Unfortunately, there is no available information on the length of renegotiation proceedings in Colombia, so it is not possible to assess if the deadline established by the law may be one of the factors causing a lower approval of repayment plans.

II.3(c) Requirements for approval of repayment plans

Moreover, it is interesting that both countries -Colombia and Chile- set a high standard for approval of repayment plans: the debtor and 2 or more creditors representing 50% of the debtors' total principal indebtedness.⁵³ Approval of the repayment plan by such percentage binds all unsecured creditors. The requirement of approval by such a high percentage of creditors may serve the purpose of avoiding a court approval. Neither the Colombian proceeding nor the Chilean renegotiation proceedings are court-driven. The Colombian proceeding is driven by private mediators. In contrast, the Chilean renegotiation proceeding is carried by a public officer that belongs to the Insolvency Authority. Hence, requiring approval by creditors representing the majority of the debtors' indebtedness validates the agreement and makes it less vulnerable to challenges by the minority, unless it breaches the law or contains a clearly unfair clause.

On the other hand, even though the foregoing gives the idea that approval of the plan relies entirely on the will of creditors, the fact is that debtors' approval is also required. Moreover, given that (1) failure to reach an agreement during the renegotiation proceeding leads to the liquidation proceeding, and (2) the liquidation proceeding provides debtors with a straight discharge: debtors with no assets or no valuable assets have a strong incentive to go to liquidation and not to give their consent for a repayment plan. As aforesaid, in a straight discharge no future value is involved: it excludes future income and after-acquired assets. Then, these Latin American proceedings depart from the more recent trends on personal insolvency. European countries and certain groups in the United States of America⁵⁴ -country generally linked with the straight discharge- expect debtors to share future value with creditors, and therefore condition discharge to approval of a repayment plan. If the intended purpose of the insolvency proceeding is to share future value with creditors; then, the requirement that debtors must give their consent to the repayment plan distorts the original intention when debtors have no assets or no valuable assets. However, another perspective is that debtors with no assets, no valuable assets or no income do not get a relief if they are

⁵² Official Communication number 2830, dated March 14, 2018, issued by the Legal Department of the Insolvency Authority (Superintendencia de Insolvencia y Reemprendimiento). The term "working days" excludes Saturdays, Sundays and holidays.

⁵³ See article 553, subsection 2 of Law 1564 of 2012, and article 268 of Law 20720.

⁵⁴ The United States Congress has enacted the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (hereafter, the "BAPCPA"). The BAPCPA makes it more difficult to file for a Chapter 7 liquidation proceeding by introducing a "means test" that consumers must complete if their monthly income at the time of the filing is more than the state median.

expected to provide future value to creditors; as generally they do not have income or their income is insufficient to share with creditors. The straight discharge system acknowledges that situation and chooses to provide relief.

In addition, the Colombian proceeding aims for a repayment plan of maximum 5 years, but it allows the repayment plan to be longer if any obligation being restructured was originally payable for a longer term or if creditors representing more than 60% of the debtors' total indebtedness vote for a longer term.⁵⁵ In contrast, Chilean law does not establish a length for the repayment plan. Debtors and creditors may vote for whatever they consider more appropriate. This may be another factor that increases the number of repayment plans. Time limit may be arbitrary in certain cases, and may end with the possibility of successful renegotiations.

Chile has published that above 90% of renegotiation proceedings terminate with an approved repayment plan, which leads to think the renegotiation proceeding is very successful. However, Chile has not published information on the length of approved repayment plans. Perhaps creditors condition approval to repayment of the full amount of their claims. If that is the case, the repayment plan would not be fulfilling its purpose; as debtors would not obtain relief. Also, no information has been published on the fulfillment of repayment plans. Perhaps it is too soon, considering that the law has only been in effect for 3 years. It is expected that repayment plans will last more than 3 years. Hopefully, the Insolvency Authority will add to monthly and annual reports information on: the average length of the proceedings, the average length of repayment plans and the percentage of fulfillment of approved repayment plans.

If a debt restructuring agreement is approved and maintained (if challenged), then the Insolvency Authority will terminate the insolvency proceeding and all of the debtor's original obligations will be deemed replaced for those contained in the repayment plan. The Insolvency Authority may issue uncollectability certificates for any amounts that cannot be collected by creditors.⁵⁶

II.3(d) Costs

As aforesaid, neither the Colombian proceeding nor the Chilean renegotiation proceeding are court-driven. The Colombian proceeding is driven by private mediators that must be registered with mediation centers authorized by the Ministry of Justice.⁵⁷ Registered mediators may be lawyers, accountants, business administrators, economists or even engineers, who must have been certified in an Insolvency Program approved by the Ministry of Justice. The Ministry of Justice sets forth the maximum fees mediators may charge for the proceeding, which were published in Ruling 2677 of 2012. Mediators must verify that debtors comply with the financial test required for filing. Mediators are also required to make renegotiation proposals, and to make sure debtors' minimum rights are protected.⁵⁸ The

⁵⁵ Id. Article 553, subsection 10 of Law 1564 of 2012.

⁵⁶ Id. Article 268 of Law 20720.

⁵⁷ Ministerio de Justicia y del Derecho. See article 533 of Law 1564 of 2012.

⁵⁸ Article 537 of Law 1564 of 2012.

proceeding is surveilled by a local court that must only solve any legal controversies arising therefrom.

In contrast, the Chilean renegotiation proceeding is driven by an administrative public body. Persons developing the role of trustees are not private mediators, as in Colombia, they are public officers paid with public resources. The foregoing causes renegotiation proceedings to be inexpensive, as debtors do not have to pay the fees of a trustee or mediator. That may be a reason why filings for renegotiation proceedings are much higher in Chile than in Colombia. However, it is important to insist in the fact that this proceeding is not available in Chile to individuals performing commercial or professional activities, but generally only to employees. Individuals performing commercial or professional activities must submit to the business proceeding, which does require hiring a professional and payment of the corresponding fees.

The fact that both proceedings are not court-driven makes them faster and more efficient. However, if the parties fail to reach agreements during the renegotiation stage the file must be delivered to the court to open a liquidation proceeding. The liquidation proceeding in both systems is court-driven. Both, Colombian and Chilean systems, require the appointment of a liquidator that has a right to collect fees.⁵⁹ However, in Chile liquidators' fees have a cap of 30 UF⁶⁰ when the parties do not approve a repayment plan but do approve the distribution of debtors' assets for liquidation. Generally, the liquidator's fees are paid from the debtors' assets to be distributed to creditors. However, in Chile the liquidators' fees will be paid by the Insolvency Authority from the public budget if debtors do not have sufficient assets to pay them.⁶¹ Again, in that case the liquidator's fees cannot exceed 30 UF.⁶² Colombia does not provide for the possibility to assign public budget to no-asset cases. Either debtors or creditors must pay the liquidators' fees. Failure to do so may disrupt the continuation of the proceeding and hinder its termination.

The fees and costs that were described also make a difference in the number of filings. The proceeding in Colombia is more expensive, as debtors have to pay 2 different professionals: the private mediator during the renegotiation stage, and a liquidator for the liquidation proceeding in the event the parties do not approve a repayment plan. In addition to that, the proceeding provides for a one-time opportunity to amend the repayment plan upon a default,⁶³ which also requires of an additional payment to the private mediator that leads the renegotiation. A mediator from an arbitration center in Colombia explains that when repayment plans are defaulted certain judges do not order the beginning of the liquidation proceeding because they provide the parties with the one-time opportunity to amend the agreement. However, such possibility only stalls the proceeding because it requires an additional payment to the private mediator of 30% of the applicable fees; payment that

⁵⁹ Articles 32, subsection 4, and 17, subsection 2, of Law 20720 (Chile); and Article 564 of Law 1564 of 2012 (Colombia).

⁶⁰ See paragraph 7 of article 267 of Law 20720. On March 24, 2018 one UF equals to \$26,633.18 Chilean pesos, and US\$1.00 equals to \$607.76 Chilean pesos. Then, 30 UF equal \$798,995.4 Chilean Pesos and US\$1,314.65 Dollars. See <http://indicadoresdeldia.cl/valor-uf-hoy.html>.

⁶¹ If the debtor does not have assets to pay the liquidator's fees, it must be concluded that the debtor has no assets to make any distributions to creditors at all.

⁶² See article 40 of Law 20720.

⁶³ Article 556 of Law 1564 of 2012.

neither debtors nor creditors wish to make.⁶⁴ Finally, a public officer from the Ministry of Justice⁶⁵ has informed that many liquidations have been stalled because appointed professionals do not accept to act as liquidators as there are not sufficient assets for payment of the liquidator's fees.

This issue is very important because this means that proceedings remain open; they do not end, leaving the parties in the same situation in which they were at the beginning of the proceeding. Indeed, creditors do not get the debtors' non-exempt assets, or any repayment; as there is no liquidator in charge of checking inventories and making a distribution proposal. Debtors not only keep the assets that should be delivered to creditors, but they also keep any assets acquired after the opening of the liquidation proceeding. According to the law, if no repayment plan is approved all after-acquired assets are out of the reach of creditors. Then, debtors get to keep all assets, and creditors receive nothing. However, if debtors keep all assets they do not receive a discharge, as discharge is conditioned to distribution of the debtors' assets to creditors.

Then, the benefits previously discussed of having an expert mediator in charge of the renegotiation proceeding disappear when the law requires a different person to act as liquidator. If the mediator gets paid for carrying the proceeding, and already knows the value of the state and the value of the claims, it is much easier for the mediator to prepare the proposal for distribution to creditors, especially if according to the law, the person in charge of the liquidation proceeding does not have to sell the assets and distribute proceeds, but only to prepare an adjudication proposal and deliver the assets to creditors. Hence, the appointment of a different person as a liquidator seems an expensive and unnecessary step that aggravates the financial condition of many debtors.

II.4 Discharge and Rehabilitation of Debtors

The analysis will be concluded by discussing the results that the key issues that have been examined have in the rehabilitation of debtors, which was the purpose intended by the laws. For such purposes, it is important to first explain certain similarities and differences that the systems in analysis have provided for the liquidation stage. In both systems the negotiation stage shall terminate and lead to bankruptcy if any of the following events takes place: (a) the parties do not approve a repayment plan, (b) debtors default the repayment plan, or (c) the repayment plan is invalidated.⁶⁶ As aforesaid, the bankruptcy proceeding focuses on the sale of the debtors' assets. Although in both systems bankruptcy is court-driven,⁶⁷ most of the work is handled by a liquidator appointed by the parties.

However, the systems differ in the responsibilities imposed on the liquidator. The Chilean system is similar to most liquidation proceedings:⁶⁸ liquidators have to make an inventory of the assets, get appraisals, sell the assets and distribute proceeds among the

⁶⁴ *Supra* note 27.

⁶⁵ José Guillermo Cobos, Head of the Office of Alternative Dispute Resolution of the Ministry of Justice of Colombia, in an email dated May 12, 2017.

⁶⁶ Article 563 of Law 1564 of 2012; and article 269 of Law 20720.

⁶⁷ Article 267 of Law 1564 of 2012.

⁶⁸ Article 36 of Law 20720.

creditors. In contrast, the Colombian system is quite unique in the fact that the liquidator is not required to sell the debtors' assets. The liquidator must only prepare a proposal for the adjudication of the assets and the judge must call for a hearing, where the parties may make observations to the proposal. Thereafter, the judge issues a judgment deciding on the distribution of the assets, which has the effect of discharging debtors from all outstanding obligations existing before the opening of the liquidation proceeding, except if behaved with bad faith. On one hand, it is a good idea that the law does not require the debtors' assets to be sold in order that proceeds are distributed to creditors. Selling the debtors' assets, especially if they have little value, may be troublesome. The price obtained may not compensate the time assigned to such task. Instead, the system proposes that all non-exempt assets are directly delivered to creditors within the 30 days following the judgment approving the proposal for distribution; transferring to creditors the burden to sell the assets. However, on the other hand, distributing the debtors' assets among the creditors is not a simple task either. The value of the assets may not necessarily correspond with the value of the claims. Any proposal for distribution may lead to some inequities. Creditors very certainly are not willing to receive assets that may be difficult to sale. Anyhow, such regulation becomes another incentive for creditors to agree on a renegotiation to avoid having to deal with the debtors' assets.

According to information provided by the Ministry of Justice of Colombia,⁶⁹ in over 20% of the cases filed the parties do not agree on a repayment plan. Accordingly, those cases are transferred to a court for the opening of the bankruptcy proceeding. 274 cases have been transferred from January 2016 to November 2, 2011 to the courts for the opening of bankruptcy proceedings, but there is no information on the outcome of the cases. Courts are not bound to provide information to the Ministry of Justice on the timing or content of their resolutions. However, it is a well-known fact⁷⁰ that many judges are not concluding the bankruptcy proceedings in no-assets cases, this is, when debtors do not have monies or sufficient assets to pay the liquidators' fees. Unfortunately, the authorities are not taking record of the number of cases that remain open. In all those cases debtors do not receive a discharge, because the discharge is conditioned to delivery of non-exempt assets to creditors. Since the liquidator is not appointed or does not accept the appointment because no fees will be paid, no one performs the tasks of the liquidator. Cases remain open or are abandoned.

As well, the statistics report shows that in approximately another 8% of the cases the proceeding does not even start with the negotiation stage. The Ministry has stated that this happens, among other reasons, because: debtors have no assets or monies for payment of the private mediator's fees, the case is not admitted because the debtors receive income from commercial activities, debtors are not natural persons, filings may not be complete, debtors do not wish to continue with the proceeding, and also this figure includes cases that are

⁶⁹ José Guillermo Cobos, Head of the Office of Alternative Dispute Resolution of the Ministry of Justice of Colombia, informed in emails dated May 12 and November 2, 2017 that 400 out of the total number of cases filed from January 2016 to November 2, 2017 (1,354) had no result [sin resultado], which means that they were still in progress. If such 400 cases are subtracted from the total cases (1,354) the result is 954. Then, the number of cases in which the parties reached no agreement (274) equals 28.72% of 954.

⁷⁰ Pursuant to officers of the Ministry of Justice (José Guillermo Cobos, email dated January 31, 2018) and experts, such as Diana Lucía Talero (email dated November 2, 2017).

voided.⁷¹ Accordingly, some of these cases are also stalled if the debtors have no assets or no valuable assets.

The foregoing situations do not happen in Chile, as Chilean law does assign a portion of the public budget to solve no asset liquidation cases. As previously mentioned, in no asset cases the law states a cap to liquidators' fees, and debtors do not have to pay for the negotiation proceeding. Therefore, cost of the proceeding does not only affect the performance and timing of the proceeding itself, but also hinders discharge and debtors' rehabilitation.

Conclusions

In Latin America only a few countries have implemented special insolvency systems for individuals. This paper focused in the regulations of Colombia and Chile. Both countries have a system for business debtors –to which big companies may submit-, and a system for non-business debtors. This paper concludes that this distinction between trader and non-trader individuals causes more difficulties than benefits nowadays as individuals may have income from different sources. Commercial insolvency proceedings are generally designed to rescue big companies, and may not be suitable for individuals. Therefore, forcing individuals that have a source of commercial income to submit to a commercial proceeding may disincentive filings, and fail to provide rehabilitation for that type of debtors.

Moreover, the renegotiation proceedings implemented by Colombia and Chile have a special feature that has played a key role in achieving restructuring agreements with creditors: failure to reach an agreement during the negotiation stage leads to bankruptcy, and bankruptcy grants a discharge. This has been a crucial element to incentive creditors to reach an agreement. However, statistics show that there are around 35% more filings in Chile than in Colombia, and that around 30% more repayment plans have been approved in Chile than in Colombia. Access requirements and costs have played an important role in these results.

In Colombia individuals may not file for insolvency until their overdue debt equals 50% (fifty percent) of their total indebtedness, which may difficult renegotiation schemes as debtors must endure their creditors' pressure for a long time and wait for their income and assets to decrease while their indebtedness continues increasing. In contrast, Chilean filing requirements for a renegotiation agreement set forth a minimum debt amount, but do not require that the overdue obligations meet a percentage of the total indebtedness. Additionally, in Chile individuals with indebtedness below the required minimum amount may always file for the liquidation proceeding without having to meet any test. Accordingly, in Chile any debtor may always have access to some form of relief, what does not happen in Colombia.

The fees and costs also make a difference in the number of filings and in the number of approved repayment plans. The proceeding in Colombia is more expensive, as debtors must pay a private mediator. In contrast, in Chile the renegotiation proceeding is free, as it is handled by public officers that cannot charge debtors or creditors for their services.

⁷¹ Emails received from José Guillermo Cobos, Head of the Office of Alternative Dispute Resolution of the Ministry of Justice of Colombia, dated January 31 and February 2, 2018.

Moreover, if a repayment plan is not approved debtors are lead to bankruptcy in both systems, where they must pay a liquidator. These causes that debtors in Colombia are bound to pay at least 2 professionals: the mediator and then a liquidator. In addition, if debtors are not able to pay for any of those professionals their proceeding will be stalled, as no public budget is assigned for these proceedings. On the other hand, in Chile liquidators' fees always have a cap when the parties do not approve a repayment plan but do approve the distribution of debtors' assets for liquidation, and in the event the debtor cannot afford the liquidator's fees the fees are paid by the Insolvency Authority from the public budget. These prevents insolvency proceedings from being stalled indefinitely in Chile and forces them to end. Termination of the insolvency proceeding is crucial for its success, as discharge may only take place upon termination of the proceeding. Therefore, it is a fundamental issue to establish mechanisms that assure the proceeding will not be stalled or interrupted, as these would prevent reaching one of the main purposes of an insolvency system for natural persons: the debtors' rehabilitation.

Finally, renegotiation and repayment terms, as well as, requirements for approval of repayment plans do not seem to have a relevance influence in the results. The fact that Colombia sets forth a limit of 60 days, which may be extended to 90, for the renegotiation proceeding does not seem to influence the results as the Insolvency Authority of Chile has reported that the average length of renegotiation proceedings in Chile is of 70 days. Furthermore, requirements for approval of repayment plans are similar: both countries require approval of creditors representing more than 50% of total indebtedness, and we do not have sufficient information on the terms of repayment plans in order to assess if such terms influence the results.

The systems in analysis are very recent. The Colombian system has been in effect since 2013 and the Chilean system since 2015. Therefore, we know that a high percentage of repayment plans are approved, but we do not know how many of those repayment plans will be fulfilled. We do not know either what is the length of approved repayment plans, or the percentage of debtors that have been discharged. We do not know the percentage of cases that remain open in Colombia because there are no resources to pay liquidators. There are still many questions without an answer, and many issues that must be followed to arrive to a complete conclusion.

However, it is great news to know that some countries in Latin America have noticed the trend in insolvency of natural persons and have started to regulate and implement insolvency systems. These countries are starting the path. There are many things that need to be tried and endeavored to arrive to a correct balance between creditors' interests and debtors' needs. Furthermore, reforms must be accompanied by an important effort in communicating and educating on the relevant aspects of insolvency and the benefits that insolvency systems provide to debtors, creditors and society to overcome the stigma that still prevails, especially when dealing with natural persons.

References:

Armour, John and Cumming, Douglas. *Bankruptcy Law and Entrepreneurship*. European Corporate Governance Institute. American Law and Economics Review, Vol. 10, No. 2, 2008, p. 303.

Block-Lieb, Susan, “*Best Practices in the Insolvency of Natural Persons*”, available at: http://siteresources.worldbank.org/EXTGILD/Resources/WB_TF_2011_Consumer_Insolvency.pdf.

Finch, Vanessa, “*Corporate Insolvency Law*”, Cambridge University Press, 2nd Ed.

Finch, Vanessa, *The Measures of Insolvency Law*, 17 Oxford Journal of Legal Studies, 1997, p. 227.

INSOL International, *Consumer Debt Report II* (Report on Findings and Recommendations), available at <https://www.insol.org>.

Jackson, Thomas H., ‘*The Logic and Limits of Bankruptcy Law*’, Harvard University Press, 1986.

Kilborn, Jason, *Behavioral Economics, Overindebtedness & Comparative Consumer Bankruptcy: Searching for Causes and Evaluating Solutions*, Emory Bankruptcy Developments Journal, Vol. 22, p. 13.

Kilborn, Jason, *Reflections of the World Bank’s Report on the Treatment of the Insolvency of Natural Persons in the Newest Consumer Bankruptcy Laws: Colombia, Italy, Ireland*, 27, Pace International Law Review, April 2015, at p. 306.

Kilborn, Jason, *The Personal Side of Harmonizing European Insolvency Law*, Norton Journal of Bankruptcy Law and Practice, No. 5.

Kilborn, Jason, *Twenty-Five years of consumer bankruptcy in Europe: Internalizing Negative Externalities and Humanizing Justice and Denmark*, International Insolvency Review, No. 18, 2009, p. 155.

Méjan Carrer, Luis Manuel C., *Un Régimen de Insolvencia de los Consumidores en México*, Praxis Legal No. 2, Abril 2016, Bosch México.

Nieto, Luis Álvaro, *Insolvencia (negociación de deudas) de persona natural no comerciante. ¿Mito o realidad?* (2016), at <http://www.centroarbitrajeconciliacion.com/content/download/16773/227083/file/Insolvencia>.

Ramsay, Iain, *Personal Insolvency in the 21st. Century (A Comparative Analysis of the US and Europe)*, Hart Publishing, 2017.

The Creditor Rights and Insolvency Standard (ICR Standard), *available at*: http://siteresources.worldbank.org/INTGILD/Resources/ICRStandard_Jan2011_withC1617.pdf.

The UNCITRAL Legislative Guide on Insolvency Law (2004), *available at*: http://www.uncitral.org/uncitral/en/uncitral_texts/insolvency/2004Guide.html

The World Bank Principles for Effective Insolvency and Creditor/Debtor Regimes, *available at*: <http://www.worldbank.org/en/topic/financialsector/brief/the-world-bank-principles-for-effective-insolvency-and-creditor-rights>

The World Bank, “*Report on the Treatment of the Insolvency of Natural Persons*”. Available *at* <https://openknowledge.worldbank.org/bitstream/handle/10986/17606/ACS68180WP0P120Box0382094B00PUBLIC0.pdf?sequence=1&isAllowed=y>

World Economic Outlook April 2012 (*Growth Resuming, Dangers Remain*), IMF, *available at* <http://www.imf.org/external/pubs/ft/weo/2012/01/pdf/text.pdf>

Ziegel, Jacob, *Facts on the Ground and Reconciliation of Divergent Consumer Insolvency Philosophies*, *Theoretical Enquiries in Law*, Vol. 7, No. 2, July 2006, p. 298.

Legal provisions and official communications:

Código Civil para la Ciudad de México (Mexico)

Código de Procedimientos Civiles para la Ciudad de México (Mexico)

Decreto 2677 of December 21, 2012 (Colombia).

Decreto Legislativo No. 1189 de 21 de agosto de 2015, que modifica la Ley General del Sistema Concursal (Peru)

Decreto 2667 of 2012. *Por el cual se reglamentan algunas disposiciones del Código General del Proceso sobre los procedimientos de insolvencia de la persona natural no comerciante y se dictan otras disposiciones.* December 21, 2012 (Peru)

Decreto 11 de 2014. *Por medio del cual se aprueba el reglamento de la ley 30201 que crea el registro de deudores judiciales morosos.* Dec 26, 2014 (Peru)

Ley 1564 de 2012 (Insolvencia de la Persona Natural No Comerciante) (Colombia)

Ley 20720 (Nueva Ley de Insolvencia y Reemprendimiento) (Chile)

Lei No. 5,869 de 11 de Janeiro de 1973 (Brazil).

Lei No. 13.105 de 16 Marco de 2015 (Brazil).

Ley 27809 of 2002. Ley General del Sistema Concursal (Peru).

Ley 30201 de 2014. *Por la cual se crea el registro de deudores judiciales morosos.*
May 7, 2014 (Peru)

Ley 24.522 (Ley de Concurso y Quiebras) (Argentina)

U.S. Bankruptcy Code.

Official communication OF116-0005155-DMA-2100 dated February 29, 2016 issued by the Ministry of Justice of Colombia.

Official Communication 2830 dated March 14, 2018 issued by the Office of Insolvency and Reorganization of Chile.

Statistics provided by the Ministry of Justice of Colombia in emails dated May 10 and November 2, 2017 and January 31, 2018.

Statistics published by the Office of Insolvency and Reorganization of Chile, available at <http://www.superir.gob.cl/wp-content/document/estadisticas/ley20720/BOL-EST-201710.pdf>

United States Courts, *Caseload Statistics Data Tables (Bankruptcy)* (2017), available at <http://www.uscourts.gov/statistics-reports/caseload-statistics-data-tables>.