American Bankruptcy Institute Law Review

Volume 10 Number 1 Spring 2002

CROSSING BORDERS INTO SOUTH AFRICAN INSOLVENCY LAW: FROM THE ROMAN−DUTCH JURISTS TO THE UNCITRAL MODEL LAW

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Introduction

The Purpose of this Article

In this article we will analyze the adoption of the UNCITRAL Model Law on Cross−border Insolvency (hereinafter "the Model Law") into South African insolvency law. We will carry out this examination against the backdrop of the current South African rules that regulate insolvency law in general and cross−border insolvencies in particular. As South Africa is said to be one of the first countries to have adopted the Model Law, we hope that this article may be interesting for readers from other countries still to do so.

Many articles have been published on the UNCITRAL cross−border initiative. [3] As few countries have enacted the Model Law in their national systems, though, little has been written on integrating and applying it in a particular legal system. We aim to show how the South African version will operate in the South African legal system; and, to make the discussion more relevant, will pose a hypothetical set of facts involving American and South African features.

A Brief History of the UNCITRAL Model Law

A number of international organizations have involved themselves over a number of years with creating an international model to deal with cross−border insolvency problems. To further this aim, INSOL International since its inception in 1991 has collaborated with other organizations such as "Committee J" of the International Bar Association. [4] These efforts gained momentum when UNCITRAL, a special committee of the United Nations, became involved in the process. This participation led to a colloquium on cross−border insolvency, co−sponsored by UNCITRAL and INSOL in Vienna in April 1994. [5] These organizations sponsored a follow−up in Toronto, Canada in March 1995 and a final multinational judicial colloquium in New Orleans in March 1997. Then UNCITRAL finalized Model Legislative Provisions on Cross−Border Insolvency during its 30th session held in Vienna in May 1997. The resolution was adopted by the General Assembly of the United Nations on November 13, 1997, and recommended that states review their domestic insolvency laws and consider adopting the UNCITRAL Model Law on Cross−Border Insolvency. The Model Law was published with a guide to enactment. [6]

A Set of Facts to Illustrate the Principles of Cross−Border Insolvency

A South African company wins a tender from the South African government to prospect for oil in South Africa. To carry out this contract, this company then enters into a joint venture with a big American oil exploration company that brings in expensive equipment, rents land in South Africa on which to store it, and hires local workers. As part of its operational requirements, it uses expensive explosives. One of the directors comes to supervise the South African contract, and his wife comes with him and buys an apartment in South Africa in her own name. To reassure a South African bank that has granted overdraft facilities to the company, the American directors sign contracts of guarantee (suretyship) obliging them to pay their company's debts if it fails to do so. The company does not incorporate itself in South Africa as an external company, but for the purposes of this discussion we will accept that it does establish a

main place of business in the Republic.

The American company later suffers a huge setback elsewhere in the world and files for liquidation in America under chapter 7 of the United States Bankruptcy Code 1978; its directors, including the one in South Africa, do so too. As part of his duties, the trustee of the company's estate in liquidation has to go to South Africa to collect the American company's assets there, including a claim for $5 million owed to the American company by the South African company under the contract although the American company still has to perform further obligations under that contract. He also has to pay the company's debts, among them an overdraft owed to the South African bank, wages owed to local employees, and arrear rents owed to a landlord. The bank is poised to take judgment and levy execution against the local assets of the company. And the American trustee of the estate of the director supervising matters in South Africa will also have to come to see to the realization and administration of that director's assets situated in South Africa.

It is possible that these American trustees may not be familiar with the details of the South African legal system, particularly its law of insolvency, winding−up, and cross−border insolvency. [7]

A Road Map for this Article

In this article we will sketch the South African law of insolvency and state the current common law on cross−border insolvency, before going on to summarize the Cross−Border Insolvency Act 42 of 2000, which adapts the UNCITRAL Model Law on Cross−Border Insolvency 1997 for application in South Africa. We will then discuss differences in the South African adaptation and attempt to apply the Cross−Border Insolvency Act to the set of facts sketched above. The South African adaptation follows the original template quite closely, and we assume that our readers have the Model Law and the *Guide* to its enactment handy, both these documents as well as the Cross−Border Insolvency Act being accessible on the Internet. [8]

An Introduction to South African Insolvency Law

A. General

A remarkable feature of the UNCITRAL Model Law is that it is intended to serve as an interface between different bankruptcy regimes that might differ significantly from one another. [9] Another feature is its application both to consumer and to corporate bankruptcy. To examine the possible application of the Cross−Border Insolvency Act in South African law, therefore, it is important to note the sources and basic philosophy of South African insolvency law.

B. The Background of South African Law

The South African legal system stems from Roman−Dutch law, [10] which is generally referred to as South African common law. English law did influence South African law, however, in particular areas of mercantile law, such as the law of insolvency and company law. South African law also adopted the English system of precedent. South African law is not codified in the continental sense. Its primary sources are therefore legislation, decisions of the High Courts, South African common law to the extent that it has not been modified by legislation and precedent, and, lastly, custom. [11] The new political dispensation has, however, changed the face of the law dramatically in that the Constitution of the Republic of South Africa 1996 [12] now contains a Bill of Rights. The Constitution is the supreme law of the land, and the courts may now test legislation and other laws against it to determine their legitimacy. [13]

C. The Development of South African Insolvency Law

The foundation of the South African law of insolvency is often said to be the Insolvency Ordinance of Amsterdam of 1777. [14] But the first significant insolvency legislation in Southern Africa was introduced in 1829 in the former Cape Colony and based on English bankruptcy law. [15] Ordinance 6 of 1843 (Cape) subsequently abolished the concept of *cessio bonorum*, [16] replaced the 1829 Ordinance, and also formed the statutory basis for Insolvency Ordinances of the former pre−Union republics in the Transvaal, the Orange Free State, and Natal. The Union of South Africa was created in 1910. The first uniform insolvency law for the whole of that Union was passed as the Insolvency Act 32 of

1916. Currently the law relating to insolvent persons is regulated by the Insolvency Act 24 of 1936 (hereinafter the "Insolvency Act"), which came into force on July 1, 1936.

D. Sources and Reform of South African Insolvency Law

South African insolvency law is not contained in a single statute. Large parts of it are regulated by the Insolvency Act, which deals with the sequestration of individuals and related matters. In addition, the Companies Act 61 of 1973 (hereinafter "the Companies Act") and the Close Corporations Act 69 of 1984 (hereinafter "the Close Corporations Act") deal with the winding up of companies and close corporations respectively; and there are special provisions applicable to the winding up of other legal entities such as pension funds, banks, medical funds, insurance companies, and co−operatives. [17] Apart from these statutory enactments, precedents and South African common−law principles will also apply in the absence of specific statutory provisions. The Insolvency Act, however, remains the principal source of South African insolvency law, and the other legislation renders certain provisions of the Insolvency Act applicable by cross−reference. We will focus on sequestration of individual debtors in terms of the Insolvency Act and the winding up of companies in terms of the Companies Act.

The review of the current insolvency laws in South Africa has been going on for some years. [18] During 1987 the South African Law Commission began investigating the whole law of insolvency, and a Project Committee was appointed to conduct and direct the review as Project 63. A series of working papers for discussion dealing with selected topics, followed by reports, [19] culminated in the (First) Draft Insolvency Bill of 1996. [20]

The 1996 Draft Insolvency Bill was published for comment although research on certain important issues had not been finalized, such as cross−border insolvencies, and the important issue of unifying the insolvency provisions for individuals and juristic persons like companies and close corporations. [21] In 2000 two further draft insolvency bills were submitted to the Minister of Justice, the one dealing with individuals and partnerships [22] and the other with corporate insolvency law as well. [23] At present the South African insolvency community is awaiting the final outcome of these initiatives but it seems that it will take at least another year or two before a new Insolvency Act will be enacted. But this does not mean that insolvency law reform is on hold, pending the outcome of this comprehensive reform project. Significant amendments in the position of employees in relation to insolvent employers have been implemented, and the UNCITRAL Model Law has been modified and enacted by Parliament. It is envisaged that the Cross−Border Insolvency Act will become a chapter in the new Insolvency Act after it has been enacted.

Essential Features of South African Insolvency Law

A. General

A sketch of the essential features of South African insolvency law will help one to understand the practical application of the current rules on cross−border insolvency in South Africa, and the possible practical application of the Cross−Border Insolvency Act.

B. The Functionaries in an Insolvent Estate

South Africa does not have specialized bankruptcy courts such as those in America assisted by the United States Trustee. Instead, the administration of insolvent estates of individuals, as well as other debtors such as companies, takes place under the supervision of the Master of the High Court, [24] and the High Court is also involved in some of the bankruptcy procedures. In the case of a debtor as defined in the Insolvency Act, a trustee is appointed to take charge of the administration of the respective estates; in the case of a company or close corporation, a liquidator is appointed for this purpose.

Trustees or liquidators are elected at the prescribed meetings of creditors. [25] The ultimate responsibility of appointing an elected trustee or liquidator rests with the Master. Although trustees and liquidators need no special license to be appointed as such under South African law, the Master keeps a list of persons that are eligible for appointment. [26]

C. The Insolvency of Individuals (Consumer Bankruptcy)

1. The Definition of "Debtor"

Under the Insolvency Act, a debtor is a person or partnership or the estate of a person or partnership that is a debtor in the usual meaning of the word, except for a company, an association of persons or other juristic person *that may be wound up in terms of the Companies Act*. [27] A deceased's estate, as well as the estate of a person incapable of handling his own affairs, also falls within the ambit of the definition. [28] The estate of any other debtor, including a trust, a club or a juristic person, can be sequestrated in terms of the Insolvency Act, where no other statute, such as the Companies Act or Close Corporations Act, provides for their winding up. [29] If spouses are married in community of property, their joint estate is sequestrated and it is therefore compulsory to join both spouses as applicants or respondents respectively, for both will be regarded as insolvents after the sequestration order has been granted. [30] By contrast, where spouses are married out of community of property, they have separate estates, and so it is the estate of the debtor spouse that should be sequestrated. [31]

2. General Requirements for Application Procedure

Many of the insolvency procedures in South Africa are driven by the ordinary rules of civil procedure in which the High Courts play a significant role. When a party thus decides which particular court to approach, he or she must consider which type of proceedings to institute: whether to proceed by way of action or by way of application. The wrong choice will waste time and perhaps leave the party facing a high order for costs. Sometimes the relevant legislation prescribes the application procedure, as in sequestration, rehabilitation, and winding−up applications; so does the Cross−Border Insolvency Act for the recognition of a foreign proceeding. [32]

Application or motion procedure is usually quicker and cheaper than action procedure. Application procedure is specific and based largely on the exchange of affidavits and then argument in court by counsel. [33] Usually there are three sets of affidavits involved in an *opposed* application:

· The founding (or initial) affidavit;

· The opposing affidavit;

· The replying affidavit.

The application procedure begins with the issue of an application, usually comprising a notice of motion and a founding affidavit. To these are sometimes attached one or more supporting affidavits and relevant documentation.

The application procedure ends in the motion court, which hears the application. There the parties' legal representatives argue on the "papers"; oral evidence is seldom heard, and the legal advisers limit their arguments to points of law and to the allegations in the affidavits.

Applications can be brought either on notice or *ex parte*. Applications on notice involve the applicant (the bringer of the application) and the respondent (the opposer of the application). Where litigation can affect the interests of another party, the application is usually brought on notice. The application is directed to the registrar of the court as well as the respondent, and both are thus informed of the proposed application.

Applications *ex parte* usually involve an applicant only, because the application is not to be served on another party. The applicant directs the application to the registrar of the relevant court who gets prior notice of the proposed application. (If there is another party involved he or she gets no prior knowledge of the application.) The *ex parte* application can be used where the applicant is the only person with an interest in the case; for example, an application for voluntary surrender, or for urgent relief.

Should an application of any kind affect the rights or interests of any person not joined in the proceedings, he or she may intervene through the formal process of intervention. Further, if another person's interests will be affected by the order that the applicant seeks, the court will not grant a final order without giving the respondent the opportunity of stating his case. The court will therefore grant a provisional order with a return date (a rule *nisi*), and require the order

to be served on the respondent. The rule *nisi* calls on the respondent to appear before the court on a certain date to furnish reasons why the provisional order should not be made final (confirmed). In this way, the rule on hearing both sides (the *audi alteram partem* rule) is complied with.

3. Sequestration Applications in Particular

The proper authority to grant the sequestration order is a High Court that has jurisdiction to hear the matter, [34] after a formal application has been made to the relevant court. [35] The expense of High Court litigation may prevent many debtors from obtaining this relief.

In seeking voluntary surrender, [36] a debtor may apply for a sequestration order to a High Court that exercises appropriate jurisdiction. The applicant debtor must prove the following on a balance of probabilities: [37]

· Compliance with statutory formalities;

· Factual insolvency;

· Sufficient funds in the free residue to cover the costs of sequestration;

· Sequestration will be to the advantage of creditors.

In seeking the compulsory sequestration of the estate of his or her debtor, the applicant creditor must prove that: [38]

· Security was given to the Master that all costs of the sequestration would be covered until a trustee is appointed.

· The applicant creditor has the standing (*locus standi*) to bring the application: that is, the applicant must have a liquidated claim of at least R100; [39]

- The debtor is factually insolvent or has committed an act of insolvency;

· There is a reasonable prospect that sequestration would be to the advantage of the creditors.

Both voluntary surrender and compulsory sequestration thus require proof of advantage or benefit of creditors as a prerequisite for the granting of the sequestration order. [40] In essence this requirement entails that there should be realizable property in the estate which would yield a dividend to the concurrent (unsecured) creditors. The size of the dividend is not prescribed by the Insolvency Act: various rules of practice deal with this vexing requirement. In voluntary surrender the debtor must also prove factual insolvency; but in compulsory sequestration the creditor may prove either factual insolvency or an act of insolvency by the debtor. [41]

The granting of a sequestration order creates a *concursus creditorum* (a "concourse of creditors") − a collective debt−collecting procedure that leads to the realization of the insolvent's property and the distribution of its proceeds among the creditors in accordance with their ranking. [42]

Section 17 of the Insolvency Act − mentioned here because it is referred to in section 19(2) of the Cross−Border Insolvency Act [43] − deals with the notice of the sequestration of the estate. The Registrar of the High Court must immediately send an original of the sequestration order and of every order concerning an insolvent estate, a trustee, or an insolvent, made by the court, to the Master of the High Court. [44] The Registrar must also send an original of every provisional sequestration order or of every final sequestration order (not preceded by such a provisional order), and of every order amending or setting aside such a prior order, made by the court, to the sheriff of every district where the insolvent seems to reside or to own property. [45] He must act in the same way as regards every officer responsible for registering title to any immovable property in the Republic, [46] every officer responsible for maintaining a register of ships, [47] and every sheriff who holds attached property belonging to the insolvent estate. [48] On receiving these transmissions, or a certificate and a copy of an order sent under section 18A (which concerns details about the insolvent), each such official must register the document and note on it when it was received at his office. In addition,

the official responsible for registering immovable property must enter a caveat against the transfer of all immovable property or the cancellation or cession of any bond registered in the name of or belonging to the insolvent, and if the sequestration order or the certificate mentioned in section 18A names the insolvent's spouse, a caveat about that spouse. [49] Similarly, each officer in charge of the ship's register must enter a caveat against the transfer of every ship or share in a ship or the cancellation or cessation of every deed of mortgage of a ship or share in a ship registered in the name of or belonging to the insolvent or spouse. [50] And the Master, on receiving a sequestration order or an order setting aside a provisional sequestration order, must give notice of this order in the *Government Gazette*. [51]

4. The Consequences of a Sequestration Order

The sequestration order has certain consequences for an individual debtor. Several of them are stated in sections 20, 23, and 75 of the Insolvency Act, these sections being mentioned in section 20(2) of the Cross−Border Insolvency Act. [52]

Section 20 of the Insolvency Act states the effect of the sequestration on the insolvent's property: the sequestration divests the insolvent of his estate and vests it first in the Master of the High Court and then in the trustee when appointed. [53] It stays civil proceedings against the insolvent until the trustee has been appointed, unless the insolvent may begin them for his own benefit. [54] And it stays execution of judgments against the insolvent once the sheriff [55] becomes aware of the insolvency. [56] For all these purposes the insolvent's estate comprises his property at the sequestration date and his property that he may acquire or that may accrue to him during the sequestration, except as section 23 of the Insolvency Act otherwise provides. [57]

Section 23 of the Insolvency Act contains 14 subsections on the insolvent's rights and obligations during his sequestration. Among its more important provisions are the following: with certain exceptions, all the property that the insolvent acquires belongs to his estate. [58] The insolvent may still conclude valid contracts, as long as he does not try to dispose of property in his insolvent estate and does not, without his trustee's written consent, form a contract harming or likely to harm the estate or any contribution to his estate that he is bound to make. [59] The insolvent may pursue any profession or occupation or employment but needs his trustee's written consent for his employment in or interest in the business of a trader who is a general dealer or manufacturer; [60] and he must send the Master a copy of this consent. [61] The insolvent is bound to keep detailed records of assets received and expenses incurred in his profession or occupation or employment, and send them each month to the trustee on request, who may require supporting proof. [62] The trustee is entitled to excess moneys not necessary for supporting the insolvent or his dependants, and may notify the insolvent's employer about this excess and then receive it accordingly. [63] The insolvent may sue and be sued independently of the trustee in regard to status matters, or rights not affecting his insolvent estate, or claims due to or by him under section 23, but his cession of his earnings will have no effect during sequestration. [64] The insolvent may recover for himself any pension to which he has a right, [65] and any compensation on the ground of defamation [66] or personal injury, but he needs the court's leave to sue his trustee for malicious prosecution or defamation. [67] The insolvent may recover for himself the remuneration or reward for work or professional services carried out by or for him after his estate has been sequestrated. [68] He may be sued for any delict [69] that he commits during his sequestration, and he, not his insolvent estate, bears responsibility. [70] He must help the trustee take charge of and realize any property that is the estate's, though the trustee must allow him what the Master considers necessary to support the insolvent and his dependants. [71] And he must keep the trustee informed of his residential and postal addresses. [72]

Section 75 of the Insolvency Act deals with civil legal proceedings against the insolvent estate. If these proceedings have been instituted against the debtor before sequestration, they lapse three weeks after the first meeting of creditors has been held, unless the person beginning them has notified the trustee or, if there is no trustee, the Master that he intends going on with them and within a further three weeks does so with reasonable speed. [73] And after the Master of the High Court has confirmed a trustee's account in an insolvent estate under section 112 of the Insolvency Act, no one may institute legal proceedings against that estate as to any liability arising before its sequestration, though the relevant court may, setting conditions that it considers appropriate, but subject to section 112, allow those proceedings to be instituted if it decides that there was a reasonable excuse for the delay in beginning them. [74]

The trustee may, except in such cases where a rule of statute rules to the contrary, abide by unexecuted (non−executory) contracts entered into by or on behalf of the insolvent before the date of sequestration, or else he or she may repudiate these contracts. [75]

5. The Administration of an Insolvent Estate

The sequestration order activates the administration procedure for realizing the estate property and duly distributing the proceeds among the creditors, within their respective classes of ranking. In essence the administration of the estate runs as follows: the Master convenes the first meeting of creditors, at which creditors may prove claims and elect a trustee. [76] The Master then appoints the trustee; [77] certain prescribed persons are disqualified from being appointed as trustees. The trustee has a list of statutory powers and duties to perform under the Master's supervision.

The trustee convenes the second meeting of creditors and also the general meetings or the special meetings. [78] Creditors have to prove their claims against the estate, and these are either admitted or rejected. [79]

At these meetings, wide statutory powers may also be exercised for interrogating the insolvent and persons who may provide information to the trustee. [80] These interrogations usually help to locate assets that the insolvent might have concealed or disposed of.

The trustee must realize the assets [81] and draw up plans for distributing their proceeds among the different classes of creditors. [82] The *concursus creditorum* created by the sequestration order ends the race among creditors. Two main categories of creditors are acknowledged by the Insolvency Act: secured creditors that rely for payment on a security as defined, and those creditors (the statutory preferent creditors and the concurrent creditors) that are to be paid from the free residue. If the estate funds do not cover the administration costs, certain prescribed creditors have to pay contributions to the estate. [83]

The trustee is entitled to remuneration according to the prescribed tariffs. [84] He or she must give final account of the distribution of the proceeds of the property in prescribed accounts that must be approved by the Master. Interested parties may object to the estate accounts before the Master approves them. [85] The trustee must follow the prescribed order of payment, though if the insolvent enters into a composition with his or her creditors, that composition governs the finalization of the estate. [86] The duties and powers of a trustee are regulated largely by the Insolvency Act. [87]

6. A Fresh Start (Discharge) for Individuals

The insolvent will be rehabilitated automatically after 10 years, calculated as from the date of the granting of the sequestration order. [88] Before then, he or she may apply to the High Court for a rehabilitation order; [89] usually the insolvent will remain under sequestration for at least four years before seeking rehabilitation.

In rehabilitation for individuals, the Master fulfills certain statutory functions, such as making recommendations to court as regards rehabilitation in certain prescribed instances. [90] Generally the insolvent obtains a discharge of his or her pre−sequestration debt in so far as it has not been paid in full. [91]

D. Corporate Insolvency Law

1. Sources of Corporate Insolvency Law

The principles regulating corporate insolvency law are to be found mainly in the Companies Act and the Close Corporations Act. Although these statutes provide for the initiation of the winding−up procedures for companies and close corporations, certain procedures and rules contained in the Insolvency Act or even the common law still control the winding up of these entities when they are unable to pay their debts. [92] In other words, neither a company nor a close corporation is a debtor as defined by the Insolvency Act: so the process of sequestration (straight bankruptcy) will not apply to these entities.

Either the Companies Act or the Close Corporations Act governs the process of winding up or liquidating a company or a close corporation, as well as the consequences of doing so. If either statute provides for a particular aspect (for example, the appointment of the liquidator), that Act will apply. But if the relevant statute does not contain a particular provision, and the company or the close corporation is unable to pay its debts, the Insolvency Act or the common−law rules will apply. As the relevant law on companies and close corporations is similar, we will concentrate on companies in this article.

2. Winding−up (Liquidation)

Chapter XIV of the Companies Act deals with the winding up or liquidation of companies. A company may be wound up by means of a High Court order or voluntarily. [93]

For the purposes of winding−up, it is important to note that the term "company" has an extended meaning in terms of section 337 in that it includes "company," "external company," as well as other "bodies corporate." Section 1 makes it clear that a company is a local incorporated company and that an external company (that is, a foreign company) is a company incorporated outside South Africa, but one that has been registered as such in terms of the South African Companies Act *or* an external company that has established a place of business within the Republic. [94] Other "bodies corporate" are not defined and would thus bear their common−law meaning, like an association of individuals capable of holding property and of suing or being sued in its corporate name. Relying on section 12, the jurisdiction clause in the Companies Act, [95] the court decided in *Lawclaims (Pty.) Ltd. v. Rea Shipping Co. SA: Schiffscommerz Aussenhandelsbetrieb Der VVB Schiffbau Intervening* [96] that a South African court would lack the jurisdiction to wind up the estate of a body corporate, such as a foreign company, that is not registered as such within the Republic *or* that has no main place of business within the area of jurisdiction of a local High Court. The court nevertheless concluded that in such an instance the foreign company would be a "debtor" as defined in the Insolvency Act and that it would thus be possible to apply for its sequestration in terms of this Act if the requirements were met. [97]

Voluntary winding−up of a company is initiated by a special resolution passed by its members. [98] If the company is solvent, the winding−up will be called a voluntary winding−up by members; but if the company cannot meet its financial obligations, the winding−up will automatically become a voluntary winding−up by creditors.

The Companies Act prescribes the persons that may apply for the winding up of a company, and the grounds on which the court may grant the winding−up order. The statute contains its own jurisdiction provision relating to companies in general. If the company is unable to pay its debts, the applicant will usually be a creditor who must prove that:

· The court has jurisdiction in the particular application;

· The applicant has standing to bring the application as required by the Companies Act; [99]

· Sufficient security has been given for paying the prescribed costs of winding−up; [100]

· There is a statutory ground for winding up the company. [101]

A foreign company become relevant within the South African legal system when it establishes a place of business in South Africa, or engages in a transaction in South Africa, even on a isolated or intermittent basis. [102] As a rule, a foreign company that establishes a place of business within South Africa must register within 21 days as an external company in accordance with the Companies Act, [103] and then abide by the relevant provisions of that statute. Yet South Africa adheres to the principle of international private law that a foreign company incorporated within another state will be recognized as such and enjoy corporate status in South Africa based on the principles of reciprocity and international comity of nations even if it is not incorporated as such. In the latter instance, the status and position of the unincorporated foreign company will be governed by the rules of private international law. [104] For the purposes of corporate bankruptcy law it thus makes a difference if the foreign company is recognized as an external company in terms of the Companies Act. For example, the jurisdiction provision in section 12 of the Companies Act then applies, and section 344(*g*) provides a special ground for winding up by the court if the external company has been dissolved in the country in which it was incorporated, or has ceased to carry on business or is merely carrying on business for

the purposes of winding−up.

3. The Consequences of Winding−up

The more important consequences after the commencement of a winding−up are the following: any share transfer is void, except with the consent of the liquidator; [105] every disposition of property after commencement of winding−up is void unless the court orders otherwise; [106] all civil proceedings against the company are suspended; [107] any attachment or execution put in force is void; [108] and, except for certain residual powers, the powers and duties of the directors cease. [109] The company, however, remains the owner of its property, and only the control over the company and its property goes to the Master and then to the liquidator once appointed. [110]

Of those provisions mentioned in the Cross−Border Insolvency Act, [111] we note that section 357 of the Companies Act obliges the Registrar of the High Court to send a copy of the winding−up order and of any order staying, amending, or setting it aside, made by the court, to the sheriffs of the provinces in which the company has its registered office or the body corporate its main office, and in which the company or body corporate owns property. [112] The Registrar must take similar steps in regard to registrars or officers responsible for maintaining statutory registers regarding any property in the Republic that seems to be a company asset, [113] and in regard to the messenger of every magistrate's court that has ordered the attachment of any company property. [114] These officers and registrars must then record these copies and note on them the date and time of receipt, [115] and where appropriate, the relevant caveat. [116]

Further, section 341 concerns dispositions and renders share transfers after winding−up void. The transfer of these shares is void if the company is being liquidated or the status of its members is being altered without the liquidator's approval after the winding−up has begun. [117] And if a company is being liquidated and cannot pay its debts, then its dispositions of its property (including rights of action) after the winding−up has begun will be void unless the court orders otherwise. [118]

Moreover, section 359 deals with the suspension of legal proceedings and the voidness of attachments. [119] After a court order for the winding−up of a company, or the registration of a special resolution for its voluntary winding−up, civil proceedings involving the company are suspended until the liquidator is appointed, and attachments or executions effective as regards the company's estate or assets after the winding−up has begun will be void. [120] And every person who intends to continue legal proceedings against the company that were suspended by the winding−up, and every person who intends instituting them to enforce a claim against the company that arose before the winding−up began, must, in four weeks after the liquidator has been appointed, give him at least three weeks' written notice before continuing or beginning those proceedings, failing which the proceedings are regarded as abandoned unless the court directs otherwise. [121]

4. The Position of the Liquidator

As soon as the liquidator is appointed, the Master sends him a copy of the statement of affairs. [122] The liquidator takes control of the affairs of the company and must immediately take possession of the assets of the company; he collects the debts of the company, pays the costs connected with the winding−up, pays the creditors of the company (if not in full, then in proportion to the amounts due to them, that is, so many cents in the rand), and distributes any surplus proportionally amongst the shareholders or, in the case of a company limited by guarantee, among contributories. [123] When the winding−up process is complete, the liquidator is relieved of his duties and the company is dissolved.

The Master exercises control over liquidators, in terms of section 381 of the Companies Act, to the extent that he, either of his own accord (*mero motu*) or after he has received complaints by any creditor, member, or contributory, must investigate any apparent dereliction of duty on the part of the liquidator. The liquidator must help the Master to perform his duties under the Act and in particular furnish required information and give the Master access to the books and documents of the company. [124]

Immediately after his appointment, the liquidator must open a book or other record in which he must enter from time to time statements of all moneys, goods, books, accounts, and other documents received by him on behalf of the company. The words "In Liquidation" or "In Voluntary Liquidation" must be included in and subjoined to the name of

the company, and the Registrar must change the register accordingly. [125]

The liquidator must liquidate the company for the benefit of the creditors and members of the company. He owes a duty to the company to see that its assets are realized and its liabilities minimized to the best possible advantage of the company; and a duty to the creditors to see that they suffer the least loss and receive the best dividend. [126] He also occupies a fiduciary position and may receive no benefit for himself from this position apart from his fixed remuneration. [127]

5. Statutory Rescue Procedures for Companies

a. judicial management

An application for a judicial management order may be launched in the High Court when any company by reason of mismanagement or for any other cause is unable to pay its debts or is probably unable to meet its obligations, and has not become or is prevented from becoming a successful concern, and there is a reasonable probability that, if it is placed under judicial management, it will be enabled to pay its debts or to meet its obligations and become a successful concern. The court may then, if it also appears just and equitable, grant a judicial management order in respect of that company. [128]

The judicial management order does not create a *concursus creditorum*, but the directors are divested of control over the affairs of the company. The control of the company passes to the Master of the High Court and then to the judicial manager. [129] The judicial manager must compile a report on the financial position of the company and on the prospects of the company becoming successful, and submit it to meetings of creditors and members. [130] The wishes of the creditors and members will be taken into account by the court in the exercise of its discretion to grant a final judicial management order. If a final judicial management order is granted, the judicial manager assumes the management of the company and must apply the assets of the company with the object of restoring the company to a successful concern. [131]

The judicial manager or any other interested party may apply to court for the cancellation of the judicial management order if it appears that the purposes of the order were fulfilled and that the company is a successful concern. By contrast, if it appears that it is undesirable that the order should remain in force and that the company should be wound up instead, then an application can be brought for the cancellation of the judicial management order and the winding up of the company. [132] Judicial management was introduced as a form of business rescue in the 1920s: an exceptional form of relief granted on narrow grounds conservatively interpreted by the courts, it has not been a success and must be reformed. [133]

There is considerable commentary in South African law on the reform of business rescue at present. [134]

b. compromises

One of the most popular rescue procedures for an insolvent company [135] is the (statutory) compromise in terms of section 311 and 312 of the Companies Act. [136] The popularity of this compromise is due mainly to certain income tax benefits: it enables the preservation of the assessed loss available in the company. [137] If the company ceases trading, the assessed loss is lost, but this loss can be set off against future income if the company is resuscitated before such cessation. [138] Section 311 of the Companies Act provides that where any compromise is proposed between a company and its creditors or any class of them, the High Court may, on the application of the company or any creditor or member of the company or, in the case of a company being wound up, of the liquidator, or if the company is subject to a judicial management order, of the judicial manager, order a meeting of the creditors or class of creditors, to be summoned in such manner as the court may direct. [139]

The requirements are therefore that there must be a compromise and that it must be between the company and its creditors. A compromise presupposes a dispute regarding rights or their enforcement. [140] In addition, the compromise must be between the company and the creditors; so there must be rights enforceable between these persons. [141] A third party (the "proposer") can be involved, but not to the exclusion of the company or creditors. [142]

As section 13(2) of the Cross−Border Act prevents the claims of foreign creditors from being ranked lower than non−preferent claims, [143] it may be worth mentioning the possibility of a subordination agreement concluded by a company in terms of a compromise or scheme of arrangement under sections 311 and 312 of the Companies Act. [144] Under a subordination agreement, "the enforceability of a debt, by agreement with the creditor to whom it is owed, is made dependent upon the solvency of the debtor and the prior payment of its debts to other creditors." [145] The effect of insolvency on these agreements has been described as follows: [146]

In the event of the insolvency of the debtor, sequestration would normally mean that the condition upon which the enforceability of the debt depends will have become incapable of fulfilment. The legal result of this would be that the debt dies a natural death (see De Wet and Yeats *Kontraktereg en Handelsreg* 5th ed vol 1 at 153; Christie *The Law of Contract in South Africa* 2nd ed at 169; Kerr *The Principles of the Law of Contract* 4th ed at 341). The result would be that the erstwhile creditor would have no claim which could be proved in insolvency.

On this line of reasoning it therefore seems that section 13 of the Cross−Border Insolvency Act does not prevent a foreign creditor from concluding a subordination agreement. If the company goes into liquidation, that creditor's claim will fall away. The subordination agreement does not alter the way in which the company's creditors would rank in the winding−up. [147]

Particular Considerations When Dealing With South African Insolvency Law

A. Voidable Dispositions

The legal actions in South African law to set aside various voidable dispositions comprise several statutory actions and one common−law action. The common−law action is the *actio Pauliana* derived from Roman and Roman−Dutch law, and available to set aside dispositions in fraud of creditors (*in fraudem creditorum*). [148] The actions under the Insolvency Act enable the setting aside of dispositions [149] made not for value; [150] voidable preferences; [151] undue preferences; [152] and collusive dealings. [153] These actions are also available in respect of dispositions by a company of its property. [154]

As regards dispositions made not for value, the court may set aside a disposition that the insolvent made without receiving value for it in return, if the trustee can prove that, where the disposition was made two years or more before the date of sequestration, then, immediately after it was made, the insolvent's liabilities exceeded his assets. If the disposition was made less than two years before the sequestration, it will be set aside if the person claiming under or benefited by it cannot prove that, immediately after it was made, the insolvent's assets exceeded his liabilities.

In regard to voidable preferences, the court may set aside a disposition made by a debtor in favor of a creditor, not more than six months before the date of his sequestration or his death as an insolvent, where the disposition had the effect of preferring one creditor above another, and immediately after it was made, the insolvent's liabilities exceeded his assets. The creditor allegedly preferred by the disposition has a defense if he can prove that the disposition was made in the ordinary course of business and was not intended to prefer one creditor above another.

In respect of undue preferences, the court may set aside a disposition made by the debtor at a time when his liabilities exceeded his assets, with the intention of preferring one creditor above another, and his estate was subsequently sequestrated.

As for collusive dealings, a court may set aside a transaction concluded before sequestration by the debtor who, colluding with another person, disposed of his property with the effect of harming his creditors or preferring one of those creditors above another. If collusive dealings are set aside, then a party to the transaction faces liability for making good any loss thus caused to the insolvent estate, and must pay for the benefit of the estate the penalty sum set by the court, not exceeding the amount that the party would have benefited by from the transaction. If the party is a creditor, he also loses his claim against the estate. [155]

Also worth noting is section 34 of the Insolvency Act, on the void sale of a business by a trader. If he transfers under a contract his business, its goodwill, or its goods or property (except in the ordinary course of that business or to secure

the payment of a debt), the transfer is void as against his creditors for a period of six months afterwards, and against the trustee of his estate, if his estate is sequestrated at any time during that period, unless he meets certain publishing requirements. These requirements compel the trader to publish a notice of the intended transfer in the *Government Gazette* and in two issues of an Afrikaans [156] and two issues of an English newspaper circulating in the district in which that business is carried on, within a period at least thirty days and not more than sixty days before the date of the transfer. [157] The publication of the required notice renders due immediately every liquidated liability of the trader in connection with that business, which would become due at some future date, although if the liability is interest−free, the amount of the liability that would have been payable at the future date if that demand had not been made will be reduced at the rate of eight per cent per annum of that amount, over the period between the date of payment and that future date. [158]

B. Labor Law

Where the estate of an employer is sequestrated or liquidated, all contracts of employment with the employees are terminated and the ex−employees may claim compensation from the estate for loss suffered because their contracts terminated prematurely. [159] These unliquidated claims are concurrent claims. In addition, the ex−employees enjoy statutory preferent claims for arrear salaries or wages and other sums, though these claims are limited to maximum amounts and periods. [160]

Since the advent of the new democratic dispensation in South Africa, labor law, and in particular the rights of employees, has developed rapidly. Under section 197(1) of the Labor Relations Act 66 of 1995 (hereinafter "the Labor Relations Act"), a contract of employment may not be transferred from one employer (the old employer) to another employer (the new employer) without the employee's consent, unless (among other things) the whole or any part of a business, trade, or undertaking is transferred by the old employer as a going concern. [161] If the old employer is insolvent and is being wound up, or if a scheme of arrangement or compromise is being entered into to avoid winding−up due to insolvency, employment contracts will automatically transfer to the new employer unless otherwise agreed. [162]

In terms of section 38 of the Insolvency Act, a contract of employment with an employer whose estate is liquidated will be automatically terminated at the time of winding−up; but in terms of section 197(2)(b) of the Labor Relations Act, the rights and obligations as they existed on the date of the winding−up will apply automatically to the employees and the new employer. When read together, section 38 of the Insolvency Act 1936 and section 197 of the Labor Relations Act seem to conflict. [163] The apparent conflict can be explained as follows: [164] the contract of employment between the insolvent employer and the employee will be terminated in terms of section 38 of the Insolvency Act 1936 on the date of winding−up, after which a contract of employment on the same terms and conditions will be transferred automatically to the new employer (owner) of the business if it is being transferred out of the insolvent estate as a going concern. The employee will have a claim for salary or wages as well as bonuses for leave in arrears in terms of the Insolvency Act against the insolvent estate of the old employer. Yet there are several difficulties of interpretation in the current dispensation, that is section 38 of the Insolvency Act read with section 197 of the Labor Relations Act. [165] Law reform is under way in this area. The liberal approach to labor may perhaps hinder the full development of business rescue.

C. Proof of Claims by Creditors

Liquidated claims can be proved by lodging an affidavit corresponding with Forms C and D of the First Schedule to the Insolvency Act. [166] This affidavit has to be lodged with the presiding officer at least 24 hours before the meeting. [167] Claims must, as a general rule, be proved before the estate is finally distributed, [168] and may only be proved three months or longer after the second meeting of creditors if the Master of the High Court so allows. [169] Employees are entitled to claim by way of an affidavit instead of a formal claim form for the preferential portion of salary, wages, or bonuses in arrear. [170]

Claims must be proved to the satisfaction of the presiding officer at a meeting of creditors. [171] The presiding officer may interrogate any creditor, or allow the creditor to be interrogated, about the details or circumstances of his alleged claim. Where a claim is not admitted, the creditor may again try to prove his claim at a later meeting or during legal

proceedings. Where the claim is for the sale of goods sold on an open account to the insolvent, the creditor has to submit a statement of account.

Having received the documents pertaining to the proven claims, the trustee must examine all available books and documents relating to the insolvent estate so as to ascertain whether the estate in fact owes the claimant the amount claimed. [172] The Master may on the trustee's advice confirm, reduce, or disallow the claim after granting the claimant the opportunity to substantiate his claim. [173] After receiving written reasons for the Master's decision, an aggrieved creditor (claimant) may establish his claim by an action at law. Suspicion about the validity of a claim is not a sufficient reason to reject such a claim. [174]

Claims must be proved against the company at a meeting of creditors in accordance with the Insolvency Act. [175] In each winding−up a secured creditor has the same duty to place a value on his security as if he were proving a claim against an insolvent estate. [176] In a winding−up by the court, the Master, on the application of the liquidator, may fix a time within which the creditors of the company must prove their claims. Should a creditor fail to prove his claim, he is excluded from the benefits of any distribution under an account already lodged with the Master. [177]

D. The Realization of Assets; and the Effect of Section 21 on the Assets of the Solvent Spouse

1. The Realization of Assets

The trustee must sell all assets under his control after the second meeting of creditors, and comply with the creditors' instructions in doing so. Where he has no such instructions, he must sell the assets by public auction or by public tender. [178] If necessary, the assets may be sold before the second meeting of creditors, where it is deemed necessary and the Master approves of such a sale. [179] Fresh produce, for example, has to be sold as soon as possible, or assets may be sold where the price suddenly soars. The trustee, auctioneer, their spouses, partners, employers, employees, and representatives may not buy any assets unless the court allows them to do so.

If a creditor possesses movable goods in terms of a real right or real security, such as a pledge, a lien or a tacit hypothec, he may realize them himself before the second meeting of creditors. The trustee (or the Master, where the trustee has not yet been appointed) has to approve the method of realization. [180] The creditor must notify both the Master and the trustee in writing that the goods are in his possession. The trustee may take over the goods within seven days after receiving this notification or after his appointment unless the goods consist of bills of exchange or securities. The take−over has to be at an agreed price. After the creditor realizes the assets in his possession, he must pay the proceeds to the trustee and then prove both his claim and his real right or security to the trustee. [181] After the second meeting of creditors, all goods have to be delivered to the trustee and the creditors have to prove their claims. [182]

In corporate bankruptcy the liquidator lacks the inherent power of realizing the assets of the company; he needs authorization from resolutions of creditors and members or contributories or, in the absence of those resolutions, from the Master. When selling company assets, the liquidator must have regard to the directions of meetings of creditors or members or contributories. Subject to such authorization, he may sell movable and immovable property of the company either as a whole or in parcels by public auction, public tender, or private contract. [183]

2. The Effect of Sequestration on the Estate of the Insolvent's (Solvent) Spouse

Section 21 is a highly controversial section in the Insolvency Act because it vests the property of the solvent spouse in the insolvent estate of the spouse whose estate has been sequestrated. It is important to consider this section within the ambit of the Cross−Border Insolvency Act, section 20(1)(*d*) of which applies section 21 of the Insolvency Act to assets situated in the Republic to the same extent as it would have applied if the debtor had been sequestrated by a court. [184] A foreign representative will thus be able to rely on it in the case of an inward−bound request for assistance with a cross−border insolvency [185] dealing with the insolvent estate of an individual.

Under section 21 of the Insolvency Act, the estate of the insolvent's spouse to whom the insolvent is married out of community of property also vests in the Master and is transferred to the trustee, once the latter has been appointed. [186]

"Spouse" has an extended meaning and also includes persons married according to any custom or law, as well as persons living with a member of the opposite sex as husband and wife, although they are not married. [187]

The solvent spouse can claim a release of his or her assets by lodging an affidavit containing a full statement of his affairs with the trustee of the insolvent estate. He must state that the property was his immediately prior to his marriage to the insolvent, or before October 1, 1926; or was acquired by that spouse under a marriage settlement in terms of an antenuptial contract; or was acquired by that spouse during the marriage with the insolvent by a title valid against the creditors of the insolvent; or is safeguarded in favor of the solvent spouse by the Insurance Act 37 of 1923; [188] or was acquired with any of the above property or with the income or proceeds thereof. [189] Where the solvent spouse fails to apply for the release of his or her assets, or where the trustee or court refuses to grant the release, that property forms part and can be sold as part of the insolvent estate.

The application of Section 21 of the Insolvency Act is somewhat hindered by section 22 of the Matrimonial Property Act, which generally legalizes genuine donations made by one spouse to another. So the trustee will have to release to the solvent spouse an asset that the solvent spouse proves was given to him by the insolvent spouse. This step may be only a temporary lull, though: the trustee may still recover the alienated property by taking legal steps to have the donation set aside as an impeachable disposition, usually as a disposition without value. [190]

Section 21 of the Insolvency Act was enacted to put a stop to the common practice by which traders and other persons sought to avoid payment of their debts by transferring property into their wives' names. [191] On the husband's insolvency the burden then rested on the trustee to impeach the wife's title. The provision was thus introduced to shift the burden of proof to the solvent spouse. This remains a drastic and arbitrary invasion upon, and inroad into, the proprietary rights of a citizen. [192] Section 21 has been criticized by leading academics and created practical difficulties in certain judgments. [193]

The Constitutional Court, however, had the opportunity in the meantime to rule on the constitutionality of section 21. [194] The majority judgment, delivered by Justice Goldstone on the basis of the Interim Constitution 1993, [195] upheld the constitutionality of section 21 of the Insolvency Act. [196] In the first place it was argued on behalf of the applicant that section 21(1) of the Insolvency Act constituted an expropriation without any compensation as required by section 28(3) of the Interim Constitution. [197] But the court did not consider whether section 21 of the Insolvency Act constituted a deprivation of property in terms of section 28(2) of the Interim Constitution. [198] It was held that section 21 of the Insolvency Act did not contravene section 28(3) of the Interim Constitution because section 21 was not an expropriation of property. [199]

Counsel for the solvent spouse also argued that section 21 violated the equality clause in section 8 of the Interim Constitution because it treated that spouse unequally in comparison with other persons who had dealings or close relationships with the insolvent. [200] But the majority of the court held that although section 21 did differentiate between solvent spouses and other persons who had dealings or close relationships with the insolvent, this differentiation was rationally connected to a legitimate government purpose, the prevention of collusion between spouses. [201] Yet Justice O'Regan (with whom Justices Madala and Mokgoro concurred) held that section 21 was unjustifiable because it breached the right not to be unfairly discriminated against, and this breach was not proved to be justifiable in an open and democratic society based on freedom and equality. [202] In particular, Justice O'Regan pointed out that many jurisdictions regulate fraudulent dispositions of property between spouses by way of the doctrine of voidable dispositions and that section 21 was thus not justifiable in view of these alternative remedies. [203] In his separate dissenting judgment, Justice Sachs held that section 21 promotes a concept of marriage in which, independent of the living circumstances and careers of the spouses, their estates are merged. He viewed this result as a direct invasion of fundamental dignity or something of comparable impact and seriousness. [204]

In spite of its approval by a majority of the Constitutional Court, section 21 remains a drastic conceptual anachronism that should not be tolerated in a modern society. It is still being debated in law reform circles. The problem that it tries to address should be dealt with in terms of the law of impeachable dispositions.

E. Rules for Distributing the Assets or the Estate

1. Secured Creditors

For a creditor to rank as a secured creditor on an insolvency estate in South African law, his security must have vested before the date of the sequestration or the winding−up. The Insolvency Act recognizes the following forms of real security in its definition in section 2:

(a) A special mortgage bond, including a mortgage bond over immovable property, a special notarial bond over movable property specifically describing the hypothecated property and which was registered after May 7, 1993, [205] as well as a special notarial bond over movable property in Natal registered in terms of section 1 of the Notarial Bonds Act (Natal) 1932 which affords a security defined by the Insolvency Act; [206]

(b) the lessor's tacit hypothec over the things carried in and brought in (*invecta et illata*) of the lessee, [207] and the hypothec of a creditor grantor in terms of an installment sales transaction; [208]

(c) a pledge; and

(d) a lien.

Usually, a general mortgage bond over immovable property which was registered after December 31, 1916 does not vest any form of security recognized by the Insolvency Act. [209] Section 102 of the Act, however, creates a weak statutory preference regarding general mortgage bonds. [210]

If a creditor of an insolvent estate who is in possession of any property belonging to that estate, over which he has a lien or a landlord's hypothec, delivers that property to the trustee or liquidator at the latter's request, he will not thereby lose the security it affords if, when delivering it he notifies the trustee or liquidator in writing of his rights and duly proves his claim against the estate. [211]

The proceeds of property subject to securities must be used first for paying the cost of maintaining, conserving, and realizing that property. [212] The cost of realizing the security includes the liquidator's remuneration, a proportional portion of the cost of the liquidator's security and Master's fees, and an amount for periodic taxes in respect of immovable property as prescribed by section 89(5) of the Insolvency Act. [213] If the proceeds of realization are insufficient, the deficiency must be paid as a contribution by those creditors, proportionally (*pro rata*), who hold the property as security for their claims.

Where a secured creditor, other than the secured creditor upon whose application the company in question was wound up or the estate of the individual was sequestrated, states in the affidavit submitted in support of the claim against the estate that he relies for the satisfaction of the claim solely on the proceeds of the property which constitutes his security, the creditor will not be liable for any costs of liquidation other than the contribution costs specified in section 106(*a*) and (*b*) of the Insolvency Act. [214] After the expenses have been paid, the proceeds must be applied in satisfying the claims of secured creditors in their order of preference as well as interest in respect of any period not exceeding two years immediately preceding the date of liquidation. [215] Interest from the date of sequestration or winding−up to the date of payment is also payable from the proceeds. [216] If anything remains after the secured creditors have been paid, the balance is deposited in the free residue (which includes the proceeds of assets not subject to any security) for distribution among the unsecured creditors. Broadly speaking, the free residue will be applied in the following order: the payment of the costs of sequestration or winding−up; the payment of the claims of the statutory preferred creditors; the payment of the concurrent (ordinary) creditors; and then in the case of companies, the division of any surplus among the members.

2. Floating Charges and Notarial Bonds

The floating charge in its British form is not known to South African law; the closest equivalent is the general notarial bond, which is confined to movable property. For the acquisition of a real right of security, however, South African law acknowledges (among other things) *special* mortgage bonds registered over immovable property in the Deeds Registry as well as certain *special* notarial bonds registered similarly over movable property as discussed in the

previous section.

The creditor who relies on a *general* notarial bond over movable property enjoys no real right of security, but merely a weak priority over the general unsecured creditors. [217]

In our set of facts we have supposed that the South African bank accepted guarantees from the directors as security for the payment of the company's debts. It is, of course, more likely that the bank would insist on real security. In that event, a special notarial bond over the company's movables that could be specified could be registered in favor of the bank in the Deeds Registry and therefore create real security. Movables such as explosives in the set of facts would rather form the subject of a general notarial bond, for it is difficult to specify them with the required precision.

3. Statutory Priorities or Preferences

In so far as it is applicable, the order of preference in terms of the Insolvency Act applies as nearly as possible to the distribution of the proceeds of the assets of a company in liquidation. [218] If there is a surplus of the proceeds of the encumbered assets, that surplus (together with the proceeds of the unencumbered assets and of the demands made on contributories in the case of companies) forms the free residue. The free residue is, broadly speaking, applied in the following order of preference: [219]

(a) First, in the insolvency of individuals, an amount limited to R300 for funeral costs of the insolvent, his wife, or minor child and then the same amount for death−bed expenses for the same people;

(b) Liquidation and administration costs rank in the following order of preference: the Master's prescribed fees and then, in equal ranking order, the costs of the successful applicant as taxed by the taxing master of the court, including reasonable costs of opposition as allowed by the court; [220] costs allowed by the Master in respect of an accountant who drafted the statement of affairs; remuneration of a trustee or a liquidator as taxed by the Master; all other costs in connection with the maintenance, conservation, and realization of the assets, including the costs of giving security by the trustee or the liquidator; [221] bank charges, postages and other small disbursements; costs of advertisements incurred in regard to the convening of meetings of creditors, (and of members and contributories in a company winding−up); costs of expenditure that the trustee or the liquidator decides to incur in realizing the estate, such as paying an endowment to a local authority in order to be able to pass transfer of ownership of immovable property; [222] costs of the sheriff incurred after the sequestration or the winding−up; [223] the salary or wages of a person employed by the trustee or the liquidator in administering the estate; [224] the remuneration of the trustee or the liquidator.

(c) The taxed fees of the sheriff in connection with any execution upon the insolvent's property and in any associated proceedings, limited to the proceeds of the sale in execution and any other costs in those proceedings limited to R50. [225]

(d) Salary and wages of employees and related claims in arrears. Since September 1, 2000 this claim has moved up a notch in the priority list. [226] The benefits included under this heading are:

The salary or wages in arrears for a period not exceeding three months (the maximum amount allowed under this provision being R12 000);

Payment in respect of any period of leave or holiday due to the employee which has accrued as a result of his or her employment by the insolvent in the year of insolvency or the previous year (the maximum amount allowable under this provision being R4 000);

Any payment due in respect of any other form of paid absence for a period not exceeding three months prior to the date of liquidation (the maximum amount allowed under this provision being R4 000); and

Any severance or retrenchment pay due to the employee in terms of any law agreement, contract or wage regulating measure (the maximum amount allowed under this provision being R12 000).

A maximum amount of R12 000 payable thereafter in respect of any contributions payable by an insolvent, including contributions payable in respect of his employees, to any pension or provident fund, medical aid or unemployment fund or any similar scheme or fund.

The claim for salary or wages enjoys preference above the claims for leave, other paid absence and severance or retrenchment, which rank equally and abate in equal proportions if necessary. These preferential claims, within their respective order of preference introduced by the new section 98A, rank equally and abate in equal proportions if necessary. The balance of any claims not covered by section 98A will be claimed concurrently with that owed to the general unsecured or concurrent creditors. [227]

(e) A number of statutory claims payable by an insolvent company, usually as an employer, to certain government and other institutions: amounts such as any assessment, penalty, or other payment payable by employers in terms of the compensation under the Compensation for Occupational Injuries and Diseases Act 130 of 1993; taxes deducted by employers in terms of the Income Tax Act and payable to the Commissioner for Inland Revenue; customs, excise, and sales duty in terms of the Customs and Excise Act 91 of 1964; value added tax, interest, fines, or penalties in terms of the Value Added Tax Act 89 of 1991; contributions payable by the insolvent as an employer in terms of the Occupational Diseases in Mines and Works Act 78 of 1973 and unemployment insurance in terms of section 99(1)(*a*)−(*e*) of the Insolvency Act. All these claims rank equally and must abate in equal proportions if necessary. [228]

(f) Income tax in arrears payable by the insolvent for any period before sequestration or winding−up. [229]

(g) Proved claims secured by general bonds (and certain special notarial bonds registered before May 7, 1993 outside the province of Natal). [230]

After the preferent creditors have been paid in their order of ranking, the concurrent claims (the claims of the general unsecured creditors), if any, are paid proportionally by means of a dividend. If the free residue is sufficient − an unlikely occurrence − concurrent creditors are awarded interest to the date of payment. [231]

In corporate bankruptcy law, any surplus assets available after payment of the costs incurred in the winding−up and the various claims of the creditors must be distributed among members according to their rights and interests in the company. [232] In the insolvency of an individual, however, such a surplus must be paid into the Guardian Fund's administered by the Master's office. [233]

4. Contributions to Cover Deficit Administration Costs

If there is no free residue or the free residue cannot meet all the expenses, certain creditors who have proved claims against the company have to pay contributions that will cover this deficiency. [234]

First, concurrent creditors who proved claims against the company, including secured creditors as regards the portion of their claims for which they rely on the free residue, must contribute in proportion to their proven claims. [235]

Where only secured creditors claim against the free residue, they will have to contribute to the cost of liquidation in proportion to the amount of their claims from the free residue. [236] We submit that secured creditors are liable in terms of this provision only if an unproved creditor who applied for the winding−up order is not liable for contribution in terms of section 14(3) read with section 106 of the Insolvency Act, or is unable to pay the contribution levied on him or her. Secured creditors can also become liable to pay a contribution in relation to the cost of realizing their securities. [237]

The Insolvency Act does not mention the contribution liability of preferent creditors directly to the extent that their claims enjoy preferences under sections 96 to 102; but it is accepted that they will be liable for contributions only after proved creditors who rely on the free residue have withdrawn their claims and paid over their part of the required contributions up to that point. [238]

If no creditor has proved a claim, the creditor who applied for sequestration or winding−up will become solely liable to make a contribution, whether or not he or she has proved the claim against the estate. The amount on which the contribution will be calculated is the amount of the claim as indicated in his or her sequestration or winding−up application. [239]

If creditors fail to pay, after being notified of their liability to contribute, the liquidator may obtain a writ of execution in order to procure payment against such a creditor. [240] This portion may be recovered proportionally from the other creditors in terms of a supplementary plan of contribution, if the Master and the liquidator conclude that the creditor cannot meet his or her obligations. [241]

The South African trustee administering an insolvent estate should warn foreign creditors of the risk under section 106 of the South African Insolvency Act of liability for paying a contribution towards costs if a claim is proved. [242]

The Transactional Context of South African Cross−Border Insolvency Law

A. General

The current Insolvency Act is silent about the assets of a debtor in a foreign jurisdiction. Nor is South Africa a party to any international treaties or conventions in this regard, though it was recently accepted as a "relevant country" for the purposes of section 426(5) of the United Kingdom Insolvency Act 1986. [243]

B. The Zulman Report

The subject of cross−border insolvencies has been studied on behalf of the South African Law Commission as a special research project under the direction of Mr. Justice Ralph Zulman. The final report of this project proposed introducing an adaptation of the Model Law. [244] This South African project began before the General Assembly of the United Nations adopted a resolution, co−sponsored by South Africa, recommending that member states should review their legislation on cross−border insolvency law and favorably consider the Model Law.

Judge Zulman makes the following recommendations in paragraph 20 of his *Final Report on Trans−National Insolvency*. [245] He says that clearly there is "to use the words of Sir Donald Nicholls VC [246] 'a crying need for an international insolvency convention. Trade takes place increasingly on an international basis. So does fraud. Money is transferred quickly and easily'." [247]

Now that South Africa has entered the world of nations, as it were, and with increasing commerce and the incidence, magnitude, and complexity of cross−border insolvencies in recent years, Judge Zulman considers it essential for South Africa to be in step with the rest of the world. He believes that one can hardly expect foreign investors and persons who wish to do business with South Africa to be left with uncertainty and sometimes gaps in a cross−border insolvency. [248] It would be far preferable if these foreigners had a ready source of reference to such law in a statute, preferably of universal application. In this regard the enactment by South Africa of the Model Law is the first prize at which South Africa should aim.

He is convinced that the Model Law enjoys the support of influential specialists in the field of insolvency in countries such as the United States, Canada, the United Kingdom, many European countries, and countries in the East. For this contention he relies on statements by Professor Westbrook and Judge Brozman who describe the principles of the Model Law as "modest" and making no attempt to "harmonize the substantive law of the enacting jurisdictions." [249] This factor may well explain the broad consensus achieved among the countries that participated in drafting the Model Law. Of much significance, in Judge Zulman's opinion, and of particular relevance to South Africa is the point made by Mr. Burman to the Senate Sub−Committee of the United States that the adoption of the Model Law will "further the interests of fair treatment for investors, lenders and commercial borrowers across all borders and thus facilitate investment and trade." [250]

C. The South African Process of Adopting the UNCITRAL Model Law

Once the United Nations accepted the Model Law during December 1997, the adoption process in South Africa gained momentum. Under the chairmanship of Judge Zulman, the Insolvency Project Committee of the South African Law Commission then investigated the possibility of modifying and adopting the Model Law as part of the continuing insolvency law reform in South Africa.

On May 25, 1998 commentaries on the advisability of the adoption of an adapted version of the Model Law ("Version 1") [251] were invited from 130 selected correspondents. [252] The *Guide to Enactment of the UNCITRAL Model Law on Cross Border Insolvency* was attached to this invitation. These invitations were published on the website of the South African Law Commission, and commentaries were to be submitted by June 30, 1998. The commentaries received were generally favorable, and after these had been reflected in Version 1, the reworked Version 2 [253] was submitted to the Insolvency Project Committee on October 29, 1998. After some further recommendations an interim report on the review of the law of insolvency, entitled "Interim Report on Review of the Law of Insolvency: The Enactment of UNCITRAL's Model Law on Cross−Border Insolvency" (Interim Report), was accepted on June 5, 1999 and submitted to the Minister of Justice that month.

The approach in the Interim Report to adopting the UNCITRAL Model Law is summarized as follows:

1. As few changes as possible should be made in order to strive for a satisfactory degree of harmonization and certainty. [254]

2. No exclusion of entities such as banks or insurance companies is proposed. [255]

3. Only terms that do not have an obvious meaning in the context of the insolvency law should be defined. [256]

4. It should be made clear that the ranking of claims is left to South African insolvency law and not merely to South Africa's conflict of law rules. [257]

5. It is important that the automatic effect of clause 20 create a breathing space without delay (par 4.18), but the court may at the request of the foreign representative or a person affected by the operation of clause 20 modify or terminate the scope of the stay and suspension of proceedings. [258]

6. The question of the appointment of a local representative should be left to the court in accordance with the Model Law. [259]

7. It should be made clear that the court has authority to indicate which South African rules should apply and modify such rules or set out conditions subject to which any rule should apply. [260]

8. Section 149(1) of the Insolvency Act should be amended to indicate that foreign representatives and creditors have access to the court as provided in chapter 2 of the Model Law and liquidation of the estate of a debtor is limited as provided in chapter 5 of the Law. [261]

9. The Commission recommends the enactment of the Bill in the Annexure to the report. [262]

During the following months the State Law Advisors and the Department of Justice revised and reworked the proposal into a formal Bill. The Cross−Border Insolvency Bill 4−2000 was subsequently submitted to the Minister of Justice during December 1999 and tabled in Parliament on February 17, 2000. The Portfolio Committee on Justice and Constitutional Development of the National Assembly then published the Bill in the *Government Gazette* for further comment from role−players in the broader society by March 18, 2000. After certain amendments had been made, the Portfolio Committee approved the Bill on September 7, 2000 and the National Assembly later did so on September 20, 2000. As part of the parliamentary procedure, the Select Committee on Security and Constitutional Affairs of the National Council of Provinces considered and approved the Bill during October 2000. The Bill was approved by the State President in Parliament on December 8, 2000 and published as the Cross−Border Insolvency Act 42 of 2000 in the *Government Gazette* on December 15, 2000. Mainly because the Portfolio Committee introduced the principle of reciprocity in section 2(2) to (4), [263] however, the Cross−Border Insolvency Act is not yet in operation.

A. General

As the Cross−border Insolvency Act is not yet in force, the field of cross−border insolvency is still governed by principles of the common law as developed by decisions of the courts.

B. The Definition of "Property" in the Insolvency Act

1. Estate Property

In the case of an individual the debtor's estate property, except exempt property, will vest in the Master of the High Court from the date of sequestration until the trustee is appointed, when it vests in the latter. [264] The control remains vested in the trustee to enable him to sell the assets and distribute the proceeds among the creditors. [265] In the case of a company or a close corporation, the liquidator will take the control of the property but the property does not vest in him or her as such, though the practical effect remains virtually the same.

"Property" includes all property (assets) owned by the insolvent at the time of sequestration as well as property acquired after sequestration but before rehabilitation. [266] Certain assets (the exempt property) are excluded by way of statutory exception from the estate of an individual debtor.

The definition of "property" in section 2 of the Insolvency Act includes all movable and immovable property wherever *situated in the Republic of South Africa* but excludes the contingent right of a fideicommissary heir or legatee. So, as a rule, all the property of the insolvent in the Republic vests in the trustee. Debts payable to the insolvent are immediately payable to the trustee. [267] Rights of inheritance also comply with the definition of "property" and thus form part of the insolvent estate. [268]

2. Exempt Property

In terms of the definition of "property" read with other various statutory exemptions, the following are exempt property in the case of an individual:

· The insolvent's wearing apparel and bedding, the whole or part of his household furniture, and tools and other essential means of subsistence (as determined by the Master or the creditors). [269]

· Property held in trust by the insolvent in his capacity as trustee, and which is protected by section 12 of the Trust Property Control Act 57 of 1988, sections 78 and 69 of the Attorneys Act 53 of 1979, and section 4(5) of the Financial Institutions (Investment of Funds) Act 39 of 1984.

· A limited amount (currently R50 000), as determined by section 63 of the Long−term Insurance Act 52 of 1998, payable as a benefit in terms of certain life insurance policies and pension benefits; [270]

· Any benefit payable in terms of the Unemployment Insurance Act 30 of 1966, the Compensation for Occupational Injuries and Diseases Act 130 of 1993, or the Occupational Diseases in Mines and Works Act 78 of 1973;

· Compensation for loss or damage suffered by reason of defamation or personal injury; [271] and

· The insolvent's salary or wages, unless the trustee claims the residue and the Master certifies what the insolvent needs to support himself and his family. [272]

3. The Estate of the Company

The company, however, remains owner of its property and only control over the company and its property goes to the Master and after his or her appointment to the liquidator. [273]

4. Property Situated in A Foreign Jurisdiction

It is clear from the above discussion of "property" that foreign assets are not included in the statutory definition and that the South African common law regarding those assets will apply. The definition of "property" endorses to some extent the principle of territoriality. It also illustrates the interplay between statutory law and common law in South Africa: where there is a gap in the legislation, the South African common law will continue to apply.

C. Common−law Principles [274]

1. Comity and the Development of Common−law Principles by the Courts

The South African law of cross−border insolvency is based on the doctrine of comity, which was formulated by the Roman−Dutch jurists in the Netherlands. [275] In the seventeenth century, Rodenburg observed that although the state was sovereign, foreign law could sometimes be applied extra−territorially in that state; why should this be? [276] In his view, "although there is no strict legal duty to apply the foreign law, there are practical reasons for its application, based on necessity and usefulness. Here, possibly, is the genesis of the comity principle of the Voets." [277] Paul Voet coined the Latin word for "comity," its synonyms being humanity and equity; [278] under this doctrine the foreign law would be given local effect because of "international goodwill [arising] from the requirements of international intercourse and commerce, from humanitas and aequitas, from the confusion, uncertainty and injustice that would otherwise eventuate in legal relations and contracts, in commerce on land and sea." [279] Paul Voet's ideas were continued by his son, Johannes; [280] and their thinking has been described as "the true comity school." [281] By contrast, [282] the other school of comity, "supra−nationalist in outlook," [283] is notable for the influential reasoning of Huber, whose important third proposition [284] was that "Those who exercise sovereign authority so act from comity that the laws of each nation having been applied within its own boundaries should retain their effect everywhere so far as they do not prejudice the power or rights of another state or its subjects." [285] The principle of comity passed eventually into South African law, and Booysen J. concluded, "It would seem that the preponderance of authority in this country is still in favour of recognizing comity as the theoretical basis of this branch of our law" in which foreign law is applied in South Africa. [286] It has been argued that comity, although an ambiguous word, now supplies the "reasons or motives that prompt a sovereign to order the application of foreign law," and that this application is warranted, "not because of courtesy or respect for foreign sovereigns but in order that [the sovereign] may do justice to the *private litigants before his courts*," reciprocity not being a valid requirement at the level of private litigation rather than of diplomacy and interstate relationships. [287] In the common law on cross−border insolvency as developed by the South African courts, comity itself is not analyzed but merely invoked as a basis for the rules to which we now turn.

2. The Distinction Between Types of Property and Types of Persons

Whether an American trustee as a foreign representative in cross−border bankruptcy proceedings must approach the South African courts for recognition before being competent to deal with local assets is determined according to classifications of property and of persons. The chief distinction is drawn between movable property and immovable property.

a. movable property, and the fiction regarding individuals

As movables are dealt with according to the domicile of the individual, [288] the order granted by the court of the bankrupt's foreign domicile (*lex domicilii*) automatically divests that individual of his or her movables in South Africa, thus creating a single *concursus creditorum*. [289] The application of this rule is illustrated in *Trustee of Howse, Sons & Co v. Trustees of Howse, Sons & Co*, a case dating from the period before the Union of South Africa in 1910. An English firm had sought liquidation in London by arrangement or composition arrangement, and its creditors in the Cape Colony had later instituted proceedings for sequestration there. The firm had only movable assets in the Cape. "The general rule relating to movable or personal estate," said De Villiers C.J., "is that it is subject to the same law as that which governs the person of the owner, in other words, the law of his domicile." [290] Satisfied that local creditors' rights would not be harmed, the Cape court even set aside the sequestration proceedings in the Cape and the local trustees' appointment. [291] Since then this rule on movables has often been acknowledged. [292] It is a simplifying means of general transfer of rights (*titulo universali*) and prevents confusion otherwise caused by conflicting *leges rei sitae*.

293

Rarely will a representative be recognized who has been appointed by a court not that of the bankrupt's domicile; 294 even then, that court's order applies only to assets in that court's jurisdiction. 295 If the insolvent acquires a new domicile after his estate has been sequestrated, assets acquired after that point do not vest in the trustee. 296

Although the rule assigns the movables to their owner's domicile by a fiction based on comity, 297 the foreign order will have to be given effect to under South African law. The better view is that the foreign trustee already owns the movables. 298 Yet the foreign trustee's ownership (*dominium*) is not unlimited. To protect local creditors, the court, as will be shown, 299 usually imposes conditions for the trustee's dealing with the local assets and removing them or their proceeds from the jurisdiction. Recognition orders have been sought in previous cases; 300 in *Ex parte Palmer NO: in re Hahn*, Berman J. pointed out that although the trustee need not seek recognition in regard to movable property, the frequency of doing so had raised the requirement into a principle. 301 An indication of the help that the South African courts are willing to give the foreign representative appears from the appellate judgment in *Moolman v. Builders & Developers (Pty.) Ltd.: Jooste intervening*. 302 This was a decision during apartheid, when the Transkei was seen in South African law, though not by most other legal systems, as a state independent from South Africa. The Transkei companies legislation copied the South African legislation. Moolman was the provisional liquidator of a company incorporated and later provisionally wound up in the Transkei, where the court had authorized an examination under section 417 and appointed a commissioner under section 418. Jooste was the director and shareholder of the company, and declined to attend the meeting of the commission in Port Elizabeth, denying the commissioner's competence to interrogate him and two other people in South Africa about large payments made to them by the company shortly before the winding−up. The South Eastern Cape Local Division refused to recognize the Transkei appointments merely for the holding of a local inquiry into the affairs of the company. But the Appellate Division (as the Supreme Court of Appeal used to be called) overruled this decision and explained that the foreign representative needed the active help of the local courts; unless recognized by the local courts, he would not be entitled to act in respect of local property, nor would his claim regarding suspect payments be heard by a local court. The present inquiry was a prudent step towards his eventual goal of retrieving the assets of the company. The court had a discretion to recognize the foreign officials, 303 the only bases for such recognition being comity and convenience. Several factors, so the appellate court considered, warranted granting this recognition: the companies legislation of the respective countries was very similar, the two countries shared close ties, the matter needed to be investigated, and an inquiry was advisable before the expenses of going to court were incurred. The recognition order, it was held, should have been granted.

b. the distinction between individuals and companies

Where a company or a close corporation is being liquidated, the foreign representative is required to seek local recognition from the court. He is not assisted by the convenient fiction, which is correspondingly of limited relevance because many international insolvencies focus on companies, not individuals. This local practice regarding foreign liquidators has long been recognized. 304 Recently, foreign liquidators learnt to their cost the importance of seeking recognition from the local courts. In *Ward and another v. Smit and others: In re Gurr v. Zambia Airways Corporation Ltd.*, 305 the airways company had been put into liquidation as an external company in South Africa under section 344(*g*) of the Companies Act, at the instance of a South African employee. This winding−up had progressed quite far when the Zambian liquidators applied under section 354 of the South African Companies Act for the recognition of their appointment and for authority to deal with the company's estate in South Africa. They wished to set aside the local liquidation order and have the company assets turned over to them. The Supreme Court of Appeal found that, for present purposes, the foreign liquidators had no authority outside Zambia. They might seek recognition in South Africa, where the courts, in the exercise of their jurisdiction and careful to protect the interests of local creditors, might authorize those liquidators to deal with the local assets, for the sake of comity, equity, and convenience. Unless duly recognized by the local court, they could not deal with the company assets, movable or immovable, in South Africa. It was no excuse that the liquidators were overworked and did not understand South African law.

c. immovable property

The rule on immovable property is simpler than the one on movable property, because it does not distinguish between types of persons, between individuals and juristic persons. [306] The law of the location of the immovable (the *lex situs*, the *lex rei sitae*) is decisive; [307] the effect of the foreign sequestration order is limited territorially. Before being allowed to deal with local immovables, the foreign representative must approach the South African court for recognition of his proper appointment. [308] In hearing these applications the South African court exercises a discretion [309] based on comity, with convenience and equity. [310] (The Cross−Border Insolvency Act, by contrast, provides for the recognition of the proceedings based on fairly simple rules, and thus limits considerably the court's discretion as regards recognition. [311])

3. The Element of Convenience

As *Re Estate Morris* also shows, [312] the element of convenience may be decisive. Although the debtor owned immovable property and owed debts to creditors abroad, it was more convenient that the court in which he had acquired a domicile of choice and also movables should be able to supervise the sequestration of his estate. In the jurisdiction of the South African court he could be interrogated; his movables were sufficiently valuable to attract the foreign trustee's attention, and his foreign creditors could prove their debts locally by submitting powers of attorney.

Convenience shifts with the facts, though, as can be seen from *Deutsche Bank AG v. Moser and Another*, [313] in some ways the converse of *Re Estate Morris*. In *Deutsche Bank* the Cape court was hearing an application for a provisional order of sequestration, not for the recognition of a foreign representative: so the case is not directly in point. The first respondent, a German citizen, lived in Germany but owned few assets there. He also owned immovable property in the jurisdiction of the Cape Provincial Division. It was argued that on grounds of fairness and convenience, the German courts rather than the South African should decide on the sequestration of his estate, for a South African trustee would find it onerous and costly to carry out the provisions of the Insolvency Act, and the first respondent, his wife, and his creditors would find it inconvenient and unfair to be required, for example, to attend meetings of creditors in South Africa. These complaints against the granting of a provisional sequestration order in South Africa moved the court far less, however, than the convenience of dealing with the South African immovable property. Convenience was convenience, not for the court, but in the events following its orders. [314] Much better that the Cape court rather than the German decide this matter, particularly because there might be no advantage for (South African) creditors in approaching the German court, whose sequestration order would still not automatically strip the debtor of his South African immovable. [315]

Convenience will feature in our application of the Cross−Border Insolvency Act to the set of facts. [316]

4. The Protection of Local Creditors

The protection of local creditors is an essential requirement in the South African common law of cross−border insolvency. Movable or immovable assets of the insolvent can be dealt with by the foreign trustee or representative only according to the procedure of the South African courts. Procedure is controlled by the *lex fori* [317] and includes issues of priorities and the ranking of claims. [318] Property burdens entitling their holders to rank on the estate have to be formed under the law of the location of the assets. [319]

Courts seeking to protect local creditors in cross−border insolvency matters normally set a range of conditions for the realization of local assets and the removal of their proceeds from the Republic. [320] Usually [321] a rule *nisi* must be issued, for local creditors must be properly informed of the foreign trustee's intention to claim those assets. [322]

A detailed example of how the courts set conditions to protect local creditors in a cross−border matter appears in *Ex parte Steyn*. [323] The Lesotho High Court sequestrated Moreira's estate and appointed Steyn trustee. Steyn approached the Orange Free State court for recognition so that he might act as trustee in regard to the insolvent's unbonded immovables in the Orange Free State. Those assets might be subject to statutory rights of preference enjoyed by the Ladybrand Town Council. The Orange Free State court recognized Steyn's appointment until it should order the withdrawal thereof. His power of dealing with South African assets would depend on his lodging security to the satisfaction of the Master of the Orange Free State for properly performing his duties and for paying the latter's costs and charges. [324] With the necessary changes and as though the South African Insolvency Act governed an Orange Free

State sequestration order issued on December 14, 1978, the Master, creditors, and the insolvent would enjoy the same rights as to the filing of inventories, [325] creditors' meetings, the proof and admission and rejection of claims, [326] the sale of assets, distribution plans, [327] the trustee's accounts, [328] the distribution of proceeds, [329] and the trustee's obligations in that regard. But the obligations for electing and appointing a trustee were excluded. The present application costs on the attorney−and−client scale, and moneys payable to the Master under local law, were administration costs.

Of some significance, it was held by Flemming J. that "only a creditor whose whole cause of action arose within the Republic of South Africa or who is an *incola* of the Republic ... shall by virtue of this order acquire any right to prove a secured or preferent claim." [330] Yet such a ruling does not cover the foreseeable situation in which Moreira might have concluded a contract in Lesotho with a Lesotho creditor who had then taken out a mortgage bond over the immovable property in the Orange Free State to secure his claim against Moreira. That creditor would not be an *incola* of the Orange Free State, nor would the whole cause of his action have arisen in that state, even though the security strengthening it had been arranged there. It is submitted that the Lesotho creditor would still have been entitled to rank as a secured creditor in respect of the immovable property in the Orange Free State. If so, then that creditor would not have obtained his right to prove a secured claim by virtue of the order in *Ex parte Steyn*, because of the way in which that order was worded.

The order in *Ex parte Steyn* went on to provide that local provisions on banking accounts and investments would apply. [331] All the above charges, costs, and proved claims would have to be paid, then the Master's written permission obtained, before any assets or remaining funds might be removed from South Africa. [332] This court order had to be published in the *Government Gazette* and a local newspaper. [333] And an insolvency court will not make an order (at least not for permanent relief) prejudicing the rights of parties not before it unless they have been duly notified of the relevant proceedings. [334]

A set of conditions tailored to the requirements of company law is to be found in *Moolman v. Builders & Developers (Pty) Ltd: Jooste intervening*. [335]

5. The Competence of Multiple Proceedings

In South African law the local recognition of the trustee does not make the debtor an insolvent. [336] Local and even foreign creditors may still sue him or seek the sequestration of his estate in South Africa; [337] no stay of proceedings usually protects the debtor from such litigation, though it should be conceded that the court in *Re African Farms Ltd* did stay a local creditor's writ of execution against movables. [338]

Such is the importance attached to protecting the interests of local creditors that, in our view, the South African approach to cross−border insolvency can be described as "modified territoriality."

D. Practical Application of the Present Principles to the Set of Facts

If the current common law were applied to our set of facts, the trustee of the American company would have to seek recognition from the South African High Court before being allowed to deal with any of the company's assets in South Africa. The trustee or trustees of any of the American directors, if those trustees were to come to South Africa in search of assets, would be able to invoke the fiction that they owned the movable assets worldwide and therefore in South Africa; but would be wise to follow the practice of applying for recognition from the High Court before attempting to deal with any local assets.

In exercising its discretion to help these foreign representatives for the sake of comity, the High Court will nevertheless set conditions such as those in *Ex parte Steyn* for the administration and realization of the local assets and the eventual removal of those assets or their proceeds from South Africa after the satisfaction of all local creditors' claims.

The recognition of these foreign representatives by the High Court would not prevent creditors of the American company or its directors − whether those creditors are foreign or South African − from instituting proceedings for the

liquidation of the American company or the sequestration of the estates of its directors.

The Cross−Border Insolvency Act 42 of 2000

A. General

Here we will not try to discuss the various provisions of the Model Law or the Cross−border Insolvency Act in detail. Yet it may be useful to give an overview of what the legislation sets out to achieve and how it does so, and to note the South African changes made to the original template.

The Cross−border Insolvency Act has been signed by the President, but the system of designating the foreign countries in respect of which it will be effective has not yet been activated by the relevant Minister of State. When we come to discuss the possible practical application of the Act, by way of an inbound request for assistance, to the set of facts we imagined at the beginning, we will presuppose that the South African Cross−border Insolvency Act will be relatively similar to the American adaptation of the Model Law when that adaptation is eventually promulgated. We will also assume that the United States will be numbered among the countries designated by the South African Minister of Justice for the purposes of the South African Cross−Border Insolvency Act.

As important for the American representative coming to South Africa is the realization that the road for the inbound representative now forks. Sections 11 and 13 of the Cross−Border Insolvency Act provide the required standing (*locus standi*) to the foreign representative or the foreign creditors to begin insolvency proceedings under the South African domestic law. The choice therefore that must be made is whether to seek recognition under the Cross−Border Insolvency Act or whether to forego recognition proceedings and instead to launch proceedings − local South African ones − under the South African insolvency laws (not the Cross−Border Insolvency Act). The main advantages of applying for recognition under the Cross−Border Insolvency Act − where this is possible because of reciprocity − are simplicity and speed: the foreign proceedings have to be recognized if the necessary requirements are met; the South African court cannot exercise a more extensive discretion to refuse recognition.

If the foreign representative must take the common−law route for recognition (because the Cross−Border Insolvency Act does not apply), then he faces having to satisfy rules giving the South African courts wider discretion. [339] (Theoretically, it would be possible to take this common−law route even if the Cross−Border Insolvency Act did apply to the facts, but this choice would be foolish because it would invite unnecessary complications.)

B. General Overview with Particular References to South African Special Features

1. The Structure of the Cross−Border Insolvency Act

After a preamble based on the Model Act, [340] the Cross−Border Insolvency Act is divided into six chapters:

(1) Interpretation and fundamental principles,

(2) Access of foreign representatives and creditors to South African courts,

(3) Recognition of a foreign proceeding and relief,

(4) Cooperation with foreign courts and foreign representatives,

(5) Concurrent proceedings, and

(6) General provisions.

In chapter 1 an important structural change from the Model Law is that the definitions appear in section 1 of the Cross−border Insolvency Act, and the scope of application is set out in section 2.

2. The South African Stylistic Features of the Cross−Border Insolvency Act

The Model Law was given a South African accent by changes of drafting style.

A long title was inserted [341] and the preamble at the beginning adapted accordingly. Reference is made to sections, not articles and the style of cross−references to subdivisions of articles differs. … Subdivisions [into subsections] were added to [sections] 14(1), 14(2) and 28. Consequential amendments and a short title were added in [sections] 33 and 34 at the end. [342]

As "granting … relief granted" was problematic in the phrase "granting, extending or modifying relief granted" in article 29(c) of the Model Law, this expression was altered to "in granting relief or in extending or modifying relief granted" in section 29(c) of the Act. "On behalf of" in article 5 was altered to "in respect of" in section 5; "evidence" in article 31, to "proof" in section 31; "shall" in articles 14(1) to (3), 15 (2) to (3), 17 (1) to (3), 18, 29, 29(*b*)(ii) and (iii), 30, and 30(*b*) and (*c*), to "must" in sections 14(1)(*a*), 14(2)(*a*) and the other corresponding sections; and "is entitled to" in articles 9, 11, 12, 16(1) and (2), and 25(2), to "may" in the corresponding sections. [343] And in the interests of comprehensive gender−neutral language, "its" in articles 1(*b*), 17(2)(*a*), 26(1) and (2), and 32 was replaced by "his or her or its" in section 1(*e*) and the other corresponding sections.

Section 2(2) to 2(4) mentions the *Gazette*. As the Cross−border Insolvency Act is a national statute, not a provincial statute, and was passed after the Constitution came into force, the reference to the *Government Gazette* is to the national *Gazette*. [344]

The preamble to the Cross−Border Insolvency Act states that it aims at cooperation between South African courts and foreign ones in cross−border insolvency matters; improved legal certainty for trade and investment; good administration to protect creditors and other interested persons, including the debtor; protection of the assets and the maximization of their value; and assistance in business rescues, thus protecting investment and saving jobs.

3. Chapter 1: Interpretation and Fundamental Principles

a. definitions

Chapter 1 on interpretation and fundamental principles is like the opening scene of a play. The six standard definitions that appear in the Model Act appear in the Cross−Border Insolvency Act also. As they appear alphabetically in the Cross−Border Insolvency Act, these definitions are "establishment" in section 1(c); "foreign court" in section 1(*d*); "foreign main proceedings" in section 1(*e*); "foreign non−main proceedings" in section 1(*f*); "foreign proceedings" in section 1(*g*); and "foreign representative" in section 1(*h*). The singular "proceeding" of the Model Law becomes plural "proceedings" throughout the Cross−Border Insolvency Act, with the necessary changes. Foreign proceedings are collective judicial or administrative proceedings (including interim ones) in a foreign State, under insolvency law in which the debtor's assets and affairs are controlled or supervised by a foreign court, for reorganization or winding−up. [345] And a foreign representative is a person or body, including an interim appointee, authorized in foreign proceedings to administer the reorganization or the winding−up of the debtor's assets or affairs or to act as a representative of the foreign proceedings. [346]

Besides these six standard definitions, section 1 of the Act contains six more placing the Act in its South African context − "court," "curator of an institution," "foreign State," "Minister," "receiver," and "Republic." The most straightforward is "Republic" − the "Republic of South Africa." [347] The relevant South African court is the High Court; [348] section 4 of the Cross−Border Insolvency Act specifies that the court competent to recognize foreign proceedings and cooperate with foreign courts is a High Court as mentioned in section 166(c) of the Constitution. [349] The relevant foreign court is a judicial or other authority competent to control or supervise foreign proceedings. [350]

The "curator of an institution" is one appointed under section 6 of the Financial Institutions (Investment of Funds) Act 39 of 1984, section 69 of the Banks Act 94 of 1990, or section 81 of the Mutual Banks Act 124 of 1993. [351] A "receiver" is a receiver or other person that the court appoints to administer a compromise or arrangement under section 311 of the Companies Act. [352] Section 5 of the Act names "the title[s] of the person or body administering

reorganization or liquidation under the law of the enacting State." [353] They are "the trustee, liquidator, judicial manager, curator of an institution, or receiver." It is noteworthy that having decided to define "curator of an institution" and "receiver," the South African Parliament did not define "trustee," "liquidator," or "trustee"; [354] probably because of the policy of not defining terms with an obvious meaning in the context of insolvency law. [355] Foreign courts, representatives, and creditors will have to read beyond the Cross−Border Insolvency Act to discover the meanings of these words. In the field of insolvency, liquidation, and bankruptcy, "trustee" and "liquidator" are terms familiar enough to those conversant with the law of the United Kingdom, for example; but a "judicial manager" is a uniquely South African appointee. [356]

The definitions "Minister" and "foreign State" in section 1 of the Cross−Border Insolvency Act go together and bear on section 2 concerning the scope of the Act. The Minister is the member of the Cabinet who sees to the administration of justice. [357] And the foreign state is one designated under section 2(2) of the Act; this designation will be discussed [358] as part of the requirement of reciprocity, an important local change to the Model Law.

b. the scope of the act, and the south african requirement of reciprocity

The Act applies in four situations: [359]

· Where a foreign court or representative asks South Africa for assistance in a foreign proceeding (inward−bound request), or,

· Conversely, where such help is requested in a foreign court in a proceeding under the laws of the Republic relating to insolvency (what we will for the sake of brevity call "local proceedings"). This request would then be an outward−bound request for assistance.

· The Act also applies when foreign proceedings and local proceedings concerning the insolvency of the same debtor are taking place concurrently (concurrent coordination); or

· Where creditors or a foreign representative ask to begin or to take part in a South African insolvency proceeding (foreign participation in local proceedings).

So the Act takes care of the main run of cross−border matters (inward−bound requests), and also the situation in *Wessels and Venter NNO, Ex parte: In re Pyke−Nott's Insolvent Estate*, [360] where local representatives want to go abroad for help. (In *Wessels*, the South African representatives were keen to unearth assets in the United Kingdom, but their application to the Orange Free State Provincial Division in what amounted to an "outward−bound request" was rejected because the representatives could not show a prima facie case or a reasonable prospect of success in the United Kingdom. [361]) And more ambitiously than the common law, the Act seeks to regulate concurrent multiple proceedings in several jurisdictions, and also to allow foreign creditors the chance to join in without suffering disadvantages because of their origins.

With the noble aims set out in the preamble to the Act and also in section 1 regarding the scope of the Act, we must contrast some unfriendly South African provisions introducing a reciprocity requirement that changes the Model Law and limits the South African adaptation considerably. [362] The Cross−Border Insolvency Act applies in respect of any State designated by the Minister by notice in the *Government Gazette.* Before making that designation, the Minister must be satisfied that that foreign state recognizes proceedings under the South African Law on insolvency to the extent that it is justified to apply the Cross−Border Insolvency Act to foreign proceedings in that state. The Minister may by notice in the *Government Gazette* withdraw any such notice, and then the foreign state will not be a foreign state for the purposes of the Act. All these notices must be approved by Parliament before they are published.

This designation procedure is reminiscent of the English approach to assisting foreign proceedings in insolvency matters. Under section 426 of the Insolvency Act 1986, the courts in the United Kingdom may exercise a discretion to assist foreign proceedings where a request is made, among others, by courts in relevant countries or territories. [363] These countries or territories are designated by the Secretary of State by order in a statutory instrument; three such orders have been issued so far, and South Africa is one of the relevant countries. [364] The South African system of

designation is wider, though: section 426 of the United Kingdom statute deals with "inbound requests" and "does not apply to permit the English court to a request assistance from a court in a relevant country or territory"; [365] whereas the South African section 2(2) to (4) will also cover the other matters mentioned in section 2(1) of the Cross−Border Insolvency Act − outward−bound requests for assistance, concurrent coordination, and foreign participation in local proceedings.

The Cross−Border Insolvency Act therefore applies only in respect of these designated states. Even after the Act itself comes into force, it will still not take effect until the Minister designates these states. And if there are foreign proceedings involving a country that is not a designated state, the South African common law on cross−border insolvency [366] will continue to apply. The system intended by the Model Law may thus take some while to function effectively as regards South Africa. We hope that South Africa's main trading partners − such as the United States and many countries in Europe − will be designated so that the Cross−Border Insolvency Act may offer a firmer base for dealing with transnational insolvency issues. And even when the system of designation is running reasonably effectively, it is still possible that there will be a delay between the introduction by another country of its local version of the Model Law and the South African designation of that foreign state for the purposes of reciprocity. In this event, the bizarre result would be that if there were proceedings between South Africa and that foreign state that would justify the application of both countries' versions of the Model Law, it would not be possible to apply the South African version until the foreign state had been designated, and in the meantime the South African common law would have to be applied in South Africa to the proceedings in question. Further, this common law would still have to be applied as regards proceedings in all undesignated countries: so we foresee a dualistic system in which the Cross−Border Insolvency Act governs some proceedings, and the common−law principles the rest. We doubt whether this dualistic system was ever contemplated by the drafters of the Model Law. What is already clear is that this process of designation is the pivot on which the whole Cross−Border Insolvency Act turns.

The introduction of this requirement of reciprocity has imposed a restriction much narrower than the standard exclusion set out in article 1(2) of the Model Law. That exclusion applies to "*types of entities, such as banks or insurance companies, that are subject to a special insolvency regime in this State and that this State wishes to exclude from this Law*." [367] Instead, the South African adaptation applies its restriction to entire legal systems.

If the Cross−Border Insolvency Act conflicts with treaty obligations, the latter prevail. [368] And the court may refuse to act under the new statute if it would manifestly infringe South African public policy to do so. [369]

The Cross−Border Insolvency Act may largely neutralize the principle in *Ex parte Wessels* requiring a prima facie case or a reasonable prospect of success. Now a trustee, liquidator, judicial manager, curator of an institution, or receiver is authorized to act in a foreign State concerning South African insolvency proceedings; this person can act as the relevant foreign law allows. [370] Further, the Act must be interpreted with consideration for its international origin, and the need to promote uniformity in its application and the observance of good faith. [371] And the court, trustee, liquidator, judicial manager, curator of an institution, or receiver may give extra help to a foreign representative under other South African laws. [372]

4. Chapter 2: Foreign Representatives' and Creditors' Access to Courts in the Republic

Chapter 2 is the gateway for foreigners. Thus a foreign representative enjoys direct access by applying directly to a South African court for relief; [373] quick, direct access, without the laborious procedure of letters of request or diplomatic or consular communications. [374] (Section 9 follows the wording of the Model Law in referring to "relief" only; but we submit that it would have been clearer if the Model Law had referred to "recognition and relief.") By a "safe conduct rule," [375] his application for relief does not, he is reassured, subject him or the debtor's foreign assets or affairs to the South African courts' jurisdiction for any purpose other than the application. [376] Other possible grounds of jurisdiction, though, remain unaffected. Further, the foreign representative may apply to begin South African insolvency proceedings, as long as the relevant requirements are met. [377] He enjoys this standing even before the foreign proceedings have been recognized; an important advantage if the debtor's assets urgently need to be preserved. [378] And once foreign proceedings are recognized, he may participate in South African insolvency proceedings [379] governed still by South African law. [380]

The foreign creditors enjoy the same rights as South African creditors as regards beginning and taking part in South African insolvency proceedings. [381] Nor may their claims be ranked lower than non−preferent claims. [382] (But South African law on the ranking of claims remains otherwise unaltered, [383] and governs the ranking of claims concerning South African assets. [384]) In addition, when South African creditors have to be notified under South African insolvency law, known creditors without South African addresses also have to be notified. [385] The notification requirements stipulate that the notice must contain any other information that should be included in such a notice to creditors under South African law or court orders. [386] The problem with these notification requirements under section 14 of the Cross−Border Insolvency Act is that only creditors in designated countries receive this notification. Under the common law, there must be publication in local newspapers; there is one decision requiring publication abroad. We think that in the spirit of the Model Law, the South African High Court should nevertheless require publication abroad even in respect of those countries not designated, thus combining the best of the Model Law (as no doubt originally intended) and the South African common law. This problem of notification suggests a further point: it is advisable that the foreign representative work closely with a South African representative to facilitate the conduct of the recognition proceedings and later the administration, realization, and distribution of the estate. The local representative will have contacts that the foreign counterpart may usually lack: one has to offset costs of a local representative against speed and efficiency. [387]

5. Chapter 3: Recognition of Foreign Proceedings and Relief

Chapter 3 is the engine−room of the Act: it provides most of the rules to regulate recognition and relief.

a. the requirements for seeking recognition

A foreign representative wishing recognition must approach the High Court with a certified copy of the decision beginning the foreign proceedings and appointing the foreign representative, or a certificate from the foreign court affirming the existence of the foreign proceedings and his appointment, or else any other evidence acceptable to the court about this existence and this appointment. [388] He must also state all foreign proceedings that, to his knowledge, concern the debtor. [389]

The representative also benefits by the simple requirements for proof. Presumptions apply to the foreign proceedings, the foreign representative, and the authenticity of the documents. [390] But the court is still allowed to require proof in its discretion.

b. provisional relief on application for recognition

The foreign representative may also seek discretionary, provisional relief when he applies for recognition of the foreign proceedings. [391] This relief may be granted even before the South African High Court has in fact recognized these foreign proceedings. But the foreign representative has to seek that relief, and show that it is urgently needed to protect the assets of the debtor or the interests of the creditor. With certain limitations, "the measures available under [section] 19 are essentially the same as those available under [section] 21" of the Cross−Border Insolvency Act. [392] This urgent provisional relief may be granted at any time between the time of filing an application for recognition and the time of deciding that application. It may include [393] staying execution against the debtor's assets; entrusting to the foreign representative or the High Court's designee the administration or realization of South African assets that are perishable, susceptible to devaluation, or otherwise in danger; and any relief mentioned in sections 21(1)(c), (*d*), or (*g*). Local notification requirements apply. [394] As we have seen, [395] notification to creditors carries with it the obligation of notifying the known creditors that do not have addresses in South Africa. This urgent provisional relief is available at any time between the filing of an application for recognition and the time the application is decided on. [396] And it continues until the recognition application is decided; but may then be extended as discretionary relief in terms of section 21(1)(*f*). [397] The South African court may refuse to grant this relief under section 19 if it would hinder the administration of foreign main proceedings. [398]

c. the recognition of proceedings as either foreign main or foreign non−main proceedings

If all the documentation is in order, and the application is made to the High Court, then, as long as there is no public policy objection, [399] the foreign proceedings must be recognized if they meet the section 1(*g*) definition and the foreign representative meets the section 1(*h*) definition. [400]

When the application for recognition is launched, a crucial distinction has to be drawn promptly by the applicant and later by the court. [401] The foreign proceedings have to be recognized either as foreign main proceedings or as foreign non−main proceedings. [402] Foreign main proceedings take place in the jurisdiction where the debtor has the center of its main interests, [403] rebuttably presumed to be the debtor's registered office or the individual's habitual residence. [404] And foreign non−main proceedings take place in the foreign state where the debtor has an establishment, [405] a place of operations where the debtor carries out a non−transitory economic activity with human beings and goods or services. [406]

Flexibility as regards recognition is provided by section 17(4). Recognition may be modified or terminated if it is shown that the grounds for granting it were fully or partly lacking, or have ceased to exist. This provision recognizes that the status of foreign proceedings may change (for example, a liquidation may be changed into a reorganization or vice versa) and new facts may emerge. For example, the foreign representative may have disregarded conditions set by the foreign court. [407]

Apart from the public policy aspect, the provisions in section 17 on the decision to recognize foreign proceedings do not include rules for evaluating the correctness of the foreign court's decision. One of the purposes behind this legislation is the encouragement of speed so as to prevent dissipation or concealment of the assets. [408]

d. the effects of recognition of foreign main proceedings

The recognition of proceedings as foreign main proceedings has important effects: [409]

· The stay of the commencement or the continuation of individual legal actions or individual legal proceedings [410] as to the debtor's assets, rights, obligations, or liabilities;

· The stay of execution against the debtor's assets;

· The suspension of the right to transfer, encumber, or otherwise dispose of any assets of the debtor; [411] and

· The application of section 21 of the Insolvency Act [412] to South African assets as if the debtor's estate had been sequestrated by a local court − this is a South African addition [413] to the Model Law.

In linking section 21 of the Insolvency Act to the foreign main proceedings, the Cross−Border Insolvency Act vests the solvent spouse's South African assets in the foreign representative. Thus the new Act changes the South African common law as declared in *Viljoen v. Venter NO*, under which section 21 of the Insolvency Act does not apply to proceedings for the recognition of the foreign trustee's appointment. [414]

In accordance with the instructions of the Model Law, [415] the Cross−Border Insolvency Act also subjects the stay and suspension − in their scope, modification, or termination − to various provisions of the Insolvency Act and the Companies Act. The stay and suspension are limited by sections 20, [416] 23, [417] and 75 [418] of the Insolvency Act, and sections 341 [419] and 359 [420] of the Companies Act, and may be altered or terminated by the court if the foreign representative or a person affected by section 20(1) of the Cross−border Insolvency Act requests. [421]

If a creditor's claim is about to prescribe, then he may begin an individual action or proceedings to preserve his claim. [422] Nor does the recognition of the foreign proceedings as foreign main proceedings affect the right to request the commencement of South African insolvency proceedings or the right to file claims in them. [423]

As regards the effects mentioned in section 20 of the Cross−Border Insolvency Act, it should be noted that the automatic stay applies only in favor of foreign main proceedings. But if local South African proceedings begin after the recognition or filing of an application for recognition of a foreign main proceeding, then the automatic stay must

be modified or terminated if it is inconsistent with those local proceedings. [424] The stay and suspension are activated automatically when the main proceeding is recognized. [425]

In passing we find it odd that the structure of the Cross−Border Insolvency Act is detailed in providing for proper publication of provisional relief under section 19; but when it comes to recognition of foreign main proceedings under section 20 and to relief that may be granted upon recognition of (any) foreign proceedings under section 21, there is no similar specific provision. These gaps mean that the court will have to remember to incorporate by reference sections 17 of the Insolvency Act [426] and section 357(1) and (4) of the Companies Act [427] when it comes to state, under section 21(4) of the Cross−Border Insolvency Act, [428] which provisions of the South African law will apply to the administration, realization, or distribution of the estate. These gaps are to be found in the Model Act itself, and we suggest that they should be filled by enacting states when the time comes. Our remarks about the wisdom of cooperating with a South African representative apply here also. [429]

e. other advantages in favor of foreign main proceedings

Certain other advantages apply in favor of the foreign main proceedings. Urgent relief under section 19 may be refused if it will interfere with the administration of main proceedings. [430] South African insolvency proceedings may be commenced only if the debtor has assets in South Africa, and these local proceedings are then restricted in effect to the debtor's assets in South Africa. [431] Further, relief in non−main proceedings must be consistent with main proceedings. [432] There is a rebuttable presumption, for the purposes of commencing South African insolvency proceedings, that the debtor is insolvent. [433] But this presumption does not apply where the foreign proceedings are foreign non−main proceedings.

At first blush there seems to be a conflict between sections 11 and 28(1) of the Cross−Border Insolvency Act, in that section 11 apparently grants the foreign representative, like foreign creditors, the right to apply for a local insolvency proceeding but section 28(1) seems to require recognition of a foreign main proceeding before the commencement of a local procedure relating to insolvency. When one reads the *Guide*, [434] however, it seems that section 28 was not intended to restrict the application of section 11 but to maintain the rights of the interested parties to launch local proceedings according to local laws, even though a foreign main proceeding might have recognized. In other words, sections 11 and 28(1) of the Cross−Border Insolvency Act should be read independently.

f. discretionary relief in regard to all foreign proceedings

Appropriate discretionary relief may be granted, whether the foreign proceedings are main proceedings or non−main proceedings, in order to protect the interests of the debtor or the creditors. The foreign representative must ask for this discretionary relief. It includes:

· Staying individual legal actions or legal proceedings in so far as not stayed under section 20(1)*(a)*;

· Staying execution in so far as not stayed under section 20(1)*(b)*;

· Suspending the right to transfer, encumber or otherwise dispose of any assets of the debtor in so far as not suspended under section 20(1)(c);

· Providing for the examination of witnesses, the taking of evidence or the delivery of information about the debtor's assets, affairs, rights, obligations or liabilities;

· Entrusting the administration or realization of all or part of the debtor's assets located in the Republic to the foreign representative or the court's designee;

· Extending provisional relief granted under section 19(1);

· Granting any additional relief that may be available to a trustee, liquidator, judicial manager, curator of an institution, or receiver under South African law. [435]

Distribution of the debtor's South African assets is possible. (In American law this step is called turnover.) At the foreign representative's request, the court may entrust the distribution of all or some of the debtor's assets in South Africa to that representative or another court designee. But the court must be satisfied that the interests of creditors in South Africa are adequately protected. [436]

Discretionary relief as regards non−main proceedings has a further requirement. The court must be satisfied that the relief concerns assets that under South African law should be administered in the foreign non−main proceedings, or that the relief concerns information required in those proceedings. [437]

Section 21 of the Cross−Border Insolvency Act adds a further South African provision: "Without derogating from the application of the laws of the Republic generally, in granting relief under this section the court must indicate the laws of the Republic relating to the administration, realization or distribution of a debtor's estate in the Republic that will apply." [438] The South African courts may therefore be expected to set conditions for the realization of assets and the removal of their proceeds from South Africa to the foreign proceedings. Specimens of such conditions are to be found in the orders granted in *Ex parte Steyn* [439] and in *Moolman v. Builders & Developers (Pty) Ltd: Jooste intervening*. [440] The court order should provide for notice of the recognition of the foreign representative, "especially if interim relief was not granted" under section 19. [441] We consider this notification of such recognition to be particularly important because the Cross−Border Insolvency Act does not contain specific provisions ordering officials such as the staff of the various Deeds Offices in South Africa to acknowledge and give effect to the orders and findings made in terms of the Act. Even where such notification can be inferred through applying provisions of domestic South African legislation that are mentioned by means of cross−references in the Cross−Border Insolvency Act, it would be far more convenient and much clearer for all concerned if the necessary recognition were to be expressed in the relevant court order. It would be even more desirable if the court order, besides stating the relevant recognition, were to express the command that the relevant foreign persons were to be accorded every legitimate consideration and assistance. This further command would go a long way to preventing obstruction or delay in compliance, and would advance the ideals of cooperation and promptness and practicality in the Model Law.

g. further consequences of the recognition of foreign proceedings

The recognition of foreign proceedings has other consequences. Recognition gives the foreign representative the right to take part in proceedings concerning the debtor under South African insolvency law, [442] though it does not vest in him any specific powers or rights. [443] Once the foreign proceedings are recognized, the foreign representative may intervene in any proceedings to which the debtor is a party. All other requirements of South African law must, however, be met. [444]

From the time when he files his recognition application, the foreign representative must promptly inform the court of any change in the status of the proceedings or the status of his appointment, and of any foreign proceedings concerning the same debtor that become known to him. [445] The South African requirement, under section 18, of "any change" is thus stricter than the requirement "any substantial change" in the Model Law. [446]

In accordance with the instructions of the Model Law, [447] section 23 of the Cross−Border Insolvency Act deals with actions to avoid acts detrimental to creditors that a trustee or liquidator enjoys under South African law. [448] But again, when the proceedings are foreign non−main proceedings, the court must be satisfied that the action concerns assets that under South African law must be administered in the foreign non−main proceedings. [449] Section 23(1) gives the foreign representative standing to initiate "any legal action to set aside a disposition that is available to a trustee or liquidator under the laws of the Republic relating to insolvency." These legal actions in South African law comprise the various statutory actions and the *actio Pauliana* at common law. [450]

Once foreign main proceedings have been recognized, the debtor is rebuttably presumed to be insolvent as far as the initiation of proceedings under the South African law of insolvency is concerned. This presumption adds in effect a ninth act of insolvency to the other eight in the Insolvency Act. [451] The significance of these acts of insolvency is that when a creditor comes to apply for the compulsory sequestration of the debtor's estate, he has to prove several requirements, one of which is that the debtor has committed an act of insolvency or is insolvent. [452] It is easier for the creditor to prove the commission of one of these acts of insolvency than the fact of the debtor's insolvency.

When granting or denying relief under section 19 (discretionary relief upon application for recognition) or section 21 (discretionary relief upon recognition of foreign proceedings), the court must be satisfied that the interests of the creditors and other interested persons, including the debtor, are adequately protected. It must similarly take account of these interests when modifying or terminating relief. The court may set what it considers appropriate conditions. If the foreign representative or a person affected by the relief so requests, the court may modify or terminate the relief. [453]

The Act thus seeks a balance between the relief given to the foreign representative and those whom it affects. [454] The persons affected are given standing. [455] The creditors are not restricted to local creditors; the *Guide* argues that "there is no justification for discriminating creditors on the basis of criteria such as place of business or nationality." [456]

6. Chapter 4: Cooperation with Foreign Courts and Representatives

In the proceedings mentioned in section 2(1) on the scope of application of the Cross−Border Insolvency Act, the court must cooperate as much as possible with foreign courts or representatives, either directly or through a trustee, liquidator, judicial manager, curator, or receiver. [457] And it may communicate and seek information or help directly from foreign courts or representatives. [458] Similar cooperation is expected of a South African representative, exercising his functions subject to the court's supervision. He in turn has the right of communicating directly with foreign courts and representatives. [459] The local representative is thus empowered to draw up and carry out cooperative arrangements.

Various methods for cooperation are suggested as examples, [460] and further recommendations are to be found in the *Guide*. [461] In regard to these methods and suggestions, it occurs to us that videoconferencing could speed up the application for urgent relief, for example: the courts of two countries could arrange a videoconference during which the foreign representative could introduce himself and state his need for urgent relief, hold up the relevant documents and even lead the necessary oral evidence, and the two judges could confer. That this idea is not far−fetched is supported by the comment of Mr. Justice Zulman that videoconferences are already being used in the hearing of bail applications in criminal cases where the accused are considered too dangerous to be transported from prison to court in South Africa. The court is thus linked up with the prison. If this procedure is legitimate and practical in South African criminal cases, why not in civil cases on cross−border insolvency too? A further benefit of the videoconference is that it would concentrate the minds of all concerned who knew that they would have to be seen to be cooperating in real time on camera, rather than seeking refuge in remoteness, formality, and delay. Particularly is this so when it is remembered that for cooperation to take place under the Model Law and the Cross−Border Insolvency Act, it is not necessary that there should first be a formal decision recognizing the foreign proceedings, [462] and direct cooperation intentionally avoids laborious old procedures such as letters rogatory and helps courts act urgently. [463]

It is obvious, however, that this cooperation in cross−border insolvency proceedings will be a novelty in South Africa. The finer points and practices will have to be worked out over time.

7. Chapter 5: Concurrent Proceedings

The forms of cooperation mention the coordination of concurrent proceedings regarding the same debtor. In this regard, the first item is the institution of South African proceedings after foreign main proceedings have been recognized. [464]

a. the rule on the pre−eminence of local proceedings

For such local proceedings, the debtor must have assets in South Africa. The effects of the local proceedings are then limited to those assets and to any others that, so as to coordinate proceedings in terms of sections 25 to 27, should be administered in those proceedings. [465] Further rules are supplied that depend on the timing of these two proceedings. [466] Section 29 "maintains a pre−eminence of the local proceeding over the foreign proceeding." [467] At all times, if foreign proceedings and local proceedings are running concurrently involving the same debtor, the court must seek cooperation and coordination under chapter 4 of the Cross−Border Insolvency Act. [468]

b. local proceedings begun, then foreign recognition sought

Where South African proceedings have been instituted and an application for the recognition of the foreign proceedings is then filed in South Africa, this timing limits the relief that may be granted in respect of the foreign proceedings. [469] This relief, whether granted under section 19 or under section 21, must accord with the South African proceedings, [470] and even if the foreign proceedings are recognized in South Africa as foreign main proceedings, section 20 does not apply. [471]

c. foreign recognition recognized or sought, then local proceedings begun

In the converse situation where foreign proceedings have been recognized or the application for their recognition has been filed, and South African proceedings are then instituted, the High Court must review the relief granted under section 19 or 21 in favor of the foreign proceedings, and modify or terminate it if it does not accord with the South African proceedings. [472] If the foreign proceedings are foreign main proceedings, the stay and suspension under section 20(1) must be altered or ended if inconsistent with the South African proceedings. [473] And if the foreign proceedings are non−main proceedings, then the court must be satisfied that the relief concerns assets that under South African law should be administered in those foreign proceedings or concerns information required in those proceedings. [474]

d. several foreign proceedings, no local proceedings

Section 30 on the coordination of foreign proceedings applies when several foreign proceedings involve the same debtor. Section 30 applies even if there are no such South African insolvency proceedings; and if, besides two or more foreign proceedings, there are South African proceedings as well, the court must then apply sections 29 and 30 together. [475]

First of all, the court must seek cooperation and coordination under chapter 4 of the Cross−Border Insolvency Act. [476] Then a pecking order is established among the various foreign proceedings: if foreign main proceedings have been recognized, then any relief granted under section 19 or 21 to a representative of foreign non−main proceedings must accord with the foreign main proceedings. [477] By contrast, if foreign non−main proceedings have been recognized, or an application for their recognition has been filed, and then foreign main proceedings are recognized, the court must also review any relief in effect under section 19 or 21 and modify it if inconsistent with the foreign main proceedings. [478] And as between two foreign non−main proceedings, the court must grant, modify, or terminate relief so as to assist coordination of the proceedings. [479] No foreign non−main proceedings are treated as inherently superior to others. [480]

Chapter 5 ends by applying the hotchpot rule on payment in concurrent proceedings. [481]

8. Chapter 6: General Provisions

Chapter 6 used to contain sections 33 and 34. Section 34 is the simpler, giving the Act its short title, the Cross−Border Insolvency Act, 2000, and stating that it will come into force on a date set by the President's proclamation in the *Gazette*.

Section 33 was more complicated. It has been repealed. [482] Initially it amended the proviso to section 149(1) of the Insolvency Act. Section 149(1) of the Insolvency Act prescribes the jurisdictional rules regarding applications for *sequestration orders under that Act*, and used to read as follows: [483]

(1) The [High] court shall have jurisdiction under this Act over every debtor and in regard to the estate of every debtor who−

(*a*) on the date on which a petition for the acceptance of the surrender or for the sequestration of his estate is lodged with the registrar of the court, is domiciled or owns or is entitled to property situate within the jurisdiction of the court; or

(*b*) at any time within twelve months immediately preceding the lodging of the petition ordinarily resided or carried on business within the jurisdiction of the court:

Provided that when it appears to the court equitable or convenient that the estate of a person *not domiciled in the Republic be sequestrated elsewhere*, or that the estate of a person over whom it has jurisdiction be sequestrated by another court within the Republic, the court may refuse or postpone the acceptance of the surrender or the sequestration.

The intention with section 33 of the Cross−Border Insolvency Act (now repealed) was to amend the proviso to section 149(1) of the Insolvency Act in order to prevent a High Court from applying the *forum non conveniens* rule to foreign applicants from designated countries. But this intention was not matched by the wording of the amendment, which merely repeated the pre−existing proviso: therefore section 33 was repealed and the part indicated above in bold in the proviso to section 149(1) was subsequently replaced. The proviso now reads as follows: [484]

Provided that when it appears to the court equitable or convenient that the estate of a person *domiciled in a State which has not been designated in terms of section 2 of the Cross−Border Insolvency Act, 200 (Act No. 42 of 200)*, should be sequestrated by a court outside the Republic**,** or that the estate of a person over whom it has jurisdiction be sequestrated by another court within the Republic the court must or postpone the acceptance of the surrender or the sequestration.

The intention is now clear in that the amended proviso ousts the *forum non conveniens* rule with regard to foreign debtors domiciled in a designated state. But that rule still applies to such persons coming from non−designated states and applying for sequestration orders in terms of the Insolvency Act. Yet the problem remains that without a clear provision regarding jurisdiction in the Cross−Border Insolvency Act, it cannot be accepted that section 149 of the Insolvency Act applies to all proceedings, for instance, the application to recognize a foreign proceeding. Nor does section 149 of the Insolvency Act apply to the winding up of a company, because the Companies Act contains its own jurisdiction provision in section 12. We submit that section 149 of the Insolvency Act in its current format will apply only when a foreign creditor or representative launches a local sequestration proceeding in terms of the Insolvency Act. For the sake of clarity, the South African Parliament should have included an original jurisdiction provision in the Cross−Border Insolvency Act based on section 149 of the Insolvency Act and section 12 of the Companies Act.

VII. Practical Application of the Cross−Border Insolvency Act to the Set of Facts

A. General

Cronin states that the Working Group on the Model Law knew it would be nearly impossible to formulate a workable regime that would change the substantive insolvency laws of the member states. [485] The result of this was a procedural regime that requires access for all relevant parties by leveling the playing fields to allow foreign representatives equal, simple, fast access to a foreign jurisdiction by allowing the state involved to maintain its own substantive insolvency law. But it is important to note that the various procedures within different jurisdictions also differ, and that the Model Law states the requirements for gaining access (that is, the substance of the relief sought) rather than the particular procedure to be applied. From another angle it would be interesting to see in years to come how far the Model Law will foster the emergence of more similar insolvency rules within the different jurisdictions and promote universality. [486]

The Model Law does not prescribe the particular civil procedures to be followed by the various states that enact it. As these procedures regarding their form as well as the court structures may differ, it is important for every state enacting the Model Law to address these issues as well when attempting to enact the Model Law. But in all types of court procedures it is imperative to establish that the person opening the case has the required standing (*locus standi*) to act in the particular matter; to deal with jurisdiction in order to approach the correct court; to follow the correct procedure for the particular case; and to establish a basis for the order required. For the recognition procedure, the Cross−Border Insolvency Act uses the term "apply." This term has a specific meaning in South African law, particularly in civil procedure. [487] When an application is brought in terms of the Cross−Border Insolvency Act, the following aspects need to be considered in order to comply with the procedural aspects and furnish the contents of the application:

· Standing (*locus standi*) and the form of the application;

· Jurisdiction;

· The contents (the basis) of the application.

B. Standing

(Locus Standi) *and the Form of the Application*

The Cross−Border Insolvency Act clearly establishes a right of direct access to the South African High Court. [488] Regarding recognition, section 9 of the Cross−Border Insolvency Act states that a foreign representative may "apply" directly to a court in the Republic for relief. [489] Section 9 does not indicate which particular division of the High Court should be approached. It is significant that the verb "apply" is used within the context of direct access, for this word indicates application procedure (motion procedure) in South African civil procedure. [490]

Where the relief sought by the foreign representative is in the form of recognition of the foreign proceedings, the application will be by means of an *ex parte* application brought in the name of the foreign representative. The court order sought would take the form of a declaratory order. The application must be based on form 2 of the prescribed forms of the High Court and must also comply with rule 6 of the High Court rules. The application must be accompanied by a founding affidavit by the foreign representative setting out his or her standing (*locus standi),* the jurisdiction of the particular court, and the basis of the application. [491] The "safe conduct rule" applies: the foreign representative's right of direct access does not subject him or the foreign assets and affairs to the jurisdiction of South African courts for any other purpose than the application, that is, the relief applied for. [492]

With regard to the current practice of applying for recognition in terms of the common law, Meskin and Kunst [493] submit that in all cases where there are local creditors the court should initially issue a rule *nisi* with directions as to its publication, and that a recognition order should not be issued without affording the insolvent an opportunity of being heard, unless the court is satisfied that the insolvent is aware of the proceedings and does not intend to oppose them. Issuing a rule *nisi* advances due process under the Constitution [494] and complies with the *audi alteram partem* rule; but it may defeat the purpose of seeking recognition and relief where, for example, the debtor could transfer money out of South Africa at the press of a button. This nettlesome matter therefore raises a constitutional issue that will also have to be worked out in due course.

1. Jurisdiction

Although section 4 of the Cross−Border Insolvency Act states that it is the High Court that performs the functions under the Act, it does not specify which particular High Court is to be approached. There are various provincial and local divisions of the High Court in South Africa, each exercising jurisdiction within its own designated area. [495] As the Cross−Border Insolvency Act does not, unfortunately, contain its own jurisdiction provision, the ordinary legal principles dealing with the jurisdiction of the High Courts thus need to be followed so as to satisfy the jurisdiction requirement. [496]

The foreign representative applying for recognition will have to decide which division of the High Court to approach. This point might pose a practical problem because more than one division might, for instance, have jurisdiction to hear the matter. The selection will have to be based on considerations of convenience and expense. [497] Once a case has been opened in a particular court, the applicant will be bound to continue the proceedings in that particular court unless leave is granted to transfer the matter to another division of the High Court.

The jurisdiction of the High Courts is determined in general by rules in the Supreme Court Act 59 of 1959 (hereinafter "the Supreme Court Act") and rules of the common law. Other legislation may contain further specific rules to be applied in a particular case, [498] or it may even oust the jurisdiction of the court in particular matters. [499] It still remains important to consider the precise grounds on which to base jurisdiction, for these depend upon the nature of the relief claimed in each case as well as other considerations. [500] In the present instance the foreign representative seeks

judicial recognition of a foreign proceeding by means of a declaratory order.

When the foreign representative must establish jurisdiction in the designated area of the High Court he must show a connecting factor (*nexus*) enabling that specific court to exercise jurisdiction. [501] For the judge when approached may ask: "What brings you to my Court?" It must nevertheless be noted that a court order once granted will apply throughout the Republic of South Africa. [502]

Under section 19(1)(*a*) of the Supreme Court Act, a division of the High Court has jurisdiction over all persons residing or being in its area of jurisdiction, in relation to all causes arising within its area of jurisdiction, and in relation to all other matters of which it may take cognizance according to law. The expression "causes arising" is not limited to a cause of action but means "legal proceedings duly arising." [503] Nevertheless, the section is not decisive on its own, and the principles of the common law regarding jurisdiction need to be followed in order to ascertain the competency of a particular court to adjudicate a matter.

"Residence" connotes something other than domicile; a person may have more than one residence at a time, but cannot be said to reside at a place that he is visiting temporarily. [504] It would thus be possible to apply for recognition to the court within whose area of jurisdiction the debtor may be residing at the time of the application. A foreign company is deemed to be a resident where it carries on business. [505]

Where the "debtor" does not reside within South Africa, the location of foreign assets will be an important indicator of which division of the High Court to approach. Although there are certain exceptions, the general rule is that the court within whose designated area of jurisdiction the assets are situated will have jurisdiction.

Although jurisdiction might seem to pose problems in a particular case because of the South African rules regulating jurisdiction, we suggest that it would tend not to do so: it has not created a real problem in applications for recognition in terms of the common law, and there is no reason that it should do so in applications under the Cross−Border Insolvency Act.

The basis of jurisdiction is said to be effectiveness, "the idea that jurisdictional rules should ensure that the court is in a position to give a meaningful judgment." [506] This aspect also depends on the nature of the proceedings, the nature of the relief claimed, or sometimes on both. [507] South African High Courts nevertheless apply principles of convenience and common sense, among other considerations, to determine whether a particular division has jurisdiction to hear and determine a particular cause. [508] But this principle is said not be a connecting factor in itself. [509] A party observing the general rule requiring a connecting factor should examine the particular facts and then approach the court where a connecting factor exists. In this regard the following factors should be important indicators:

· The location of assets of the foreign debtor;

· The local court that granted a sequestration or liquidation order in the case of a local proceeding;

· The place where the foreign debtor resides or is deemed to reside within the Republic of South Africa;

· The place where the debtor carries on business within the Republic.

It would not really make sense to bring an application to a specific division of the High Court if no connecting factor exists. Although there are no precedents in this regard, we submit that the South African courts would be more lenient should a jurisdictional issue arise in terms of the Cross−Border Insolvency Act, even if the principle of convenience is said not to establish a connecting factor in itself. [510] This submission is supported by the South African interpretational rules and the existence of the inherent jurisdiction that the High Courts enjoy at common law. The tenor of the Cross−Border Insolvency Act is cooperation and the provision of effective measures for dealing with cross−border insolvency. [511] In the interpretation of this Act, regard is to be had to its international origin and the need to promote uniformity in its application and the observance of good faith. [512]

It is controversial in South African law whether the principle of *forum non conveniens* applies in general, in that a court of competent jurisdiction may decline to hear a matter if it appears more practical that it should be heard elsewhere in a foreign jurisdiction. [513] Foreign representatives should note that, under 9 of the Supreme Court Act, any civil proceeding or matter instituted in any division of the High Court may upon application by any party thereto be transferred to another division of the High Court if that matter may be more conveniently or more fitly heard or determined in another division. The facts of the matter may thus necessitate the transfer of the matter to another division. It appears to be a requirement that the court which first heard the matter must itself have had jurisdiction but that the court to which the matter was referred need not have been originally competent. [514]

We submit that once jurisdiction has been established for recognition purposes, it will not be conclusive for all subsequent litigious matters, such as the setting aside of a disposition or a claim based on a contract. In each such matter that might arise, the general rules governing jurisdiction will have to followed.

At this point we can note the difference between foreigners from designated countries who seek to initiate or participate in local South African proceedings, and foreigners from non−designated countries who wish to do so. For those foreigners from non−designated countries may still find that the proviso to section 149(1) of the Insolvency Act [515] can be invoked by an intervening creditor (foreign or local) or by the court of its own accord, so as to send the foreign applicant back to where he came from or to somewhere else abroad. This preliminary reverse thus illustrates the benefit for foreigners from designated countries. If the debtor is a company, whether a local or an external company, it will become a factual issue whether section 12 of the Companies Act will apply to local proceedings. [516]

2. The Contents of the Application

The format of an *ex parte* application should comply with form 2 of the prescribed court forms. The founding affidavit must be accompanied at least by:

a certified copy of the decision commencing the foreign proceedings and appointing the foreign representative; [517] or

a certificate from the foreign court affirming the existence of the foreign proceedings and of the appointment of the foreign representative; [518] or

in the absence of evidence referred to in paragraphs (a) and (b), any other evidence acceptable to the court of the existence of the foreign proceedings and of the appointment of the foreign representative; [519] and also by

a statement identifying all foreign proceedings in respect of the debtor that are known to the foreign representative. [520]

The language of the foreign jurisdiction may be a stumbling−block; the court may therefore require the documents supplied in support of the application for recognition to be translated into an official language of South Africa. [521]

Section 16 creates certain presumptions on which the court hearing the matter may rely. If the decision or certificate regarding the foreign proceeding and appointment of the representative referred to in section 15(2) indicates that the foreign proceedings are proceedings within the meaning of section 1(*g*), that is, collective judicial or administrative proceedings, and that the foreign representative is a person or body within the meaning of section 1(*h*), the court may so presume. The court may also presume that documents submitted in support of the application for recognition are authentic, whether or not they have been legalized. Finally, in the absence of proof to the contrary, the debtor's registered office, or habitual residence in the case of an individual, is presumed to be the center of the debtor's main interests.

In addition, we strongly recommend that the foreign representative or the foreign creditor should specify in the application papers what additional relief he wants the South African High Court to grant in terms of section 21 of the Cross−Border Insolvency Act. [522] He will thus help the court to specify the laws of the Republic relating to the administration, realization, and distribution of a debtor's estate that should apply to the particular facts. Guidance on the form of the court order may be gleaned from examining the orders in *Ex parte Steyn* as regards individuals and *Moolman* as regards companies. [523] The court may grant any appropriate relief, including the authorization of a

foreign representative or a (local) trustee or liquidator to take care of the administration and realization of the debtor's local assets. [524]

C. Consequences and Effects of the Order in the Present Set of Facts

We accept that the South African High Court, even though no South African insolvency proceedings may yet have been opened, will nevertheless, applying precedents such as the order in *Ex parte Steyn*, order that the realization, administration, and distribution of the assets in South Africa will be governed by the Insolvency Act and the Companies Act as appropriate, as though insolvency proceedings had already been instituted. [525] This point brings home the perhaps concealed truth that the court has considerable powers of ordering how the cross−border matter will run: so much is still dealt with in terms of (domestic) South African law.

1. Assets

All the assets will be governed by the local rules on realization, administration, and distribution. [526] In particular, the explosives used by the company may form the subject of an order for urgent relief made by the High Court at the instance of the foreign representative so that those assets can be protected and their value preserved. [527]

As for the director supervising matters in South Africa, his American trustee may be surprised to discover that the controversial section 21 of the Insolvency Act automatically applies to the apartment and other local assets of this director's solvent wife and vests them eventually in the foreign representative. [528] The wife should be astute to invoke her rights to apply for the release of the assets under section 21(2) of the Insolvency Act.

2. Stay and Suspension of Proceedings and Execution

Should the bank meanwhile take judgment and obtain a warrant of execution, the order recognizing the trustee of the company stays the bank's intended course of action. The bank may not execute the warrant; and if it had not yet taken judgment, it would not have been able to proceed even with that step.

The court may also grant a stay and suspension, which will temporarily prevent local creditors from attaching any assets of the company in South Africa. The effect, we suspect, is that even the landlord's legal hypothec, though it can be established by proper inventorying of the assets, cannot be carried into effect or stop the stay and suspension. Yet the court may take the existence of this hypothec into consideration when hearing the matter.

The stay and suspension will nevertheless be subject to the local provisions set out at length in sections 20, 23, and 75 of the Insolvency Act and sections 341 and 359 of the Companies Act. In other words, for example, local exemptions will apply: the foreign representative may well not get all the debtor's assets.

3. Creditors, Local and Foreign

The local creditors of the company include a secured preferent creditor (the landlord for rent *in arrears*), non−secured statutorily preferent creditors (the ex−employees), and at least one important non−preferent unsecured (concurrent) creditor, the bank relying on its guarantee. (The guarantees by the American directors are contracts, personal security, and thus do not render real security in favor of the bank. But the bank would try to recover its full claims by going after the local assets of the company and if these are insufficient, then it might consider launching an application to the High Court for relief in America (an outward−bound request under section 2(1)(b) of the Cross−Border Insolvency Act).) The South African company may also suffer contractual damages as a result of the inability of the American company to complete its contractual obligations: these will usually be concurrent claims. Very important, if sections 12 and 13(2) of the Cross−Border Insolvency Act are read together and the High Court so directs under section 21(4), the foreign representative may be seen as representing the American creditors of the company, who thus rank equally with the South African concurrent creditors in so far as they may not otherwise be secured or preferent creditors in terms of South African insolvency law. The order in which all these creditors will be paid is determined by the South African order of preference in terms of the Insolvency Act. [529]

The foreign creditors are helped considerably by the new requirements for notification in section 14 of the Cross−Border Insolvency Act. So these creditors should now know of any new proceedings to be launched against the American company. [530]

4. Employees in Particular

The order of preference includes section 98A of the Insolvency Act dealing with the preferential portion of ex−employees' claims for damages. There is some uncertainty how section 38 of the Insolvency Act could be applied together with section 197 of the Labor Relations Act to these particular facts, since it seems unlikely that the company would be sold as a going concern. Foreign representatives still need to consider this possibility. [531]

5. Risk of Liability for Contribution

Usually the liability for paying contributions depends on a creditor's proving a claim against the estate. But we suggest that judicial directions regarding the administration of the South African estate will include instructions requiring all creditors to prove their claims under South African law. Consequently, the American creditors may not know that they face the risk of having to pay contributions to cover the costs of administering the local estate of the company. They will have to decide whether their prospects of recovering a worthwhile dividend from the free residue of the estate outweigh the risk of liability for contribution. This decision should be made promptly, so that their liability for contribution may at least be minimized if they decide that the local proceedings are not worth pursuing. [532]

6. The Hotchpot Rule

Should further proceedings against the company necessitate the South African High Court's coordinating concurrent proceedings involving the company, the American creditors and other foreign creditors will be governed by the hotchpot rule. [533] In this regard, the considerable discrepancies between the rand and several foreign currencies may play a role: for example, US $1 million is worth about R11 million.

Conclusion

The Cross−Border Insolvency Act is the beginning, not the end. It can be improved further by amendment. Foreign representatives and creditors will also have to acquaint themselves with South African insolvency law and its relation to the Cross−Border Insolvency Act, and with the other South African statutes and common−law rules and principles relevant to the particular set of facts. For it is important to realize that, having entered South Africa through the gateway of the Cross−Border Insolvency Act, the foreigners will also have to play the game by the local rules. In this regard, although appointing a co−representative in South Africa might hinder pure universality by leading to further costs, it might advance speed and efficiency if the foreign representative could rely on local knowledge and contacts.

In choosing whether to seek recognition under the Cross−Border Insolvency Act, foreign creditors should realize that they may not be ranked lower than ordinary concurrent creditors in the order of preference, whereas under the common−law rules on cross−border insolvency law, it is only what remains after the payment of local creditors that is then remitted to the foreign proceedings. In effect the foreign creditors are almost subordinated to the local concurrent creditors by the common law; but under the Cross−Border Insolvency Act, this odious distinction can no longer be drawn. Yet that distinction will survive even more glaringly under the dualistic system that the reciprocity requirement creates. Under the Cross−Border Insolvency Act, creditors from designated countries will rank no lower than South African concurrent creditors; but under South African common law, creditors from non−designated countries will rank after the South African concurrent creditors and the creditors from designated countries. Nor is it clear how the cooperation of courts is to be achieved under this dualistic system, when some courts do not come within the system of designated countries. The application of the distributional rules becomes rather complicated. There is all the more reason, then, for countries to make sure that they appear on the list of designated countries once it is clear what the requirements for joining this club will be. On a more abstract level, we are witnessing a movement from territoriality towards universality, the Cross−Border Insolvency Act being a way−station; and it is unfortunate that the designation system reins in the smooth progress that UNCITRAL no doubt envisaged. The dualistic South African system will create undesired problems.

Designation is the key to the whole new system: which countries it will favor. The Cross−Border Insolvency Act may still remain the preserve of a rather exclusive club of nations, rather than the catalyst for change and openness, flexibility and speed that the Model Law intended to achieve. The Cross−Border Insolvency Act in this sense is prematurely arthritic.

Besides the issue of reciprocity, the true effectiveness of the Cross−Border Insolvency Act is now seen to depend on the strength of the local statutes, principles, and procedures in the particular enacting State. These factors might significantly influence and even impede the progressive application of the Model Law, for even if the same Model Law template is adopted in many states, there may still remain considerable variations in its specific application in various jurisdictions.

In particular in South Africa, the development of the Cross−Border Insolvency Act will depend largely on the flair and flexibility of South African practitioners and the judges of the High Courts. [534] For all its weaknesses and uncertainties, we applaud the introduction of the Cross−Border Insolvency Act. Imaginatively applied, it has enormous potential to catapult the South African law of cross−border insolvency out of the age of sailing−ships and sealing−wax and into the age of the spaceship and the computer. It speeds up recognition considerably by fairly simple rules that limit obfuscation, prevarication, and delay. It also intends to bring about an equitable system of distribution that in particular takes account of the interests of foreign creditors in ways not achieved by the common law, and throws light on a rather arcane subject for foreign creditors not used to the common−law rules based on comity. The proper enactment and development of the Model Law may help developing countries [535] to attract inward investment. In writing this article we have seen many other issues that space prevents us from airing, but we hope to have shown that the enacted version of the Model Law will operate in a particular legal system and even how improvements might be made for the sake of clarity both in the South African version and in the versions that other enacting states may be devising.

FOOTNOTES:

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[3] See, e.g., Andre J. Berends, The UNCITRAL Model Law on Cross−Border Insolvency: A Comprehensive Overview, 6 Tul. J. Int'l & Comp. L. 309 (1998); Matthew T. Cronin, UNCITRAL Model Law on Cross−Border Insolvency: Procedural Approach to a Substantive Problem, 24 Iowa J. Corp. L. 709 (1999); M. Cameron Gilreath, Overview and Analysis of How the United Nations Model Law on Insolvency Would Affect United States Corporations Doing Business Abroad, 16 Bankr. Dev. J. 399 (2000); Sara Isham, UNCITRAL's Model Law on Cross−Border Insolvency: A Workable Protection for Transnational Investment at Last, 26 Brook. J. Int'l L. 1177 (2001); Liza Perkins, A Defense of Pure Universalism in Cross−Border Corporate Insolvencies, 32 N.Y.U. J. Int'l L. & Pol'y. 787 (2000); Ronald J. Silverman, Advances in Cross−Border Insolvency Cooperation: The UNCITRAL Model Law on Cross−Border Insolvency, 6 ILSA J. Int'l & Comp. L. 265 (2000); A. D. Smith & D. A. Ailola, Cross−Border Insolvencies: An Overview of Some Recent Legal Developments, 11 S. African Merc. L.J. 192, 202−07 (1999); Jeremy Smith, Approaching Universality: The Role of Comity in International Bankruptcy Proceedings Litigated in America, 17 B.U. Int'l L.J. 367 (1999); A. L. Stander, ? Oplossing vir die Hantering van Transnasionale Insolvensies?, 62 Tydskrif Vir Hedendaagse Romeins−Hollandse Reg 508 (1999); Claudia Tobler, Managing Failure in the New Global Economy: The U.N.C.I.T.R.A.L. Model Law on Cross−Border Insolvency, 22 B.C. Int'l & Comp. L. Rev. 383 (1999); see also D. A. Ailola, The UNCITRAL Model Law on Cross Border Insolvency: Its Efficacy and Suitability as a Basis for a SADC Convention, 2000 Stellenbosch L. Rev. 215 (2000). Back To Text

[4] Committee J of the International Bar Association proposed a Model International Insolvency Co−operation Act (MIICA) several years ago, but the project did not find much favor with governments. The Committees also drafted a

Draft Cross−Border Insolvency Concordat, intended to serve as an interim measure until commercial nations adopt treaties and statutes as guides for practitioners in harmonizing cross−border insolvencies. The 1995 edition of this Concordat was considered in Paris, France, during September 1995. See M. B. Cronje, Diploma in Insolvency Law and Practice: Study Notes ¶ 36.3 (2001) (on file with authors). Back To Text

[5] See Joint Project of UNCITRAL and INSOL International on Cross−Border Insolvencies: Expert Committee's Report on Cross−Border Insolvency Access and Recognition, Draft 1 (Vienna, Mar. 1995). Back To Text

[6] See UNCITRAL Model Law on Cross−Border Insolvency Law: Guide to Enactment of the UNCITRAL Model Law on Cross−Border Insolvency, XXVIII UNCITRAL Y.B. pt. 3, 2, U.N. Doc. A/CN.9/442 1997 [hereinafter Guide]. Back To Text

[7] In this article we will use "cross−border insolvency" to cover the sequestration of individuals and the liquidation or winding−up of juristic persons such as companies. Back To Text

[8] See UNCITRAL Model Law on Cross−Border Insolvency (with Guide to Enactment) available at http://www.uncitral.org/english/texts/insolven/ml+guide.htm; Cross−Border Insolvency Act 42 of 2000, available at http://www.policy.org.za/govdocs/legislation/2000/act42.pdf (both websites visited on Jan. 24, 2002). Back To Text

[9] The drafters of the Model Law did not intend to create extensive substantive law on the subject, but to allow for the harmonization of procedural aspects to serve as a template for dealing coherently with different legal systems. They also intended to set a minimum standard for rules of distribution. See Cronin, supra note 1, at 709; Guide, reprinted in UNCITRAL MODEL LAW ON CROSS−BORDER INSOLVENCY: Guide to Enactment of the UNCITRAL Model Law on Cross−Border Insolvency, 6 Tul. J. Int'l & Comp. L. 415, 419 (1998). Back To Text

[10] Roman−Dutch law was brought to the Cape by officials of the Dutch East India Company ("VOC") establishing a refreshment station between the Netherlands and the East Indies in the 17th century, and was not displaced by English law during the subsequent British occupation of the Cape in the late 18th and early 19th centuries. Roman−Dutch law then spread throughout Southern Africa with settlers moving into the interior. See Eduard Fagan, Roman−Dutch Law in its South African Historical Context, in Southern Cross: Civil Law and Common Law in South Africa, 33−64 (R. Zimmermann & D. Visser, eds. 1996) (giving history of Roman−Dutch Law); H. R. Hahlo & Ellison Kahn, The South African Legal System and Its Background, 483−596 (1968) (giving history of Roman−Dutch Law). Back To Text

[11] See D. Kleyn & F. Viljoen, Beginner's Guide for Law Students, (2d ed. 1998). Back To Text

[12] See Constitution of the Republic of South Africa, 108 (1996), available at http://www.polity.org.za/govdocs/constitution/saconst.html (visited on Feb. 19, 2002) [hereinafter Constitution]. Back To Text

[13] See Kleyn & Viljoen, supra note 9, at 56. Back To Text

[14] See C. Smith, The Law of Insolvency 6 (3d ed. 1988); Mars: The Law of Insolvency in South Africa 4 (8th ed. By Elmarie de la Rey 1988); see also Fey NO and Whiteford NO v. Serfontein, 1993 (2) SA 605 (A). Back To Text

[15] See J. W. Wessels, History of the Roman−Dutch Law 670 (1908) (noting this ordinance retained some Dutch practices, such as cessio bonorum i.e. debtor's surrendering his estate to his creditors); see also Mary Jo Newborn Wiggins, The Sixth Annual Ernst C. Stiefel Symposium: Rethinking the Structure of Insolvency Law in South Africa, 17 N.Y.L. Sch. J. Int'l & Comp. L. 509, 510 (1997) (noting South African insolvency law is based on both Dutch and English law). Back To Text

[16] See Wessels, supra note 13. Back To Text

[17] See § 42−43 Long−term Insurance Act 52 (1998); Ch. VIII Mutual Banks Act 124 (1993); § 68 Banks Act 94 (1990); § 33 Financial Markets Control Act 55 (1989); Ch.X Co−operatives Act 91 (1981); §§ 27, 28, 39 Unit Trusts

Control Act 54 (1981); § 18C Medical Schemes Act 72 (1967); § 35 Friendly Societies Act 25 (1956); and § 28 Pension Funds Act 24 (1956). Back To Text

[18] Before 1987 some ad hoc working documents were published. See e.g., "Preferences On Insolvency" (South African Law Commission Project 37, Working Paper No.1, 1982) and its subsequent "Report on the Review of Preferent Claims in Insolvency" (South African Law Commission Project No. 37, Interim Report, 1984). Back To Text

[19] In contrast with the practice in the USA and England, the South African Project Committee did not compile a full report on the investigation. Back To Text

[20] The Draft Insolvency Bill and Explanatory Memorandum of 1996 were published for comment by the South African Law Commission as the "Review of the Law of Insolvency: Draft Insolvency Bill and Explanatory Memorandum" (Working Paper No. 66, Project No. 63, 1996) [hereinafter "Draft Insolvency Bill" & "Explanatory Memorandum"]. Back To Text

[21] The term "debtor" was not defined, for it was not settled whether the new statute should apply to companies and other legal persons. This issue is not as simple as finding an appropriate definition, though, because the application of every clause of the Draft Insolvency Bill with regard to the various types of debtors will have to be considered. See A. Boraine & K. van der Linde, The Draft Insolvency Bill − An Exploration (part 1), 1998 Tydskrif Vir Die Suid−Afrikaanse Reg 621; The Draft Insolvency Bill − An Exploration (part 2), 1999 Tydskrif Vir Die Suid−Afrikaanse Reg 38. Back To Text

[22] See Draft Insolvency Bill and Explanatory Memorandum of 2000. Back To Text

[23] See Final Report Containing Proposals on Unified Insolvency Act, (Jan. 2000) (on file at Merensky Library, University of Pretoria). Back To Text

[24] The Master of the High Court is a public official whose functions include the supervision of the administration of insolvent estates by appointing trustees or liquidators, giving them directions as to certain aspects of the administration of insolvent estates and confirming the formal estate accounts. Back To Text

[25] See §§ 54(1), 364(2) Insolvency Act 24 (1936) (reading with § 369 Companies Act 61 (1973)). In voluntary winding−up, either the members or the creditors of the company elect the liquidator, depending on whether the winding−up is a voluntary winding−up by members or a voluntary winding−up by creditors. Back To Text

[26] Some believe that the Master's powers are too wide in this respect. See K. van Rensburg, The Appointment of Provisional Trustees and Liquidators, 1998 De Rebus 70. Back To Text

[27] For the winding up of companies, see infra notes 91, et seq. Back To Text

[28] See § 3(1) Insolvency Act 24 (1936). Back To Text

[29] See Cassere v. United Party Club, 1930 WLD 39; Magnum Financial Holdings (Pty.) Ltd. (In Liquidation) v. Summerly & Another, 1984 (1) SA 160 (W) 163; Lawclaims (Pty.) Ltd. v. Rea Shipping: Schiffscommerz Aussenhandelsbetrieb Der VVB Schiffbau Intervening, 1979 (4) SA 745 (N) 751. Back To Text

[30] See § 17(4) Matrimonial Property Act 88 (1984). Although such spouses must be joined, non−joinder will not necessarily void the sequestration order. See Absa Bank Ltd. t/a Trust Bank v. Goosen, 1998 (2) SA 550 (W); Ratilal v. Dos Santos, 1995 (4) SA 117 (W). Back To Text

[31] But this separateness of these spouses' estates is drastically affected by section 21 of the Insolvency Act. See infra notes 183−203 and accompanying text. Back To Text

[32] See infra notes 32−40 and accompanying text (pertaining to sequestration); infra note 89 and accompanying text (discussing rehabilitation); infra notes 98−100 and accompanying text (explaining winding−up); infra notes 372, 376, 486−523 and accompanying text (pertaining to Cross−Border Insolvency Act). Back To Text

[33] See High Court rule 6 and Forms 2 and 2(a) of the prescribed forms of the High Court as per Schedule 1 reprinted in Louis De Villiers Van Winsen: The Civil Practice Of The Supreme Courts In South Africa (Now The High Courts And The Supreme Court Of Appeal) 350, et seq. (4th ed., eds. Louis de Villiers Van Winsen, Andries Charl Cilliers & Cheryl Loots 1997) [hereinafter Herbstein & Van Winsen]. Back To Text

[34] Section 149(1)(a) of the Insolvency Act makes it clear that a court will have jurisdiction to hear a sequestration application if the debtor is domiciled or owns or is entitled to property within the jurisdiction area of the court or where the debtor within 12 months before the application resided or carried on business within that area. Under section 149(1)(b) the court may also refuse to grant a sequestration order if it appears equitable or convenient that, where the debtor is not domiciled within the Republic of South Africa, his estate be sequestrated elsewhere, or if it appears that another South African court that has jurisdiction is the more suitable court to approach. See P. M. Meskin & Jennifer A. Kunst, Insolvency Law And Its Operation In Winding−Up ¶ 15.1.6.1 (1990) (discussing jurisdiction provision). Back To Text

[35] See Id. ¶ 15.1.6.1. Back To Text

[36] From the debtor's point of view, voluntary surrender is a form of debt relief. Back To Text

[37] See §§ 3−7 Insolvency Act 24 (1936); Meskin & Kunst, supra note 32, ¶ 3.1. Back To Text

[38] See §§ 8−12 Insolvency Act 24 (1936); Meskin & Kunst, supra note 32, ¶ 2.1. Back To Text

[39] The currency used in South Africa is the Rand and is abbreviated as "R". At the present rate of conversion, $1 equals about R11,50. Back To Text

[40] See Meskin & Kunst, supra note 32, ¶ 2.1.4. Back To Text

[41] See §§ 4, 6, 8−12 Insolvency Act 24 (1936). Back To Text

[42] See Smith, supra note 12, at 1−19. Back To Text

[43] See infra note 393 and accompanying text. Back To Text

[44] See § 17(1)(a) Insolvency Act 24 (1936); see also Mars, supra note 12, at 128−29 (pertaining to section 17); Meskin & Kunst, supra note 32, ¶¶ 5.6.1−5.6.3. Back To Text

[45] See § 17(1)(b)(i) Insolvency Act 24 (1936). Back To Text

[46] See id. § 17(1)(b)(ii). Back To Text

[47] See id. § 17(1)(b)(ii)bis (reading with § 4(c) Merchant Shipping Act 57 (1951)). Back To Text

[48] See id. § 17(1)(b)(iii) Insolvency Act 24 (1936). Back To Text

[49] See id. § 17(3). Back To Text

[50] See id. § 17(3)bis Insolvency Act 24 (1936). Back To Text

[51] See id. § 17(4). Back To Text

[52] See infra note 420 and accompanying text. Back To Text

[53] See § 20(1)(a) Insolvency Act 24 (1936); see also Mars, supra note 12, at 174; Meskin & Kunst, supra note 32, ¶ 5.2. Compare § 361 Companies Act 61 (1973), with Henochsberg on the Companies Act at 764−65 (The Hon. Mr. Justice B. Galgut (consulting editor)) (CD−Rom version consulted Jan. 21, 2002). Back To Text

[54] See § 20(1)(b) Insolvency Act 24 (1936) (main provision); see also Mars, supra note 12, at 138−41; Meskin & Kunst, supra note 32, ¶ 6.4. Back To Text

[55] In South Africa a sheriff is the official who carries out the execution of judgments and other court processes. See L. T. C. Harms, I. van der Walt & D. Harms, Civil Procedure: High Court, 3(1) THE LAW OF SOUTH AFRICA ¶ 89 (W. A. Joubert founding ed., 1st reissue 1997). They are not the same kind of officials as a sheriff in American law. Back To Text

[56] See § 20(1)(c) Insolvency Act 24 (1936); MARS, supra note 12, at 142; Meskin & Kunst, supra note 32, ¶ 6.1. Back To Text

[57] See § 20(2) Insolvency Act 24 (1936); see also Mars, supra note 12, at 142, 175, 186, 310; Meskin & Kunst, supra note 32, ¶¶ 6.1, 5.1, 5.2. But see Wessels NO v. De Jager en ? Ander NNO, 2000 (4) SA 924 (SCA) (allowing insolvent heir to repudiate his inheritance). Back To Text

[58] See § 23(1) Insolvency Act 24 (1936); see also Mars, supra note 12, at 307; Meskin & Kunst, supra note 32, ¶ 5.13. Back To Text

[59] See § 23(2) Insolvency Act 24 (1936); see also Mars, supra note 12, at 308; Meskin & Kunst, supra note 32, ¶ 5.16; compare §§ 341, 353 Companies Act 61 (1973), with Henochsberg, supra note 52, at 676−81, 744−46. Back To Text

[60] "Trader" is defined at length for the purposes of the Insolvency Act in § 2. See Mars, supra note 12, at 230−31, 311, 313. Back To Text

[61] See § 23(3) Insolvency Act 24 (1936); see also Mars, supra note 12, at 133, 138, 184, 199, 274, 310, 313−14; Meskin & Kunst, supra note 32, ¶ 5.14.1. Back To Text

[62] See § 23(4) Insolvency Act 24 (1936); see also Mars, supra note 12, at 201, 312, 315; Meskin & Kunst, supra note 32, ¶ 5.15. Back To Text

[63] See § 23(5) Insolvency Act 24 (1936); see also Ex parte Theron en ? Ander; Ex parte Smit; Ex parte Webster, 1999 (4) SA 136 (O); Mars, supra note 12, at 185, 274; Meskin & Kunst, supra note 32, ¶ 5.15. Back To Text

[64] See § 23(6) Insolvency Act 24 (1936); see also Muller v. De Wet NO and Others, 1999 (2) SA 1024 (W); Mars, supra note 12, at 201, 303−04, 312; Meskin & Kunst, supra note 32, ¶ 5.14.3. Back To Text

[65] See § 23(7) Insolvency Act 24 (1936); see also Mars, supra note 12, at 201; Meskin & Kunst, supra note 32, ¶ 5.14.2. Back To Text

[66] "Defamation" is the South African delict (meaning tort) dealing with "the unlawful publication animo iniuriandi of a statement concerning another person which has the effect of injuring that person in his reputation." See A. Roos, Defamation 7 The Law Of South Africa ¶ 244 (W. A. Joubert founding ed., 1st reissue 1995) (defining "defamation"). Back To Text

[67] See § 23(8) Insolvency Act 24 (1936); see also Santam Ltd. v. Norman and Another, 1996 (3) SA 502 (C); Mars, supra note 12, at 191, 201; Meskin & Kunst, supra note 32, ¶ 5.14.3. Back To Text

[68] See § 23(9) Insolvency Act 24 (1936). This empowerment is subject to section 23(5) on the excess not required to support himself or his dependants. See Mars, supra note 12, at 99, 303, 311, 312; Meskin & Kunst, supra note 32, ¶ 5.14.1. Back To Text

[69] "Delict" is the South African name for tort, i.e. an actionable civil wrong. Back To Text

[70] See § 23(10) Insolvency Act 24 (1936); see also Mars, supra note 12, at 312−13; Meskin & Kunst, supra note 32, ¶ 5.14.3. Back To Text

[71] See § 23(12) Insolvency Act 24 (1936); see also Mars, supra note 12, at 301; Meskin & Kunst, supra note 32, ¶ 5.6.10. Back To Text

[72] See § 23(13) Insolvency Act 24 (1936); see also Mars, supra note 12, at 299. See generally § 363A Companies Act 61 (1973). Back To Text

[73] See § 75(1) Insolvency Act 24 (1936); see also Mars, supra note 12, at 139; Meskin & Kunst, supra note 43, ¶ 6.5.1. Back To Text

[74] See § 75(2) Insolvency Act 24 (1936); see also Wilkens v. Potgieter NO and Another, 1996 (4) SA 936 (T); Mars, supra note 12, at 428. Back To Text

[75] The general common law regarding unexecuted contracts confers on the trustee an election to abide by the contract or to repudiate it, with particular consequences for the solvent party to the contract. In certain instances the Insolvency Act and other legislation prescribe specific rules altering the general rule. See e.g., § 35 Insolvency Act 24 (1936) (concerning sale of immovable property); id. § 36 (concerning cash sale of movable property); id. § 37 (concerning lease contracts); id. § 38 (concerning employment contracts); id. § 84 (concerning installment sales transactions). Back To Text

[76] See §§ 40(1), (2), 44, 54 Insolvency Act 24 (1936). Back To Text

[77] See id. at § 56; see also van Rensburg, supra note 24, at 70. Back To Text

[78] See §§ 40(3), 41, 43 Insolvency Act 24 (1936); see §§ 412−13 Companies Act 61 (1973) (pertaining to companies). Back To Text

[79] See id. § 44 (reading with Forms C and D of First Schedule to Insolvency Act). Section 48 of the Insolvency Act provides for the proof of conditional claims, and § 50 deals with the inclusion of interest in arrears with regard to an interest−bearing debt as well as the proof of a debt that will become due only after the date of sequestration. Back To Text

[80] See id. §§ 64−66, 152. Back To Text

[81] See id. §§ 80bis, 82, 83. Back To Text

[82] See id. §§ 95−103. Back To Text

[83] See §§ 105−06 Insolvency Act 24 (1936). Back To Text

[84] See id. § 63 (reading with tariff B of Second Schedule to Insolvency Act). Back To Text

[85] See id. §§ 107−12 (regarding confirmation of accounts and distribution of proceeds of realized assets). Back To Text

[86] See id. §§ 119−23. Back To Text

[87] The duties of trustees are mainly contained in §§ 18A, 40, 45, 69−72, 76−82, and 91 of the Insolvency Act, and their powers in §§ 18B, 73, 77−78(1)−(3), and 80(1). See §§ 386−411 Companies Act 61 (1973) (regarding position of liquidator). Back To Text

[88] See id. § 127A. Back To Text

[89] See id. §§ 124−26. Back To Text

[90] See id. § 124(1). Back To Text

[91] See id. § 129(1)(b). Back To Text

[92] See § 339 Companies Act 61 (1973); § 66 Close Corporations Act 69 (1984) (reading with section 339 of Companies Act); Cilliers & Benade, Corporate Law, 493−552, 673−86 (3d ed. 2000) (comprehensively discussing of winding−up of companies and close corporations). Back To Text

[93] See § 343 Companies Act 24 (1936). Back To Text

[94] In § 1(1) of the Companies Act, "place of business" is defined as "any place where the company transacts or holds itself out as transacting business and includes a share transfer or share registration office." See Henochsberg, supra note 52, 643−44. This issue can itself be very complicated, and we will not go into it in detail here. Back To Text

[95] The division of the High Court in whose area of jurisdiction the registered office or the main place of business is, has jurisdiction to hear the matter. See § 12(1) Companies Act 24 (1936). Back To Text

[96] 1979 (4) SA 745 (N) 751B. Back To Text

[97] See id. at 755A; see also supra notes 26−29 and accompanying text (defining "debtor"). Back To Text

[98] See § 349 Companies Act 24 (1936). Back To Text

[99] These applicants include the company itself, a creditor, a member, the Master, the judicial manager, or the Minister. See id. § 346(1). Back To Text

[100] See id. § 346(3). Back To Text

[101] See id. § 344 (reading with section 345). Although a company may be wound up for reasons other than its insolvency, we will assume in this article that the company is unable to pay its debts; this factor will also establish a ground for winding up the company in question. See § 345(f) (reading with section 345 for presumption regarding inability to pay debt). Back To Text

[102] See Cilliers & Benade, supra note 91, at 47. Back To Text

[103] See id.; see also § 1(1) (reading with § 332 Companies Act 61 (1973)). Back To Text

[104] See Lawclaims (Pty.) Ltd. v. Rea Shipping Co. SA: Schiffscommerz Aussenhandelsbetrieb Der VVB Schiffbau Intervening, 1979 (4) SA 745 (N) 752. Back To Text

[105] See § 341(1) Companies Act 61 (1973). Back To Text

[106] See id. § 341(2). Back To Text

[107] See id. § 359(1)(a). Back To Text

[108] See id. § 359(1)(b). Back To Text

[109] Volkskas Ltd. v. Darrenwood Elec. (Pty) Ltd., 1973 (2) SA 386 (T); Sec'y for Customs & Excise v. Millman NO, 1975 (3) SA 544 (A). Back To Text

[110] See § 361(1) Companies Act 61 (1973). Back To Text

[111] See § 20(2) Cross−Border Insolvency Act 42 (2000), see infra note 420 and accompanying text. Back To Text

[112] See § 357(1)(a) Companies Act 61 (1973). Back To Text

[113] See id. § 357(1)(b). Back To Text

[114] See id. § 357(1)(c). Back To Text

[115] See id. § 357(4)(a). Back To Text

[116] See id. § 357(4)(b); see also Henochsberg, supra note 52, at 753−55 (discussing section 357). Back To Text

[117] See § 341(1) Companies Act 61 (1973); see also Henochsberg, supra note 52, at 676−81 (explaining section 341). Back To Text

[118] See § 341(2) Companies Act 61 (1973). Back To Text

[119] See id. § 359; see also Henochsberg, supra note 52, at 757−62 (discussing section 359). Back To Text

[120] See § 359(1) Companies Act 61 (1973). Back To Text

[121] See id. § 359(2). Back To Text

[122] See id. § 363(5). Back To Text

[123] See id. § 391. Back To Text

[124] See id. § 392. Back To Text

[125] See id. § 49; § 22 Close Corporations Act 69 (1984). Back To Text

[126] See James v. Magistrate, Wynberg, 1995 (1) SA 1 (C); Receiver of Revenue, Port Elizabeth v. Jeeva, 1996 (2) SA 573 (A). Back To Text

[127] See § 384(3) Companies Act 61 (1973). Back To Text

[128] See id. § 427(1). Back To Text

[129] See id. § 429. Back To Text

[130] See id. § 430. Back To Text

[131] See id. § 432. Back To Text

[132] See id. §§ 433, 440. Back To Text

[133] See Le Roux Hotel Mgmt. (Pty.) Ltd. and Another v. E. Rand (Pty.) Ltd. (FBC Fidelity Bank Ltd. (Under Curatorship), Intervening), 2001 (2) SA 727 (C) esp at 738G−744H. See generally Ch. XV Companies Act 61 (1973); Henochsberg, supra note 52, at 923−59. Back To Text

[134] See P. Kloppers, Judicial Management: A Corporate Rescue Mechanism in Need of Reform, 1999 Stellenbosch L. Rev. 417; idem, Judicial Management Reform: Steps to Initiate a Business Rescue, 13 S. African Mercantile L.J. 359 (2001); Harry Rajak & Johan Henning, Business Rescue for South Africa, 116 S. African L.J. 262 (1999); Anthony J. Smits, "Corporate Administration": A Proposed Model, 1999 De Jure 80. Back To Text

[135] But see infra notes 158−164 and accompanying text (discussing problems in current labor law). Back To Text

[136] See generally Henochsberg, supra note 52, at 601−32. Back To Text

[137] See § 20(1)(a) Income Tax Act 58 (1962). Back To Text

[138] See SA Bazaars (Pty.) Ltd. v. Comm'r of Inland Rev., 1952 (4) SA (A); Robin Consol. Indus. Ltd v. Comm'r of Inland Rev., 1997 (3) SA 654 (SCA). Back To Text

[139] See § 311(1) Companies Act 61 (1973). Back To Text

[140] See Ex parte Cyrildene Heights (Pty.) Ltd., 1966 (1) SA 307 (W); Ex parte Millman: In re Multi−Bou (Pty) Ltd., 1987 (4) SA 405 (C). Back To Text

[141] See Ex parte Federale Nywerhede Bpk, 1975 (1) SA 826 (W). Back To Text

[142] See Ex parte Kaplan: In re Robin Consol. Indus. Ltd., 1987 (3) SA 413 (W). Back To Text

[143] See infra notes 381 and accompanying text. Back To Text

[144] See M. S. Blackman, Companies, 4(3) The Law Of S. Africa (W. A Joubert, founding ed., 1st reissue 1996) (discussing subordination agreements). Back To Text

[145] See Ex parte De Villiers: in re Carbon Dev. (Pty.) Ltd. (in liquidation), 1993 (1) SA 493 (A) 504−05; see also S. M. Luiz & K. E. van der Linde, Subordination Agreements − Are They Worth The Paper They Are Written On?, 5 S. African Mercantile L.J. 100 (1993) (criticizing Ex parte De Villiers); J. S. McLennan, Abuse of Limited Liability, Insider Debts and Subordination Agreements, 110 S. African L.J. 686 (1993) (criticizing Ex parte De Villiers). Back To Text

[146] De Villiers, 1993 (1) SA, at 505A−B. Back To Text

[147] Blackman, supra note 143, ¶ 67 and n.54. Back To Text

[148] See Fenhalls v. Ebrahim, 1956 (4) SA 723 (N). Back To Text

[149] A "disposition" is defined as "any transfer or abandonment of rights to property and includes a sale, lease, mortgage, pledge, delivery, payment, release, compromise, donation or any contract therefor, but does not include a disposition in compliance with an order of the court." See § 1 Insolvency Act 24 (1936). Back To Text

[150] See id. § 26; see also Mars, supra note 12, at 206−43 (explaining section 26, 29−31, and 34 of Insolvency Act). Back To Text

[151] See § 29 Insolvency Act 24 (1936). Back To Text

[152] See id. § 30. Back To Text

[153] See id. § 31. Back To Text

[154] See § 340 Companies Act 61 (1973). Back To Text

[155] See § 31(2) Insolvency Act 24 (1936). Back To Text

[156] Derived from Dutch, Afrikaans is one of the eleven official languages of South Africa. See § 6(1) Constitution of South Africa. Back To Text

[157] See id. § 34(1). Back To Text

[158] See id. § 34(2). Back To Text

[159] See § 38 Insolvency Act 24 (1936); see also SA Agricultural Plantation & Allied Workers Union v. H. L. Hall & Sons (Group Serv.) Ltd. & Others, (1999) 20 ILJ 399 (LC) (regarding application of section 38 in case of liquidated company). See generally S. Lombard & A. Boraine, Insolvency and Employees: An Overview of Statutory Provisions, 1999 De Jure 300. Consider also the English cases of In re General Rolling Stock Co., (Chapman's Case), (1866) L.R. 1 Eq. 346 and In re Oriental Bank Corp., (MacDowall's Case), (1886) 32 Ch.D. 366. Back To Text

[160] See § 98A Insolvency Act 24 (1936). Back To Text

[161] See P. A. K. le Roux, Transferring Contracts of Employment: Implications Surrounding the Sale of a Business under the New LRA, 1996 Contemp. Lab. L. 11. Back To Text

[162] See § 197(2)(b) Labor Relations Act. Back To Text

[163] See E. C. Schlemmer & A. N. Oelofse, Konflik tussen die Wet op Arbeidsverhoudinge en die Insolvensiewet, 1996 Tydskrif Vir Die Suid−Afrikaanse Reg 559 (discussing interaction and possible conflicts between section 38 of Insolvency Act and section 197 read with section 210 of Labor Relations Act); R. G. Evans, New Developments in Insolvency and Contracts of Employment, (2000) 12 S. African Mercantile L.J. 408. Back To Text

[164] See H L Hall & Sons, (1999) 20 I.L.J. 399. Back To Text

[165] See Schlemmer & Oelofse, supra note 162; SA Agricultural Plantation & Allied Workers Union v. H. L. Hall & Sons (Group Serv.) Ltd. & Others, (1999) 20 ILJ 399 (LC); Ndima & Others v Waverley Blankets Ltd., (1999) 20 I.L.J. 1563 (LC); Nicci Whitear−Nel, The Effect of Insolvency on a Contract of Employment, 21 Indus. L.J. 845 (2000); see also M. J. D. Wallis, Section 197 is the Medium: What is the Message?, 21 Indus. L.J. 1 (2000). Back To Text

[166] See § 44 Insolvency Act 24 (1936). In the case of special claims such as unliquidated claims, conditional claims, and claims due after the sequestration or liquidation. See §§ 78(3), 48, 50 Insolvency Act 24 (1936). Back To Text

[167] See M. Klein, Die Eisvorm − Insolvente Boedels, 1990 De Rebus 60 (discussing proving of claims). Back To Text

[168] See §§ 104(1), (2) Insolvency Act 24 (1936). Back To Text

[169] See Cools v. The Master, 1998 (4) SA 212 (C). Back To Text

[170] See § 98A(3) Insolvency Act 24 (1936). Back To Text

[171] See § 44(3) Insolvency Act 24 (1936); Ben Rossouw Motors v. Druker, 1975 (1) SA 816 (T). Back To Text

[172] See § 45(1), (2) Insolvency Act 24 (1936). Back To Text

[173] See id. § 45(3). Compare Kommissaris van Binnelandse Inkomste v. Willers, 1994 (3) SA 283 (A), with Wilken v. Potgieter, 1996 (4) SA 936 (T) (regarding reopening of account). Back To Text

[174] See Caldeira v. The Master of the Supreme Court, 1996 (1) SA 869 (N). Back To Text

[175] See § 366(1)(a) Companies Act 61 (1973); Smith, supra note 12, at 217 et seq; Mars, supra note 12, at 332−56. Back To Text

[176] See § 366(1)(b) Companies Act 61 (1973); § 44(4) Insolvency Act 24 (1936). Back To Text

[177] See § 366(2) Companies Act 61 (1973). Back To Text

[178] See § 82 Insolvency Act 24 (1936); Mookrey v. Smith NO, 1987 (1) SA 332 (C); A. L. Stander, Artikel 82 van die Insolvensiewet 24 Van 1936 en Bona Fides, 53 Tydskrif Vir Hedendaagse Romeins−Hollandse Reg 273 (1990). Back To Text

[179] See § 80 Insolvency Act 24 (1936). Back To Text

[180] See id. § 83. Back To Text

[181] See id. § 83(5). Back To Text

[182] See id. §§ 83(6),(11). Back To Text

[183] See §§ 386(4)(h), 387(1) Companies Act 61 (1973). Back To Text

[184] See infra notes 411−13 and accompanying text. Back To Text

[185] See § 2(1)(a) Cross−Border Insolvency Act 42 (2000). Back To Text

[186] See § 21(1) Insolvency Act 24 (1936). Back To Text

[187] See id. § 21(13). If the American director were to take up residence with a South African mistress and his (the director's) estate were later sequestrated, section 21 of the Insolvency Act would in principle, as a result of its inclusion in the Cross−Border Insolvency Act, govern the South African assets in his solvent wife's estate, but not the assets in his mistress's estate. As a judge cynically observed: "This seems like placing a premium on adultery as contrasted with concubinage." Chaplin NO v. Gregory (or Wyld), 1950 (3) SA 555 (C) 564E. Back To Text

[188] The current statute is now the Long−term Insurance Act 52 of 1998. Back To Text

[189] See § 21(2) Insolvency Act 24 (1936). Back To Text

[190] See supra notes 148−149 and accompanying text. Back To Text

[191] Cf. Maudsley's Trustees v. Maudsley, 1940 TPD 399, 404; SMITH, supra note 12, at 108. Back To Text

[192] See Enyati Resources Ltd. v. Thorne, 1984 (2) SA 551 (C) 557. Back To Text

[193] See N. L. Joubert, Skenkings Tussen Man en Vrou, Simulasie en Artikel 21 Van die Insolvensiewet 24 Van 1936, 1992 Tydskrif Vir Die Suid−Afrikaanse Reg 345 (pointing out anomalies and injustices arising from appellate decision in De Villiers v. Delta Cables, 1992 (1) SA 9 (A)). A. N. Oelofse in a submission to the South African Law Commission (Explanatory Memorandum to the 1996 Draft Insolvency Bill ¶ 11.14) argued that sections 21(3) and (5) confused the intended application of section 21 as, in view of the decision in Constandinou v. Lipkie, 1958 (2) SA 122 (O), the trustee is entitled to distribute the proceeds of property ostensibly belonging to the estate, although the

purpose was to include property actually belonging to the estate. The abolition of the prohibition of donations between spouses by the Matrimonial Property Act also defeated the purpose of section 21. See Smith, supra note 12, at 113. Back To Text

[194] See e.g., Harksen v. Lane, 1997 (11) BCLR 1489 (CC). Back To Text

[195] The Constitution of the Republic of South Africa 200 (1993) repealed by The Constitution of the Republic of South Africa (1996). Back To Text

[196] See id. at 1519F. Back To Text

[197] See id. at 1501F. Back To Text

[198] Nor did the court consider section 28(1) of the Interim Constitution. The distinction between an expropriation and a deprivation of property had been recognized in the law of South Africa and of many foreign jurisdictions long before it was set out in sections 28(1) and (2) of the Interim Constitution. See §§ 25(1) and (2) of the Constitution. See generally A. J. Van Der Walt, The Constitutional Property Clause 101−14 (1997); A. J. van der Walt & H. Botha, Coming to Grips with the New Constitutional Order: Critical Comments on Harksen v. Lane NO, 13 S. African Pub. L.J. 17 (1998); R. G. Evans, The Constitutionality of Section 21 of the Insolvency Act 24 of 1936, 1998 Stellenbosch L. Rev. 359. Back To Text

[199] See Harksen, 1997 (11) BCLR at 1505C−D. Back To Text

[200] See id. at 1505E−G. Back To Text

[201] See id. at 1516E−G. Back To Text

[202] See id. at 1530D−F. Back To Text

[203] See id. at 1528E−1530C; see also L. Jansen van Rensburg, Die Weglating van Artikel 21 − Bied Die Konsep Insolvensiewet van 1996 Voldoende Alternatiewe Beskerming?, 1997 Tydskrif Vir Die Suid−Afrikaanse Reg 674 at 687 (concluding doctrine of voidable dispositions will provide sufficient remedy especially if concept of "associate" as included in both 1996 and 2000 Draft Insolvency Bills is accepted in new Insolvency Act). Back To Text

[204] See Harksen, 1997 (11) BCLR at 1535A−C. Back To Text

[205] This is the commencement date of the Security by Means of Movable Property Act 57 of 1993. Back To Text

[206] See the definition of "security" and "special mortgage" in section 2 of the Insolvency Act as amended by section 4 of the Security by Means of Movable Property Act. But this definition is incomplete because if does not mention securities created by legislation such as section 84 of the Insolvency Act or section 20(5) of the Alienation of Land Act 68 of 1981. Back To Text

[207] See § 85 Insolvency Act 24 (1936). Back To Text

[208] See id. § 84(1) (defining installment sales transaction as form of hire−purchase). Back To Text

[209] See id. § 86. Back To Text

[210] See id. § 102 as well as the discussion in the next section and infra note 229 and accompanying text. Back To Text

[211] See id. § 47. Back To Text

[212] See id. § 89(1). Back To Text

[213] See De Wet v. Stadsraad van Verwoerdburg, 1978 (2) SA 86 (T); see also In Nel NO v. Body Corp. of the Seaways Building, 1996 (1) SA 131 (A) (deciding body corporate of sectional title scheme enjoys stronger preference than local authority with regard to levies in arrears). Back To Text

[214] See § 89(2) Insolvency Act 24 (1936); see also infra notes 233−41 and accompanying text (discussing liability for contribution). Back To Text

[215] See id. §§ 89(3), 95(1). Back To Text

[216] See id. § 95(1) read with § 103(2). Back To Text

[217] See infra note 229 and accompanying text; § 102 Insolvency Act 24 (1936). Back To Text

[218] See §§ 95−103 Insolvency Act 24 (1936); § 342(1) Companies Act 61 (1973). Back To Text

[219] See §§ 97−103 Insolvency Act 24 (1936). Back To Text

[220] See id. § 97(3). Back To Text

[221] See § 383(1) Companies Act 61 (1973). Back To Text

[222] See De Wet v. Stadsraad van Verwoerdburg, 1978 (2) SA 86 (T) 98. Back To Text

[223] See § 97(2)(a) Insolvency Act 24 (1936). Back To Text

[224] See id. § 97(2)(c). Back To Text

[225] See id. §§ 98(1),(2). Back To Text

[226] This amendment being an improvement of the position of employees was introduced by the Judicial Matters Second Amendment Act 122 of 1998, which came into operation on Sept. 1, 2000. Back To Text

[227] The ex−employees' preference was previously governed by section 100(1) of the Insolvency Act, which ranked those preferent claims directly after the statutory claims listed in paragraph (e) of the main text of our article. Back To Text

[228] See § 99(2) Insolvency Act 24 (1936). Back To Text

[229] See id. § 101. Back To Text

[230] See § 102 Insolvency Act 24 (1936) (reading with section 1(3) Security by Means of Movable Property Act (1993)). This 1993 Act was made to apply retrospectively to special notarial bonds registered before its commencement date of May 7, 1993. Before this Act was passed, the position of special notarial bondholders outside Natal was not clear until Cooper NO en Andere v. Die Meester en ? Ander, 1992 (3) SA 60 (A) acted as the catalyst for promulgation of the 1993 Act. Back To Text

[231] See § 103 Insolvency Act 24 (1936). Back To Text

[232] See § 342(1) Companies Act 61 (1973). Back To Text

[233] See § 116 Insolvency Act 24 (1936). Back To Text

[234] See id. §§ 106, 342(2) Companies Act 61 (1973). Back To Text

[235] See § 106 Insolvency Act 24 (1936). Back To Text

[236] See id. § 106(a). Back To Text

[237] See id. § 89(1). Back To Text

[238] See Ongevallekommissaris v. Die Meester, 1989 (4) SA 69 (T). Back To Text

[239] See § 14(3) Insolvency Act 24 (1936). Back To Text

[240] See id. § 118. Back To Text

[241] See id. § 118(3). Back To Text

[242] See M. B. Cronje, UNCITRAL's Model Law on Cross−Border Insolvency and the Cross−border Insolvency Act 42 of 2000 ¶ 2.3.9.7 (unpublished paper delivered at seminar at University of Pretoria, June 2001). Back To Text

[243] See infra notes 362−64 and accompanying text. Back To Text

[244] This was published as a document of the United Nations General Assembly, as A/CN.9/442 of 97−12−19. Back To Text

[245] See Research Unit for Banking Law: Rand Afrikaans University, Johannesburg 1998. Back To Text

[246] See In re Paramount Airways Ltd. (In administration), [1993] Ch 223 (CA) 239A−D. Back To Text

[247] See the reference in "Interim Report on Review of the Law of Insolvency: The Enactment of UNCITRAL's Model Law on Cross−Border Insolvency" ¶ 3.5.1 [hereinafter "Interim Report"]. Back To Text

[248] See id. ¶ 3.5.2. Back To Text

[249] See id. ¶ 3.6. Back To Text

[250] Cf. Jonathan L. Flaxer, United States Senate Subcommittee Holds Hearings on UNCITRAL Cross−Border Insolvency Proposal, INSOL World, Mar. 1998 as referred to in Interim Report at n.10. Back To Text

[251] "Version 1" refers to the first version of the Cross−Border Insolvency Act. Back To Text

[252] M. B. Cronje, a senior researcher at the South African Law Commission, was the researcher on the adoption project. Back To Text

[253] "Version 2" refers to the second version of the Cross−Border Insolvency Act. Back To Text

[254] See Interim Report, ¶ 4.2. This approach is in line with Guide, supra note 4, ¶ 12 (stating "[a]lthough it cannot be said that 'as few changes as possible' have been made, few changes of substance have been made"); see also Cronje, supra note 241, ¶ 3.2. Back To Text

[255] See ¶ 4.6 of the Interim Report. Back To Text

[256] See id. ¶ 4.9. Back To Text

[257] See id. ¶ 4.14. Back To Text

[258] See id. ¶ 4.19. Back To Text

[259] See id. ¶ 4.25. Back To Text

[260] See id. ¶ 4.35. Back To Text

[261] See id. ¶ 5.3. Back To Text

[262] See id. ¶ 6.2. Back To Text

[263] See infra notes 361−64 and accompanying text. Back To Text

[264] See § 20(1)(a) Insolvency Act 24 (1936). Back To Text

[265] See id. § 25(1). Back To Text

[266] See id. § 20(2). Back To Text

[267] If payment is made to the insolvent, the obligation is not terminated unless the debtor involved can prove that he acted in good faith and without knowledge of the sequestration. Back To Text

[268] See Brown v. Oosthuizen, 1980 (2) SA 155 (O). Back To Text

[269] See id. § 82(6) Insolvency Act 24 (1936). Back To Text

[270] See id. § 23(7). Back To Text

[271] See id. § 23(8). Back To Text

[272] See id. § 23(9). Back To Text

[273] See § 361(1) Companies Act 61 (1973). Back To Text

[274] See Alastair Smith, Some Aspects of Comity and the Protection of Local Creditors in Cross−Border Insolvency Law: South Africa and the United States Compared, 14 S. African Mercantile L.J. (forthcoming 2002). Back To Text

[275] See generally C. F. Forsyth, Private International Law 36−41 (3d ed. 1996) (discussing comity); Sarah K. Harding, Re Sefel Geophysical Ltd: A Canadian Approach to Some Specific Problems in the Adjudication of International Insolvencies, 12 Dalhousie L.J. 412, 425−26 (1989) (same); Hessel E. Yntema, The Comity Doctrine, 65 Mich. L. Rev. 9, 19, 25 (1966); Ellison Kahn, The "Territorial and Comity School" of the Conflict of Law of the Roman−Dutch Era, in Huldigingsbundel Aangebied Aan Professor Daniel Pont Op Sy Vyf−En−Sewentigste Verjaardag 219 (1970). There are also more recent works on this subject. See generally Joel R. Paul, Comity in International Law, 32 Harv. Int'l L.J. 1, 3 (1991) (remarking on variety of meanings of "comity"); cf. Kaepa, Inc. v. Achilles Corp., 76 F.3d 624, 629 (5th Cir. 1996); Turner Entm't Co. v. Degeto Film GmbH, 25 F.3d 1512, 1519 (11th Cir. 1994); Biggelaar v. Wagner, 978 F.Supp. 848, 857 (N.D. Ind. 1997); In re Hakim, 212 B.R. 632, 641 (Bankr. N.D. Cal. 1997); Sol Picciotto, Networks in International Economic Integration: Fragmented States and the Dilemmas of Neo−Liberalism, 17 N.W. J. Int'l L. & Bus. 1014, 1023 n.17 (1997). Back To Text

[276] See Kahn, supra note 274, at 221. Back To Text

[277] See id. at 222. Back To Text

[278] See id. Back To Text

[279] See id. at 222−23. This is referred to as "the prevailing orthodoxy of our day − that no state is compelled to recognize foreign law, but that there are good reasons why it should in certain circumstances be recognized." See

Forsyth, supra note 274, at 41. Back To Text

[280] See Kahn, supra note 274, at 224−25. Back To Text

[281] With the Voets are grouped Artzenius, Van der Linden, and Van der Keessel. See id. at 231. Back To Text

[282] See Kahn, supra note 274, at 226 n.92 (stressing "there are in fact two comity schools" and criticizing Yntema's confusing them). Back To Text

[283] With Huber are grouped Rodenburg and Wesel. See id. at 231. Back To Text

[284] Cf. Forsyth, supra note 274, at 37 n.92. Back To Text

[285] See D. J. Llewelyn Davies, The Influence of Huber's De Conflictu Legum on English Private International Law, 18 Brit. Y.B. Int'l L. 49, 65 (1937). Back To Text

[286] See Laconian Maritime Enter. Ltd. v. Agromar Lineas Ltd., 1986 (3) SA 509 (D) 515H. Back To Text

[287] See Forsyth, supra note 274, at 59 (italics in original). Back To Text

[288] As the maxims state, "Mobilia sequuntur personam" or "mobilia ossibus inhaerent." See Tr. of Howse, Sons & Co.; Jocelyne v. Shearer & Hine, (1884) 3 SC 14, 19; Ex parte BZ Stegmann, 1902 TS 40, 47. Back To Text

[289] See Ex parte Palmer NO (In re Hahn), 1993 (3) SA 359 (C) 362H. Back To Text

[290] Compare Trustee of Howse, 3 SC at 19, with Kurt H. Nadelmann, Bankruptcy Treaties, 92 U. Pa. L. Rev. 58, 79 n.180 (1944). Back To Text

[291] Trustee of Howse, 3 SC at 22; A. B. Edwards, Conflict of Laws, in 2 Law Of South Africa, ¶ 458 nn.19−21 (W. A. Joubert, founding ed., 1st reissue 1993). Back To Text

[292] See In re Clark's Zoutpansberg Expl. Co., (1892) 9 SC 197, 198 (stating Cape courts "should in comity recognize, without special confirmation, the status of official liquidators appointed in the Transvaal so far as moveables are concerned"); Ex parte Celliers NO, (1884) 1 Kotzé 102; Midgley's Trustee v. Ballance & Letchford, (1884) 5 NLR 309, 314; see also Re Estate Morris, 1907 TS 657, 666; Re Estate Campbell, 1905 TS 28; Ex parte Stegmann, 1902 TS 40 at 47; Leslie's Trustee v. Leslie, 1903 TS 839; Herman NO v. Tebb, 1929 CPD 65, 72; Greub v. The Master and others, 1999 (1) SA 746 (C) 752F; N. Am. Bank (in liquidation) v. Granit, 1998 (3) SA 557 (W) 567B−C; Bekker NO v. Kotzé and Another, 1996 (4) SA 1296 (Nm); Bekker NO v. Kotzé and Another, 1996 (4) SA 1296 (Nm); Viljoen v. Venter, NO 1981 (2) SA 152 (W) 155C−E (finding "abundant authority, both South African and foreign" for rule); Hymore Agencies Durban (Pty) Ltd. v. Gin Nih Weaving Factory, 1959 (1) SA 180 (D) 183A. Back To Text

[293] See Edwards, supra note 290, ¶ 456. Back To Text

[294] See Estate Morris, 1907 TS at 668; Palmer, 1993 (3) SA at 364H−I. Submission to the jurisdiction may also be a valid ground. See Palmer, at 364H. Back To Text

[295] See Estate Morris, 1907 TS at 666. Back To Text

[296] See Herman, 1929 CPD at 72. Back To Text

[297] "Mobilia sequuntur personam" or "mobilia ossibus inhaerent" See Forsyth, supra note 274, at 35, n.81 (in Accursian gloss), 318, 321−22 (3d ed. 1996); see also Nahrungsmittel GmbH v. Otto, 1993 (1) SA 639 (A) 647H−I); Celliers, 1 Kotzé at 104 (recognition "per comitatem"); Edwards, supra note 290, ¶ 456 n.3 (stating "[i]f, at the close of the Roman−Dutch era in Holland, that brocard was applied, it was done out of comity and treated as a fiction …");

cf. Philip St. J. Smart, Cross−Border Insolvency 143 (2d ed. 1998). Back To Text

[298] See Estate Morris, 1907 TS 657, 666; cf. Re African Farms Ltd., 1906 TS 373 at 378−79; Smart, supra note 296, at 183, 222. Back To Text

[299] See infra notes 319−334 and accompanying text. Back To Text

[300] See Moolman v. Builders & Dev. (Pty.) Ltd.: Jooste intervening, 1990 (1) SA 954 (A) 960B−C. Back To Text

[301] See Ex parte Palmer NO (In re Hahn), 1993 (3) SA 359 (C) 362F. Back To Text

[302] 1990 (1) SA 954 (A). Back To Text

[303] If there is a foreign sequestration order, then the court has discretion to recognize it. But if there is no such foreign sequestration order, but still a valid appointment (as, for example, under a company's special resolution), then the appointment of the foreign trustee may be recognized. Back To Text

[304] See Donaldson v. British SA Asphalte and Mfg. Co. Ltd., 1905 TS 753, 756−57; see also Liquidator Rhodesian Plastics (Pty.) Ltd. v. Elvinco Plastic Products (Pty.) Ltd., 1959 (1) SA 868 (C) (conveniently discussing earlier decisions); Ex parte Liquidator Shell Co. of Rhodesia Ltd. (in voluntary liquidation), 1964 (2) SA 223 (SR) 224E−F (court describing rule on requirement of foreign liquidator's seeking recognition as "trite law"). Back To Text

[305] 1998 (3) SA 175 (SCA). Back To Text

[306] For criticism of the rigidity of the rule, though, see Forsyth, supra note 274, at 320 and n.21. Back To Text

[307] See Stegmann, 1902 TS at 47−48; Ex parte Singer: In re Insolvent Estate Skeen, (1905) 26 NLR 536 at 543−46; Forsyth, supra note 274, 358 and n.301; Mars, supra note 12, at 177−78; Smith & Ailola, supra note 1, at 193. Back To Text

[308] See supra note 302. Back To Text

[309] See Re Estate Morris, 1907 TS 657, 666; Ex parte Stegmann, 1902 TS at 47−48; In re Singer, 1905 N (26 NLR) 536, 546; Herman NO v. Tebb, 1929 CPD 65, 73; Chaplin NO v. Gregory (or Wyld), 1950 (3) SA 555 (C). Back To Text

[310] Stegmann, 1902 TS at 54 (discussing comity); Ward v Smit and Others: In re Gurr v Zambia Airways Corp. Ltd., 1998 (3) SA 175 (SCA) at 179G (mentioning equity); Moolman v. Builders & Dev. (Pty.) Ltd.: Jooste intervening, 1990 (1) SA at 961D (discussing convenience); Ex parte Steyn, 1979 (2) SA 309 (O) 310H (stating comity). Back To Text

[311] See infra notes 398−399 and accompanying text. Back To Text

[312] 1907 TS 657. Back To Text

[313] 1999 (4) SA 216 (C). Back To Text

[314] See id. at 219H−H/I. Back To Text

[315] See id. at 219I−220A. Back To Text

[316] See infra notes 496, 507, 509 and accompanying text. Back To Text

[317] Forsyth, supra note 274, at 20−22. Back To Text

[318] Id. at 21 and n.115, 359 and n.308; Edwards, supra note 290, ¶ 458 n.29. Back To Text

[319] Stegmann, 1902 TS at 56; Edwards, supra note 290, ¶ 458 n.30. Back To Text

[320] See MARS, supra note 12, at 178 n.48. Cf. In Re Bank of Credit & Commerce Int'l, SA (No. 10) [1997] Ch. 213, 219B−C (counsel arguing "[t]he court of the ancillary winding up will not permit funds to be transmitted to the jurisdiction of the court of the principal winding up without first making provision for the local secured, preferential and statutory creditors."; counsel citing In re Queensland Mercantile Agency Co. Ltd., (1888) 58 L.T. 878, 879); In re African Farms Ltd., (1906) T.S. 373, 377, 381, 382, 384, 392; In re Nat'l Benefit Assurance Co., (1927) 3 D.L.R. 289, 302; In re Union Theatres Ltd., (1933) 35 W.A.L.R. 89, 91). When deciding In re Bank of Credit & Commerce Int'l, SA (No.10) [1997] Ch. at 239H−240B, Scott V.C. approved in passing the "good sense of the procedure" set out by Philip St. J. Smart, Cross−Border Insolvency, 244 (1991) (stating "if an ancillary winding up is ordered, the powers of the English liquidator may be restricted to collecting the English assets and settling a list of creditors. Finally, the assets so collected shall, after satisfying preferred creditors and other approved payments, be remitted to the foreign liquidator so that the claims of the creditors can be dealt with on an equal footing in one single liquidation"); see also The Cornelis Verolme, (1997) 2 NZLR 110 (citing with approval In re African Farms, 1906 TS 373); SMART, supra note 296, at 85 n.14, 86 n.2. Back To Text

[321] See Patrick O'Brien, Transnational Aspects in South African Insolvency Law, Conference On Reform Of South African Insolvency Law, 24 n.125 (Research Unit for Banking Law: Rand Afrikaans University, Johannesburg (1995) (setting forth exceptions). Back To Text

[322] See id. at 24 n.124 (setting forth authorities). Back To Text

[323] 1979 (2) SA 309 (O). Back To Text

[324] See Ex parte Link's Estate, 1904 TS 251, 252 (stating security to equal local assets' value); id. at 253 (holding asset realization under Master's supervision permitted before security actually lodged); see also In re African Farms, 1906 TS at 384 (requiring security for obeying recognition order and also paying local debts); In re Melliar, Smith & Co: Ex parte Hooper, 1922 CPD 116, 120 (same); Ex parte Getliffe & another: In re Dominion Reefs Ltd., 1965 (4) SA 75 (T) 77H−78F (setting time limit for furnishing security for paying company's local debts). Back To Text

[325] See In re African Farms, 1906 TS at 384 (order (b)); In re Melliar, Smith & Co: Ex parte Hooper, 1922 CPD at 120. Back To Text

[326] See Ex parte Getliffe & another, 1965 (4) SA at 77H−78F; In re Link's Estate, 1904 TS at 253 (order (b)); In re African Farms, 1906 TS at 384 (order (d)); Re Greatrex & Son Ltd., 1907 TS 538, 539 (order (d)); In re Melliar, Smith & Co: Ex parte Hooper, 1922 CPD at 121 (order (d)). Back To Text

[327] See Re Greatrex & Son Ltd., 1907 TS at 539 (order (f)); In re African Farms, 1906 TS at 373 (order (f)); In re Melliar, Smith & Co: Ex parte Hooper, 1922 CPD at 121 (order (f), and also receipts from local creditors who had proved claims and been paid dividends). Back To Text

[328] See Re Greatrex & Son Ltd., 1907 TS at 539−40 (order (e)); In re African Farms, 1906 TS at 384−85 (order (e)); In re Melliar, Smith & Co: Ex parte Hooper, 1922 CPD at 121 (order (e), also specifying items expected in account). Back To Text

[329] See Ex parte Getliffe & another, 1965 (4) SA at 77H−78F; In re African Farms, 1906 TS at 384; In re Link's Estate, 1904 TS at 253 (order (c) states "all questions of preference and priority in respect of assets in this colony shall be regulated by the laws of the colony"). Back To Text

[330] See Ex parte Steyn, 1979 (2) SA 309 (O) 312C. Back To Text

[331] See § 70 Insolvency Act 24 (1936). Back To Text

[332] See Ex parte Steyn, 1979 (2) SA at 312D; Ex parte Getliffe & another, 1965 (4) SA at 77H−78F (stating Master's endorsement required once sure of payment of local fees and disclosure of insolvent's assets). Alternatively, the court's permission would be required. See Re Greatrex & Son Ltd., 1907 TS at 540; In re Melliar, Smith & Co: Ex parte Hooper, 1922 CPD at 121. Back To Text

[333] Ex parte Steyn, 1979 (2) SA at 312D; see also Ex parte Getliffe & another, 1965 (4) at 77H−78F (four); Ex parte Link's Estate, 1904 TS 251, 253; In re Stegmann, 1902 TS at 56 (foreign publication). Back To Text

[334] See Clegg v. Priestley, 1985 (3) SA 950 (W) 953I−954G. Back To Text

[335] See 1990 (1) SA 954 at 961I−962A read with 957F−958C. Back To Text

[336] See Edwards, supra note 290, ¶ 458 n.26 (citing Herman, 1929 CPD 65); MARS, supra note 12, at 178 n.44 (citing Chaplin, 1950 (3) SA at 562; Steyn, 1979 (2) SA at 310). Back To Text

[337] See Edwards, supra note 290, ¶ 458 n.26 (citing Alexander & Co. v. Lioni, 1875 Buch 79; Cape of Good Hope Bank v. Mellé, (1893) 10 SC 280; Reynolds v. Howse & Early, (1883) 3 EDC 304; Langerman v. Van Iddekinge, 1916 TPD 123; Melliar, 1922 CPD 116; Ex parte Solomon, 1928 WLD 1; Herman, 1929 CPD at 76; Hymore Agencies, 1959 (1) SA 180); see also Forsyth, supra note 274, at 359 n.310 (noting trustee not recognized in Hymore Agencies). Back To Text

[338] African Farms, 1906 TS at 385 (order (2)); O'Brien, supra note 320, at 23 n.119. Back To Text

[339] See supra notes 36−40 and accompanying text (discussing South African sequestration procedure); supra notes 98−100 and accompanying text (discussing winding−up procedure), and supra V.C. (discussing South African common−law rules on recognition). Back To Text

[340] Preambles such as the one to the Cross−Border Insolvency Act are rare in South African law. A famous example is the one to the Constitution. Back To Text

[341] "To provide effective mechanisms for dealing with cases of cross−border insolvency; and to amend the Insolvency Act, 1936, so as to further regulate the jurisdiction of the High Courts; and to provide for matters connected therewith" (original bolding removed). Back To Text

[342] See Cronje, supra note 241, ¶ 3.2.3. Back To Text

[343] Cf. id. ¶ 3.2.4. Back To Text

[344] See § 2(c) Interpretation Act 33 (1957); L. M. Du Plessis, Statute Law and Interpretation, in 25(1) The Law Of South Africa ¶ 290 (W. A. Joubert (founding ed., 1st reissue 2001) (explaining promulgation of legislation); Hahlo & Kahn, supra note 8, at 167−69. Back To Text

[345] See § 1(g) Cross−Border Insolvency Act 42 (2000). Back To Text

[346] See id. § 1(h). Back To Text

[347] See id. § 1(l). In passing it may be noted that the definition of "Republic" in section 2 of the Insolvency Act, which included "the mandated territory of South−West Africa," was deleted by section 1 of the General Law Amendment Act 49 of 1996. Back To Text

[348] See §§ 1(a), 4 Cross−Border Insolvency Act 42 (2000) (naming "[c]ompetent court or authority" as required by Article 4 of Model Law). Back To Text

[349] See Khumalo v. Potgieter, 2001 (3) SA 63 (SCA) 65I (explaining section 166(c) of Constitution). Back To Text

[350] See § 1(d) Cross−Border Insolvency Act 42 (2000). Back To Text

[351] See § 1(b) Cross−Border Insolvency Act 42 (2000). Back To Text

[352] See id. § 1(k). Back To Text

[353] See Art. 5 Model Law. Back To Text

[354] See § 5 Cross−Border Insolvency Act 42 (2000); see also id. §§ 7, 21(1)(g), 25(1), 26(1)−(2). Back To Text

[355] See supra note 255 and accompanying text. Back To Text

[356] On judicial management, see supra notes 127−132 and accompanying text. Back To Text

[357] See § 1(j) Cross−Border Insolvency Act 42 (2000). At present, Dr. Penuell M. Maduna is the Minister. See Maduna Profile, available at http://www.polity.org.za/people/NCABINET/ maduna_pm.html. Back To Text

[358] See infra notes 361−364 and accompanying text. Back To Text

[359] See § 2(1) Cross−Border Insolvency Act 42 (2000). Back To Text

[360] 1996 (2) SA 677 (O); see also Guide, supra note 4, ¶ 27. Back To Text

[361] The court's decision was criticized by L. Steyn, A Reflection on the Need for Cross−border Insolvency Legislation in S. Africa, 9 South African Mercantile L.J. 225 (1997). Back To Text

[362] See §§ 2(2)−(4) Cross−Border Insolvency Act 42 (2000). Back To Text

[363] See §§ 426(5), (11) Insolvency Act 1986. Back To Text

[364] 2 Dicey And Morris On The Conflict Of Laws ¶ 30−097 nn.7−8 (13th ed. by Lawrence Collins, gen.ed. 2000). The relevant statutory instruments are S.I. 1986 No. 2123 (sched. 1 ¶ 1 mentioning Anguilla, Australia, The Bahamas, Bermuda, Botswana, Canada, the Cayman Islands, the Falkland Islands, Gibraltar, Hong Kong, the Republic of Ireland, Montserrat, New Zealand, St. Helena, the Turks and Caicos Islands, Tuvalu, and the Virgin Islands), S.I. 1996 No. 253 (sched. 1 ¶ 1. mentioning Malaysia and the Republic of South Africa), and S.I. 1998 No. 2766 (explanatory note ¶ 1 mentioning Brunei Darussalam). Back To Text

[365] See Dicey & Morris, supra note 363, ¶ 30−97 n.8. Back To Text

[366] See supra notes 273−337 and accompanying text. Back To Text

[367] The South African Law Commission received no suggestions that certain entities should be excluded from the operation of the Cross−Border Insolvency Act. See Cronje, supra note 241, ¶ 3.2.2 n. 87. Back To Text

[368] See § 3 Cross−Border Insolvency Act 42 (2000). Back To Text

[369] See id. § 6. Back To Text

[370] See id. § 5; see also Guide, supra note 4, ¶ 85 (explaining "…the scope of the power exercised abroad by the administrator would depend upon the foreign law and courts."). Back To Text

[371] See § 8 Cross−Border Insolvency Act 42 (2000). Back To Text

[372] See id. § 7. Back To Text

[373] See id. § 9. Back To Text

[374] See Guide, supra note 4, ¶ 28. Back To Text

[375] See id. ¶ 94. Back To Text

[376] See § 10 Cross−Border Insolvency Act 42 (2000). Back To Text

[377] See id. § 11. Back To Text

[378] See Guide, supra note 4, ¶ 99. Back To Text

[379] See § 12 Cross−Border Insolvency Act 42 (2000). Back To Text

[380] See Guide, supra note 4, ¶ 101. Back To Text

[381] See § 13(1) Cross−Border Insolvency Act 42 (2000). Back To Text

[382] See id. § 13(2). The Cross−Border Insolvency Act thus does not adopt the alternative wording suggested by footnote 2 of the Guide for replacing part 2 of article 13(2). Back To Text

[383] See §§ 13(1), (2) Cross−Border Insolvency Act 42 (2000). Back To Text

[384] So a foreign creditor's claim will be tested according to the Insolvency Act to establish his ranking and his class as a creditor, regardless of his position in his own foreign state. See id. at § 13(2); see also Stander, supra note 6, at 519. Back To Text

[385] See § 14(1)(a) Cross−Border Insolvency Act 42 (2000). Back To Text

[386] See id. § 14(3)(c). Back To Text

[387] See infra notes 425−428 and accompanying text. Back To Text

[388] See id. § 15(2); see also id. § 17(1)(c). Back To Text

[389] See id. § 15(3). Back To Text

[390] See id. §§ 16(1)−(2). Back To Text

[391] See id. § 19. Back To Text

[392] See Guide, supra note 4, ¶ 137. Back To Text

[393] See § 19(1) Cross−Border Insolvency Act 42 (2000). Back To Text

[394] See id. § 19(2). Back To Text

[395] See supra notes 384−385 and accompanying text. Back To Text

[396] See id. § 19(1). Back To Text

[397] See id. § 19(3); see also Guide, supra note 4, ¶ 139 (stating extension would "avoid a hiatus between the provisional measure issued before recognition and the measure issued after recognition."). Back To Text

[398] See § 19(4) Cross−Border Insolvency Act 42 (2000). Back To Text

[399] See id. § 6. Back To Text

[400] See id. § 17(1). Back To Text

[401] See id. § 17(3). Back To Text

[402] See id. § 17(2). Back To Text

[403] See id. § 17(2)(a). Back To Text

[404] See § 16(3) Cross−Border Insolvency Act 42 (2000). Back To Text

[405] See id. § 17(2)(b). Back To Text

[406] See id. § 1(c). Back To Text

[407] See Guide, supra note 4, ¶ 130. Back To Text

[408] See id. ¶ 125. Back To Text

[409] See § 20(1) Cross−Border Insolvency Act 42 (2000). Back To Text

[410] On the scope of "actions and proceedings," see Guide, supra note 4, ¶ 146. Back To Text

[411] As regards sanctions for defying § 20(1)(c) of the Cross−Border Insolvency Act, the Model Law, and the Cross−Border Insolvency Act are silent. See also Guide, supra note 4, ¶ 147. Back To Text

[412] See supra notes 184−203 and accompanying text (explaining section 21 of Insolvency Act). Back To Text

[413] See § 20(1)(d) Cross−Border Insolvency Act 42 (2000). Back To Text

[414] 1981 (2) SA 152 (W). Back To Text

[415] See Article 20(2) of the Model Law. Back To Text

[416] See supra notes 52−56 and accompanying text (discussing section 20 of Insolvency Act). Back To Text

[417] See supra notes 57−71 and accompanying text (explaining section 23 of Insolvency Act). Back To Text

[418] See supra notes 72−73 and accompanying text (pertaining to section 75 of Insolvency Act). Back To Text

[419] See supra notes 116−117 and accompanying text (discussing section 341 of Companies Act). Back To Text

[420] See supra notes 118−120 and accompanying text (discussing section 359 of Companies Act). Back To Text

[421] See § 20(2) Cross−Border Insolvency Act 42 (2000). Back To Text

[422] See id. § 20(3). Back To Text

[423] See id. § 20(4). Back To Text

[424] See id. at 29(b)(ii). Back To Text

[425] See Guide, supra note 4, ¶ 126. No such automatic effects apply to non−main proceedings. See id. ¶ 141; see also id. ¶ 32 (setting forth importance of the stay and suspension). Back To Text

[426] See supra notes 42−50 and accompanying text. Back To Text

[427] See supra notes 111−115 and accompanying text. Back To Text

[428] See infra note 437 and accompanying text. Back To Text

[429] See supra note 386 and accompanying text. Back To Text

[430] See § 19(4) Cross−Border Insolvency Act 42 (2000). Back To Text

[431] See id. at § 28 (stating "[t]he Model Law imposes virtually no limitations on the jurisdiction of the courts in the enacting State to commence or continue insolvency proceedings."); see also Guide, supra note 4, ¶ 42. Back To Text

[432] See § 30 Cross−Border Insolvency Act 42 (2000). Back To Text

[433] See id. § 31. Back To Text

[434] See Guide, supra note 4, ¶ 184 et seq. Back To Text

[435] See id. § 21(1). Back To Text

[436] See id. § 21(2). Local interests are protected by the general statement of the principle of protection of local interests (section 22(1)), the requirement that the court must be sure that local creditors' interests are protected before it orders the assets to be distributed (section 21(2)), and the court's power of setting conditions for the relief granted (section 22(2)); see also Guide, supra note 4, ¶ 157. But it should be noted that later the Guide expressly avoids limiting article 22 of the Model Law to local creditors. See Guide, supra note 4, ¶ 163. Back To Text

[437] See § 21(3) Cross−Border Insolvency Act 42 (2000). Back To Text

[438] See id. § 21(4). Back To Text

[439] See supra notes 322−332 and accompanying text. Back To Text

[440] See supra note 301 and accompanying text; see also Cronje, supra note 241, ¶ 3.2.1.4. Back To Text

[441] See id. ¶ 3.2.1.4. Back To Text

[442] See § 12 Cross−Border Insolvency Act 42 (2000). Back To Text

[443] See Guide, supra note 4, ¶ 101. Back To Text

[444] See § 24 Cross−Border Insolvency Act 42 (2000). Back To Text

[445] See id. § 18. Back To Text

[446] See Cronje, supra note 241, ¶ 3.2.1.2; Guide, supra note 4, ¶ 133. Back To Text

[447] See Article 23(1) of the Model Law. Back To Text

[448] See § 23(1) Cross−Border Insolvency Act 42 (2000). Back To Text

[449] See id. § 23(2). Back To Text

[450] See supra notes 147−157 and accompanying text. Back To Text

[451] See § 8 Insolvency Act 24 (1936) (listing eight acts of insolvency). Back To Text

[452] For provisional sequestration, see 10 Insolvency Act 24 (1936) (focusing on section 10(b) for final sequestration); see also id. § 12 (focusing on section 12(1)(b)). Back To Text

[453] See § 22 Cross−Border Insolvency Act 42 (2000) Back To Text

[454] See Guide, supra note 4, ¶ 161. Back To Text

[455] See id. ¶ 162. Back To Text

[456] See id. ¶ 163. Back To Text

[457] See § 25(1) Cross−Border Insolvency Act 42 (2000). Back To Text

[458] See id. 25(2). Back To Text

[459] See id. 26. Back To Text

[460] See id. § 27. The Cross−Border Insolvency Act does not take up the invitation in article 25(f) of the Model Law to "list additional forms or examples of cooperation." Back To Text

[461] See Guide, supra note 4, ¶ 179. Back To Text

[462] See id. ¶ 177. Back To Text

[463] See id. ¶ 178. Back To Text

[464] See § 28 Cross−Border Insolvency Act 42 (2000). Back To Text

[465] The last clause covers the situation where the South African insolvency proceedings, to be run properly, must include foreign assets, particularly if no foreign proceeding is necessary or available where they are located. See Guide, supra note 4, ¶ 187. Back To Text

[466] See § 29 Cross−Border Insolvency Act 42 (2000). Back To Text

[467] See Guide, supra note 4, ¶ 190. Back To Text

[468] See supra notes 456−462 and accompanying text. Back To Text

[469] See § 29(a) Cross−Border Insolvency Act 42 (2000). Back To Text

[470] See id. § 29(a)(i). Back To Text

[471] See id. § 29(a)(ii). Back To Text

[472] See id. § 29(b)(i). Back To Text

[473] See id. § 29(b)(ii). Back To Text

[474] See id. § 29(c). Back To Text

[475] See Guide, supra note 4, ¶¶ 44, 192. Back To Text

[476] See supra notes 456−462 and accompanying text. Back To Text

[477] See § 30(a) Cross−Border Insolvency Act 42 (2000). Back To Text

[478] See id. § 30(b). Back To Text

[479] See id. § 30(c). Back To Text

[480] See Guide, supra note 4, ¶ 193. Back To Text

[481] See § 32 Cross−Border Insolvency Act 42 (2000); Guide, supra note 4, ¶ ¶ 198−200. Back To Text

[482] See § 47 Judicial Matters Amendment Act 42 (2001), reprinted in Government Gazette 22912, Notice 1313, (Dec. 7, 2001). Back To Text

[483] See § 149 Insolvency Act 24 (1936) (emphasis added). Back To Text

[484] The present proviso to section 149(1) of the Insolvency Act was inserted by section 2 of the Judicial Matters Amendment Act 42 of 2001 (italics in the original). See Lawclaims (Pty.) Ltd. v. Rea Shipping Co. SA: Schiffscommerz Aussenhandelsbetrieb Der VVB Schiffbau Intervening, 1979 (4) SA 745 (N) 755H−756A where the court applied the proviso in its previous form to rule against a local proceeding. Back To Text

[485] See Cronin, supra note 1, at 710. Back To Text

[486] Similarly the Preamble to the Cross−Border Insolvency Act states that South Africa acknowledges the need to create effective mechanisms for dealing with cases in cross−border insolvency in accordance with the Model Law, bearing in mind the need for internationally harmonized legislation governing instances in cross−border insolvency. Back To Text

[487] See supra II.C.(2) (giving general discussion of application procedure). Back To Text

[488] See supra notes 372−375 and accompanying text. Back To Text

[489] Section 9 forms part of chapter 2 dealing with access of foreign representatives and creditors to courts in the Republic of South Africa. It is to be noted that "relief" includes more than the recognition of a foreign proceeding. See e.g., §§ 7, 19, 21 Cross−Border Insolvency Act 42 (2000). Back To Text

[490] See also id. §§ 15(1), 17(3), 19(1) (referencing "apply" and "application"). Back To Text

[491] See supra II.C.(2). Back To Text

[492] See § 10 Cross−Border Insolvency Act 42 (2000). Back To Text

[493] See Meskin & Kunst supra note 32, ¶ 4.58. Back To Text

[494] See Constitution supra note 10, § 34. Back To Text

[495] See section 6 read with the First Schedule to the Supreme Court Act 59 of 1959. Back To Text

[496] See Herbstein & Van Winsen, supra note 31, at 36 and David Pistorius, Pollak On Jurisdiction, passim (1993) (explaining jurisdiction of the High Courts). Back To Text

[497] See Herbstein & Van Winsen, supra note 31, at 36. Back To Text

[498] As in the case of sequestration or winding up applications of companies, the proper court to approach is also a division of the High Court that will be able to exercise jurisdiction over the matter. See supra note 94 and accompanying text. Back To Text

[499] For instance, appeals against the decision of the Commissioner for Inland Revenue regarding objections by a taxpayer are heard by a Special Income Tax Court. See § 83 Income Tax Act. Back To Text

[500] See Herbsetin & Van Winsen, supra note 31, at 55. Back To Text

[501] See Forsyth, supra note 274, at 177. Back To Text

[502] See § 26 Supreme Court Act. Back To Text

[503] See Bisonboard Ltd. v. K Braun Woodworking Machinery (Pty.) Ltd., 1991 (1) SA 482 (A) 486D−E. Back To Text

[504] See Ex parte Minister of Native Affairs, 1941 AD 53 at 58−60. Back To Text

[505] See supra note 93 and accompanying text. Back To Text

[506] See Forsyth, supra note 274, at 150. Back To Text

[507] L. T. C. Harms, Civil Procedure In The Supreme Court, at ¶ D4 (1990), relying on Estate Agents Board v. Lek 1979 (3) SA 1048 (A) 1063. Back To Text

[508] See Estates Agents Board, 1979 (3) SA at 1067E. Back To Text

[509] See Pistorius, supra note 495, at 23. Back To Text

[510] See Forsyth, supra note 274, at 162−63. Back To Text

[511] See Preamble, Cross−Border Insolvency Act 42 (2000). Back To Text

[512] See id. § 8. Back To Text

[513] See Forsyth, supra note 274, at 162−65. In the case of sequestration applications in terms of the Insolvency Act, the proviso to section 149 does empower the court to refuse hearing the matter if it appears convenient or equitable that the estate of a debtor not domiciled within the Republic be heard elsewhere. See supra note 482 and accompanying text. Back To Text

[514] See Forsyth, supra note 274, at 163. Back To Text

[515] This position would not have arisen had section 33 of the Cross−Border Insolvency Act not been repealed. See supra note 481 and accompanying text. We doubt whether the present problem occurred to the draftsmen repealing section 33 of the Cross−Border Insolvency Act. Back To Text

[516] See supra note 95 and accompanying text. Back To Text

[517] See § 15(2) Cross−Border Insolvency Act 42 (2000). Back To Text

[518] See id. Back To Text

[519] See id. Back To Text

[520] See id. § 15(3). Back To Text

[521] See id. § 15(4). Back To Text

[522] See id. § 21(4). Back To Text

[523] See supra notes 322−334 and accompanying text. Back To Text

[524] See § 21(1)(e) Cross−Border Insolvency Act 42 (2000). Back To Text

[525] See supra notes 322−334 and accompanying text. Back To Text

[526] See supra II.C.(5), II.D.(3), III of this article. Back To Text

[527] See supra notes 392−393 and accompanying text. Back To Text

[528] See supra notes 184−203 and accompanying text. Back To Text

[529] See supra notes 204−232 and accompanying text. Back To Text

[530] See supra notes 384−385 and accompanying text. Back To Text

[531] See supra notes 158−164 and accompanying text. Back To Text

[532] See supra notes 233−241 and accompanying text. Back To Text

[533] See supra note 480 and accompanying text. Back To Text

[534] The words of Innes C.J. on the inherent flexibility of Roman−Dutch law itself may encourage today's practitioners and judges: "There come times in the growth of every living system of law when old practice and ancient formulae must be modified in order to keep in touch with the expansion of legal ideas, and to keep pace with the requirements of changing conditions. And it is for the courts to decide when the modifications, which time has proved to be desirable, are of a nature to be effected by judicial decision, and when they are so important or so radical that they should be left to the Legislature." Blower v. Van Noorden, 1909 TS 890, 905. Back To Text

[535] Emerging markets have been described as combining great hopefulness with a hint of chaos. Back To Text