THE CASE FOR AN INSOLVENCY LAW

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Fiji's insolvency law covering individuals and companies, like much of the country's commercial law and legal system, is part of the colonial inheritance. Suppose there was no colonial inheritance? Would we need to develop, or adopt from elsewhere, something like our current statutory regimes?[2]

Insolvency law is a part of the larger subject, the law of creditor and debtor. Under an insolvency regime special rules supplant our regular law of creditor and debtor. The debtor's insolvency, a factual condition, becomes a ground to curtail, to modify and to replace (to a greater or lesser degree) the regular procedural and substantive rights of creditors, and likewise to modify both the rights and obligations of the debtor. A relationship of creditor and debtor that commences under one set of rules ends under a significantly different set of rules in consequence of the factual development concerning one party to the relation. All of this is highly unusual. In no other field of law do developments concerning one party to an existing relation usher in a regime replacing our regular law of the field.[3]

This highly unusual feature prompts the question: Why is there an insolvency law at all? The question might be addressed from an historical viewpoint or from a law and economics viewpoint. In what follows the viewpoint taken is jurisprudential. Examining the question from this stance enables us to isolate and articulate core issues and consider some of the

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[2] The question while hypothetical for Fiji has been a live question in relatively recent times for former eastern bloc countries adopting the capitalist model of organization and for countries, still nominally communist, like China and Vietnam. The answer, sensibly, has largely been to cut and paste. The question also exists as a real and live question in the context of national insolvency. Nation states, like any other legal person, may become insolvent. Some do so with notorious regularity. Debate continues as to both the desirability and practicality of creating an insolvency law that might govern relations between an insolvent nation state and its creditors.

[3]An insolvency law without an attendant regular law of creditor and debtor is hard to imagine. However, one can easily imagine a legal system in which the fact of a debtor's insolvency is of no legal consequence so that notwithstanding a debtor's insolvency the creditor debtor relation remains governed by our regular law of creditor and debtor. Insolvency law is thus in a quite real sense, an optional extra.

possible answers, both the path taken and that not taken. The end result is a claim as to the proper ambit of insolvency law and justification for a regime/s exhibiting features that are central to Fiji's current insolvency regimes.

CREDITOR AND DEBTOR ISSUES

The insolvency of a debtor gives rise to different issues for the parties to the creditor debtor relationship. We begin by focusing on creditor issues.

Creditor issues

For creditors, the debtor's insolvency typically means that creditors' claims cannot be paid in full. Aggregate claims exceed the realizable value of the debtor's asset. In such circumstances how are the debtor's assets to be applied in satisfying the claims of creditors? The problem is one of distribution, and being an issue for the law, a problem of distributive justice. What is the appropriate governing principle/s of distribution?

In theory many particular principles might be put forward in answer to this question. In practice there are likely to be only three serious contenders. First, distribution might be ordered by reference to some quality of a claim. For example, debts might be paid in order of their age. The debt longest due, paid first. If paid in full, the debt second longest due is paid. And so on. Second, distribution might be ordered by reference to some quality of the creditor. For example, in a society that venerates the elderly, debts might be paid in order of the age of the creditor. The eldest creditor is paid first. If her claim is paid in full, then the second eldest creditor is paid. And so on. The third possible principle is that which comes immediately to mind of post-enlightenment man. Pay claims equally and without discrimination; or, as the maxim goes, equity is equality. Apply assets among creditors by reference to a creditor's claim measured as a fraction of creditors' aggregate claims. This last alternative is the most abstract of the three. It takes account of only two facts; the sum of creditor claims and the sum of assets available. It is thus most naturally the default principle. As a default it would apply unless and until displaced by more specific considerations.

The three contending principles of distribution may be combined utilizing classes. For example, using the particular examples above we could create a class (class one) composed of older claims and elderly creditors (with a cut-off age for each) and then a class (class two) of all other claims. The classes are ranked while claims within each class are governed by the third principle. Assets are first applied on a pro rata basis satisfying class one claims. If class one is paid in full, remaining asset are applied pro rata in satisfying class two claims.

Recognition that the insolvency of a debtor gives rise to a problem of distributive justice to be addressed by the selected principle/s of distribution has two immediate practical consequences. First, it becomes necessary to halt or freeze regular creditor initiatives to pursue payment. There need not be a bar on legal actions generally, but there must be a bar on creditors obtaining execution or exercising self-help remedies. Second, assets of the debtor must in some fashion be taken into the custody of the law. It becomes necessary to preserve assets of the debtor (in particular from dissipation by the debtor himself/itself) until such time as the assets may be realized and the proceeds thereof applied among creditors in accordance with the principle/s of distribution.

(What happens thereafter is largely a question of practical and efficient design. There will need to be a central figure to whom creditors prove their claims and who will determine the entitlement of each in accordance with the principle/s of distribution. The debtor's assets in the custody of the law will need to be realized and distribution effected per the determination of the central figure. Both roles in fact are typically given to a single central figure; the trustee in bankruptcy in the case of an insolvent individual and the liquidator in the case of an insolvent company.)

The bar on creditor initiatives to obtain payment together with the control assumed by the law of the debtor's asset gives shape to what becomes the pre-eminent feature of an insolvency regime; it's communal character. Creditors previously related only by the happenstance of having a common debtor, are now members of a community of creditors. A world in which the debtor has multiple discrete relations with multiple creditors, is replaced by a world in which creditors as a group divide the assets available and bear the losses of the debtor's insolvency in accordance with a common principle/s of distribution.

The communal character of an insolvency regime is in one significant respect legally unique. The community that arises is involuntary, mandated, imposed from above on its creditor members.

The law often enough deals with communities. The law formulates rules concerning partners in a firm and deals with disputes among partners; likewise re members of a company or a class of shareholders; likewise re families, the beneficiaries of a trust, the owners of properties in a housing estate, and so on. In each of these cases membership of the community is voluntary, or, in the case of a family, in part voluntary and in part in the natural order of things. While membership may sometimes be bestowed rather than sought (for example, an heir who finds herself one of a group of beneficiaries under a trust) acquiescence, the failure to renounce that bestowed, ensures ongoing membership is voluntary. The same is not true of the creditor in insolvency. The creditor finds his pre-existing right to pursue payment barred and is offered in its place a right to participate in the insolvency regime. This is a case of my way or the highway, no free choice at all.

Beyond being legally unique the creation of an involuntary community is unusually intrusive on the private relations between creditor and debtor. A creditor who has extended credit to a debtor against the background of regular creditor debtor law under which the creditor may on his own initiative pursue payment of overdue debt by way of execution or self help, now finds his access to these remedies blocked. The rules have been changed, the goalposts moved. In place of the creditor's private right there is an administration of the debtor's asset for the creditor and others, heretofor strangers. This development will be good or bad news dependent on a creditor's particular circumstances. The diligent creditor to whom payment was due, who obtained judgment and who is on the verge of issuing execution that would clearly produce complete satisfaction of the judgment debt is unhappy. The dilatory creditor feels relieved.

The introduction of some principle/s of distribution with its attendant procedural consequences displaces a radically different set of values. These are the mores of the market place. Parties are autonomous, self reliant, deal at arm's length. The race goes to the swiftest. There are no stand alone problems of distributive justice. All outcomes are just provided parties have adhered to the rules. If creditor A is diligent, gets execution and obtains payment in full while creditor B is dilatory and finds the cupboard bare, the outcome is just. Likewise the outcome is just if creditor B is diligent and gets payment in full while creditor A is dilatory and disappointed.

For any law of insolvency there will necessarily be important transition issues. First, who may trigger the shift? Who may invoke the insolvency regime – a single creditor; the debtor himself; some administration official? Second, how may the transition be eased? The regime having being invoked, does it only operate henceforth, or the regime now being in place, do we look back to earlier events that have taken place under regular creditor debtor law and reconsider those events, perhaps to unwind their effect or perhaps to rule that actions legitimate at the time are now to be regarded as illegitimate. These are interesting issues, but their consideration may be postponed. Attention must be given to the prior problem of legitimacy. Is it legitimate to move the goalpost mid-game? What can be said to a diligent creditor who just short of execution finds the fruit of his diligence suddenly denied by imposition of a communal insolvency regime?

Two lines of argument are available, one empirical and one jurisprudential. The empirical argument focuses on the value destruction that may occur in consequence of private creditor initiatives in enforcing payment. Actions by individual creditors obtaining execution against business assets of the debtor may result in dismemberment of the debtor's business. Value that may inhere in the business as a whole as a going concern is lost. The imposition of a moratorium together with centralized control of the debtor's assets in the custody of the law ensures this value will not be lost to the benefit of creditors overall and society in general. One can't doubt that such cases exist. Their frequency and the measure of any value preserved, requires empirical investigation. This is not something we pursue here.

There are several strands to the jurisprudential case. The first concerns the playing field. Where a debtor is solvent the order in which creditors move to enforce payment will not affect the ultimate outcome. If the debtor is solvent, the diligent creditor will be paid ahead of the dilatory creditor, but all will be paid. Where the debtor is insolvent, the order of payment becomes critical. There is likely to be (in fact often is) a race to obtain payment. Under the mores of the marketplace, the outcome of the race, whatever it may be, will be fair, but this is conditional on the race itself being fair. The playing field, or here the race track, must be flat. In fact the track may not be flat for two reasons. First, it may not be the competition among creditors that determines the outcome, but the debtor himself. The debtor may play favorites, exhausting his assets in paying favored creditors before even the most diligent of creditors is able to effect execution or exercise any available self help remedies. The race goes to the most favored, not the fastest.[4]

The second problem confronting the condition that the race be fair is that not all creditors may be in the starting blocks when the insolvency or imminent insolvency of the debtor becomes apparent. Execution or self help remedies are only available where a debt is presently payable. Creditors to whom a debt is due but not yet payable, however great their diligence, cannot take action to obtain payment from the debtor's limited resources. Diligent creditors, of course, may have bargained for an acceleration clause to protect themselves in precisely this situation. However, not all creditors may be in a position to strike such a bargain. Debt in the broader sense includes unliquidated claims and contingent liabilities for which there can be no conventional acceleration clause.

If either of the above two conditions exist the distribution resulting from the race to be paid cannot be fair. Room thus exists to adopt some principle of distribution.

What of a situation where neither condition exists? The debtor is not playing favourites; the claims of all creditors are due and payable. Can imposition of some principle of distributive justice be justified in this circumstance? The case here for rejecting the distribution that

[4] Could this problem be countered by an isolated rule against preferential payments? Who could complain and how would payments recovered be applied? An isolated rule will likely look like an attenuated insolvency regime.

results from a race among creditors is that once the debtor is insolvent the very idea of a race is misplaced. Competition in the market place is competition for attention, for sales, for market share, competition on price, competition on offering a better product and so on. A race among creditors to obtain payment is a qualitatively different proposition. Parties have an accrued right. A race transposes the "right" to a "right if you are quick". The right, as the leftist critic might say, becomes hollow. Respecting the right requires respecting its substance as much as its form. The debtor being insolvent, respect is only advanced if we stop the race for payment and substitute some alternative principle for distribution of the debtor's insufficient assets.

One might here contrast the business and legal perspectives. Business notoriously never has legal problems, it has only business problems. Rights are an instrument, pursued, compromised, waived and defended in the service of business goals. The law, however, values rights for their own sake. It could hardly do otherwise. All creditors having a right to payment, determining who gets paid by means of a race is barbaric. We come back to equity is equality. Absent other reasons for discrimination, all right holders must share in those assets available.[5]

We have been looking at the issues presented for creditors by the debtor's insolvency. One final point, an important point, remains to be made.

The argument to date proceeds from recognition that the insolvency of a debtor gives rise to a problem of distributive justice. The payment of creditors from the debtor's limited resources needs to be governed by some principle/s of distribution. This in turn requires that private creditor initiatives to pursue payment be barred and that assets of the debtor be taken into the custody of the law. A central figure determines individual creditor's entitlements per the principle/s of distribution, administers the debtor's assets and effects payment to

[5] The legal analysis can be more refined. A judgment creditor has a higher right than the creditor who has not brought suit. The creditor who has reduced the debt into possession through execution has a higher right again. What role if any should these distinctions play once the debtor is insolvent? Provisions like the Bankruptcy Act s.42 raise these issues.

creditors. Creditors share in funds on a pro rata basis (the default principle) absent some more specific culture dependent/policy dependent principle.

The analysis and construct that here emerges suffers from "foreign expert syndrome"; it fails to listen to the voices on the ground, or more precisely, to provide those voices an opportunity to be heard. Insolvency law is a part of commercial law. Commercial law at times regulates but this is not (nor should ever be) its principal function. Commercial law's primary function is to facilitate commerce. Commercial law is a resource. It provides the rules and forms that may be utilized by commercial actors to pursue their commercial ends. Parties make deals. The law provides the law of deals (contract law) to facilitate deal making. So it is with company law, agency law etc. Missing from the analysis thus far, is a sufficient attention to this facilitative role. Where and how should this enter the analysis?

The obvious answer is that once the distributive justice issue arising from the debtor's insolvency is recognized, the race for payment rejected for reasons earlier advanced, and an involuntary community imposed on creditors, that community should be free to determine what next happens. By way of example, creditors might agree to a composition and immediate release of unpaid debt, or they might agree that assets now in the custody of the law be returned to the custody of the debtor, the debtor thereafter to make a series of payments made possible by continuing business operations.

Agreement among creditors on a course of action may be difficult to obtain if the creditors are many and their interests at variance, for example, some favouring rapid payment, others interested in maximizing the possible payment and willing to be patient in achieving that goal. Deal making on regular contract principles would require that all creditors agree. Here insolvency law may play a facilitative role, facilitating decision making within the community through rules under which the decision of a sufficient majority will bind all members of the community.

The default principle is in consequence doubly a default. It applies absent some more specific principle of distribution and absent an agreement among the community of creditors to proceed in some different fashion.

Debtor issues

We turn now to consider the issues surrounding the debtor in consequence of his or its insolvency. The issues are in the main two-fold and touch on the insolvent individual and insolvent company in different ways.

The first issue concerns what is to be done with the insolvent debtor. Whether company or individual, insolvency marks the commercial death of the trader. Business terms concerning insolvent traders – corporate undertakers, zombie companies, vulture funds, distressed debt – vividly draw attention to this pre-eminent meaning and consequence of insolvency for the debtor. The trader's commercial death is a factual matter. For the law the issue is what legal consequences, if any, then follow. Insolvent companies and insolvent individuals require separate consideration. We begin with the former.

Insolvent companies

The legal fate of an insolvent company is as obvious as it is inevitable. The company, its assets in some fashion in the custody of the law, is a wasted being. Absent a deal with creditors or an infusion of fresh funds from an interested party – the company's members; a new investor; creditors of the company – the company's raison d'être, whatever that may be, cannot be pursued. Being without reason to be the company is ended, dissolved.

Companies that are commercially dead are terminated. Need further be said? Indeed one matter does require consideration: Is the law concerning the termination of insolvent companies a matter of company law, a matter of insolvency law, or in some fashion a fusion of the two? The answer, is the last. To see this we need to first separate and then recombine the company and insolvency elements in our law of company liquidation.

The law on the ending of companies is necessarily first and foremost a topic for company law. The modern limited liability company is a legal artifact par excellence; created, sustained and ended by legal rules. Concomitantly the law of companies is composed of three principal topics; rules providing for the creation of companies; rules governing companies during their life; and rules providing for the termination of companies. The pure company law components of the last can be identified if we consider the termination of a solvent company. Principal aspects of this topic are stated hereunder in point form.

- The termination of a company is an orderly regulated process known as winding up. The expression winding up refers to a termination of the affairs of a company rather than termination of the company itself. The latter is dissolved, the final step in the process of winding up.

- A company may be wound up voluntarily on the initiative of its members, or compulsorily in consequence of a court order. A court order may be sought by the company itself, a contributory (typically a present member), or some regulatory authority.

- Solvent companies are typically wound up for one of several reasons. It may be that the commercial objective a company was created to pursue is at an end, no longer profitable or no longer of interest. There may be tensions between members best resolved by terminating the legal vehicle, the company, by which they associate. The company's objects may have become illegal.

- The administrative process associated with the death of a company differs from that of a deceased individual in two significant respects. First there is no vesting of property in a personal representative. Title to property of the company remains in the company until property is realized and then distributed in the winding up process. This is made possible by a second point of difference – company law reverses the chronology of the natural world. In nature, the individual dies, leaving his affairs to be wound up. Under company law, the company's affairs are wound up and only then is the company terminated. Postponing dissolution in this fashion enables the company's continuing legal personality to be used in holding assets. Overall, we achieve a more technically efficient administrative process than occurs in a deceased estate.

- On the commencement of the winding up all present, prospective and contingent claims against the company must be identified and valued. This is essential in consequence of the fact that the company will cease to exist on completion of the winding up process.

- For the personal representative of a deceased estate, company law substitutes a liquidator. The liquidator takes control of the company and thereby its affairs. As with a personal representative the liquidator is charged with getting in and realizing assets, applying the proceeds thereof in satisfying liabilities and distributing the remainder if any among (not heirs but) company members.

All points made above are part of our company law. They concern rules and processes devised to address the third principal topic in any body of company law.

How does insolvency law enter the picture? Recall the essential features of an insolvency administration as outlined earlier. Creditors are subject to a moratorium, assets of the debtor are taken into the custody of the law, creditors prove their claims to a central figure who realizes assets and applies the proceeds among creditors in accordance with the principle/s of distribution. The parallels between an insolvency administration and the winding up process are obvious. If we combine this fact with the fact that an insolvent company being commercially dead must be wound up, the obvious design choice is to have a single administrative process that serves both ends rather than sequentially an insolvency administration followed by a winding up process. This can be achieved by adapting the winding up process to incorporate elements of an insolvency administration. Specifically this involves the following.

- The liquidator, the individual at the centre of the winding up process will serve as the individual at the centre of the insolvency administration.
- The requirement that assets of the debtor be taken into the custody of the law is satisfied by having the liquidator take control of the company.
- The regular powers and duties of a liquidator in the winding up of a solvent company are enhanced by the addition of those powers and duties required of the administrative individual at the centre of an insolvency administration.
- Presuming creditors may initiate insolvency proceedings, creditors will be added to the list of parties who may petition the court for a compulsory winding up, the ground of the petition being the insolvency of the debtor company.
- Where an insolvent company commences a voluntary winding up process, creditors rather than members will be given the right to appoint the party who is to act as liquidator.

What emerges here is a hybrid that might be described as an insolvency administration followed by the company's dissolution or a winding up process incorporating an insolvency administration. Where might this be located? In Fiji the insolvency administration/winding up of insolvent companies is dealt with in the Companies Act. In England, the law on administration of insolvent companies is placed alongside the law of bankruptcy in an omnibus Insolvency Act. At the end of the day the design choice is a matter of style rather than substance.

Insolvent individuals

The commercial death of an insolvent individual presents the law with a situation more difficult and more interesting than that which arises on the commercial death of a company. In the case of a company, no value remains in the insolvent company once assets are applied among creditors. The final dissolution of the company tidies the legal landscape. None mourn but the unhappy investors who have lost their capital. In the case of an insolvent individual, value does remain even after assets are stripped away. Value inheres in the individual himself, both an economic value and that moral good seen in human life itself. What now is to be done? There are three broad possibilities.

The first alternative we might call the slave option. The economic value inhering in the individual himself might be realized through a sale of the debtor in a market for slaves with the sale proceeds applied in meeting unsatisfied creditor claims. The debtor's new status need not be indefinite. A slave status and the correlative ownership interest have a time dimension. A 10 year slave is worth more than a 9 year slave and so on. The prevailing price for slaves in combination with the value of unsatisfied creditor claims caps the term of years for which the debtor is sold into slavery.

Slavery it should be noted need not exhibit the barbarities and racism associated with the Atlantic slave track. A legal system that provides for a slave status may regulate the treatment of slaves (forbidding harms and mandating levels of maintenance), prosecute offending owners, provide for forfeiture, permit redemption by charitably minded parties, regulate prices, regulate or perhaps prohibit trading and perhaps accept individuals selling themselves into slavery.

The slave option has a narrow commercial logic. It has too, one very attractive feature. Realization of the debtor himself ends all relations between the insolvent debtor and his creditors. What more might creditors claim beyond a sale of the debtor himself? The attendant consequences are significant. A debtor on completion of any slave term will be freed of past creditor claims even if such claims have not been paid in full. It could be that the sale of the debtor realizes only a small sum perhaps due to the age and condition of the debtor, perhaps due to the condition of the slave market. It could be there is a failed auction, no buyers seeing any value in the debtor on offer. Whatever the cause, it is the consequence that is important. The slave option neatly determines the affair of the insolvent debtor. Old debt whether or not paid in full is discharged. The debtor is freed of his past.

The second alternative we might call the creditor focused option. The earlier established outline of an insolvency administration – assets of the debtor taken into the custody of the law to be realized by a central administrative figure who makes distribution to creditors – leaves unaddressed some more particular issues. First, what happens to assets of the debtor acquired after the insolvency administration is imposed. Is after acquired property – for example, wages earned by the debtor, lottery winnings, an inheritance – also taken into the custody of the law? Second, what claims may participate in the insolvency administration? May creditor claims arising subsequent to imposition of the insolvency administration participate or is there a cut-off date? The insolvent individual, stripped of assets, commercially dead but otherwise very much alive brings both issues into focus.

The first of these issues at root raises the issue so neatly determined by the slavery option. When will the relationship between debtor and creditors be determined? What will terminate the relationship? The standard answer to this question is that debt is discharged – the relationship ended – by payment, by set off, or by release. The imposition of an insolvency regime, triggered by recognition of the distributive justice problem confronting creditors, on its face does nothing to change the standard answer. It follows that any after acquired property of the debtor will continue to be taken into the custody of the law to be applied among creditors per the appropriate principle/s of distribution. The creditor-debtor relationship ends, and with that the insolvency administration, only when debts are paid in full or creditors agree to a release of unpaid debt.[6]

The issue of fresh liabilities is open to two general responses. (a) Later creditors simply join in the administrative regime already in place. (b) Later creditors are precluded from pursuing payment under regular creditor debtor law (after acquired assets coming into the custody of the law) and at the same time denied admission to the regime already in place. In short new creditor claims are postponed until existing creditor claims are discharged. Response (b) is preferable. It discourages the creation of new credit relations that exacerbate the existing insolvency. In consequence, third parties engaging in dealings with the debtor (granting credit; entering contractual relations that might give rise to damages claims) act at their peril.

[6] Creditors might agree to release debt beneficently or for reasons of self-interest. A debtor facing insurmountable debt has little incentive to earn income. Creditors and debtors each acting from self-interest might agree to the release of debt conditional upon the debtor making payment to some agreed feasible measure.

The third alternative we might call the debtor focused option. The broad outline of any further alternative beyond those already considered is obvious. The law must mandate the debtor's release from debt for which there is no reasonable prospect of payment. More specifically, this will require that a debtor subject to an insolvency administration be released from that administration before debt is paid in full. The debtor being personally discharged, assets acquired thereafter are not taken into the custody of the law. Unsatisfied creditor claims continue but as previously only paid from former assets that may still be in the custody of the law under the insolvency administration. Unsatisfied claims become worthless once these assets are realized and the proceeds distributed. Fresh liabilities barred from the insolvency administration may be enforced against the debtor and his assets acquired subsequent to his release under our regular creditor debtor law.

This third alternative confronts immediate theoretical difficulties. A creditor's principal right is the right to payment. (Accompanying this right is an entitlement (common to any civil right) to waive the right and release the obligor.)[7] If the law mandates release of the insolvent debtor the creditor's principal right becomes defeasible. That right is already defeasible in common ways; for example, it is defeated if obtained by fraud or if not asserted in the period required by the statute of limitations. However, to defeat the right on the grounds of the obligor's incapacity to satisfy his obligation is a wholly different story. It approaches saying that the right of the creditor is a right to payment only so long as the debtor is able to pay. This is not a right in any conventional sense. A party to a contract has a right to performance and if the obligor is unable to perform then a right to damages. Mandating the debtor's release in consequence of his incapacity to pay while maintaining that the creditor's principal right is to payment seems better suited to the topsy turvy world of Alice's wonderland than a system of serious jurisprudence.

[7] Waiver by the creditor is not to be confused with the commercial practice of writing off bad debts. This is a wholly different phenomenon. A creditor writing off bad debt is doing no more than reconciling himself with reality. The creditor assessing his own position, recognizes the reality that a debt is likely to go unpaid, marks its value at zero and in the modern vernacular "moves on". The personal accounting of the creditor does not constitute a waiver of the debtor's obligation.

Beyond any theoretical difficulties, a mandated release of unpaid debt may also raise practical concerns. Such a rule may operate as an inducement to the bad faith debtor to run up unsustainable debt and as a deterrent to the granting of credit by those who might otherwise grant credit.

Both the theoretical and practical concerns must be kept in perspective. The defeasance proposed is narrowly confined. Under regular creditor debtor law there is no mandated release. The debtor's inability to pay does not excuse payment. The right to payment stands although unsatisfied in fact. Only following the imposition of an insolvency administration is any consideration given to the mandated release of the debtor from unsatisfied claims. That decision may be made discretionary and be subject to satisfaction of a number of pre-conditions; for example, that the debtor has co-operated in surrendering assets into the custody of the law; that debt incurred has not been incurred improperly without any reasonable prospect of payment; that the debtor has not been guilty of any fraud or sharp practices; that no reasonable prospect exists that debt can be paid in full; and so on.

Carefully circumscribing any mandated release of unpaid debt in this manner can adequately address practical concerns. It can, too, lessen the urgency of the principled objection. It, however, cannot answer it. The principled objection still stands. There is something topsy turvy here.

What is to be done with the insolvent individual – slave option, debtor focused option or creditor focused option? As a practical matter option one must immediately be set aside. Legal systems in earlier times have permitted the insolvent individual to be sold into slavery. Today variants of the practice of debt slavery exist in fact. However, no modern legal system provides a status of slave nor might conceivably do so. Absent such a status, it is not open to insolvency law to adopt option one.

Options two and three are not in immediate competition. Each commences in the same fashion. While debt remains unpaid the debtor remains subject to the insolvency administration, his after acquired property taken into the custody of the law for the benefit of the community of creditors. The choice proposed by the two alternatives concerns how long this situation should prevail. Is the debtor to remain subject to the administration until debt is paid in full, an event that may be unattainable in the debtors lifetime, or, might the administration terminate at some earlier point with debt yet unpaid forgiven?[8]

A case for option three follows, with three reasons briefly stated.

Reason one focuses on a particular category of debtor, the entrepreneur. The true entrepreneur, it has been said, is an individual who has gone bankrupt twice before the age of thirty. That of course is unlikely were our insolvency law to adhere to option two. The young entrepreneur who fails a first time with significant debt might be labouring under an insolvency administration long past the age of thirty. Worse, the prospect of such a future may well deter entrepreneurial risk taking in the first place. High percentages of entrepreneurial initiatives fail. If the economy requires and benefits from entrepreneurial initiatives some means of escape from insurmountable debt must be held out for would be entrepreneurs. Option three does this while yet deterring unduly wanton or reckless risk taking by carefully circumscribing the grant of a release.

It should be noted that while the law provides the limited liability company as a means of ring fencing risk and loss the protection obtained is often illusory. The ubiquity of the shareholder guarantee ensures the fate of the individual entrepreneur is closely linked to the fate of any corporate vehicle he may utilize. Insolvency of the one will often ensure the insolvency of the other.

An argument founded on entrepreneurs is necessarily narrow. Not all insolvent individuals are entrepreneurs. A more general and a more contemplative reason concerns the type of society we wish to construct. What makes for a good society? The question is impossibly

[8] The choice required is not diminished by the possibility of alternative bargained outcomes. As noted earlier, creditors acting from their own self-interest might agree to release the debtor once an agreed minimum sum, realistically attainable, is paid. Such deals are not assured. Creditors may be vindictive. Or creditors may benefit in other ways from a prolonged administration, for example, the elimination of the debtor as a trade creditor.

large, but we can limit it here to matters of form rather than substance. As a formal matter a good society is one that so far as possible includes all, rather than includes some and excludes others. A society in which all have a stake is better (and happier) than a society in which there is an underclass, a ghetto, a black economy. The proposition is general because all societies at times designedly and deliberately exclude. Gaols exclude. Professional licencing rules exclude. Private property excludes. In each case there are good reasons for the form and extent of the exclusion. A division of free men and slaves excludes and in modern times being unable to find sufficient justification for the division we reject it.

The insolvent debtor exits society's regular material and commercial life. Prima facie all assets are lost to creditors, and while debt remains unsatisfied all future assets and income will be similarly lost. This is a function of the debtor's unpaid debt rather than the law. Absent an insolvency regime assets will be lost as creditors race to obtain execution; under an insolvency regime the same assets will be lost to a more orderly administration. Where is the debtor to reside? One hopes he has accommodating relatives. Lacking capital and access to credit the debtor cannot commence a business. Employment is the only likely means of deriving income and here the debtor will be "working for his creditors", retaining only such percentage of income as will cover life's bare necessities. While we talk of being "enslaved by our home mortgage", the expression is more colourful than accurate since the home might be sold and the debt retired. However, for the insolvent debtor with insurmountable debt there is no light at the end of the tunnel. He will be working for his creditors for a lifetime. For the debtor in this position the best practical solution may be to "lose himself" – to relocate to a new community unknown to his creditors and there commence a new life, a fresh start, with no mention of his past. The insolvent debtor pushed to this extreme is in fact wholly excluded from the society. A society that aims to be inclusive will offer the fresh start locally. This can be achieved by the insolvency regime providing for a mandated release of debt in carefully circumscribed circumstances.

A third reason is that often vaguely stated as "changing attitudes to debt". The attitude in issue here is the overall societal attitude that comes to be reflected in the law and that occasionally may be led by the law.[9] In regard to debt the seminal change in modern times (say 1750 onwards) occurs with the introduction of modern companies legislation. We earlier considered the plight of the insolvent company. Here there is no mandated release from debt. Absent deal making between the company and its creditors or an infusion of fresh monies, the commercial death of the company is followed by its termination. That, however, is only the narrow story. The broader story is that while unsatisfied creditors see their claims vanish on the demise of the company, company members walk away free of liabilities. For members this is an incredibly sweet deal. Members may benefit from the company's good times, taking funds out of the company as dividends, and abandon the company in bad.

The sweet deal offered members by a limited liability company is justified by sound reasons. The construction of canals and railways requires it. Large numbers of strangers cannot be expected to join together in the intimate fashion of partners. Only the offer of limited liability can efficiently attract the large numbers of investors required for significant capital pools. Thus justified, canals and railroads are built all over the British Isles and later around the world.

The seminal Salomon's case clearly reveals the novelty of what has been accomplished. The Court of Appeal represent the old order. They rule against Salomon. Their reasoning is incoherent and confused. But their intuition is sure. Victory for Salomon would be a fraud on creditors and cannot be permitted. The Law Lords disclose no similar intuition and coolly work through the logic of the new companies legislation.

How complete is the triumph of the limited liability company? The answer is; pretty complete. However we do find interstitial ambivalence. The banking sector provides several examples. Depositors, creditors who in a traditional banking business model are the principal creditors of the bank company, without means to require an insolvent company to call on members to contribute sufficient funds to ensure solvency, are in many countries guaranteed payment by the state. In Fiji where there is no formal government guarantee of depositor's

[9] Changes in societal attitude (whatever the topic) commonly occur incrementally over extended periods although dramatic events can precipitate rapid change.

claims the regulator may appoint an individual, the Controller, to take control of an insolvent or near insolvent bank. The Controller's powers include the power to appropriate assets of members (without limit) in order to satisfy liabilities of the banking company.[10]

How does all of this relate to insolvent individuals and in particular options two and three? In the final analysis, the world of legal persons is populated by individuals and individuals alone. A company's members are either individuals, or alternatively a second company or a pension fund or an investment trust, behind which in turn are individuals. However long the chain, at the end of the chain stand individuals. Thus the sweet deal of limited liability is in every instance a sweet deal either immediately or mediately for individuals. It is individuals who walk away when the limited company is insolvent leaving creditors with unpaid claims that vanish when the company dissolves. Against this fact, what is to be done when the individual himself is the insolvent debtor? The development of the limited liability company makes it easier to agree to a mandated release of debt for the insolvent individual. A mandated release of debt is not a form of limited liability for individuals, but it appears less shocking, less novel, viewed against that background. Indeed such a provision, carefully circumscribed, appears desirable to reduce the dissonance that will otherwise exist between the fates of the individual debtor and the individual who has acted behind a company shield.

[10] Banking Act 1995 s.32(7)