

PART 5

CONCLUSION AND RECOMMENDATIONS

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In this part a conclusion will be drawn from the preceding chapters, in order to determine whether the introduction of a unified insolvency statute is possible, desirable and capable of implementation.

CHAPTER 12

CONCLUSION AND RECOMMENDATIONS

SUMMARY

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1 INTRODUCTION

In chapter 1 it was stated that the objective of this study is to make recommendations regarding a framework within which corporate insolvency law reform can be conducted. It was also stated that, in doing so, a unified Insolvency Act would be proposed as part of the conclusion. From the above study it has become evident that the introduction of a substantially unified Insolvency Act is indeed attainable. In this chapter the most important recommendations resulting from the research conducted in this study will be briefly summarised.

2 HISTORICAL DEVELOPMENT OF INSOLVENCY LAW AND THE LAW RELATING TO WINDING-UP

Although the research in this study is aimed at creating a framework for *corporate* insolvency law reform, it was necessary to trace the historical development of individual insolvency law since it forms the basis of the administration of all insolvent estates in South Africa.¹ The fact that corporate insolvency is dealt with in separate legislation in South Africa can be ascribed to the fact that the concept of a separate juristic person, complete with its own legal personality and a creature separate from the members who own and manage it, only came into being in South Africa in the late nineteenth century. Prior to this, South African common law (and consequently also the statutes which contained provisions in this regard) only made provision for individuals and the only known form of business enterprise at the time, namely the partnership.

The creation of the concept of juristic personality in the form of companies, and later close corporations, resulted in the parallel development of corporate insolvency with that of individual or consumer insolvency. By the time legislation regulating companies and close corporations came into being in South Africa, there was already quite a substantial body of law which regulated the insolvency of individuals. In adapting to these new forms of legal personality, legislation regulating the winding-up of these creatures of statute developed in a piecemeal fashion, mostly in tandem with the developments taking place in regard to individual insolvency law.

The conclusion that has been drawn from this part of the research is that South African insolvency law is neither pure Roman-Dutch (common) law, nor pure English law. Rather it appears to be a hybrid of Roman-Dutch law and English law. On the one hand the statutory provisions contained in the Insolvency Act 24 of 1936 contain very strong elements of English law, although this statute, and the preceding statutes on which it is based, also contain many principles of

¹ See ch 2 above.

Roman-Dutch law. On the other hand there is no doubt that the South African common law, comprising Roman-Dutch law and the judgments of the courts, forms the basis of the non-statutory insolvency law that still finds application today. Corporate insolvency was an unknown concept during the early period of South African insolvency law, as company law itself only started to evolve from the mid-nineteenth century onwards.

In tracing the parallel development of South African winding-up law with that of individual insolvency law, specific attention was given to a historical overview of South African company and winding-up law, which is for the most part based on English law.² The conclusion that has been reached is that the concept of separate juristic personality was not known under South African common law, and that the concept of the company as it is known in South Africa today, has its origins in English law as introduced into South Africa. In addition to the historical overview of company and winding-up law in South Africa, research was also conducted into the introduction of the close corporation as a juristic person.

The conclusion that has been reached as a result of this part of the research is that the law regulating the winding-up of companies and close corporations has evolved from humble beginnings, necessitated by the advent of legal personality, to more complex provisions contained in various pieces of modern-day legislation. It has also been concluded that the continuous amendments to the Companies Act, the separation of the winding-up provisions relating to banks, insurance companies and the like into separate legislation, the development of insolvency law as a separate legal discipline and the advent of close corporations, have resulted in a myriad of fragmented provisions providing for corporate insolvency. Despite the piecemeal development of winding-up law, it developed in very much the same way as South African insolvency law. The parallel development of winding-up and insolvency law is striking, as is the fact that, historically, these separate branches of the law developed along similar lines, following English law developments until the late twentieth century. The consolidation of the law relating to corporate

² See ch 3 above.

and individual insolvency seems to be the next logical step in this process, and will allow insolvency law to develop and reach its full potential as a separate legal discipline.

3 OTHER JURISDICTIONS

In determining whether a unified insolvency statute is attainable, or even desirable, a brief reference to the insolvency systems of other jurisdictions served as a useful benchmark.³ Countries such as Germany and the United States of America have by all accounts succeeded in bringing about unified insolvency legislation. In referring to these two jurisdictions reference is made to their codified systems of legislation, and the fact that they have specialist insolvency or bankruptcy courts. Reference to the insolvency systems of England and Australia, both of which have similar legislation to that employed in South Africa, also proved to be beneficial.

The research pertaining to other jurisdictions was intended to reflect the historical development of their insolvency laws, the reform process they have followed, and the philosophy underlying their respective systems. Due to the fact that South African insolvency legislation has been modelled on English law, the law reform process in this country is of particular importance. It is also important to note how Australia, who also obtained its insolvency laws from England, has since approached the subject in its own reform process.

3 1 England

Winding-up law in England originated as a means of bringing about the demise of large trading companies upon their inability to pay their debts. As the concept of the company as a separate legal entity grew in popularity within a highly modernised society and business climate, the winding-up procedures were adapted to meet the ever-changing needs of these artificial juristic persons.

³ See ch 4 above.

The popularity of separate legal personality brought with it a number of problems, such as abuse by unscrupulous company promoters and directors. As the popularity of companies grew, the need to distinguish (upon insolvency) between individuals and companies diminished, to the point where England, by introducing the Insolvency Act of 1985, sought to do away (as far as possible) with these distinctions. Unfortunately the English legislature elected not to implement all the recommendations made by the Cork Committee, and it is evident that its recommendations envisaged a more far-reaching integration of the laws relating to individuals and corporate debtors. The main lessons that can be learnt by South Africa from the development of English insolvency law are the following:

- (a) Why corporate insolvency law experienced a parallel development with individual insolvency law;
- (b) Political issues can often hamper the proper development of the law. This was illustrated by the fact that all of the recommendations of the Cork Report were not fully implemented;
- (c) That one of the workable alternatives to having a truly unified Insolvency Act is the duplication of the insolvency provisions that apply to both individual and corporate insolvency;
- (d) That incorporating individual and corporate insolvency into one statute does not necessarily bring about a unification of the insolvency laws, especially when the Act itself still makes a distinction between corporate and individual insolvency.

Although insolvency law in England has developed quite substantially over the centuries, they have still not perfected the unity of their insolvency legislation. Despite this, the English system of insolvency law appears to work quite well in practice.

3 2 Australia

Although Australian insolvency and winding-up law is very similar to its South African counterparts, the fact remains that the Harmer Report chose not to recommend a unified statute. From the Harmer Report it is evident that the Commission of Inquiry chose only to concentrate on law reform and not on introducing a unified insolvency statute. However, it would appear that Australian insolvency legislation has at least succeeded in avoiding the pitfalls of a “connecting clause” that makes the rules of insolvency relating to individuals applicable also to corporate insolvency. The Australian Corporations Act contains its own complete set of rules regulating insolvency, and it is not necessary to refer back to the Bankruptcy Act in order to find the law relating to a specific issue.

The fact that Australia has a federal system of government also played a role in the Harmer Commission deciding against unified insolvency legislation, a fact that can be attributed more to constitutional issues than insolvency law considerations. Serious policy and political issues are raised when enacting federal legislation, a problem that South Africa will not encounter when having to decide such an issue. Research on the Australian insolvency system has revealed that a dual system of insolvency law can work quite well where the provisions relating to insolvency have been duplicated in the various statutes that regulate insolvency. The Australian insolvency system differs from that in England, in that Australia still employs separate legislation for individual and corporate insolvency, not having consolidated their legislation into a single statute as was done in England.

3 3 Germany

Research on the insolvency system of the Federal Republic of Germany, revealed that this country has one of the most modern (unified) insolvency systems in the world. The German Insolvency Code is a bold, modern piece of insolvency legislation that strikes a sound balance between a simplified insolvency procedure and the protection of debtor and creditor rights. The research also revealed that Germany has evidently taken a leaf out of the very liberal bankruptcy laws of the United States, and has successfully adapted these principles to their own unique situation. Despite misgivings about the introduction of a unified Insolvency Code in Germany, they nevertheless went ahead with its promulgation. The Insolvency Code is relatively new and only time will tell whether or not its introduction has been successful. South Africa can learn from the German experience by introducing a uniform insolvency statute, despite the fact that the initial promulgation of such an Act may turn out to be defective in certain areas in practice. Defects in the system will eventually reveal themselves and can be rectified by means of amendments, a technique that is applied to good effect in, for example, the United States.

3 4 The United States of America

Research on the American system of bankruptcy revealed that their early statutes too were based on the English statutes of the time. However, as the American economic, social and political systems progressed, legislation was designed around the specific needs of the country. This saw a divergence from English law as early as the mid-nineteenth century. Although the first federal bankruptcy legislation that was passed under the United States Constitution was to a large extent modelled on English law, it was the beginning of an even bigger divergence from the conservative pro-creditor bankruptcy laws that still applied in England.

Bankruptcy laws in the United States were usually only amended or enforced at federal level after some or other financial calamity had struck the nation. It was only in the late nineteenth century

that bankruptcy law became entrenched at federal level. But from that point onward, and to a large extent due to the success of the reorganisation provisions contained in the 1898 Act, federal bankruptcy laws have remained a permanent feature. At present the Bankruptcy Code has become entrenched, reflecting the importance that Americans attach to this dynamic field of the law.

The research in this part revealed that progressive liberalisation has caused America to move from being a pro-creditor insolvency jurisdiction to becoming a liberal pro-debtor system. American bankruptcy law can best be described as a dynamic field of the law, ever-changing to meet the needs of the society it serves. Although the United States Bankruptcy Code is a uniform insolvency statute in the true sense of the word, the research conducted in this study revealed that its precise mechanics cannot easily be imported into a country that does not make use of a federal system of government and a federal court system. The Americans have designed their bankruptcy laws around the uniqueness of their socio-economic and political system, and while the effectiveness of their system is to be lauded, it cannot be implemented in its precise form by a country that only has a developing economy. However, apart from exposing the South African insolvency system's weaknesses as a pro-creditor system, there are also some other lessons to be learnt from the American experience, namely:

- (a) It is in fact possible to bring about an insolvency statute that applies to all debtors;
- (b) The United States Bankruptcy Code is a fine example of incorporating all the relevant aspects of insolvency law into one statute. Not only does the code deal with straight liquidation, but it also has numerous chapters dealing with business rescue and the reorganisation of consumer debt.
- (c) The United States Bankruptcy Code is also an example of how insolvency as a separate legal discipline can evolve. From its humble origins in English law, it has developed into

a federally controlled legal system that is both liberal and pro-debtor; which is quite a turn-around from the pro-creditor system it originated from.

- (d) Finally, the United States Bankruptcy Code is a good example of how insolvency legislation can be arranged within a single statute in order to promote the harmonisation of the bankruptcy laws. The arrangement of the Code itself in different chapters can serve as a useful template on which other jurisdictions can model their own insolvency laws.

4 THE CONCEPT OF A UNIFIED INSOLVENCY ACT⁴

4 1 The application of the law of insolvency to the winding-up of companies and close corporations

Before determining the need for a single insolvency statute in South Africa, research was first conducted in order to determine how the current system of dual legislation functions.⁵ The research revealed many of the problems that are experienced with the duality of our insolvency legislation, and illustrated exactly how fragmented the legislative provisions dealing with corporate insolvency really are.

In finding a solution to the problems caused by the fragmented provisions dealing with corporate insolvency, proposals have been made in order to rectify the problem. In terms of the research conducted in this part of the thesis, two possible solutions to this problem presented themselves, namely:

⁴ See part 4A above.

⁵ See ch 5 above.

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- (a) The introduction of a unified insolvency statute. This solution is regarded as being the best solution to the problem, and entails the introduction of a single insolvency statute that will remove the fragmented nature of current insolvency law, replacing it with a cohesive single statute that will obviate the need for connecting provisions and cross-referencing between Acts. The introduction of a unified insolvency statute is the recommendation made in terms of this study, the result of which is contained in annexure E.
- (b) Duplication of all the provisions relating to insolvency in the relevant Acts dealing with winding-up. This solution is offered as the second-best option, and entails a duplication of the procedural and substantive insolvency law provisions in the current legislation dealing with winding-up, for example in the Companies Act and the Close Corporations Act. Although not the best option, it would effectively remove the need for a connecting provision and cross-referencing between Acts. This option is currently the *modus operandi* in England and Australia and, while not the most desirable solution, seems to work reasonably well.

4 2 Defining “debtor” for the purposes of a unified insolvency statute

Having determined that a unified or a single insolvency statute can effectively address the problems experienced with a dual system of insolvency law, the drafting of the unified statute in such a way as to make it applicable to all types of debtors was examined.⁶ Formulating a definition of “debtor” for the purposes of a unified insolvency statute was the next step in this

⁶ See ch 6 above.

process. Research on this aspect revealed the importance of including an all-encompassing definition of “debtor” in a unified insolvency statute. The result of this research is the proposal for an extensive definition of “debtor” that can be used in a unified Insolvency Act.⁷

4 3 Specialised institutions under a unified Insolvency Act⁸

In this part of the study the rules applicable to the winding-up of specialised institutions which enjoy preferential treatment due to the nature of these business concerns, were examined. The conclusion reached is that the reason for their preferential treatment is based on the protection of the public interest. The question that had to be decided within the framework of this study, is whether or not these institutions deserve their specialised status - not generally, but in the event of insolvency.

The conclusion that has been reached in this regard is that specialised institutions can quite effectively be accommodated within the framework of a unified insolvency statute, and it has consequently been recommended that instead of duplicating an excessive number of clauses in each specialised Act which provide for essentially the same circumstances, it would be far more sensible to provide for the relatively few key aspects that provide for the protection of the public interest. It is therefore recommended that a single clause regulating the liquidation of these specialised institutions be included in a unified Insolvency Act.⁹

⁷ See ch 6 above and the definition of “debtor” in cl 1 of the proposed unified Insolvency Act in ann E.

⁸ See ch 7 above.

⁹ See cl 9 of the unified Insolvency Act in ann E.

5 PROPOSALS FOR UNIFORM PROVISIONS RELATING TO INDIVIDUAL AND CORPORATE INSOLVENCY¹⁰

5.1 Liquidation applications

The research conducted in this part of the thesis exposed the very real differences between natural and juristic persons regarding the acts of insolvency and grounds upon which a company or close corporation may currently be wound up.¹¹ However, this research also revealed that:

- (a) The acts of insolvency and grounds for liquidation are not necessarily mutually exclusive;
- (b) The South African Law Commission has elected to retain the somewhat archaic acts of insolvency, contrary to other countries such as England which have scrapped them as being outdated;
- (c) The South African Law Commission has elected to retain the “advantage to creditors” test in the case of voluntary liquidations by individuals.

Consequently the conclusion has been made that the above factors hamper the introduction of uniform liquidation applications in that the grounds upon which liquidation can be sought differ in the case of individuals and juristic persons. In attempting to bring about a unified insolvency statute, common ground was sought for the basis upon which the liquidation of individuals and juristic persons could be regulated. The possibility of introducing uniform liquidation application procedures for individuals and corporate entities was also investigated.

¹⁰ See part 4B above.

¹¹ See ch 8 above.

The conclusion reached in this part of the research is that although it is possible to bring about the uniformity of liquidation applications to a certain degree, it is impossible to entirely unify these provisions under a unified insolvency statute. This is borne out by the fact that separate provisions still have to be made for the liquidation of individuals and corporate entities. The reasons for this conclusion are as follows:

- (a) While a benefit for creditors is required for the granting of a liquidation order in regard to natural person and partnership debtors, the same requirement is not a prerequisite for the liquidation of a company or close corporation.
- (b) While a natural person debtor can only be placed in liquidation by the court (due to the benefit for creditors requirement and the change of status that it brings about), this is not the case in regard to companies and close corporations which can also be liquidated on a voluntary basis.
- (c) A natural person and partnership debtor can only be liquidated if he, she or it is insolvent, while companies and close corporations can be liquidated on grounds other than insolvency.
- (d) While an individual has the ability to earn income subsequent to his or her liquidation, this is not the case when dealing with a company, close corporation or partnership.

For these reasons it was impossible to recommend the total uniformity of liquidation applications such as those found in the jurisdictions of the United States of America or Germany. It has further been concluded that to bring about a unified system of insolvency law as it is applied in these countries, would require a total shift in the philosophy underlying South African insolvency law. From the tenor of the South African Law Commission's Draft Insolvency Bill and its

explanatory memorandum, the government is evidently not yet ready to make the paradigm shift that will bring about a change to the underlying philosophy of the “benefit for creditors” requirement that is applied in the case of individual insolvency. It is therefore concluded in this part of the study that the failure to be able to totally unify South African insolvency and winding-up law is not to be found in the structures of existing insolvency legislation, but rather in the philosophy underlying insolvency law as a whole.

Despite these shortcomings, the proposals made in this part of the study go a long way towards streamlining and simplifying liquidation applications. It is further submitted that the proposed unified provisions relating to liquidation applications will rid the current system of insistent interpretational problems, and bring about far more clarity in regard to the procedures that have to be followed, no matter what type of debtor is being dealt with.¹²

5 2 Commencement of liquidation and the vesting of the insolvent estate

In this part of the thesis research was conducted on two aspects regarding individual and corporate insolvency that are dissimilar to each other, namely the date of commencement of liquidation and the vesting of the insolvent estate.¹³ The research revealed that under current South African law, the provisions relating to the commencement of liquidation and the rules relating to the vesting of the insolvent estate, differ in the case of individual and corporate insolvency. In approaching these dissimilar aspects of individual and corporate insolvency, the current situation under South African law was investigated and a brief comparison made with other jurisdictions.

¹² See the proposals made in ch 8.

¹³ See ch 9 above.

In regard to the commencement of liquidation and sequestration, the research revealed that the date of sequestration currently differs from the date of winding up of a company by the court, the former being the date of the granting of the order to sequester, the latter being the date upon which the application to wind up the company is lodged with the Registrar of the High Court. It also revealed that the commencement of liquidation in the case of a voluntary winding-up differs from the commencement of liquidation in the case of a winding-up by the court, the former being the date upon which the resolution is registered by the Registrar of Companies.

In order to bring about uniformity in the case of liquidation by the court, a uniform date for the commencement of liquidation is proposed, which will apply equally to individuals and corporations alike. However, due to the unique nature of the voluntary liquidation of corporate entities by means of a resolution, the date of liquidation in such cases must necessarily differ from the date of liquidation in the case of a liquidation order granted by the court. This difference is brought about by procedural necessities, and has easily been provided for in the proposals made under this part of the study.¹⁴ As regards the effect of the commencement of liquidation, proposals have also been made in order to bring about uniformity in this regard.¹⁵

In regard to the vesting of the insolvent estate upon sequestration and liquidation, different rules apply. In the case of a debtor who is a natural person the debtor is divested of his or her estate and the assets *vest* in the Master and then in the trustee once appointed. However, in the case of a company being wound up by the court, the assets fall under the *custody and control* of the Master and then the liquidator, once appointed. It is, however, possible for the court to make an order vesting the property of a company in the liquidator. The research in this part of the study

¹⁴ See ch 9 above and the definition of “date of liquidation” in cl 1 of the proposed unified Insolvency Act in ann E below.

¹⁵ See ch 9 above and cl 14(1) of the unified Insolvency Act in ann E below.

sought to determine why this difference exists, where it originated from, whether such a difference is justified and whether or not the vesting rule can be made uniform in regard to all types of debtors.

The research revealed that it is still customary, in England, Australia and South Africa, to allow the estate assets to vest in the trustee in the case of individual insolvency. In the case of corporate debtors the various countries' provisions merely allow custody and control of the assets to pass to a liquidator upon liquidation. However, in the United States and Germany, the latter of the two countries having the most recent of all the insolvency legislation referred to, the insolvency administrator only obtains the right to deal with the assets to the exclusion of others without actual vesting taking place.

The conclusion that is reached is that actual vesting, or ownership, of the estate assets is not a necessary requirement upon insolvency, and the recommended clause dealing with this aspect in a unified Insolvency Act has been drafted with uniformity in mind. After investigating the origin of the vesting rule in insolvency, the conclusion is reached is that there is no justification in South African common law for its existence. Consequently the recommendation is made that only custody and control should pass to the liquidator in both individual and corporate insolvency.

6 PROPOSALS FOR THE INCLUSION OF ANCILLARY MATTERS UNDER A UNIFIED INSOLVENCY ACT¹⁶

If the conclusion to this study is that a unified insolvency statute should be introduced in South Africa, this cannot be achieved unless substantially all aspects relating to insolvency are included in such an Act. In this regard a number of issues were researched in order to determine whether

¹⁶ See ch 10 above.

or not they could also be included under the unified Insolvency Act proposed in annexure E to this study. Due to the wide ambit of the issues researched under this part of the thesis, it was impossible to discuss them in any detail; consequently a discussion of the merits and principles of these ancillary matters were not included in the research that was conducted. The purpose of this part of the study was designed to provide a holistic approach to the introduction of a unified insolvency statute, and the conclusions that were reached are the following:

- (a) As regards alternatives to liquidation (debt relief measures), it is recommended that the provisions relating to administration orders and pre- and post-liquidation compositions should be included in a unified insolvency statute. As far as pre- and post-liquidation compositions are concerned, these proposals have been included in the provisions of a unified Insolvency Act.¹⁷ However, because administration orders are currently included under the Magistrates' Courts Act, these provisions have been omitted from the proposals for a unified insolvency statute.
- (b) As regards insolvent deceased estates it is submitted that the procedures as they currently stand should remain in the Administration of Estates Act. These provisions contain special procedures, and there is no sound motivation for their removal from the current legislation.
- (c) As regards business rescue provisions, it has been concluded that South Africa needs to introduce a revised system of business rescue that can replace the current system of judicial management. However, in order to reserve a place in the unified Insolvency Act for a new business rescue procedure, and because judicial management is an existing form of business rescue with an accompanying body of case law, it is recommended that the provisions be retained in the proposed unified insolvency statute. In addition to retaining the provisions relating to judicial management for the time being, two minor amendments

¹⁷ See cl 118 and cl 119 of the proposed unified Insolvency Act in ann E below.

to the provisions have been recommended in order to make it more accessible as a business rescue mechanism. The first of these two recommended amendments relates to the burden of proof in order to obtain a judicial management order, and the second relates to making the provisions accessible to other types of debtors in addition to companies. In addition to judicial management the provisions of section 311 of the Companies Act, relating to compromises, have been included in the proposed unified Insolvency Act. The provisions that are proposed to be included in the unified insolvency statute relate only to a compromise between a debtor and its creditors, the provisions relating to an arrangement having been removed. It is also recommended that these provisions be made applicable to all types of debtors that have legal personality.

- (d) As regards personal liability, it has been proposed that all the provisions relating to personal liability be consolidated in order that they may apply to other juristic persons as well. In addition, an insolvent trading provision has been recommended for inclusion under the unified Insolvency Act proposed by this study. Recommendations for special provisions relating to the personal liability of members of close corporations have also been included in the proposals.
- (e) As far as cross-border insolvencies are concerned, it has been proposed in this chapter that the Cross-Border Insolvency Act 42 of 2000 be inserted as a separate chapter in a unified insolvency statute.

7 VOLUNTARY LIQUIDATION UNDER A UNIFIED INSOLVENCY ACT¹⁸

Research in this part of the study revealed that liquidation or winding-up is a process that precedes the dissolution of a company. This is one of the most important differences between

¹⁸ See ch 11 above.

the sequestration of an individual and the winding-up of a juristic person. This right of the members of companies and close corporations to bring about the demise of the entity they created, was already recognised in some of the earliest legislation governing company law. This right must be seen to be an entrenched right of the members of companies and close corporations, and any legislation purporting to regulate the liquidation of these entities must take cognisance of the mechanisms that have been in place for a number of years.

The research in this regard caused the following questions to be posed:

- (a) Should a unified insolvency statute deal only with the liquidation of insolvent entities, or should it include the liquidation also of solvent ones?
- (b) Should voluntary liquidations be restricted to companies and close corporations, or should the principles be extended to include other entities such as trusts?
- (c) Can the provisions relating to voluntary liquidations (by resolution) be simplified and streamlined?
- (d) Can the provisions relating to voluntary liquidations be drafted in such a way as to provide more protection to creditors than is the case under current South African company and close corporation law?
- (e) Is the role presently played by the members in the winding-up of a company or close corporation justified, or should their role in the liquidation process be reduced or even completely removed?

In addressing these questions the historical development of voluntary liquidation was used as a valuable assessment tool, as was a comparative study of other jurisdictions. The conclusion that is reached in this part of the study is that in creating a framework for corporate insolvency law reform, and as long as South Africa elects to retain a multiple gateway approach to insolvency law, voluntary liquidation by resolution remains a key concept. The continued existence and refinement of the provisions relating to voluntary liquidation are paramount in answering the question as to whether a truly unified insolvency statute is achievable or not. The conclusions that have been reached as a result of the research conducted in this regard can be summarised as follows:

- (a) The provisions relating to voluntary liquidation in a unified insolvency statute should be limited to the liquidation of *insolvent* entities.
- (b) The provisions relating to the voluntary liquidation of solvent entities, such as companies and close corporations, should be retained in the enabling legislation, such as the Companies Act or the Close Corporations Act.
- (c) The terminology surrounding the use of voluntary liquidations should be simplified, and the term “voluntary liquidation by resolution” should be employed.
- (d) The provisions relating to voluntary liquidation by resolution should be extended to cover also trust debtors and association debtors.
- (e) It is possible to have uniform provisions for the voluntary liquidation by resolution of any type of debtor.

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- (f) It is possible to simplify and streamline the provisions relating to voluntary liquidation by resolution, at the same time building in more safeguards for creditors.
 - (g) There is no justification for the continued role played by members in the administration process where the entity is insolvent or unable to meet its financial obligations, hence the removal of these provisions.

8 CONCLUDING REMARKS

Although corporate insolvency only started developing during the second half of the nineteenth century, it has shown tremendous growth in a relatively short period of time. The growth in this area has been profound during the second half of the twentieth century, to the point where it now overshadows consumer insolvency in both the number and the value of estates that enter insolvency. Despite the piecemeal development of corporate insolvency law, it experienced a parallel development with consumer insolvency and has since evolved into a separate and identifiable branch of the law.

During the past thirty years or so, most countries have experienced a plethora of reforms dealing with insolvency in general, but especially in regard to corporate insolvency. These reforms have concentrated on consolidating consumer and corporate insolvency in an attempt to harmonise their insolvency laws. This has brought about a shift in philosophy, namely the move away from a liquidation culture to one of business rescue, which is now seen as being part and parcel of insolvency law. In bringing about these reforms the focus has been on not only unifying the insolvency procedures, but also in simplifying them. It is for this reason that many jurisdictions have elected to introduce a single gateway approach to insolvency, a sort of “one-stop” service in order to obtain relief. However, a single gateway approach clearly calls for the existence or introduction of a debtor-friendly system of insolvency.

There is no doubt that South Africa has a pro-creditor system of insolvency. This is borne out by the South African Law Commission's Draft Insolvency Bill which elected to retain not only the archaic acts of insolvency relating to consumer insolvency, but also the retention of the "benefit for creditors" requirement in regard to liquidation applications. In addition, South Africa has a dual gateway approach to corporate insolvency in that a company or close corporation may be liquidated by the court or voluntarily.

Although the above factors have hampered the recommendations made in this thesis for the introduction of a unified insolvency statute, it has not made the drafting of such a statute an impossible task. Consequently it is the recommendation of this thesis that a unified Insolvency Act can, and should, be introduced. The recommendations made by this thesis have been included in the form of a draft Insolvency and Business Recovery Bill, which can be found in annexure E below.